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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 JEHAN ZEB MIR,
12 Plaintiff,
13 v.
14 KIMBERLY KIRCHMEYER et al.,
15 Defendants.

Case No.: 3:12-cv-02340-GPC-DHB
**ORDER OVERRULING
PLAINTIFF'S OBJECTIONS AND
AFFIRMING MAGISTRATE
JUDGES' ORDERS**
[ECF Nos. 183, 185, 215.]

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17 Before the Court are Plaintiff Jehan Zeb Mir's ("Plaintiff's") three sets of
18 Objections to Orders issued by Magistrate Judge David H. Bartick and Magistrate Judge
19 Louisa S. Porter:

- 20 1. Objections (Dkt. No. 183) to Judge Bartick's June 27, 2016 Order denying
21 Plaintiff's motion to compel a further deposition of Joshua Bardin (Dkt. No. 174);
22 2. Objections (Dkt. No. 185) to (1) Judge Bartick's June 21, 2016 Order denying in
23 part and reserving in part Plaintiff's *ex parte* application to compel Defendant
24 Kimberly Kirchmeyer to produce documents (Dkt. No. 169) and to (2) Judge
25 Bartick's July 1, 2016 Supplemental Order sustaining Kirchmeyer's assertion of
26 the deliberative process privilege and declining to compel Kirchmeyer to produce
27 any further documents to Plaintiff (Dkt. No. 177); and
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1 3. Objections (Dkt. No. 215) to Judge Porter’s November 14, 2016 Order denying
2 Plaintiff’s motion to compel production of documents from Defendant Sharon
3 Levine (Dkt. No. 207).

4 Defendants Kimberly Kirchmeyer and Sharon Levine, M.D. (collectively, “Defendants”),
5 filed three separate responses to each set of Plaintiff’s Objections. (Dkt. Nos. 228, 229,
6 221, respectively.) Plaintiff filed three replies. (Dkt. Nos. 231, 233, 234.)

7 The Court deems Plaintiff’s Objections suitable for disposition without oral
8 argument pursuant to Civil Local Rule 7.1(d)(1). Having reviewed the parties’ briefing
9 and the applicable law, and for the reasons set forth below, the Court **OVERRULES**
10 Plaintiff’s three sets of Objections and **AFFIRMS** Magistrate Judge Bartick’s and
11 Magistrate Judge Porter’s Orders.

12 **BACKGROUND**

13 Because the Court has previously recited the facts of this case at length, (*see* Dkt.
14 No. 159), the Court will not repeat them here.

15 Plaintiff initiated this action on September 25, 2012, alleging that Defendants
16 wrongfully took disciplinary action against his physician’s and surgeon’s certificate.
17 (Dkt. No. 1.) Plaintiff seeks prospective injunctive relief under 42 U.S.C. § 1983 against
18 Defendants in their official capacities, challenging the underlying California Medical
19 Board’s decision to revoke his license. (Dkt. No. 159 at 39.¹)

20 For clarity, the Court will detail the relevant procedural background to each set of
21 Plaintiff’s Objections *infra* in the Discussion section.

22 **LEGAL STANDARD**

23 Under Federal Rule of Civil Procedure 72(a), aggrieved parties may file objections
24 to the rulings of a magistrate judge in non-dispositive matters within fourteen days.
25 Fed. R. Civ. P. 72(a). In reviewing a magistrate judge’s order, the district judge “must

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27 ¹ All citations to the record refer to pagination generated by the CM/ECF system.

1 consider timely objections and modify or set aside any part of the order that is clearly
2 erroneous or is contrary to law.” Fed. R. Civ. P. 72(a); 28 U.S.C. § 636(b)(1)(A); *see*
3 *also United States v. Raddatz*, 447 U.S. 667, 673 (1980); *Osband v. Woodford*, 290 F.3d
4 1036, 1041 (9th Cir. 2002). Under the “clearly erroneous standard,” a court should
5 overturn a magistrate judge’s ruling when it is “left with the definite and firm conviction
6 that a mistake has been committed.” *See Concrete Pipe & Prods. of Cal., Inc. v. Constrs.*
7 *Laborers Pension Trust*, 508 U.S. 602, 622 (1993). A magistrate judge’s legal
8 conclusions as to non-dispositive matters are reviewable for clear error. *Grimes v. City &*
9 *Cnty. of San Francisco*, 951 F.2d 236, 240–41 (9th Cir. 1991) (citing *Maisonville v. F2*
10 *America, Inc.*, 902 F.2d 746, 747–48 (9th Cir. 1990)).

11 DISCUSSION

12 I. Plaintiff’s First Set of Objections (Dkt. No. 183)

13 A. Plaintiff’s Deposition of Dr. Bardin

14 On October 21, 2015, Plaintiff served a deposition subpoena on third party Joshua
15 Bardin, M.D. (“Dr. Bardin”) and included in the subpoena a request to produce
16 documents. (Dkt. No. 157-2.) Dr. Bardin’s counsel invited Plaintiff to provide him with
17 any documents Plaintiff wanted Dr. Bardin to review prior to the deposition, but Plaintiff
18 did not provide counsel with any documents. (Dkt. No. 157-4 at 3, ¶ 4.)

19 On December 16, 2015, Dr. Bardin appeared for his deposition. (Dkt. No. 157-3.)
20 In response to Plaintiff’s document requests, Dr. Bardin produced his curriculum vitae,
21 board certification, and license, but stated that he did not have any of the other documents
22 that Plaintiff sought. (*Id.* at 4–6.) Dr. Bardin also testified that he did not have any
23 copies of written communications with officials from the Board regarding Plaintiff’s
24 underlying administrative matter, and that he lacked recollection of the medical journals,
25 articles, and books upon which he based his testimony in October 2004. (*Id.* at 5.) Dr.
26 Bardin stated that he did not review any documents before the deposition. (*Id.* at 15.)

27 The deposition concluded after less than ninety minutes. (*Id.* at 61–62.) Shortly
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1 into the deposition, Plaintiff expressed frustration with Dr. Bardin’s inability to recall
2 certain events and assumed that Dr. Bardin would thereafter be unable to answer
3 Plaintiff’s remaining questions. (*See, e.g., id.* at 28–29.) Plaintiff asserted that the
4 deposition had to be continued because Dr. Bardin had not reviewed his testimony from
5 the underlying administrative proceedings or the medical records. (*Id.*) Despite opposing
6 counsel’s repeated, good-faith efforts to encourage Plaintiff to proceed with the
7 deposition, Plaintiff refused and responded that doing so would take too much time.
8 (*See, e.g., id.* at 29–50, 59–60.) Plaintiff unilaterally terminated the deposition. (*Id.* at
9 60–61.) Opposing counsel advised Plaintiff that Dr. Bardin would not agree to continue
10 the deposition. (*Id.* at 45 – 46; Dkt. No. 157-1 at ¶¶ 5–6; Dkt. No. 157-4 at ¶¶ 7–8.)

11 **B. Magistrate Judge Bartick’s Order (Dkt. No. 174)**

12 On April 15, 2016, Plaintiff filed an *ex parte* motion to compel a further deposition
13 of Dr. Bardin. (Dkt. No. 150.) On June 27, 2016, Judge Bartick denied Plaintiff’s
14 motion to compel a further deposition of Dr. Bardin. (Dkt. No. 174.) Judge Bartick
15 began by noting Plaintiff’s continued failure to comply with Judge Bartick’s chambers
16 rules and orders, the Southern District’s Civil Local Rules, and the Federal Rules of Civil
17 Procedure, despite prior warning from the Court. (*Id.* at 3–4.) Although it would have
18 been well within Judge Bartick’s discretion to reject Plaintiff’s motion solely for
19 Plaintiff’s noncompliance with multiple rules, Judge Bartick nonetheless addressed the
20 merits of the parties’ discovery dispute. (*Id.*)

21 First, Judge Bartick cited Federal Rule of Civil Procedure 45(d)(1)’s requirement
22 that “[a] party or attorney responsible for issuing and serving a subpoena must take
23 reasonable steps to avoid imposing undue burden or expense on a person subject to the
24 subpoena.” (*Id.* at 4–5.) Judge Bartick also noted that Rule 45 does not impose a duty on
25 a non-entity witness to review documents or otherwise prepare in advance of the
26 deposition. (*Id.* at 5.) Judge Bartick then concluded that Dr. Bardin fulfilled his
27 obligations under the subpoena by appearing for deposition on December 16, 2015, and
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1 by bringing the requested documents that he had in his possession. (*Id.*) Judge Bartick
2 then concluded that Plaintiff’s refusal to continue questioning Dr. Bardin was
3 unreasonable, inappropriate, and based on speculation. (*Id.* at 5–6.) Judge Bartick found
4 that Plaintiff’s actions did not constitute “reasonable steps to avoid imposing undue
5 burden or expense on a person subject to the subpoena” under Rule 45(d)(1) and denied
6 Plaintiff’s motion. (*Id.*)

7 **C. Plaintiff’s Grounds for Objections**

8 Plaintiff objects on grounds that (1) Dr. Bardin is an expert; (2) Dr. Bardin did not
9 produce documents as required under Rule 45(a)(1)(C)–(D), even though the documents
10 were available to him and under his control; and (3) it was appropriate to terminate the
11 deposition in order to provide Dr. Bardin with documents and time to refresh his
12 recollection. (Dkt. No. 183 at 5–9.) In support of his motion to compel a further
13 deposition of Dr. Bardin, Plaintiff cites *Orrison v. Balcor Co.*, 132 F.R.D. 202, 203 (N.D.
14 Ill. 1990) and *Ethicon Endo-Surgery v. U.S. Surgical Corp.*, 160 F.R.D. 98, 99–100 (S.D.
15 Ohio 1995), cases wherein motions to compel further deposition of witnesses were
16 granted. (*Id.* at 8–9.) Finally, Plaintiff argues that continuing the deposition would
17 impose no prejudice on Dr. Bardin. (*Id.* at 9–10.)

18 Plaintiff’s grounds for objections amount to disagreement with Judge Bartick’s
19 Order and fail to clear the high bar of demonstrating clear error. First, Plaintiff cannot
20 demonstrate that Judge Bartick’s conclusion that Dr. Bardin is not an expert witness is
21 contrary to law or clearly erroneous. Judge Bartick properly concluded that while Dr.
22 Bardin was formerly a medical expert for the California Medical Board and was retained
23 for purposes of testifying in the underlying disciplinary proceedings, Dr. Bardin was not
24 retained or designated as an expert for purposes of this instant action. (Dkt. No. 174 at
25 2.) Second, Dr. Bardin testified on the record that he did not have in his possession any
26 of the other documents Plaintiff sought. (Dkt. No. 157-3 at 4–6.) Third, Plaintiff cites no
27 law in support of his position that it was appropriate to unilaterally terminate the
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1 deposition to (1) provide Dr. Bardin with documents that Plaintiff did not provide to Dr.
2 Bardin beforehand despite opposing counsel’s invitation to do so, and (2) provide Dr.
3 Bardin with more time to refresh his recollection, despite the fact that nearly six hours of
4 deposition time remained and the fact that Plaintiff improperly assumed that Dr. Bardin
5 would be unable to answer his remaining questions. Furthermore, Plaintiff’s legal
6 authorities are inapposite. *See Contardo v. Merrill Lynch, Pierce, Fenner and Smith*, 119
7 F.R.D. 622, 625 (D. Mass. 1988) (holding that plaintiff could not circumvent an order
8 prohibiting further discovery in the case “by serving a subpoena *duces tecum* upon an
9 employee of the defendant commanding the employee to produce documents within the
10 custody, control and/or possession of the defendant”); *Orrison v. Balcor Co.*, 132 F.R.D.
11 202, 203 (N.D. Ill. 1990) (holding that plaintiff could be required to submit to a second
12 deposition even though the discovery cut-off date had passed because plaintiff “brought
13 numerous documents which had not been produced previously” when appearing for the
14 first deposition, and “[n]one of the defendants had a sufficient opportunity to review the
15 documents prior to the deposition”); and *Ethicon Endo-Surgery v. U.S. Surgical Corp.*,
16 160 F.R.D. 98, 99 (S.D. Ohio 1995) (concluding that “[t]he record reflects numerous
17 instances of improper instructions to witnesses not to answer questions by attorneys”).

18 Judge Bartick’s Order was neither contrary to law nor clearly erroneous.

19 Accordingly, this Court **OVERRULES** Plaintiff’s Objections (Dkt. No. 183) and
20 **AFFIRMS** Judge Bartick’s Order (Dkt. No. 174).

21 **II. Plaintiff’s Second Set of Objections (Dkt. No. 185)**

22 **A. Judge Bartick’s Orders (Dkt. Nos. 169, 177)**

23 On October 19, 2015, Plaintiff served a Request for Production of Documents on
24 Defendant Kimberly Kirchmeyer (“Kirchmeyer”). (Dkt. No. 148 at 44–48.) In Requests
25 Nos. 2, 6, and 10, Plaintiff requested minutes from the closed session meetings that the
26 Medical Board held in 2006, 2008, and 2010 concerning the disciplinary action against
27 Plaintiff. (*Id.*) On December 22, 2015, Kirchmeyer responded and asserted that the
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1 deliberative process privilege applied to the minutes from the closed sessions of the
2 Board meetings. (*Id.* at 50–68.)

3 On April 15, 2016, Plaintiff filed an *ex parte* motion to compel Kirchmeyer to
4 produce documents. (Dkt. No. 148.) On June 21, 2016, Judge Bartick denied in part and
5 reserved in part Plaintiff’s motion. (Dkt. No. 169.) Specifically, because Kirchmeyer did
6 not provide a privilege log or a declaration substantiating her claim of deliberative
7 process privilege, Judge Bartick reserved ruling on whether Kirchmeyer should be
8 compelled to produce documents responsive to Plaintiff’s Requests for Production Nos.
9 2, 6, and 10. (*Id.* at 4–6.)

10 In addition, Judge Bartick noted Plaintiff’s failure to comply with the Court’s
11 procedures for filing discovery motions, the Court’s rules governing *ex parte*
12 applications, and the duty to meet and confer prior to bringing a discovery motion under
13 Federal Rule of Civil Procedure 37(a) and under the Southern District’s Civil Local Rule
14 26.1(a). (Dkt. No. 169 at 2–3.) Moreover, Plaintiff’s motion was untimely by two
15 months without justification. (*Id.* at 3.) As Judge Bartick correctly stated, (*id.*), it would
16 have been well within Judge Bartick’s discretion to reject Plaintiff’s motion for these
17 reasons alone. *See, e.g.*, Civ. L.R. 26.1(a) (“The court will entertain no motion pursuant
18 to Rules 26 through 37, Fed. R. Civ. P., unless counsel will have previously met and
19 conferred concerning all disputed issues.”); *Rogers v. Giurbino*, 288 F.R.D. 469, 477
20 (S.D. Cal. 2012) (“A court can deny a motion to compel solely because of a party’s
21 failure to meet and confer prior to filing the motion.”); *Scheinuck v. Sepulveda*, No. C 09-
22 0727 WHA PR, 2010 WL 5174340, at *1 (N.D. Cal. Dec. 15, 2010) (same).

23 On June 29, 2016, Kirchmeyer filed a declaration and privilege log pursuant to the
24 Court’s June 21, 2016 Order. (Dkt. No. 176.) In a Supplemental Order on July 1, 2016,
25 Judge Bartick concluded that the closed session minutes were predecisional and
26 deliberative, and that Plaintiff’s need for the minutes did not outweigh the Board’s
27 interest in nondisclosure. (Dkt. No. 177 at 3.) Judge Bartick further found that
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1 disclosure of the closed session minutes could chill frank and open discussion by Board
2 members during closed session deliberations. (*Id.* at 4.) Accordingly, Judge Bartick
3 sustained Kirchmeyer’s assertion of the deliberative process privilege. (*Id.*)

4 **B. Plaintiff’s Grounds for Objections**

5 Plaintiff asserts five objections: (1) the deliberative process privilege does not
6 apply to civil rights claims (Dkt. No. 185 at 4–6); (2) Kirchmeyer’s assertion of the
7 qualified deliberative process privilege is overcome by a number of factors, which the
8 Court did not consider (*id.* at 6–8); (3) Kirchmeyer’s declaration is not consistent with the
9 privilege log, which is independently defective (*id.* at 8–10); (4) administrative decisions
10 are not protected by the deliberative process privilege (*id.* at 10); and (5) the privilege
11 was waived by the publication of the Board’s decisions (*id.* at 10–11).

12 Again, Plaintiff’s grounds for objections amount to disagreement with Judge
13 Bartick’s Orders and fail to clear the high bar of demonstrating clear error. First, Plaintiff
14 provides no legal authority to support his assertion that the deliberative process privilege
15 does not apply to civil rights claims. Plaintiff’s cites to factually inapposite cases
16 wherein courts held that the “deliberative process privilege does not apply when the
17 government’s intent is at issue.” *Jones v. City of Coll. Park, Ga.*, 237 F.R.D. 517, 520
18 (N.D. Ga. 2006) (Title VII and Section 1983 claim alleging “racial discrimination in
19 connection with nonrenewal of Plaintiff’s employment”); *see also Waters v. U.S. Capitol*
20 *Police Bd.*, 218 F.R.D. 323, 324 (D.D.C. 2003) (holding that the deliberative process
21 privilege could not be used “to thwart discovery of information in a case in which a
22 plaintiff challenges governmental action as discriminatory”); *Qamhiyah v. Iowa State*
23 *Univ. of Sci. & Tech.*, 245 F.R.D. 393, 399 (S.D. Iowa 2007) (holding that the
24 deliberative process privilege did not apply where plaintiff alleged that the deliberative
25 process itself was “tainted with unlawful discrimination”); *Burka v. N.Y. City Transit*
26 *Auth.*, 110 F.R.D. 660, 667 (S.D.N.Y. 1986) (concluding that “the recorded observations
27 of an eyewitness” were not protected by the deliberative process privilege, as the
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1 “privilege applies only to expressions of opinion or recommendations, not to the facts
2 upon which such evaluations might have been based”); *Mem’l Hosp. for McHenry Cty. v.*
3 *Shadur*, 664 F.2d 1058, 1063 (7th Cir. 1981) (holding that the deliberative process
4 privilege did not apply where plaintiff “alleged that the defendants . . . used the Hospital
5 committee apparatus discriminatorily to deny him staff privileges at the Hospital in
6 furtherance of an unlawful restraint of trade”); *United States v. Am. Tel. & Tel. Co.*, 524
7 F. Supp. 1381, 1389 (D.D.C. 1981) (“An exception to the general thought-process rule is
8 made where there are allegations of misconduct or misbehavior, *and evidence to that*
9 *effect is not privileged.*” (emphasis added)); *Kelly v. City of San Jose*, 114 F.R.D. 653,
10 659 (N.D. Cal. 1987) (dicta voicing the court’s opinion that “the ‘deliberative process’
11 privilege should be limited to communications designed to contribute, directly, to the
12 formulation of important public policy”). Government intent is not similarly at issue in
13 this case, as this Court previously held that Plaintiff did not sufficiently state a claim for
14 Fourteenth Amendment equal protection violations (*inter alia*, racial discrimination)
15 under Section 1983. (Dkt. No. 59 at 14–16; Dkt. No. 159 at 32–34.)

16 Second, Judge Bartick did in fact consider factors to determine whether the
17 deliberative privilege applied. (Dkt. No. 177 at 3–4.) Applying settled law, Judge
18 Bartick evaluated the following factors: “1) the relevance of the evidence; 2) the
19 availability of other evidence; 3) the government’s role in the litigation; and 4) the extent
20 to which disclosure would hinder frank and independent discussion regarding
21 contemplated policies and decisions.” *F.T.C. v. Warner Commc’ns Inc.*, 742 F.2d 1156,
22 1161 (9th Cir. 1984). In particular, Judge Bartick found that Plaintiff already has the
23 complete State administrative record available to him, and that disclosure of the closed
24 session minutes would chill frank and independent discussion by Board members. (Dkt.
25 No. 177 at 3–4.) This Court finds that there was no clear error in Judge Bartick’s
26 conclusion that Plaintiff’s need for the information did not outweigh and override the
27 deliberative process privilege.

1 Third, Kirchmeyer's declaration is not "incorrect and misleading" or inconsistent
2 with the privilege log. (Dkt. No. 185 at 8.) Plaintiff's citation to *Grossman v. Schwarz*,
3 125 F.R.D. 376, 381 (S.D.N.Y. 1989) does not avail his objection to Kirchmeyer's
4 declaration. (*Id.*) In her declaration, Kirchmeyer stated that she is the Executive Director
5 for the Medical Board of California, affirmed she had personal knowledge of the facts
6 attested to in the declaration and privilege log, and provided the factual bases for her
7 claim of injury to legitimate government interests flowing from a potential disclosure.
8 (Dkt. No. 176.) Furthermore, Kirchmeyer's list of the dates of the closed session
9 meetings (November 2, 2006; April 24, 2008; and July 29, 2010) and the dates on which
10 the decisions rendered at the meetings were adopted (December 6, 2006; June 13, 2008;
11 and September 27, 2010, respectively) are completely consistent with the dates provided
12 in the privilege log. Plaintiff does not establish how Kirchmeyer's declaration is
13 incorrect or misleading; rather, the record indicates that Kirchmeyer complied with
14 applicable legal requirements. *See Grossman*, 125 F.R.D. at 381 ("Governmental
15 privilege must ordinarily be invoked by a department head or other responsible agency
16 official, after a personal review of the documents, in an affidavit stating a factual basis
17 for the claim of injury to legitimate government interests flowing from disclosure.").

18 Nor is the privilege log independently defective. (Dkt. No. 176-1.) Contrary to
19 Plaintiff's assertions, (Dkt. No. 185 at 10), the privilege log contains sufficient
20 information, including document descriptions and the subject matter contained within;
21 the author, recipient, and/or custodian of the documents; and the category of privilege
22 and application of privilege asserted for each document, (Dkt. No. 176-1). Plaintiff does
23 not identify any defects in the privilege log that would inhibit Plaintiff or the Court from
24 adequately assessing the claim of privilege. *See Friends of Hope Valley v. Frederick Co.*,
25 268 F.R.D. 643, 650–51 (E.D. Cal. 2010).

26 Fourth, Plaintiff mistakenly conflates the ultimate administrative decision itself
27 with the deliberative process that resulted in the decision. (Dkt. No. 185 at 10.) It is
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1 settled law that “the deliberative process privilege permits the government to withhold
2 documents that reflect advisory opinions, recommendations and deliberations comprising
3 part of a process by which governmental decisions and policies are formulated.”
4 *Hongsermeier v. C.I.R.*, 621 F.3d 890, 904 (9th Cir. 2010) (internal citation, quotation
5 marks, and alteration omitted). Plaintiff’s legal authorities are factually inapposite. *See*
6 *Mem’l Hosp. for McHenry Cty. v. Shadur*, 664 F.2d 1058, 1063 (7th Cir. 1981)
7 (confidential medical disciplinary proceedings based on peer review required to be
8 disclosed in antitrust action alleging conspiracy); *Scott v. Bd. of Educ. of City of E.*
9 *Orange*, 219 F.R.D. 333, 337 (D.N.J. 2004) (concluding that “inquiry into the Board’s
10 pre-decisional mental impressions and discussions [was] necessary to challenge the
11 purported reason for Plaintiff’s termination,” as plaintiff “attack[ed] the integrity of the
12 Board’s decision to terminate him” and “alleged that he was terminated . . . because he
13 failed to participate in an illegal bidding scheme and because he attempted to unearth
14 such scheme”).

15 Fifth, Plaintiff provides no support for the proposition that the publication of the
16 Board’s decisions results in an automatic waiver of the deliberative process privilege.
17 (Dkt. No. 185 at 10–11.) *Mobil Oil Corp. v. U.S. E.P.A.*, 879 F.2d 698, 699 (9th Cir.
18 1989) (concluding that the EPA had not “waived its right to invoke statutory exemptions
19 to Mobil’s request for documents under FOIA by its release of related documents to
20 Mobil and third parties”) does not avail Plaintiff’s argument.

21 Finally, this Court expresses concern with Plaintiff’s repeated failure to comply
22 with the rules and orders governing discovery despite multiple warnings from the Court.
23 It would have been well within Judge Bartick’s discretion to reject Plaintiff’s motion
24 solely for his failure to comply with Judge Bartick’s scheduling order and chambers
25 rules, the Southern District’s Civil Local Rules, and the Federal Rules of Civil Procedure.
26 *See, e.g.*, Civ. L.R. 26.1(a); *Rogers*, 288 F.R.D. at 477.

27 In sum, this Court **OVERRULES** Plaintiff’s Objections (Dkt. No. 185) and
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1 **AFFIRMS** Judge Bartick’s Orders (Dkt. Nos. 169, 177).

2 **III. Plaintiff’s Third Set of Objections (Dkt. No. 215)**

3 **A. Judge Porter’s Order (Dkt. No. 207)**

4 Plaintiff moved to compel documents from Defendant Sharon Levine (“Dr.
5 Levine”) responsive to his amended Requests for Production of Documents A, B, C, D,
6 E, and G. (Dkt. No. 201.) Judge Porter denied the motion on November 14, 2016. (Dkt.
7 No. 207.) With respect to Requests A, B, and C, Judge Porter determined that the
8 documents requested were equally available to Plaintiff, and that the Requests were
9 improperly served after the discovery cut-off date without permission. (*Id.* at 3–4.) With
10 respect to Requests D and E, Judge Porter determined to be sufficient Dr. Levine’s
11 responses indicating that despite a diligent search and inquiry, the documents requested
12 were not in her possession, custody or control. (*Id.* at 4–5.) Finally, with respect to
13 Request G, Judge Porter concluded that the Request sought irrelevant information that
14 violated privacy rights, and that Plaintiff did not establish sufficient need for the
15 information, given his prior deposition of Dr. Garg.² (*Id.* at 5.)

16 **B. Plaintiff’s Grounds for Objections**

17 Plaintiff contends that Judge Porter abused her discretion in denying his motion to
18 compel responses to Requests A, B, and C. (Dkt. No. 215 at 7.) However, Plaintiff
19 merely avers that Judge Porter’s determination was incorrect, without establishing any
20 grounds for how Judge Porter’s decision was contrary to law. Plaintiff also objects to
21 Judge Porter’s determination that his Requests A, B, and C, which requested new
22 documents not requested in Plaintiff’s original Document Requests, exceeded the scope
23 of the Court’s June 29, 2016 order. (*Id.*) Plaintiff’s objection is futile. Judge Porter’s
24 June 29, 2016 order reopened discovery solely for the purpose of allowing the
25 depositions of Kirchmeyer and Dr. Levine to go forward and directed Kirchmeyer and

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27 ² Plaintiff does not object to Judge Porter’s ruling regarding Request G. (Dkt. No. 215 at 8.)

1 Dr. Levine to respond only to the Requests for Production of Documents that were
2 attached to their deposition notices. (Dkt. No. 175 at 8.) Plaintiff improperly sought
3 documents beyond the scope of discovery allowed by the Court’s order.

4 With respect to Requests D and E, Plaintiff again asserts that the Court’s sustention
5 of the deliberative process privilege is erroneous. (Dkt. No. 215 at 8.) Plaintiff’s
6 objection to Judge Porter’s Order is misplaced, as Judge Porter based her decision not on
7 Judge Bartick’s earlier ruling sustaining Defendants’ assertion of the deliberative process
8 privilege, but on Dr. Levine’s statement that “after a diligent search and inquiry,” she was
9 unable to locate any responsive documents, as the documents were not in her possession,
10 custody, or control. (Dkt. No. 207 at 4–5.) Moreover, this Court has already addressed
11 Plaintiff’s objections regarding the deliberative process privilege, *supra* Part II, with
12 respect to the closed session minutes from 2006, 2008, and 2010.

13 Finally, Plaintiff attached to his Objections excerpts from the deposition transcripts
14 of Linda Whitney and Kimberly Kirchmeyer. (Dkt. No. 215 at 10–21.) This Court
15 declines to consider the deposition transcripts, as Plaintiff provides no justification for
16 not first raising the excerpts to the Magistrate Judge. *See Harbridge v. Yates*, No. 1:10-
17 CV-00473 AWI, 2012 WL 639476, at *1 (E.D. Cal. Feb. 24, 2012) (“[O]bjections to a
18 Magistrate Judge’s order are not the place for a party to make a new argument and raise
19 facts not addressed in his original brief.” (internal citation and quotation marks omitted)).

20 Accordingly, this Court **OVERRULES** Plaintiff’s Objections (Dkt. No. 185) and
21 **AFFIRMS** Judge Porter’s Order (Dkt. No. 207).

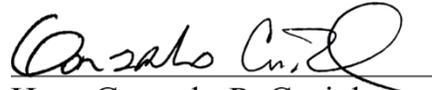
22 **CONCLUSION**

23 For the foregoing reasons, this Court **OVERRULES** Plaintiff’s three sets of
24 Objections (Dkt. Nos. 183, 185, 215) and **AFFIRMS** Magistrate Judge Porter’s and
25 Magistrate Judge Bartick’s Orders. (Dkt. Nos. 174; 169, 177, 207.)

26 **IT IS SO ORDERED.**

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1 Dated: January 17, 2017

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3 Hon. Gonzalo P. Curiel
4 United States District Judge
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