

1  
2  
3  
4  
5  
6  
7  
8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA

10  
11 DUWAYNE JACKSON,

12 Plaintiff,

13 v.

14 D. PARAMO, et al.,

15 Defendants.  
16  
17  
18

Case No.: 17CV882-CAB (BLM)

**ORDER GRANTING IN PART  
PLAINTIFF'S MOTION TO COMPEL  
DISCOVERY**

**[ECF Nos. 82 and 90]**

19 Currently before the Court is Plaintiff's November 26, 2018 motion to compel discovery  
20 [see ECF No. 90 ("MTC")] and Defendant O. Navarro's December 18, 2018 opposition to the  
21 motion [see ECF No. 93 ("Oppo.")].

22 **RELEVANT BACKGROUND**

23 On July 14, 2018, Plaintiff propounded his first request for production of documents to  
24 Defendant Navarro. MTC at 5-9. Defendant responded to the requests on August 16, 2018.  
25 Id. at 16-23; see also Oppo. at 2. In addition to the written responses and objections, Defendant  
26 served a privilege log, the declaration of the litigation coordinator at RJ Donovan, and produced  
27 184 pages. Id. at 12-15, 24-25; see also Oppo. at 2.

28 On October 17, 2018, Plaintiff submitted a motion for order compelling discovery that

1 was accepted by the Court on discrepancy on October 31, 2018. See ECF Nos. 81 and 82.  
2 Plaintiff's motion argued that Defendant Navarro failed to fully respond to Plaintiff's Requests  
3 for Production of Documents ("RFPs") Nos. 1- 13. ECF No. 82 at 1. Plaintiff attached a copy of  
4 the RFPs and Defendant Navarro's responses to the requests. Id. at 13-22. Plaintiff complained  
5 that Defendant Navarro objected to the RFPs as "irrelevant," argued that "each item sought by  
6 the Plaintiff is relevant to the claims and defenses in the case," and asserted that he is seeking  
7 grievances and complaints regarding inmate mistreatment by Defendant Navarro. Id. at 1-2.  
8 The Court's review of Plaintiff's motion revealed that the attached RFP responses did not include  
9 relevancy objections. Id. at 13-22. Moreover, Plaintiff's argument discussed in detail an "Item  
10 1" seeking

11 any and all grievances; complaints or other documents received by the defendants  
12 or their agents at Richard J. Donovan Correctional Facility concerning mistreatment  
13 of Inmates by defendants Paramo, Romero, Valdovinos, Navarro and any  
14 memoranda, investigative files or documents created in response to such  
documents since August 2, 2016[.]

15 but that was not what was sought in the attached RFP No. 1s. Id. at 2, 13-14 and 21. None of  
16 the fifteen RFPs attached to the motion requested the types of grievances or complaints that  
17 Plaintiff stated he was seeking. Id. at 13-22. Given these inconsistencies, and in order to enable  
18 the Court to properly consider Plaintiff's request, the Court ordered Plaintiff to refile his motion  
19 to compel on or before November 27, 2018 (1) clearly identifying each discovery request to  
20 which Plaintiff is seeking to compel further response, (2) including a copy or verbatim statement  
21 of each RFP Plaintiff is moving to compel and Defendant Navarro's response to it and, (3)  
22 explaining in detail, why Plaintiff is seeking the information, how the requested information is  
23 relevant to the case, and why Defendant Navarro's response is improper or insufficient. ECF  
24 No. 83 at 2. Defendant Navarro was ordered to file his opposition to the motion on or before  
25 December 18, 2018. Id. at 3. The parties timely filed their motion and opposition. See MTC  
26 and Oppo.

27 ///

28 ///

1 **LEGAL STANDARD**

2 The scope of discovery under the Federal Rules of Civil Procedure is defined as follows:

3 Parties may obtain discovery regarding any nonprivileged matter that is relevant  
4 to any party's claim or defense and proportional to the needs of the case,  
5 considering the importance of the issues at stake in the action, the amount in  
6 controversy, the parties' relative access to relevant information, the parties'  
7 resources, the importance of the discovery in resolving the issues, and whether  
8 the burden or expense of the proposed discovery outweighs its likely benefit.  
Information within this scope of discovery need not be admissible in evidence to  
be discoverable.

9 Fed. R. Civ. P. 26(b)(1).

10 District courts have broad discretion to determine relevancy for discovery purposes. See  
11 Hallett v. Morgan, 296 F.3d 732, 751 (9th Cir. 2002). District courts also have broad discretion  
12 to limit discovery to prevent its abuse. See Fed. R. Civ. P. 26(b)(2) (instructing that courts must  
13 limit discovery where the party seeking the discovery "has had ample opportunity to obtain the  
14 information by discovery in the action" or where the proposed discovery is "unreasonably  
15 cumulative or duplicative," "obtain[able] from some other source that is more convenient, less  
16 burdensome, or less expensive," or where it "is outside the scope permitted by Rule 26(b)(1)").

17 A party may request the production of any document within the scope of Rule 26(b).  
18 Fed. R. Civ. P. 34(a). "For each item or category, the response must either state that inspection  
19 and related activities will be permitted as requested or state with specificity the grounds for  
20 objecting to the request, including the reasons." Id. at 34(b)(2)(B). The responding party is  
21 responsible for all items in "the responding party's possession, custody, or control." Id. at  
22 34(a)(1). Actual possession, custody or control is not required. Rather, "[a] party may be  
23 ordered to produce a document in the possession of a non-party entity if that party has a legal  
24 right to obtain the document or has control over the entity who is in possession of the  
25 document." Soto v. City of Concord, 162 F.R.D. 603, 619 (N.D. Cal. 1995). "The party seeking  
26 production of the documents bears the burden of proving that the documents are in the other  
27 party's possession, custody, or control." Philippe Charriol Int'l Ltd. v. A'lor Int'l Ltd., 2016 WL  
28 7634440, at \*2 (S.D. Cal. Mar. 10, 2016) (citing United States v. Int'l Union of Petroleum &

1 Indus. Workers, AFL-CIO, 870 F.2d 1450, 1452 (9th Cir. 1989)).

2 **DISCUSSION**

3 Plaintiff seeks to compel further response from Defendant Navarro to RFPs No. 1-3. MTC.  
4 Defendant contends that he has fully complied with Plaintiff's Requests and that Plaintiff's motion  
5 should be denied in its entirety. Oppo.

6 A. Request for Production No. 1

7 Plaintiff seeks to compel further response to RFP No. 1. MTC at 2. RFP No. 1 seeks "all  
8 documents that pertain verify or suggest for inspection within the served Parties Possession or  
9 control to measure, survey or copy. "CDCR's" employee or officer employee, liability insurance  
10 Policy of Defendant Navarro." MTC at 6. Defendant responded to RFP No. 1 by stating that the  
11 "CDCR is self-insured and as such, no responsive documents exist." Id. at 17.

12 Plaintiff argues that the information being sought is relevant to his claim of "vicarious  
13 liability of the employee wrongful acts necessary incidental to his work" and that Defendant's  
14 response is incomplete. Id. at 2. Defendant contends that "[b]y explaining that no responsive  
15 document exists, Defendant has fully complied with his discovery obligations. Indeed,  
16 Defendant cannot be ordered to produce documents that do not exist." Oppo. at 3. Defendant  
17 Navarro notes that Plaintiff's only claim against him is for violations of the Eighth Amendment  
18 and that Plaintiff has not asserted a vicarious liability claim against him. Id. at 3 n.1.

19 Defendant has responded that no responsive documents exist. Plaintiff has not provided  
20 any reason or evidence indicating that this response is untruthful and the Court has no reason  
21 to believe that Defendant is withholding responsive documents. Accordingly, Plaintiff's motion  
22 to compel further response to RFP No. 1 is **DENIED**.

23 B. Request for Production No. 2

24 Plaintiff seeks to compel further response to RFP No. 2. MTC at 2. RFP No. 2 seeks "all  
25 documents that verify, pertain or measure to inspect or copy what CDCR's Policy on the  
26 controlled use of force non lethal [sic] weapons." Id. at 6. Defendant responded to RFP No. 2  
27 stating

28 Defendant objects to this request on the ground that it is vague and ambiguous in

1 its request for "all documents" that "verify, pertain or measure." Further, to the  
2 extent it seeks documents that "pertain" to policies, it includes documents  
3 protected by the attorney client privilege and the attorney work product doctrine.  
4 Without waiving these objections, defendant responds as follows: CDCR's policy  
5 on the controlled use of force involving non-lethal weapons is contained in Title 15  
6 which is publicly available.

6 Id. at 17.

7 Plaintiff argues that the information being sought is "relevant to the claim cause of action"  
8 and that Defendant provided an evasive answer and withheld the information for policy reasons.  
9 Id. at 2-3. Defendant contends that "no further disclosure can be compelled because Defendant  
10 has fully responded and there are no additional documents to produce." Oppo. at 4. Defendant  
11 also contends that since Plaintiff has access to Title 15, he does not need to produce Title 15  
12 and that Plaintiff has failed to establish why Defendant's response is inadequate or that the  
13 privilege objection is unjustified. Id. at 4 n.3.

14 Plaintiff's request as written is overbroad and seeks irrelevant documents and potentially  
15 privileged information. Plaintiff "bears the burden of demonstrating why [Defendant's]  
16 objections are not justified." Burnett v. Sedillo, 2018 WL 4923519, at \*2 (E. D. Cal. Oct. 10,  
17 2018) (citing Grabek v. Dickinson, 2012 WL 113799, at \*1 (E. D. Cal. Jan. 13, 2012) and Ellis v.  
18 Cambra, 2008 WL 860523, at \*4 (E. D. Cal. Mar. 27, 2008)). Plaintiff has not done so.  
19 Accordingly, Plaintiff is not entitled to the additional documents described in his request.  
20 However, the Court finds that Defendant's response is insufficient as Title 15 of the United States  
21 Code is voluminous and contains many provisions inapplicable to Plaintiff's RFP. Defendant  
22 Navarro therefore, must supplement his response by providing the specific sections of Title 15  
23 that contain the CDCR policy on "the controlled use of force non lethal [sic] weapons." MTC at  
24 6; see also Oppo. at 3. In addition, if Defendant Navarro has possession, custody, or control  
25 of, or a legal right to obtain, any relevant policies governing the use of non-lethal force or  
26 weapons, he must produce them. Accordingly, Plaintiff's motion to compel further response to  
27 Request No. 2 is **GRANTED IN PART.**

28 ///

1 C. Request for Production No. 3

2 Plaintiff seeks to compel further response to RFP No. 3. MTC at 3. RFP No. 3 seeks "all  
3 documents that relate or pertain to CDCR Incident Reports of the Plaintiff on the dates of August  
4 2, 2016 and January 16, 2017 within the Parties Possession or control to inspect, measure,  
5 survey or copy." Id. at 6. Defendant responded to RFP No. 3 stating

6 Defendant objects to this request on the ground that it is overly broad in its request  
7 for "all documents that relate or pertain to" various Incident reports and on the  
8 ground that by including the phrase "relate or pertain to" Incident reports, the  
9 request seeks documents protected by the attorney client privilege and the  
10 attorney work product doctrine. Without waiving these objections, Defendant  
11 responds as follows: Defendant hereby produces the August 2, 2016 Incident  
12 Report, No. RJD-C14-16-08-0393AI, and the January 16, 2017 Incident Report,  
13 No. RJD-CYD-17-01-0018AI.

13 Id. at 17.

14 Plaintiff argues that the information being sought is relevant to his August 2, 2016 and  
15 January 16, 2017 incident reports which are inconclusive and do not contain CDCR forms 3010-  
16 A, 3011 A, 3012 A, 3034 A and 3036 A, which are being improperly withheld by Defendant. Id.  
17 at 3. Defendant contends that Plaintiff has again failed to meet his burden of establishing the  
18 inadequacy of Defendant's responses. Oppo. at 5. Defendant further contends that the  
19 documents Plaintiff seeks are beyond the scope of the demand as he produced the requested  
20 incident reports and the five CDCR forms that Plaintiff mentions are "not Incident Reports nor  
21 are they part of the Incident Reports" and, therefore, not responsive the RFP No. 3. Id. at 6.  
22 Defendant notes that there are no CDCR 3034 or 3036 forms related to the August 2, 2016  
23 incident report. Id. at 6 n.5. Defendant further notes that even if the CDCR forms were  
24 responsive to the request, they would be protected by the Official Information Privilege. Id. at  
25 6. Defendant argues that he did not assert the Official Information Privilege in response to  
26 Request No. 3 because "the request did not solicit such documents, and as such the privilege  
27 does not apply." Id. at 6 n.6.

28 As an initial matter, Defendant's contention that the forms are outside of the scope of

1 Plaintiff's demand is unpersuasive. Plaintiff requested all documents that relate to the January  
2 and August Incident Reports, not only the reports themselves. Oppo. at 6; see also MTC at 3.  
3 While Defendant argues that the requested forms are "part of the Manager's Review/Use of  
4 Force Critique Package" and not an Incident Report or part of an Incident Report, Defendant's  
5 argument that the forms are nonresponsive is defeated by the declaration of Associate Warden  
6 J. Juarez. Associate Warden Juarez declares that a Use of Force Critique Package "typically  
7 includes a Crime Incident Report; inmate disciplinary rule violation reports; information about  
8 the injuries sustained by officers, inmates, and prison staff; the identity of other officers whose  
9 statements appear in the report; and the reviewing officials' assessment of the use of force."  
10 MTC at 14. As such, there is sufficient evidence that forms relating or pertaining to the incident  
11 reports were not produced. Plaintiff therefore has satisfied his burden of establishing why  
12 Defendant's response to RFP No. 3 may be inadequate.

13 Defendant contends that even if the requested forms were responsive to Plaintiff's RFP,  
14 they are protected by the Official Information Privilege. "Federal common law recognizes a  
15 qualified privilege for official information." Sanchez v. City of Santa Ana, 936 F.2d 1027, 1033  
16 (9th Cir. 1990) (citing Kerr v. United States Dist. Ct. for N.D. Cal., 511 F.2d 192, 198 (9th  
17 Cir.1975), aff'd, 426 U.S. 394, 96 S.Ct. 2119, 48 L.Ed.2d 725 (1976)). The party asserting the  
18 privilege has the initial burden of proving the applicability of the privilege. See Kelly v. City of  
19 San Jose, 114 F.R.D. 653, 669-71 (N.D.Cal.1987); see also Hampton v. City of San Diego, 147  
20 F.R.D. 227, 230 (S.D.Cal.1993) ("Through this opinion, this court is hereby joining the Northern  
21 District's and Central District's procedures outlined in Kelly v. City of San Jose, 114 F.R.D. 653  
22 (N.D.Cal.1987) and Miller v. Pancucci, 141 F.R.D. 292 (C.D.Cal.1992) for invoking the official  
23 information privilege"); Stewart v. City of San Diego, 2010 WL 4909630, at \*1 (S.D. Cal. 2010)  
24 (applying Kelly). A party seeking to invoke the official information privilege in response to a  
25 discovery request must serve a timely discovery response specifically identifying the official  
26 information privilege as a basis for its objection. Kelly, 114 F.R.D. at 669. The objection must  
27 be accompanied by a declaration or affidavit "from a responsible official within the agency who  
28 has personal knowledge of the principal matters to be attested to in the affidavit or declaration."

1 Id. The affidavit or declaration must include:

2 (1) an affirmation that the agency generated or collected the material in issue and  
3 has in fact maintained its confidentiality (if the agency has shared some or all of  
4 the material with other governmental agencies it must disclose their identity and  
5 describe the circumstances surrounding the disclosure, including steps taken to  
6 assure preservation of the confidentiality of the material), (2) a statement that the  
7 official has personally reviewed the material in question, (3) a specific identification  
8 of the governmental or privacy interests that would be threatened by disclosure of  
9 the material to plaintiff and/or his lawyer, (4) a description of how disclosure  
10 subject to a carefully crafted protective order would create a substantial risk of  
11 harm to significant governmental or privacy interests, (5) and a projection of how  
12 much harm would be done to the threatened interests if the disclosure were made.

11 Id. at 670. "If the non-disclosing party does not meet this initial burden of establishing cause  
12 to apply the privilege, the court must order disclosure of the documents; if the party meets this  
13 initial burden, the court generally conducts an *in camera* review of the material and balance  
14 each party's interests." Bryant v. Armstrong, 285 F.R.D. 596, 605 (S.D. Cal. 2012).

15 The balance test requires that "courts must weigh the potential benefits of disclosure  
16 against the potential disadvantages." Sanchez, 936 F.2d at 1033-34. The Kelly court provided  
17 a non-exhaustive list of factors (taken from Frankenhauser v. Rizzo, 59 F.R.D. 339 (E.D. Pa.  
18 1973)) that may be considered when engaging in this weighing process: (1) the extent to which  
19 disclosure will thwart governmental processes by discouraging citizens from giving the  
20 government information; (2) the impact upon persons who have given information of having  
21 their identities disclosed; (3) the degree to which government self-evaluation and consequent  
22 program improvement will be chilled by disclosure; (4) whether the information sought is factual  
23 data or evaluative summary; (5) whether the party seeking the discovery is an actual or potential  
24 defendant in any criminal proceeding either pending or reasonably likely to follow from the  
25 incident in question; (6) whether the police investigation has been completed; (7) whether any  
26 intradepartmental disciplinary proceedings have arisen or may arise from the investigation; (8)  
27 whether the plaintiff's suit is non-frivolous and brought in good faith; (9) whether the  
28 information sought is available through other discovery or from other sources; and (10) the



1 importance of the information sought to the plaintiff's case. Kelly, 114 F.R.D. at 663. In making  
2 this determination, courts must conduct "a situation specific analysis of the factors made  
3 relevant by the request in issue and the objection to it." Id. In civil rights cases against police  
4 departments, the balancing test should be "moderately pre-weighted in favor of disclosure."  
5 Soto, 162 F.R.D. at 613 (quoting Kelly, 114 F.R.D. at 661).

6 Defendant states that the requested forms are "part of the Manager's Review/Use of  
7 Force Critique Package prepared by the Institutional Executive Review Committee ("IERC")" and  
8 should not be produced as they are protected by the Official Information Privilege. Oppo. at 6.  
9 The Court is not familiar with the identified forms and Defendant did not provide them. However,  
10 Defendant has provided a declaration from Associate Warden J. Juarez regarding these  
11 documents.<sup>1</sup> The declaration states that Associate Warden J. Juarez is familiar with the "CDCR's  
12 use-of-force policies, procedures, reviews of staff use of force, and the accompanying records  
13 generated," has personal knowledge of the matters discussed in the declaration, and personally  
14 reviewed the Use of Force Critique Packages at issue. MTC at 12, 14. The declaration also  
15 states that the CDCR has maintained the confidentiality of its use-of-force policies and  
16 procedures and that Use of Force Critique Packages are produced with the expectation that they  
17 will remain confidential. Id. at 13-14. The declaration further states that the CDCR's interest in  
18

---

19  
20 <sup>1</sup> Associate Warden J. Juarez declares that the Use of Force Critique Package is generated when  
21 force is used by an officer and typically includes a

22 Crime Incident Report; inmate disciplinary rule violation reports; information about  
23 the injuries sustained by officers, inmates, and prison staff; the identity of other  
24 officers whose statements appear in the report; and the reviewing officials'  
25 assessment of the use of force.

26 MTC at 14. Defendant already has provided Plaintiff with the two Crime Incident Reports. Based  
27 on its experience with these types of cases, the Court assumes that Plaintiff also has been  
28 provided with or has the ability to obtain disciplinary rules violation reports concerning his own  
violations. Plaintiff also is aware of the injuries that he sustained as a result of the August 2016  
and July 2017 incidents. Accordingly, while the Court is not familiar with the specific forms  
being requested, it appears that the Official Information Privilege does not apply to the entire  
Manager's Review/Use of Force Critique Package.

1 obtaining the opinions, assessments, and statements of officers regarding force used by other  
2 officers and the overall efficacy of the review process could be compromised by the disclosure  
3 of the Packages to Plaintiff. Id. at 14. In addition, Associate Warden J. Juarez declares that  
4 there is a safety interest that would be compromised with disclosure because once inmates are  
5 knowledgeable about an institution's use-of-force policies and procedures, they will be able to  
6 strategically plan attacks to maximize success by knowing the response they will get from  
7 officers. Id. at 13. Finally, the declaration states that inmate privacy interests would be  
8 threatened with disclosure as inmates would be less likely to cooperate with investigations so  
9 as to not be labeled a "snitch" or be seen as crossing another inmate. Id. at 14-15. The  
10 declaration notes that even with a protective order governing the disclosure, there would be a  
11 substantial risk of harm because inmates who are not subject to a protective order could obtain  
12 the confidential information allowing that information to be disseminated throughout the prison.  
13 Id. at 15. Finally, Associate Warden J. Juarez declared that "[g]iven that inmate Jackson is  
14 currently serving a long prison term sentence, it is my belief that any civil sanction associated  
15 with violating a protective order would be an ineffective deterrent." Id.

16 The Court finds that Defendant has satisfied the threshold requirement for application of  
17 the Official Information Privilege. Accordingly, the Court will perform an *in camera* review of  
18 the requested documents so that the Court may engage in a balancing analysis to determine  
19 whether the Official Information Privilege applies. Defendant must lodge a copy of forms 3010-  
20 A, 3011 A, 3012 A, 3034 A and 3036 A related to the January 16, 2017 Incident Report and a  
21 copy of forms 3010-A, 3011 A, and 3012 A related to the August 2, 2016 Incident with the Court  
22 for *in camera* review on or before **February 1, 2019**. Defendant also must identify which  
23 portions of the Use of Force Critique Package already have been provided to Plaintiff and which  
24 portions Defendant believes are protected by the Official Information Privilege. The Court will  
25 then review the documents and issue an order regarding Plaintiff's motion to compel further  
26 response to RFP No. 3.

27 D. Personnel Records

28 Without tying it to a specific Request for Production, Plaintiff states in his motion that he

1 "seeks documents pertaining to particular kinds of Complaints and allegations about the  
2 defendants. Whether or not they are part of 'Personnel records.' He does not seek other matters  
3 that may be in the 'Personnel Records.' Such as medical data or information about their records  
4 of lateness, leaves, vacations. Etc." MTC at 3. Plaintiff argues that such complaints are relevant  
5 to his claim of supervisory liability against Defendant G. Stratton because despite the fact that  
6 complaints have been made against at least five of the six Defendants, no action has been taken  
7 against them. Id.

8 Defendant contends that the RFPs do not seek personnel records and that he did not  
9 assert the relevancy objection identified by Plaintiff. Defendant speculates that "Plaintiff seems  
10 to be addressing a discovery request that he propounded to a different defendant and that  
11 defendant's response to that request." Oppo. at 5-6 n.4. Accordingly, Defendant contends that  
12 Plaintiff's argument should be disregarded.<sup>2</sup> Id.

13 RFPs 1-3 do not seek use of force complaints against Defendant Navarro or any other  
14 officers. Moreover, Plaintiff's justification for the relevancy of the complaints is without merit as  
15 G. Stratton is not a defendant in this case. Because Plaintiff did not request use of force  
16 complaints in his RFPs, his informal request in the body of his motion to compel is **DENIED**.

### 17 **CONCLUSION**

18 Plaintiff's motion to compel further response to Requests for Production Nos. 1 is  
19 **DENIED**.

20 Plaintiff's motion to compel further response to RFP No. 2 is **GRANTED IN PART**.  
21 Defendant Navarro, must supplement his response to RFP No. 2 in accordance with this order  
22 on or before **February 1, 2019**.

23 Defendant Navarro must lodge the documents responsive to RFP No. 3 with Judge Major's  
24 Chambers on or before **February 1, 2019**. An order regarding Plaintiff's motion to compel RFP  
25 No. 3 will follow.

---

26  
27  
28 <sup>2</sup> G. Stratton is not named as a Defendant in this case. See Docket; see also ECF No. 37  
(Plaintiff's Second Amended Complaint).

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

Plaintiff's request for officer complaints is **DENIED**.

**IT IS SO ORDERED.**

Dated: 1/17/2019

  
\_\_\_\_\_  
Hon. Barbara L. Major  
United States Magistrate Judge