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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 STEVE ROMANO, an individual,  
12 Plaintiff,  
13 v.  
14 AT&T MOBILITY SERVICES, LLC, a  
15 Delaware limited liability company; and  
16 DOES 1 through 25, inclusive,  
17 Defendants.  
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Case No.: 3:20-CV-00698-JLS-KSC

**ORDER REGARDING JOINT  
MOTION FOR DETERMINATION  
OF DISCOVERY DISPUTE**

**[Doc. No. 22]**

20 Before the Court is the parties' Joint Motion for Determination of Discovery  
21 Dispute, in which defendant AT&T Mobility Services, LLC ("defendant" or "AT&T")  
22 moves to compel plaintiff Steve Romano ("plaintiff") to provide further responses to  
23 written discovery requests (the "Motion to Compel" or "Mot."). Doc. No. 22. For the  
24 reasons set forth below, the Court GRANTS defendant's Motion to Compel.

25 **I. BACKGROUND**

26 This case arises out of defendant's alleged wrongful termination of plaintiff in  
27 February 2018. *See generally* Doc. No. 1-6 ("Complaint"). Plaintiff, who was 60 years  
28 old at the time AT&T terminated his employment, claims that AT&T discriminated against

1 him because of his age. *See id.* At issue in the Motion to Compel is AT&T’s Request for  
2 Production (“RFP”) No. 2, which seeks documents provided to, or received from, the  
3 California Employment Development Department (“EDD”) or the California  
4 Unemployment Insurance Appeals Board (“UIAB”) since February 28, 2018 pertaining to  
5 plaintiff’s efforts to obtain unemployment benefits, any alleged wrongful conduct by  
6 defendant, or to any allegations in the Complaint. Mot. at 3, 22. Plaintiff objected on the  
7 basis of relevance and to the extent the request sought documents subject to the “official  
8 information privilege under Evidence Code section 1040 and Unemployment Insurance  
9 Code sections 1094, 2111.” *Id.* at 4, 40.

## 10 **II. LEGAL STANDARDS**

11 Under Rule 26(b)(1) of the Federal Rules of Civil Procedure, “the scope of discovery  
12 includes ‘any non-privileged matter that is relevant to any party’s claim or defense and  
13 proportional to the needs of the case.’” *Skyline Wesleyan Church v. Cal. Dep’t of Managed*  
14 *Health Care*, 322 F.R.D. 571, 583 (S.D. Cal. 2017) (quoting Fed. R. Civ. P. 26(b)(1)). The  
15 standard for “relevance” under the Federal Rules is “commonly recognized as one that is  
16 necessarily broad . . . ‘to encompass any matter that bears on, or that reasonably could lead  
17 to other matter that could bear on, any issue that is or may be in the case.’” *Gusman v.*  
18 *Comcast Corp.*, 298 F.R.D. 592, 595 (S.D. Cal. 2014) (citations omitted); *see also V5*  
19 *Techs. v. Switch, Ltd.*, 334 F.R.D. 297, 301 (D. Nev. 2019) (“Relevance for the purposes  
20 of discovery is defined broadly.”).

21 “A party may withhold ‘information otherwise discoverable by claiming it is  
22 privileged.’” *Skyline Wesleyan Church*, 322 F.R.D. at 583 (quoting Fed. R. Civ. P.  
23 26(b)(5)). “However, the broad scope of permissible discovery is limited by . . . relevant  
24 privileges” only. *Bd. of Trs. of the Leland Stanford Junior Univ. v. Roche Molecular Sys.*,  
25 237 F.R.D. 618, 621-22 (N.D. Cal. 2006). “In a federal action based on diversity such as  
26 this one, [California] state law governs all privilege claims.” *Chavez v. Sw. Key Program,*  
27 *Inc.*, 2012 U.S. Dist. LEXIS 192143, at \*2 (S.D. Cal. Aug. 2, 2012) (citing Fed. R. Evid.  
28 501). Any party “opposing discovery,” including by the assertion of a privilege, “has the

1 burden of showing that discovery should not be allowed.” *La. Pac. Corp. v. Money Mkt.*  
2 *I Institutional Inv. Dealer*, 285 F.R.D. 481, 485 (N.D. Cal. 2012) (citations omitted). The  
3 Court has “broad discretion” to “permit or deny discovery.” *Hallett v. Morgan*, 296  
4 F.3d 732, 751 (9th Cir. 2002) (citation omitted).

### 5 **III. DISCUSSION**

#### 6 **A. The EDD and UIAB Documents Are Relevant**

7 The Court begins by addressing relevance. Defendant asserts that the limited  
8 unemployment records AT&T has show that when plaintiff applied for unemployment  
9 benefits, he did not report that he was terminated for discriminatory reasons. Mot. at 5.  
10 Defendant therefore states that the information sought by RFP No. 2 is relevant and  
11 discoverable to show plaintiff’s “subjective beliefs as to the reasons AT&T terminated him,  
12 his competence, and his overall treatment,” as well as revealing any “history of inconsistent  
13 statements.” *Id.* at 5-6. Plaintiff disagrees, and states defendant cannot “establish any  
14 connection” between the EDD and UIAB documents and this case. *Id.* at 9. Plaintiff urges  
15 the Court to deny the Motion to Compel because RFP No. 2 “seeks information not  
16 reasonably calculated to lead to the discovery of admissible evidence.”<sup>1</sup> Mot. at 10.

17 The Court agrees with defendant and finds AT&T has carried its “burden,” as the  
18 moving party, “of establishing that its request satisfies the relevancy requirement of Rule  
19 26(b)(1).” *Bryant v. Ochoa*, 2009 U.S. Dist. LEXIS 42339, at \*4 (S.D. Cal. May 14, 2009).  
20 As noted, discovery is “construed broadly” to allow parties to “define and clarify [] issues.”  
21 *Hampton v. City of San Diego*, 147 F.R.D. 227, 229 (S.D. Cal. 1993). Furthermore, there  
22 is “no requirement that the information sought directly relate to a particular issue” in this  
23 case to be discoverable. *Shaw v. Experian Info. Sols., Inc.*, 306 F.R.D. 293, 296 (S.D. Cal.  
24 2015). Given the liberal scope of discovery under Rule 26, the Court is persuaded that the  
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27 <sup>1</sup> The phrase “reasonably calculated to lead to the discovery of admissible evidence” was deleted from  
28 Rule 26 as part of the 2015 amendments, as it “create[d] problems” and was often “used . . . incorrectly[]  
to define the scope of discovery.” See Fed. R. Civ. P. 26, advisory committee notes to 2015 amendments.

1 documents “bear on” issues in the case, including plaintiff’s credibility. *Gusman*, 298  
2 F.R.D. at 595; *see also Shaw*, 306 F.R.D. at 296. Thus, “in the absence of a privilege,” the  
3 documents are discoverable and should be produced. *See Hampton*, 147 F.R.D. at 229.

4 **B. Neither the California Evidence Code nor the California Unemployment**  
5 **Insurance Code Prevent the Discovery of the EDD and UIAB Documents**

6 Plaintiff also argues that the EDD and UIAB documents are not discoverable  
7 because they contain information that is “privileged from disclosure pursuant to California  
8 Evidence Code § 1040 and California Unemployment Insurance Code §§ 1094 and  
9 2111.” Mot. at 7. In response, defendant contends that plaintiff “lacks standing to assert  
10 the privilege” codified in California Evidence Code § 1040. *Id.* at 5-6. Defendant further  
11 asserts that even if the EDD and UIAB documents are protected under California  
12 Unemployment Insurance Code §§ 1094 and 2111, plaintiff has waived such statutory  
13 protections by pursuing this litigation. *Id.*

14 The Court agrees. California Evidence Code § 1040 “creates a qualified privilege  
15 against agency disclosure of ‘official information,’ which is . . . ‘information acquired in  
16 confidence by a public employee in the course of his or her duty and not open, or officially  
17 disclosed, to the public[.]’” *In re Cal. Pub. Utils. Com.*, 892 F.2d 778, 783 (9th Cir. 1989)  
18 (quoting Evid. Code § 1040(a)). Importantly, the “privilege to refuse to disclose official  
19 information” belongs to the “public entity.” Cal. Evid. Code § 1040(b). Thus, defendant  
20 is correct that plaintiff cannot assert a privilege for official information because ““only the  
21 government entity holds the privilege.”” Mot. at 6 (quoting *Music Grp. Macao Commer.*  
22 *Offshore Ltd. v. Foote*, 2015 U.S. Dist. LEXIS 85089, at \*12 (N.D. Cal. June 30, 2015)).

23 Moreover, these statutes prevent the *public* disclosure of information provided by  
24 plaintiff to EDD and UIAB.<sup>2</sup> Here, however, there is a blanket Protective Order in place  
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27 <sup>2</sup> Unemployment Insurance Code § 1094(b) also renders the information inadmissible at trial or other  
28 proceeding, but “[i]nformation ... need not be admissible in evidence to be discoverable.” Fed. R. Civ. P.  
26(b)(1).

1 to which the parties stipulated that affords the parties the right to designate material  
2 produced in discovery as “confidential” or “for counsel only,” thereby prohibiting its  
3 disclosure outside the litigation. *See* Doc. Nos. 16, 17 at 4-6. Protective orders – such as  
4 the one governing discovery here – can mitigate the breadth of discovery and “provide a  
5 safeguard for parties and other persons.” *Big Lagoon Rancheria v. Cal.*, 700 F. Supp. 2d  
6 1169 (N.D. Cal. 2010) (citation omitted). Yet, plaintiff does not even acknowledge the  
7 Protective Order, let alone explain why it is insufficient to address any concerns he has  
8 regarding the confidentiality of his unemployment records. *See Soto v. City of Concord*,  
9 162 F.R.D. 603, 616 (N.D. Cal. 1995) (noting that a “carefully drafted protective order  
10 could minimize the impact of [] disclosure.”).

11 As to California Unemployment Insurance Code, § 1094 of that statute “provides  
12 that the information delivered to the Department of Employment by an employing unit  
13 ‘shall . . . not be open to the public, nor admissible in evidence in any action or special  
14 proceeding,’” while § 2111 similarly “provides that the information ‘is confidential and  
15 shall not be published or open to public inspection in any manner[.]’” *Crest Catering Co.*  
16 *v. Super. Ct. of L.A. Cty.*, 62 Cal. 2d 274, 277-78 (1965) (citations omitted).

17 Plaintiff relies on *Crest* in asserting that documentation submitted to the EDD is  
18 privileged, and therefore, not subject to discovery. Mot. at 8 (citing *Crest*, 62 Cal. 2d at  
19 277). The Court finds plaintiff’s reliance misplaced. Although the California Supreme  
20 Court in *Crest* noted that §§ 1094 and 2111 “create a privilege,” the Court ultimately held  
21 that privilege could be, and had been, waived. *See Crest*, 62 Cal. 2d at 277-78.<sup>3</sup> The *Crest*  
22 court found that while California Unemployment Insurance Code §§ 1094 and 2111 serve  
23 to protect “the confidentiality of information submitted to the Department of  
24 Employment,” a party may waive such statutory protections by engaging in “an act which,  
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27 <sup>3</sup> Additionally, “[t]he conclusion that Crest waived the privilege is buttressed by the fact that the payrolls  
28 and the tax returns contain basically the same information.” *Crest*, 62 Cal. 2d at 279. Yet, “[t]he same  
information does not become less obtainable merely because it is written on a governmental form.” *Id.*

1 according to its natural import, is so inconsistent with an intent to enforce the right as to  
2 induce a reasonable belief that such right has been relinquished.” *Id.* (citation omitted).

3 “One example of an inconsistent act is the bringing of a lawsuit, the gravamen of  
4 which is ‘so inconsistent with the continued assertion of the . . . privilege as to compel the  
5 conclusion that the privilege has in fact been waived.’” *Chavez v. Sw. Key Program, Inc.*,  
6 2012 U.S. Dist. LEXIS 192143, at \*4 (S.D. Cal. Aug. 2, 2012) (quoting *Wilson v. Super.*  
7 *Ct.*, 63 Cal. App. 3d 825, 830 (1976)); *see also, e.g., Gomez Cabrales v. Aerotek, Inc.*, 2018  
8 U.S. Dist. LEXIS 77705, at \*10 (C.D. Cal. May 8, 2018) (finding “to the extent [] EDD  
9 documents are protected under California law, such protection has been waived because  
10 ‘the gravamen of the disability discrimination suit is inconsistent with the continued  
11 assertion of the protections of the California Unemployment Insurance [C]ode for  
12 documents relating to disability applications and benefits.’”) (citations omitted)).

13 Accordingly, the Court is unpersuaded by plaintiff’s argument that “filing an age  
14 discrimination lawsuit does not waive and relinquish the privilege.” Mot. at 8. The  
15 gravamen of plaintiff’s age discrimination suit is inconsistent with the continued assertion  
16 of the protections of the California Unemployment Insurance Code for documents  
17 pertaining to unemployment benefits, particularly because plaintiff alleges that he was  
18 terminated because of his age. *See* Complaint at 7. The Court finds Plaintiff has waived  
19 the protection of the EDD and UIAB documents “by maintenance of an action inconsistent  
20 with the assertion of the privilege.” *Chavez*, 2012 U.S. Dist. LEXIS 192143, at \*6. To the  
21 extent there are any legitimate privacy concerns in the absence of privilege, the Court finds  
22 that such concerns can be mitigated by the parties’ Protective Order. *See* Doc. No. 17.

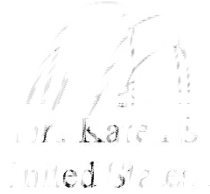
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1 **ORDER**

2 For the reasons set forth above, defendant's Motion to Compel further responses to  
3 RFP No. 2 [Doc. No. 22] is **GRANTED**. Plaintiff shall amend his responses to RFP No.  
4 2 and produce responsive documents within 5 business days of the date of this Order.

5 **IT IS SO ORDERED.**

6 Dated: November 17, 2020

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