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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

THE ESTATE OF RUBEN NUNEZ  
by and through its successor-in-  
interest LYDIA NUNEZ, ALBERT  
NUNEZ, and LYDIA NUNEZ,  
Plaintiff,  
v.  
CORRECTIONAL PHYSICIANS  
MEDICAL GROUP, INC., et al.,  
Defendants, Third-Party Plaintiffs,  
v.  
CORRECTIONAL PHYSICIANS  
MEDICAL GROUP, INC., et al.,  
Third-Party Defendants.

Case No.: 16cv1412-BEN-MDD

**ORDER ON JOINT DISCOVERY  
MOTION PRESENTING  
PLAINTIFFS' MOTION TO  
COMPEL PRODUCTION OF  
DOCUMENTS**

**[ECF No. 150]**

Before the Court is the parties' Joint Discovery Motion filed on August 7, 2017. (ECF No. 150). The joint motion presents Plaintiffs' motion to compel production of documents from Defendant Patton State Hospital ("Patton"). (*Id.*). The dispute involves disclosure of documents created by Patton pertaining to meetings held following the death of Ruben Nunez.

## LEGAL STANDARD

1  
2 The Federal Rules of Civil Procedure generally allow for broad  
3 discovery, authorizing parties to obtain discovery of “any nonprivileged  
4 matter that is relevant to any party’s claim or defense and proportional to the  
5 needs of the case....” Fed. R. Civ. P. 26(b)(1). “Information within the scope  
6 of discovery need not be admissible in evidence to be discoverable.” *Id.*  
7 District courts have broad discretion to determine relevancy for discovery  
8 purposes. *See Hallett v. Morgan*, 296 F. 3d 732, 751 (9th Cir. 2002).  
9 Similarly, district courts have broad discretion to limit discovery where the  
10 discovery sought is “unreasonably cumulative or duplicative, or can be  
11 obtained from some other source that is more convenient, less burdensome, or  
12 less expensive.” Fed. R. Civ. P. 26(b)(2)(C).

13 A party may request the production of any document within the scope of  
14 Rule 26(b). Fed. R. Civ. P. 34(a). “For each item or category, the response  
15 must either state that inspection and related activities will be permitted as  
16 requested or state an objection to the request, including the reasons.” *Id.* at  
17 34(b)(2)(B). If the responding party chooses to produce responsive  
18 information, rather than allow for inspection, the production must be  
19 completed no later than the time specified in the request or another  
20 reasonable time specified in the response. *Id.* An objection must state  
21 whether any responsive materials are being withheld on the basis of that  
22 objection. *Id.* at 34(b)(2)(C). An objection to part of a request must specify  
23 the part and permit inspection or production of the rest. *Id.*

## DISCUSSION

### Request for Production (“RFP”) No. 21

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25  
26 In this RFP, Plaintiffs request documents generated, produced, written,  
27 drafted, edited, compiled, or used by any Patton employee in preparation,

1 anticipation, or utilization “at the meeting” to review the circumstances of  
2 Nunez’s death. (ECF No. 150 at 3). While this RFP is vaguely worded, “the  
3 meeting” appears to be a January 2016 Morbidity/Mortality Interdisciplinary  
4 Review Committee (“MIRC”) meeting.

5 Defendant Patton has objected, stating that they are entitled to official  
6 information, deliberative process, and self-critical analysis privileges. On  
7 July 7, 2017, Defendants filed a privilege log and declaration. (ECF No. 150-  
8 4, 150-5). The Privilege Log identifies these three documents as (1) Internal  
9 Interdiscipline/Service Review of Death Summary; (2) DSH External  
10 Mortality Review; and (3) E-mail to M. Gomes re: MIRC discussions. (ECF  
11 No. 150-4).

12 According to Dr. Kayla Fisher, Medical Director for the Department of  
13 State Hospitals – Patton State Hospital, the primary predominant purpose of  
14 a MIRC meeting is to “explore ways to reduce morbidity or mortality, and/or  
15 improve patient outcomes.” (ECF No. 150-5 at ¶2). In her declaration, Dr.  
16 Fisher, explains why Defendants believe the three documents fall within the  
17 scope of the three claimed privileges.

#### 18 1. Official Information Privilege

19 “Federal common law recognizes a qualified privilege for official  
20 information.” *Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1033 (9th  
21 Cir.1990) (citing *Kerr v. United States Dist. Ct. for the N. Dist. of Cal.*, 511  
22 F.2d 192, 198 (9th Cir.1975)). The discoverability of official documents  
23 should be determined under the “balancing approach that is moderately pre-  
24 weighted in favor of disclosure.” *Kelly v. City of San Jose*, 114 F.R.D. 653,  
25 661 (N.D. Cal. 1987). The party asserting the privilege must properly invoke  
26 the privilege by making a “substantial threshold showing.” *Id.* at 669. To  
27 meet this showing, Defendants “must submit a declaration or affidavit from a

1 responsible official with personal knowledge of the matters to be attested to  
2 in the affidavit.” *Dowel v. Griffin*, 275 F.R.D. 613, 616 (S.D. Cal. Aug. 17,  
3 2011) (quoting *Soto v. City of Concord*, 162 F.R.D. 603, 613). Specifically,  
4 “[i]n order to fulfill the threshold requirement, the party asserting the  
5 privilege must submit a declaration or affidavit from a responsible official  
6 with personal knowledge of the matters to be attested to in the affidavit. The  
7 affidavit must include: (1) an affirmation that the agency generated or  
8 collected the material in issue and has maintained its confidentiality; (2) a  
9 statement that the official has personally reviewed the material in question;  
10 (3) a specific identification of the governmental or privacy interests that  
11 would be threatened by disclosure of the material to plaintiff and/or his  
12 lawyer; (4) a description of how disclosure subject to a carefully crafted  
13 protective order would create a substantial risk of harm to significant  
14 governmental or privacy interests, and (5) a projection of how much harm  
15 would be done to the threatened interests if disclosure were made.” *Soto*, 162  
16 F.R.D. at 613 (quoting *Kelly*, 114 F.R.D. at 670). If the nondisclosing party  
17 does not meet this initial burden of establishing cause to apply the privilege,  
18 the court must order disclosure of the documents; if the party meets this  
19 initial burden, the court generally conducts an in camera review of the  
20 material and balance each party's interests. *Soto*, 162 F.R.D. at 613; *Kelly*,  
21 114 F.R.D. at 671.

22 Here, Patton has failed to meet the threshold burden because they have  
23 not satisfactorily declared requirements 3 through 5. The declaration did not  
24 identify the specific governmental or privacy interest that would be  
25 threatened by disclosure of these three documents. Further, Dr. Fisher’s  
26 declaration has not described a risk to significant governmental or privacy  
27 interests that would not be overcome through a protective order. Rather, Dr.

1 Fisher’s opinion states that disclosure would “erode integrity and security of  
2 the protected documents” and “affect the morale” of those who took part in  
3 creating or using the documents in question. (ECF No. 150-5 at ¶7). That  
4 there might be lower morale among the unnamed MIRC participants if these  
5 documents were disclosed under a protective order does not rise to the level of  
6 harm to an unidentified significant governmental or privacy interest.

7 Since Patton has not met their burden, the Court is not required to  
8 conduct an in camera review and may require production of the requested  
9 documents. As such, Defendants’ objection on the basis of official information  
10 privilege is **OVERRULED**.

## 11 2. Deliberative Process Privilege

12 Patton argues that as a government agency, the deliberative process  
13 privilege allows for open and robust discussion among hospital staff and  
14 applies here to keep the documents used in preparation for and about the  
15 MIRC meeting unavailable for discovery. Plaintiff argues the deliberative  
16 process privilege does not apply because Patton failed to make the threshold  
17 showing required to invoke the privilege.

18 The deliberative process privilege permits governmental agencies to  
19 withhold documents that “reflect[] advisory opinions, recommendations and  
20 deliberations comprising part of a process by which governmental decisions  
21 and policies are formulated.” *Hongsermeier v. C.I.R.*, 621 F.3d 890, 904 (9th  
22 Cir. 2010) quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975).  
23 The purpose of the deliberative process privilege is to “promote frank and  
24 independent discussion among those responsible for making governmental  
25 decisions,” and ultimately to “protect the quality of agency decisions.” *F.T.C.*  
26 *v. Warner Communications, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1994). In  
27 order to be protected by the privilege, a document must be both

1 “predecisional” and “deliberative.” *Id.* A document is “predecisional” if it was  
2 “prepared in order to assist an agency decision maker in arriving at his  
3 decision.” *Hongsermeier*, 621 F.3d at 904. A document is “deliberative” if its  
4 disclosure would “expose an agency’s decision making process in such a way  
5 as to discourage candid discussion within the agency and thereby undermine  
6 the agency’s ability to perform its functions.” *Id.* “[W]henver the unveiling  
7 of factual materials would be tantamount to the ‘publication of the evaluation  
8 and analysis of the multitudinous facts’ conducted by the agency, the  
9 deliberative process applies.” *Nat’l Wildlife Fed’n v. U.S. Forest Serv.*, 861  
10 F.2d 1114, 1119 (9th Cir. 1988) (citation omitted).

11 The deliberative process privilege is a qualified privilege. *Warner*  
12 *Communications*, 742 F.2d at 1161. A party may obtain materials protected  
13 by the privilege if the need for the information overrides the government’s  
14 interest in non-disclosure. *Id.* The following factors are considered in  
15 deciding whether to override the privilege: “1) the relevance of the evidence;  
16 2) the availability of other evidence; 3) the government’s role in the litigation;  
17 and 4) the extent to which disclosure would hinder frank and independent  
18 discussion regarding contemplated policies and decisions.” *Id.*

19 Here, through Dr. Fisher’s declaration, Patton has not indicated how  
20 the documents they are seeking to withhold directly contribute to the  
21 formulation of policy. The declaration makes no mention of formulating  
22 governmental decisions in the wake of the MIRC meeting. Further, Patton  
23 does not assert that MIRC meetings are geared toward policymaking at all or  
24 that they are attended by policymakers. Dr. Fisher simply states that a  
25 MIRC session’s predominant purpose is exploring ways to reduce morbidity  
26 and mortality and/or improving patient outcomes. (ECF No. 150-5 at ¶2).  
27 While a MIRC meeting may aim to guide future medical decisions, not every

1 decision results in a governmental policy and as such the Court finds that  
2 Patton has not shown how the MIRC meeting and these associated  
3 documents are deliberative. Patton cannot invoke the deliberative process  
4 privilege to shield discovery of these three documents.

5 As such, Patton's assertion of deliberative process privilege is

6 **OVERRULED.**

7 3. State and Federal Self-Critical Analysis Privileges

8 Lastly, Patton encourages the Court to endorse a federal self-critical  
9 analysis privilege or, in the alternative, apply California Evidence Code §  
10 1157(a). (ECF No. 150 at 19, 23). The parties agree that there is no  
11 unequivocal federal case law that supports self-critical analysis privilege,  
12 however Patton argues that some courts have adopted a privilege and others  
13 have left the door open to the possibility of said privilege.

14 In arguing for and against a federal privilege, the parties both cite  
15 *Agster v. Maricopa Cty.*, 422 F.3d 836 (9th Cir. 2005). In *Agster*, parents of a  
16 prisoner who died in custody of county sheriff's department brought action  
17 against the county. Plaintiffs sought discovery of the mortality review and  
18 defendant declined asserting the peer review privilege. The Ninth Circuit  
19 declined to create peer review privilege for county correctional health  
20 services' 'mortality review' of circumstances surrounding the prisoner's death.

21 Similarly, in *Leon v. County of San Diego*, 202 F.R.D. 631 (S.D. Cal.  
22 2001), a § 1983 action against the county, sheriff's department, and sheriff,  
23 alleging deliberate indifference to detainee's medical condition, failure to  
24 train and supervise, and existence of policy, practice or custom creating  
25 constitutional violations, the court held (1) nursing peer review records from  
26 county detention facility were relevant to municipal liability and, therefore,  
27 were discoverable; (2) provision of California Evidence Code privileging

1 medical peer review records did not apply to protect records from discovery;  
2 and (3) self-critical analysis privilege under federal common law did not  
3 apply to protect records from discovery.

4 While Plaintiffs cite *Agster* in support of discovery, Patton argues that  
5 the decision left the door open to hospitals' use of the critical self-analysis  
6 privilege, pointing to the decision's differentiation between the defendant  
7 Correctional Health Services and an "ordinary hospital." *Agster*, 422 F.3d at  
8 839. The assumption is that Patton considers itself to be an "ordinary  
9 hospital." Patton's population is, according to their website, over 90%  
10 individuals who are either incompetent to stand trial, mentally disordered  
11 offenders, individuals deemed not guilty by reason of insanity, or sexually  
12 violent predators. While Patton and the correctional medical provider in  
13 *Agster* may not be entirely the same, both have a correctional mission that  
14 must be taken into account when seeking to apply the self-critical analysis  
15 privilege. Thus, this privilege is not recognized by the Ninth Circuit in the  
16 context of the instant case.

17 Were the court to adopt the self-critical analysis privilege, Patton would  
18 need to establish that the documents met the following three criteria: "first,  
19 the information must result from a critical self-analysis undertaken by the  
20 party seeking protection; second, the public must have a strong interest in  
21 preserving the free flow of the type of information sought; finally, the  
22 information must be of the type whose flow would be curtailed if discovery  
23 were allowed." *Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d 423, 426  
24 (9th Cir. 1992).

25 As a threshold matter here, Dr. Fisher's declaration does not indicate  
26 that the MIRC is a self-critical analysis or a peer review process. As it is, the  
27 words "self-critical" or "peer-review" are not in the declaration at all. Nor has



1 Patton provided any law that would serve as a gap filler to establish that a  
2 MIRC session is inherently a self-critical or peer-review practice. As stated  
3 above, Dr. Fisher's declaration simply states that a MIRC session's  
4 discussions "explore ways to reduce morbidity or mortality, and/or improve  
5 patient outcomes." (ECF No. 150-5 at ¶2). The declaration does not detail  
6 through what means this exploration occurs.

7 Further, Patton encourages the Court to look to California Evidence  
8 Code § 1157 for guidance. (ECF No. 150 at 23.) State privilege law applies to  
9 purely state law claims brought in federal court pursuant to diversity  
10 jurisdiction; however, state law claims that are pendent to federal question  
11 cases are governed by federal privilege law. *Burrows v. Redbud Cmty. Hosp.*  
12 *Dist.*, 187 F.R.D. 606, 610 (N.D. Cal 1998). In the instant case the Court's  
13 jurisdiction is grounded on 42 U.S.C. § 1983 based on Plaintiff's civil rights  
14 claims. Thus, federal privilege law applies.

15 As such, Patton's assertion of the self-critical analysis privilege is  
16 **OVERRULED.**

### 17 CONCLUSION

18 Accordingly, Patton's objection and assertion of the deliberative process  
19 privilege with regard to the three documents at issue is **OVERRULED**. The  
20 Court compels Patton to produce the three documents at issue to Plaintiff in  
21 response to Request for Production No. 21.

22 **IT IS SO ORDERED.**

23 Dated: September 11, 2017

24   
25 Hon. Mitchell D. Dembin  
26 United States Magistrate Judge  
27