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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

SHAKINA ORTEGA, etc., et al.,  
Plaintiffs,  
v.  
SAN DIEGO POLICE  
DEPARTMENT, etc., et al.,  
Defendants.

Case No. 13-CV-87-LAB (JMA)

**ORDER ON JOINT MOTION  
REGARDING ORTEGA'S  
"PITCHES" REQUEST TO  
OBTAIN DEFENDANT  
JONATHAN MCCARTHY'S SAN  
DIEGO POLICE DEPARTMENT  
PERSONNEL FILE  
[DOC. NO. 26]**

The parties have filed a Joint Motion for Determination of Discovery Dispute regarding the production of internal law enforcement documents by Defendant Jonathan McCarthy ("Defendant") to Plaintiff Shakina Ortega. Doc. No. 26. Pursuant to the Court's *Procedures for Obtaining Internal Law Enforcement Documents*, Defendant submitted a binder of all documents listed on its "Privilege Log - Request for Production, Set One" to the Court for *in camera* review. The Court has now reviewed the joint motion and subject documents. Based upon the *in camera* review and the Court's evaluation of the parties' arguments, the Court issues the following order.

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1 **I. BACKGROUND**

2 This action is brought under 42 U.S.C. § 1983 against the San Diego  
3 Police Department, Jonathan McCarthy, and the City of San Diego by  
4 Plaintiffs Shakina Ortega, Tamia Ortega, and Jacob Ortega, the surviving  
5 spouse and children of decedent Victor Ortega. Plaintiffs allege that on  
6 June 4, 2012, Defendant McCarthy, who responded to a 911 call made by  
7 Shakina Ortega reporting domestic violence, shot and killed Victor Ortega  
8 following a foot pursuit. Plaintiffs, who allege that Defendant McCarthy had  
9 no probable cause to justify the use of deadly force, assert claims for  
10 violation of civil rights, discrimination, assault and battery, wrongful death,  
11 and negligence.

12 Plaintiff Shakina Ortega (“Plaintiff”) presently moves the Court for an  
13 *in camera* review of Defendant McCarthy’s police personnel file, and for an  
14 order to produce documents pursuant to the stipulated protective order in  
15 this action (see Doc. No. 22). Joint Mot. at 2.

16  
17 **II. DISCUSSION**

18 **A. Disputed Discovery Requests**

19 Plaintiff Shakina Ortega requests that the Court conduct an *in camera*  
20 review of Defendant McCarthy’s personnel records to determine which  
21 documents are relevant to Plaintiffs’ claim for damages, and specifically  
22 seeks the following documents:

- 23 1. All complaints regarding Officer McCarthy prior to June 4, 2012;
- 24 2. All reports or files that concern allegations of use of excessive  
25 force by Officer McCarthy;
- 26 3. All records of Officer McCarthy’s training in the use of lethal and  
27 non-lethal force, pursuits, responding to domestic violence calls  
and handcuffing procedures;
- 28 4. All records of Jonathan McCarthy’s training and education  
concerning foot pursuits and all reports of foot pursuits  
conducted by Officer McCarthy;

- 1 5. All reports or files concerning Officer McCarthy's use of  
2 firearms (primary and secondary);
- 3 6. All records regarding training and/or approval of Officer  
4 McCarthy's secondary weapon and holster;
- 5 7. All documents regarding Officer McCarthy's history of discipline  
6 or disciplinary actions;
- 7 8. All documents identified in Defendants' privilege log, attached  
8 as Exhibit "1";
- 9 9. All documents prepared by Internal Affairs; and
- 10 10. All documents and things in the Internal Affairs file.

11 (Joint Mot. at 5.)

12 Defendants object to the release of any information in Defendant  
13 McCarthy's personnel file on the bases that the information is confidential,  
14 and is protected from production under California Penal Code section  
15 832.7, and federal and California state privacy laws. Further, Defendants  
16 assert the official information privilege as a basis for withholding the  
17 documents. (*Id.* at 5-6.) Defendants request that any information ordered  
18 to be produced by the Court be produced pursuant to the parties' stipulated  
19 protective order. (*Id.* at 6.)

## 20 **B. Legal Standards**

21 Federal Rule of Civil Procedure 26 states:

22 Parties may obtain discovery regarding any nonprivileged  
23 matter that is relevant to any party's claim or defense—including  
24 the existence, description, nature, custody, condition, and  
25 location of any documents or other tangible things and the  
26 identity and location of persons who know of any discoverable  
27 matter. For good cause, the court may order discovery of any  
28 matter relevant to the subject matter involved in the action.  
Relevant information need not be admissible at the trial if the  
discovery appears reasonably calculated to lead to the  
discovery of admissible evidence. All discovery is subject to the  
limitations imposed by Rule 26(b)(2)(C).

Fed. R. Civ. P. 26(b)(1). The scope of discovery under the Federal Rules  
is extremely broad. See, e.g., Kelly v. City of San Jose, 114 F.R.D. 653,  
668 (N.D. Cal. 1987). "The party who resists discovery has the burden to

1 show that discovery should not be allowed, and has the burden of  
2 clarifying, explaining, and supporting its objections.” Oakes v. Halvorsen  
3 Marine Ltd., 179 F.R.D. 281, 283 (C.D. Cal. 1998).

4 “[I]n federal question cases where pendent state claims are raised  
5 the federal common law of privileges should govern all claims of privilege  
6 raised in the litigation.” Perrignon v. Bergen Brunswig Corp., 77 F.R.D.  
7 455, 459 (N.D. Cal. 1978). “State privilege doctrine, whether derived from  
8 statutes or court decisions, is not binding on federal courts in these kinds of  
9 cases.” Kelly, 114 F.R.D. at 655.

10 With respect to a party’s assertion of privacy rights as a means to  
11 protect documents from discovery, federal courts ordinarily recognize that a  
12 constitutionally-based right of privacy can be raised in response to  
13 discovery requests. Soto v. City of Concord, 162 F.R.D. 603, 616 (N.D.  
14 Cal. 1995). The resolution of a privacy objection involves a balancing of  
15 the need for the information sought against the privacy right asserted. Id.  
16 (citing Perry v. State Farm Fire & Cas. Co., 734 F.2d 1441, 1447 (11th Cir.  
17 1984)). “In the context of the disclosure of police files, courts have  
18 recognized that privacy rights are not inconsequential.” Soto, 162 F.R.D. at  
19 616. “Federal courts should generally give some weight to privacy rights  
20 that are protected by state constitutions or state statutes.” Kelly, 114  
21 F.R.D. 653, 656 (N.D. Cal. 1987). “However, these privacy interests must  
22 be balanced against the great weight afforded to federal law in civil rights  
23 cases against police departments.” Soto, 162 F.R.D. at 616.

24 The privilege set forth in California Penal Code section 832.7, upon  
25 which Defendants rely in part to protect the subject documents from  
26 discovery, provides as follows:

27 Peace officer or custodial officer personnel records and records  
28 maintained by any state or local agency pursuant to Section  
832.5, or information obtained from these records, are  
confidential and shall not be disclosed in any criminal or civil

1 proceeding except by discovery pursuant to Sections 1043 and  
2 1046 of the Evidence Code.

3 Cal. Penal Code § 832.7(a). Federal courts, however, have found that  
4 section 832.7 is not applicable in evaluating discovery disputes in 42  
5 U.S.C. § 1983 claims. See, e.g., Green v. Baca, 226 F.R.D. 624, 643-44  
6 (C.D. Cal. 2005); see also Miller v. Pancucci, 141 F.R.D. 292, 298-99 (C.D.  
7 Cal. 1992) (finding California rules for discovery and privileges, including  
8 California Evidence Code section 1043, referenced in sections of California  
9 Penal Code, to be “fundamentally inconsistent” with federal law and the  
10 liberal federal policy on discovery). The Court therefore will not apply  
11 California Penal Code section 832.7 to its analysis of this matter. See  
12 Soto, 162 F.R.D. at 609 (refusing to apply California privilege law to similar  
13 discovery dispute involving police files).

14 Federal common law recognizes a qualified privilege for official  
15 information. Kerr v. United States Dist. Ct. for the Northern Dist. of Cal.,  
16 511 F.2d 192, 198 (9th Cir. 1975). The discoverability of official documents  
17 is determined under the “balancing approach that is moderately pre-  
18 weighted in favor of disclosure.” Kelly, 114 F.R.D. at 661. The party  
19 asserting the privilege must properly invoke the privilege by making a  
20 “substantial threshold showing.” Id. at 669. The party must file an  
21 objection and submit a declaration or affidavit from a responsible official  
22 with personal knowledge of the matters attested to in the affidavit. Id. The  
23 affidavit must include: (1) an affirmation that the agency has generated or  
24 collected all of the subject material and that it has maintained its  
25 confidentiality; (2) a statement that the official has personally reviewed the  
26 material in question; (3) a specific identification of the governmental or  
27 privacy interests that would be threatened by disclosure of the material to  
28 the plaintiff and/or his or her attorney; (4) a description of how disclosure

1 subject to a carefully crafted protective order would create a substantial risk  
2 of harm to significant governmental or privacy interests; and (5) a  
3 projection of how much harm would be done to the threatened interest or  
4 interests if disclosure were made. Id. at 670.

5 **C. Relevance**

6 **1. Prior Complaints and Allegations of Excessive Force**  
7 **Against Defendant McCarthy (Category Nos. 1 & 2)**

8 Plaintiff seeks to obtain documents pertaining to prior complaints and  
9 allegations of excessive force against Defendant McCarthy. Records of  
10 citizen complaints against defendant law enforcement officers have been  
11 found relevant to a plaintiff's civil rights claim. Soto, 162 F.R.D. at 620.  
12 Such information "may be crucial to proving [a] [d]efendant's history or  
13 pattern of such behavior." Id. Information of this type may also be relevant  
14 on issues of "credibility, notice to the employer, ratification by the employer  
15 and motive of the officers." Hampton v. City of San Diego, 147 F.R.D. 227,  
16 229 (S.D. Cal. 1993). Furthermore, such information may be relevant to  
17 the issue of punitive damages, as the "information may lead to evidence of  
18 a continuing course of conduct reflecting malicious intent." Id. Accordingly,  
19 the Court finds that documents reflecting prior citizen complaints and  
20 allegations of excessive force against Defendant McCarthy are relevant.

21 While such documents are relevant to Plaintiffs' claims, the Court  
22 notes that documents responsive to Category Nos. 1 and 2 were not  
23 included in the binder provided to the Court by Defendants for *in camera*  
24 review. Accordingly, the Court presumes there are no such responsive  
25 documents. If this is the case, and if they have not done so already,  
26 Defendants shall serve an appropriate discovery response reflecting this  
27 fact. If this is not the case, Defendants shall immediately inform Plaintiff's  
28 counsel and the Court of the same, shall explain why said documents were

1 not previously provided to the Court, and shall make arrangements with the  
2 Court for the submission of additional documents for *in camera* review.

3 **2. Personnel Documents (Category Nos. 3-7)**

4 Plaintiff also seeks documents relating to the training, use and  
5 approval of weapons, and history of discipline of Defendant McCarthy. In  
6 cases involving section 1983 claims, courts have repeatedly held that  
7 police personnel files are relevant and discoverable. See Green, 226  
8 F.R.D. at 644; Soto, 162 F.R.D. at 614-15. This includes any periodic  
9 performance evaluations by superiors. See Unger v. Cohen, 125 F.R.D.  
10 67, 70 (S.D.N.Y. 1989) (finding such information to be “clearly relevant” in a  
11 section 1983 action arising out of alleged on-duty conduct). Such  
12 information is relevant for the same reasons set forth above with respect to  
13 the relevance of citizen complaint records. See, e.g., Hampton, 147 F.R.D.  
14 at 229; Soto, 162 F.R.D. at 614-15. Additionally, employee performance  
15 appraisals may contain information on an officer defendant’s “ethics,  
16 interpersonal relationships, decision making abilities, work and safety  
17 habits, and crime scene management techniques.” Soto, 162 F.R.D. at  
18 615. In accordance with these authorities, the Court finds that the following  
19 documents are relevant and responsive to Plaintiff’s discovery requests:  
20 Pages 0004, 0017, 0018, 0046-0047 (performance evaluation referencing  
21 the subject incident), 0048-0050 (performance evaluation referencing a foot  
22 pursuit involving Officer McCarthy), 0066, and 0069.

23 **3. Internal Affairs Records of Subject Incident (Category Nos.  
24 9 & 10)**

25 This information is relevant. See Kelly, 114 F.R.D. at 665-66 (stating  
26 that internal affairs investigations, including the statements that go into  
27 such reports and the opinions and recommendations that conclude them,  
28 are “presumptively discoverable”). Accordingly, the following documents,

1 consisting of the Internal Affairs file of the subject incident, are relevant:  
2 Pages 0090-0611.<sup>1</sup>

3 **D. Privacy Objection**

4 As set forth above, resolution of a privacy objection requires a  
5 balancing of the need for the information sought against the privacy right  
6 asserted. Here, the Court finds Plaintiff's need for the information sought is  
7 great. This information is unlikely to be available from any source other the  
8 Defendants' records. As the court in Kelly stressed, there is a strong public  
9 interest in uncovering civil rights violations of the type at issue in this case.  
10 Soto, 162 F.R.D. at 617; Kelly, 114 F.R.D. at 667. After considering "the  
11 great weight that is afforded to federal civil rights laws" (see Soto, 162  
12 F.R.D. at 617) and the case law, discussed above, the Court finds the  
13 privacy interests asserted by Defendants with respect to these documents  
14 on the whole are outweighed by Plaintiff's need for the information.  
15 Moreover, a stipulated protective order was entered in this case on July 24,  
16 2013, which limits the dissemination of any documents ordered disclosed.  
17 See Doc. No. 22. The protective order and, as discussed below, the  
18 redaction of any highly personal information for which Plaintiff has not  
19 shown a need, will amply protect Defendants' privacy interests. See, e.g.,  
20 Soto, 162 F.R.D. at 616 (stating that "[a] carefully drafted protective order  
21 could minimize the impact of . . . disclosure").

22 **E. Official Information Privilege**

23 Defendants fail to demonstrate any of the requirements that are  
24 necessary to establish the official information privilege applies to any of the  
25 documents at issue. Kelly, 114 F.R.D. at 669. Furthermore, as previously

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26  
27 <sup>1</sup>The Court notes that Pages 0334-0336 appear to be misplaced in the  
28 subject Internal Affairs file as they related to a different incident. Additionally,  
although Defendants' privilege log indicates that the Internal Affairs file is  
comprised of pages 0090 to 0611, the last page in the binder provided to the  
Court is numbered 0582.



1 mentioned, a protective order has been entered that mitigates against a  
2 risk of harm to Defendants' interests. The Court, thus, concludes the  
3 official information privilege does not bar discovery of the information  
4 sought.

5 **F. Redactions**

6 To the extent personal information of Defendant McCarthy – i.e.,  
7 home address, telephone number, family members, etc. – or the name or  
8 personal information of other law enforcement officers exists within the  
9 documents to be produced – such information may be redacted prior to  
10 production, as Plaintiff has not shown a need for such information.

11 **G. Documents Required to be Produced**

12 The following documents shall be produced to Plaintiff subject to the  
13 protection of the Protective Order previously entered in this case:

14 0004

15 0017

16 0018

17 0046-0047

18 0048-0050

19 0066

20 0069

21 0090-0611 (Pages 0334-0336 may be withdrawn per footnote 1,  
22 *supra*. If the Internal Affairs file goes only to page 0582, and not  
23 0611, Defendants shall serve an amended privilege log reflecting  
this.)<sup>2</sup>

24 All other documents provided to the Court for *in camera* review are  
25 not responsive to Plaintiff's discovery requests and are not relevant to the  
26 claims made in this case, and thus need not be produced.

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27 <sup>2</sup>Any electronically stored information (e.g., photographs, sound recordings)  
28 contained within this file (or any document ordered to be produced) shall be  
produced in accordance with Fed. R. Civ. P. 34(a)(1)(A).

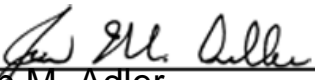
1 **III. CONCLUSION**

2 Based on the foregoing, and pursuant to the Court's *in camera*  
3 review, the Court **ORDERS** Defendants to produce all documents required  
4 to be produced in this Order pursuant to the Protective Order entered by  
5 the Court on July 24, 2013. All documents shall be produced to Plaintiffs  
6 within one week of the date of this Order.

7 Defendants shall contact the undersigned's chambers at (619) 557-  
8 5585 to make arrangements to retrieve their documents.

9 **IT IS SO ORDERED.**

10 DATED: October 21, 2013

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12 Jan M. Adler  
13 U.S. Magistrate Judge  
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