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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

SALVADOR LUA,  
  
Plaintiff,  
  
v.  
  
IAN MCNETT AND CITY OF SAN DIEGO,  
  
Defendant.

Case No.: 23CV32-JAH(BLM)

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

**[ECF NO. 21]**

Currently before the Court is Plaintiff's March 4, 2024 Motion to Compel Discovery [ECF No. 21-1 ("MTC")], Defendants' March 11, 2024 opposition to the motion [ECF No. 22 ("Oppo.")], and Plaintiff's March 18, 2024 Reply [ECF No. 23 ("Reply")].

**FACTUAL BACKGROUND**

On January 6, 2023, Plaintiff filed a complaint pursuant to 42 U.S.C. § 1983. ECF No. 1; see also MTC at 1. Plaintiff filed a First Amended Complaint ("FAC") on February 12, 2024 alleging (1) violation of the Bane Act, Cal. Civ. Code § 52.1; (2) negligence; (3) liability under Monell v. Department of Social Services of New York, 436 U.S. 658 (1978); and (4) excessive force. ECF No. 18. Specifically, Plaintiff alleges that on August 31, 2019, after suspecting him off unlocking electric scooters for two minors, Defendant McNett performed a leg sweep on Plaintiff that resulted in Plaintiff landing face first on the concrete and shattering his eye-socket, cheekbone, and mandible. Id. at 1. Plaintiff further alleges that Defendant McNett then tased him for twenty seconds and knocked him unconscious before sitting on top of Plaintiff and intentionally "ben[ding] his handcuffed wrists backwards" to the point where Plaintiff cried out

1 in pain. Id. at 2, 5. As a result, Plaintiff was admitted to USCD Medical Center and treated for  
2 a zygomaticomaxillary complex fracture that required ten or more follow-up appointments to  
3 fully treat. Id. at 6.

4 Plaintiff later plead guilty to one count of misdemeanor resisting an officer, in violation of  
5 Penal Code section 69. Id. A San Diego Police Department Internal Affairs review from October  
6 2022 concluded that Defendant McNett had not properly used his body camera and did not  
7 properly document his use of force related to this incident. Id. A July 2022 review sustained  
8 the allegation that Defendant McNett “used excessive force against Lua by applying force to him  
9 after he was already detained and in handcuffs.” Id. at 7.

10 Finally, Plaintiff alleges that Defendant McNett has previously used unreasonable force  
11 on the job and that the San Diego Police Department was aware of this behavior and did nothing  
12 to stop it. Id. at 2.

### 13 **RELEVANT PROCEDURAL BACKGROUND**

14 On November 17, 2023, Defendants served their Initial Disclosures. ECF No. 21-2,  
15 Lodgment of Exhibits In Support of Motion to Compel at (“Lodgments”) at Exhibit 1.

16 On December 12, 2023, Plaintiff served a Request For Production of Documents (“RFPs”)  
17 on Defendant. MTC at 2; see also Lodgments at Exhibit 2. Defendants responded to Plaintiff’s  
18 RFPs on January 19, 2024. Id. at 2; see also Lodgments at Exhibit 3. On January 22, 2024,  
19 Plaintiff requested a meet and confer with Defendants that was originally scheduled for January  
20 26, 2024 and later moved to February 1, 2024. Id. at 3; see also Lodgments at Exhibit 4. On  
21 January 26, 2024, Defendants provided a privilege log. Id. at 3. After meeting and conferring,  
22 the parties continued to disagree about Internal Affairs reports related to Defendant McNett.  
23 Id. Plaintiff sent Defendants a follow up email on February 6, 2024 with case law in support of  
24 his position and narrowed the scope of the request to “any records that pertain to the use of  
25 force or to honesty/dishonesty or McNett’s willingness to comply with supervision (e.g. the  
26 instances in which he refuses to sign reprimands).” Id.; see also Lodgments at Exhibit 4.  
27 Defendants did not respond to the email and Plaintiff sent another email on February 13, 2024.  
28 Id. at 4. That same day Defendants responded that they had not yet had time to review those

1 issues and requested a February 22, 2024 meet and confer. Id. The parties met and conferred,  
2 but Defendants' position remained the same.

3 On February 26, 2024, counsel for Plaintiff, Alex Coolman, and counsel for Defendant,  
4 Elizabeth Atkins, jointly contacted the Court regarding a discovery dispute involving employment  
5 and training records and reports from Internal Affairs cases. In regard to the dispute, the Court  
6 issued an Order Setting Briefing Schedule. The parties timely filed the required briefing. MTC,  
7 Oppo., and Reply.

### 8 **PROTECTIVE ORDER**

9 The Court notes that on November 15, 2023, the parties were ordered to "file a joint  
10 motion for a protective order, which includes the terms of their agreement for handling  
11 confidential documents and information, on or before December 20, 2023." ECF No. 15. The  
12 parties failed to do so, and no protective order has been entered in this case. See Docket.  
13 Accordingly, the parties are **ORDERED** to file a Joint Motion for Entry of Stipulated Protective  
14 Order by **April 8, 2024**. The parties are reminded to review Judge Major's Chambers Rules  
15 prior to filing the Joint Stipulation.

### 16 **LEGAL STANDARD**

17 The scope of discovery under Federal Rules of Civil Procedure ("Fed. R. Civ. P.") is defined  
18 as follows:

19 Parties may obtain discovery regarding any nonprivileged matter that is relevant  
20 to any party's claim or defense and proportional to the needs of the case,  
21 considering the importance of the issues at stake in the action, the amount in  
22 controversy, the parties' relative access to relevant information, the parties'  
23 resources, the importance of the discovery in resolving the issues, and whether  
24 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.

25 Fed. R. Civ. P. 26(b)(1). Typically, the relevance standard is broad in scope and "encompass[es]  
26 any matter that bears on, or that reasonably could lead to other matters that could bear on, any  
27 issue that is or may be in a case." Doherty v. Comenity Capital Bank, c, at \*2 (S.D. Cal. May 9,  
28 2017). Relevance, however, is not without limits. Id. The 2015 amendment to Rule 26(b)

1 removed the phrase “reasonably calculated to lead to the discovery of admissible evidence”  
2 because it was often misconstrued to define the scope of discovery. Fed. R. Civ. P. 26(b)(1)  
3 advisory committee’s notes (2015 amendment). Instead, to fall within the scope of discovery,  
4 the information must also be “proportional to the needs of the case,” requiring lawyers to “size  
5 and shape their discovery requests to the requisites of a case” while “eliminat[ing] unnecessary  
6 or wasteful discovery.” Fed. Civ. R. P. 26(b)(1); Cancino Castellar v. McAleenan, 2020 WL  
7 1332485, at \*4 (S.D. Cal Mar. 23, 2020) (quoting Roberts v. Clark Cty. Sch. Dist., 312 F.R.D.  
8 594, 603 (D. Nev. 2016)).

9 District courts have broad discretion to determine relevancy for discovery purposes. D.M.  
10 v. County of Merced, 2022 WL 229865, at \* 2 (E.D. Cal. Jan. 26, 2022) (citing Hallett v. Morgan,  
11 296 F.3d 732, 751 (9th Cir. 2002) and Survivor Media v. Survivor Prods., 406 F.3d 625, 635  
12 (9th Cir. 2005)). District courts also have broad discretion to limit discovery to prevent its abuse.  
13 See Fed. R. Civ. P. 26(b)(2) (instructing that courts must limit discovery where the party seeking  
14 the discovery “has had ample opportunity to obtain the information by discovery in the action”  
15 or where the proposed discovery is “unreasonably cumulative or duplicative,” “obtain[able] from  
16 some other source that is more convenient, less burdensome or less expensive,” or where it “is  
17 outside the scope permitted by Rule 26(b)(1)”). Further, “[w]hen analyzing the proportionality  
18 of a party’s discovery requests, a court should consider the importance of the issues at stake in  
19 the action, the amount in controversy, the parties’ relative access to the information, the parties’  
20 resources, the importance of the discovery in resolving the issues, and whether the burden or  
21 expense of the proposed discovery outweighs its likely benefit. Cancino, 2020 WL 1332485, at  
22 \*4 (citing Fed. R. Civ. P. 26(b)(1)).

23 Fed. Civ. R. P. 34 provides that a party may serve on another a request for production of  
24 documents, electronically stored information, or tangible things within the scope of Fed. Civ. R.  
25 P. 26(b). Fed. R. Civ. P. 34(a). Where a party fails to produce documents requested under Rule  
26 34, the party propounding the request for production of documents may move to compel  
27 discovery. See Fed. R. Civ. P. 37(a). “The party seeking to compel discovery has the burden of  
28 establishing that its requests satisfy the relevancy requirements of Rule 26(b)(1). Thereafter,

1 the party opposing discovery has the burden of showing that the discovery should be prohibited,  
2 and the burden of clarifying, explaining, or supporting its objections.” Williams v. County of San  
3 Diego, 2019 WL 2330227, at \*3 (citing Bryant v. Ochoa, No. 7cv200 JM (PCL), 2009 WL  
4 1390794, at \*1 (S.D. Cal. May 14, 2009) (internal quotations omitted).

### 5 **PLAINTIFF’S POSITION**

6 Plaintiff argues that the motion is timely since Defendants did not confirm their legal  
7 position until February 22, 2024 and that regardless, Plaintiff made diligent, good faith efforts  
8 to resolve the dispute informally and accommodate Defendants’ schedule which excuses any  
9 delay. MTC at 4-7. Plaintiff also argues that the sought after Internal Affairs reports are relevant  
10 and discoverable especially under a Monell theory of liability. Id. at 7-10. Plaintiff notes that  
11 Defendants have failed to provide a specific basis for withholding the reports and instead provide  
12 improper boilerplate objections. Id. Finally, Plaintiff argues that Defendant McNett’s personnel  
13 files are relevant to assessing Defendant McNett’s credibility, judgment, and interactions with  
14 his supervisors for purposes of Plaintiff’s Monell claim. Id. at 10-11.

### 15 **DEFENDANTS’ POSITION**

16 Defendants contend that Plaintiff’s motion is untimely and should not be considered by  
17 the Court. Oppo. at 2-4. Defendants also contend that Plaintiff’s request for Internal Affairs  
18 reports is overbroad and violates the privacy rights of Defendant McNett and unrelated third  
19 parties. Id. at 4-7. Specifically, any Internal Affairs reports that (1) do not contain allegations  
20 of use of force, (2) contain unsustained, unfounded, or exonerated allegations, and (3) address  
21 actions after the subject incident, are not relevant. Id. at 5-7. Finally, Defendants contend that  
22 Plaintiff’s request for personnel records is overbroad, irrelevant, and in violation of Defendant  
23 McNett’s privacy rights. Id. at 8-9. Defendants note that at the Court’s request, they are willing  
24 to provide the Court with the Internal Affairs reports at issue for *in camera* review. Id.

### 25 **PLAINTIFF’S REPLY**

26 Plaintiff replies that the motion should be considered timely as any delay was due to  
27 defense counsel’s request for additional time to meet and confer after Plaintiff’s counsel informed  
28 defense counsel that he was going to contact the Court on February 14, 2024 regarding the

1 discovery dispute. Reply at 2. Plaintiff's counsel sent this email after defense counsel failed to  
2 respond to Plaintiff's counsel's email of February 6, 2024. Id. Plaintiff also replies that  
3 Defendants' justification for non-disclosure of Internal Affairs files is vague and "inconsistent  
4 with what the publicly disclosed portions of those files show." Id. at 4. Finally, Plaintiff replies  
5 that Defendants' justification for non-disclosure of personnel files is vague and boilerplate. Id.  
6 at 8-9.

## 7 DISCUSSION

### 8 A. Timeliness

9 As an initial matter, Defendants argue that Plaintiff's motion should be denied because it  
10 was filed more than 30 days after the event giving rise to the dispute in violation of this Court's  
11 Chamber Rules. Oppo. at 2-4.

12 The Scheduling Order Regulating Discovery and Other Pretrial Proceedings states that:

13 All discovery motions must

14 be filed within 30 days of the service of an objection, answer or response which becomes  
15 the subject of dispute or the passage of a discovery due date without response or  
16 production, and only after counsel have met and conferred and have reached impasse  
17 with regard to the particular issue. The Court's procedures for resolving discovery  
18 disputes are set forth in Magistrate Judge Barbara L. Major's Civil Chambers Rules, which  
19 are posted on the Court's website. **A failure to comply in this regard will result in  
20 a waiver of a party's discovery issue. Absent an order of the court, no  
21 stipulation continuing or altering this requirement will be recognized by the  
22 court.**

23 ECF No. 15 at 2 (emphasis in original). Section V E of Judge Major's Chambers Rules states:

24 All discovery motions must be filed within 30 days of the event giving rise to  
25 the dispute and only after counsel have met and conferred and communicated  
26 with the Court as set forth above. The event giving rise to the dispute is NOT  
27 the date on which counsel reach an impasse in their meet and confer efforts.  
28 For written discovery, the event giving rise to the dispute is the service of the  
initial response or production of documents, or the passage of the due date  
without a response or document production. For oral discovery, the event giving  
rise to the dispute is the receipt of the transcript from the Court reporter of the

1 affected portion of the deposition.<sup>1</sup>

2 Here, Plaintiff served discovery on December 12, 2023 and Defendants responded on January  
3 19, 2024. Thirty days from January 19, 2024 was February 19, 2024. Plaintiff requested a meet  
4 and confer on January 22, 2024. MTC at 2. The parties met and conferred on February 1, 2024,  
5 Plaintiff followed up via email on February 6, 2024, and on February 13, 2024, Defense counsel  
6 informed Plaintiff that she had “not had a chance to even look into these issues yet.” Id. at 3-  
7 4. The parties scheduled a follow up meet and confer for February 22, 2024 and later contacted  
8 the Court on February 26, 2024. Id. While Plaintiff’s counsel should have reached out to the  
9 Court when Defense counsel failed to respond to his February 6, 2024 efforts to schedule a  
10 second meet and confer<sup>2</sup>, the Court understands Plaintiff’s counsel desire to “thoroughly meet  
11 and confer and [] make every effort to resolve [the] disputes without the necessity of court  
12 intervention” in accordance with Judge Major’s Chambers Rules which was difficult to do when  
13 he did not receive a response to his second attempt to meet and confer and defense counsel  
14 had not reviewed any of Plaintiff’s counsel’s February 6, 2024 email or the legal issues addressed  
15 therein. In light of these facts, the Court declines to deny Plaintiff’s motion on this basis and  
16 will consider the arguments on the merits. The Court reminds the parties to respond to one  
17 another in a timely fashion and to review and comply with this Court’s Chambers Rules.

18 B. Internal Affairs Reports

19 1. Right to Privacy

20 Defendants contend that the requested documents violate Defendant McNett’s privacy  
21 rights and violate the rights of unrelated third parties as the Internal Affairs documents contain  
22 personal information about officers under investigation, witnesses, and third-party complainants.

23 <sup>1</sup> Available at

24 <https://www.casd.uscourts.gov/judges/major/docs/Chambers%20Rules%20Civil.pdf>

25 <sup>2</sup> See Judge Major’s Chambers Rules (“[i]f a party or lawyer fails to respond to opposing counsel’s  
26 request to meet and confer for more than 72 hours, counsel may contact chambers and request  
27 a telephonic conference with the clerk assigned to the case or an appropriate briefing  
28 schedule.”). Available at

<https://www.casd.uscourts.gov/judges/major/docs/Chambers%20Rules%20Civil.pdf>

1 Oppo. at 5-6. Defendants note that “[e]ven with the protective order, there would be a  
2 substantial risk of harm to that complainant’s privacy rights and could chill future complainants  
3 from the type of honesty and vulnerability necessary when investigating claims against Officers.”  
4 Id. at 6. Defendants contend that the five Internal Affairs reports that do not contain a use of  
5 force allegation should not be disclosed in the interest of protecting the privacy rights of  
6 Defendant McNett and other third parties. Id. Defendants request that if the Court orders  
7 disclosure of the documents, “that all names, contact information, and other identifying  
8 information of non-Defendants officers and third parties be redacted.” Id.

9 Federal courts recognize a constitutionally based right of privacy that may be asserted in  
10 response to discovery requests. Soto v. City of Concord, 162 F.R.D. 603, 616 (N.D. Cal. July 17,  
11 1995); Medina, 2014 WL 4793026, at \*4 (S.D. Cal. Sept. 25, 2014). In resolving privacy  
12 objections, courts balance the need for the requested information against the asserted privacy  
13 right. Id. “In the context of the disclosure of police files, courts have recognized that privacy  
14 rights are not inconsequential.” Soto, 162 F.R.D. at 616; Kelly v. City of San Jose, 114 F.R.D.  
15 653, 660 (N.D. Cal. Feb. 26, 1987). “However, these privacy interests must be balanced against  
16 the great weight afforded to federal law in civil rights cases against police departments.” Soto,  
17 162 F.R.D. at 616. “Current case law suggests the privacy interests police officers have in their  
18 personnel files do not outweigh plaintiff’s interests in civil rights cases.” Dowell v. Griffin, 275  
19 F.R.D. 613, 617 (S.D. Cal. Aug. 17, 2011) (citing Soto, 162 F.R.D. at 617; Hampton v. City of  
20 San Diego, 147 F.R.D. 227, 230 (S.D. Cal. 1993); Miller v. Pancucci, 141 F.R.D. 292 (C.D. Cal.  
21 1992)). Further, privacy rights can be adequately protected by a “tightly drawn” protective  
22 order. See Kelly, 114 F.R.D. at 662, 666, 671; Hampton, 147 F.R.D. at 231.

23 Here, Defendants’ privacy interests do not outweigh Plaintiff’s interest in his civil rights  
24 case. While Defendants raise some valid concerns, they do not explain why a well thought out  
25 protective order in connection with redactions of personal identifying information is insufficient  
26 for protecting their privacy interests or would result in a “substantial risk of harm.” See Lamon  
27 v. Adams, 2010 WL 4513405, at \*3-4 (E.D. Cal. Nov. 2, 2010) (ordering redaction of the names  
28 of the inmates who filed grievances against correctional officer before documents were provided

1 to plaintiff); see also Smith v. Kiesz, 2013 WL 1338927, at \*2 (E.D. Cal., Apr. 3, 2013) (ordering  
2 defendant to produce documents from defendant's personnel file and noting that any documents  
3 disclosed were subject to a protective order that required defense counsel "to redact any and  
4 all identifying personal information which might pose a security risk if released, including, but  
5 not limited to, the defendant's home addresses, social security numbers, telephone numbers,  
6 etc."); Eusse v. Vitela, 2015 WL 9008634, at \*4 (S.D. Cal. Dec. 14, 2015) (noting defendants'  
7 privacy concerns and ordering that "the names and identifying information of the individuals  
8 who made the complaints, as well as other officers who were not involved in the incident, may  
9 be redacted."); Thompson v. Morales, 2008 WL 413757, at \*1 (E.D. Cal., Feb. 13,  
10 2008) ("Privacy concerns, if any, may be addressed by redaction of names, CDC numbers, and  
11 other identifying information, should the defendants be required to produce documents  
12 responsive to this request."). Accordingly, Defendants' request that the Internal Affairs reports  
13 be withheld on the basis of a privacy concern is **DENIED**.

## 14 2. Relevance

15 Plaintiff argues that the Internal Affairs records are relevant to Defendant McNett's "own  
16 judgment and credibility as a police officer, to his history of using force, and to the City's  
17 supervision of Office McNett" all of which go to Monell liability. MTC at 7.

18 Defendants identify ten Internal Affairs reports and divide them into three groups: reports  
19 containing no use of force (5), reports containing unsustained, unfounded, or exonerated use  
20 of force (4), and an unrelated post-incident report (1). Oppo. at 4. Defendants contend that  
21 the requested documents are irrelevant to Plaintiff's claims. Id.

22 Plaintiff replies that at least the first category presented by Defendants does not align  
23 with the publicly disclosed redacted portions of the files which identify a sustained use of  
24 excessive force allegation against Defendant McNett, thereby calling into question Defendants'  
25 categorization and assessment of the Internal Affairs reports. Reply at 4-5. Plaintiff argues that  
26 Defendants' assertions about the Reports "should not be taken at face value." Id. at .5

27 The Court finds that the Internal Affairs reports are relevant. First, the Court agrees with  
28 Plaintiff that Internal Affairs reports that do not address use of force may still be relevant to

1 other issues at play in this case. Second, Defendants themselves admit that the four reports  
2 that comprise their second category of documents are relevant, they just believe that  
3 Defendants' privileges outweigh the relevancy since "none of these reports found any  
4 wrongdoing by Officer McNett." *Oppo.* at 6. Finally, Defendants do not provide specific  
5 information about the last Internal Affairs report, only stating that it "involves an incident that  
6 is not in any way similar to the incident in this case" and "was years after the subject incident  
7 date." *Oppo.* at 7. Defendants do not say if the report concerns the use of force or an allegation  
8 that goes to Defendants' credibility or other issues present in this case, if the allegation was  
9 sustained, or exactly when the incident occurred. The conduct at issue in the current case  
10 occurred in August 2019, less than five years ago so Defendants' statement that the incident at  
11 issue in the Internal Affairs complaint was "years after" August 2019 does not support their  
12 argument that it is irrelevant. Accordingly, the Court finds that all of the identified Internal  
13 Affairs reports are relevant as defined in Fed. R. Civ. P. 26.

### 14 3. Official Information Privilege

15 Defendants contend that the requested documents are also protected by the Official  
16 Information Privilege. *Oppo.* at 4. "Federal common law recognizes a qualified privilege for  
17 official information." Sanchez v. City of Santa Ana, 936 F.2d 1027, 1033 (9th Cir. 1990)  
18 (citing Kerr v. United States Dist. Ct. for N.D. Cal., 511 F.2d 192, 198 (9th Cir. 1975), *aff'd*, 426  
19 U.S. 394, 96 S.Ct. 2119, 48 L.Ed.2d 725 (1976)). The party asserting the privilege has the initial  
20 burden of proving the applicability of the privilege. See Kelly, 114 F.R.D. at 669–  
21 71; see also Hampton, 147 F.R.D. at 230 ("Through this opinion, this court is hereby joining the  
22 Northern District's and Central District's procedures outlined in Kelly v. City of San Jose, 114  
23 F.R.D. 653 (N.D. Cal. 1987) and Miller v. Pancucci, 141 F.R.D. 292 (C.D. Cal. 1992) for invoking  
24 the official information privilege"); Stewart v. City of San Diego, 2010 WL 4909630, at \*1 (S.D.  
25 Cal. 2010) (applying Kelly). A party seeking to invoke the official information privilege in  
26 response to a discovery request must serve a timely discovery response specifically identifying  
27 the official information privilege as a basis for its objection. Kelly, 114 F.R.D. at 669. The  
28 objection must be accompanied by a declaration or affidavit "from a responsible official within

1 the agency who has personal knowledge of the principal matters to be attested to in the affidavit  
2 or declaration.” Id. The affidavit or declaration must include:

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

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

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

1 information sought is available through other discovery or from other sources; and (10) the  
2 importance of the information sought to the plaintiff's case. Kelly, 114 F.R.D. at 663. In making  
3 this determination, courts must conduct "a situation specific analysis of the factors made  
4 relevant by the request in issue and the objection to it." Id. In civil rights cases against police  
5 departments, the balancing test should be "moderately pre-weighted in favor of  
6 disclosure." Soto, 162 F.R.D. at 613 (quoting Kelly, 114 F.R.D. at 661).

7 Defendants have not satisfied their initial burden of proving the applicability of the privilege.  
8 Defendants provided the Declaration of Captain Jeffrey Peterson, supervisor of the Internal  
9 Affairs Unit of the San Diego Police Department. See ECF No. 22-1, Declaration of Jeffrey  
10 Peterson ("Peterson Decl."). While Captain Peterson declares that he supervises the Internal  
11 Affairs Unit and describes the general practices of the unit regarding generating, collecting, and  
12 maintaining records relating to allegations of officer misconduct, he does not provide any specific  
13 information as to this case or the documents/information requested in this case. Id. Captain  
14 Peterson also fails to (1) declare that he personally reviewed the materials Plaintiff seeks, (2)  
15 provide "a description of how disclosure subject to a carefully crafted protective order would  
16 create a substantial risk of harm to significant governmental or privacy interests[,] and (3)  
17 provide "a projection of how much harm would be done to the threatened interests if the  
18 disclosure were made." Id.

19 Because Defendants fail to meet their burden, the Court need not conduct an *in*  
20 *camera* review of the document or address the Kelly balancing test. See Hoyt v. Valdovinos,  
21 2021 WL 2550080, at \*5 (S.D. Cal., June 22, 2021) (citing Eusse v. Vitela, 2015 WL 1013774  
22 (S.D. Cal. Dec. 14, 2015) (declining to apply the balancing test and requiring disclosure when  
23 the declaration did not meet the second and fourth threshold Kelly factors) and Bryant v.  
24 Armstrong, 285 F.R.D. 596, 605 (S.D. Cal. 2012) (declining to apply the balancing test and  
25 requiring disclosure when the declaration did not meet the threshold showing)). Accordingly,  
26 the Court **VERRULES** Defendants' objections based on Official Information Privilege.

27 ///

28 ///

1           4.     Deliberative Process Privilege

2           Defendants contend that the requested documents are also protected by the Deliberative  
3 Process Privilege. Oppo. at 4. The deliberative process privilege aims to “shield certain intra-  
4 agency communications from disclosure” and thus “allow agencies freely to explore possibilities,  
5 engage in internal debates, or play devil's advocate without fear of public scrutiny.” Lahr v.  
6 National Trans. Safety Bd., 569 F.3d 964, 979 (9th Cir. 2009). A two-part test is used to  
7 determine if the privilege has been properly invoked. See Ingrande v. AutoZoners, LLC, 2022  
8 WL 788672, at \*2 (S.D. Cal., Mar. 15, 2022) (citing Lahr, 569 F.3d at 982). The party opposing  
9 discovery must show that the documents at issue are pre-decisional and deliberative. Id. Pre-  
10 decisional means that the document “is prepared [ ] to assist an agency decisionmaker in arriving  
11 at his decision and may include recommendations, draft documents, proposals, suggestions, and  
12 other subjective documents which reflect the personal opinions of the writer rather than the  
13 policy of the agency.” Id. (quoting Assembly of California v. United States Dep't of Commerce,  
14 968 F.2d 916, 920 (9th Cir. 1992)). Deliberative means that “the disclosure of the materials  
15 would expose an agency's decision-making process in such a way as to discourage candid  
16 discussion within the agency and thereby undermine the agency's ability to perform its  
17 functions.” Id. (quoting Lahr, 569 F.3d at 982).

18           The deliberative process privilege is a qualified one, and [a] litigant may obtain  
19 deliberative materials if his or her need for the materials and the need for  
20 accurate fact-finding override the government's interest in non-disclosure.  
21 Warner, 742 F.2d at 1161. Among the factors to be considered in making this  
22 determination are: 1) the relevance of the evidence; 2) the availability of other  
23 evidence; 3) the government's role in the litigation; and 4) the extent to which  
24 disclosure would hinder frank and independent discussion regarding  
25 contemplated policies and decisions. Id. The Court may also consider “(5) the  
26 interest of the litigant, and ultimately society, in accurate judicial fact finding,  
27 (6) the seriousness of the litigation and the issues involved, (7) the presence of  
28 issues concerning alleged governmental misconduct, and (8) the federal interest  
in the enforcement of federal law.

1 Estate of Serna v. County of San Diego, 2023 WL 7477321, at \*9 (S.D. Cal., Aug. 30, 2023)  
2 (quoting N. Pacifica, LLC v. City of Pacifica, 274 F. Supp. 2d 1118, 1122 (N.D. Cal. 2003) (internal  
3 citations omitted)).

4 “Courts have held that the deliberative process privilege generally does not apply in civil-  
5 rights lawsuits to protect from disclosure internal-affairs documents, investigations, and records  
6 of witness/police officer statements, as these routinely generated communications are not  
7 designed to contribute to the formulation of important public policy.” Shiflett by and through  
8 Davenport v. City of San Leandro, 2023 WL 4551077, at \*5 (N.D. Cal., July 13, 2023) (citing  
9 Soto, 162 F.R.D. at 612–13) (“The ‘deliberative process’ privilege, closely related to the self-  
10 critical analysis privilege, is also inappropriate for use in civil rights cases against police  
11 departments.”)). Defendants cite no authority nor provide any explanation in support of  
12 applying the Deliberative Process Privilege. See Oppo. Accordingly, the Court **OVERRULES**  
13 Defendants' objections based on Deliberative Process Privilege. See Pittman v. Cnty. of San  
14 Diego, 2010 WL 3733867, at \*3 (S.D. Cal. Sept. 17, 2010), reconsidered on other grounds, 2010  
15 WL 4570252 (S.D. Cal. Nov. 3, 2010). (“The deliberative process privilege does not apply to the  
16 requested documentation because the internal affairs investigation does not reflect discussion  
17 among those responsible for governmental decision-making. Rather, the documentation includes  
18 Plaintiffs’ complaints, the names of the deputies involved, witnesses identified, along with  
19 findings and conclusions regarding the specific incident between Plaintiffs and the deputies.”)

### 20 C. Personnel Files

21 Plaintiff argues that Defendant McNett’s personnel records are relevant “because they speak  
22 to Officer McNett’s judgment and credibility as a police officer, to his history of using force, and  
23 to the City’s supervision of him.” MTC at 10. Plaintiff notes that despite his attempt to narrow  
24 the request related to personnel files, Defendants have not provided any personnel records. Id.  
25 Plaintiff further notes that Defendants’ privilege log states “privacy” or “privacy – not subject  
26 incident” for all of the requested personnel records which is an improper response and should  
27 result in the waiver of Defendants’ claim of privilege. Id. at 10-11.

1 Defendants explain that Defendant McNett's personnel files contain more than 300 pages  
2 and include information such as school records, home addresses, and banking information.  
3 Oppo. at 8. Defendants also assert that the records date back to 2014 and therefore are  
4 "overbroad as to time." Id. Defendants argue that Plaintiff's request is overbroad, seeks  
5 irrelevant information, includes records that are protected by California Penal Code section 832  
6 and that Plaintiff's need for the records does not outweigh Defendants McNett's state privacy  
7 rights. Id. at 8-9. Defendants also note that some of the records regarding "discipline of the  
8 subject incident" have been disclosed. Id. at 8.

9 Police personnel records are "relevant and discoverable" in § 1983 cases. See Green v. Baca,  
10 226 F.R.D. 624, 644 (C.D. Cal. 2005) (citations omitted); Soto, 162 F.R.D. at 614-15; Medina,  
11 2014 WL 4793026, at \*6. "Items typically found in personnel files, such as records concerning  
12 training and performance, have been held to be relevant on the issues of credibility, notice to  
13 the employer, ratification by the employer, motive of the officers and malicious intent." Myles  
14 v. County of San Diego, 2016 WL 2343914, at \*14 (S.D. Cal., May 4, 2016) (citing Kassab v.  
15 San Diego Police Dep't, 2008 U.S. Dist. LEXIS 72619, at \*6-7 (S.D. Cal. Sept. 19, 2008) and  
16 Soto, 162 F.R.D. at 613). Further, because performance evaluations are conducted on a routine  
17 basis, "the absence of materials documenting officer misconduct would tend to suggest the  
18 officer in question performed adequately and in accord with department policies." Stewart, 2010  
19 WL 4909630, at \*2.

20 1. Relevancy

21 Plaintiff argues that Defendant McNett's personnel files are relevant as they speak to his  
22 judgment and credibility as a police officer, his history of using force, and the City's supervision  
23 of him. MTC at 10. Defendants contend that Plaintiff's request for personnel files is overbroad  
24 and seeks irrelevant information. Oppo. at 7-9.

25 The Court finds that the personnel files contain relevant information and that the request  
26 which Defendants state encompasses three hundred plus documents is proportional to the needs  
27 of the case. The Court acknowledges that the files also may contain irrelevant information, but  
28 Defendants provide no authority or justification for redacting portions of the files or paragraphs

1 of a document because they contain irrelevant information. See United States Aviation  
2 Underwriters Inc. v. Aerospike Iron, LLC, 2023 WL 2414265, at \*2 (S.D. Cal., Mar. 8, 2023)  
3 (“there is no legal basis to redact documents for relevancy concerns”) (citing Caccamise v. Credit  
4 One Bank, N.A., 2019 WL 1900908, \*5 (S.D. Cal., Apr. 26, 2019) (“Defendant is not permitted  
5 to redact responsive documents for relevancy purposes”); Hill v. Asset Acceptance, LLC, 2014  
6 WL 3014945 (S.D. Cal., July 3, 2014) (ordering defendant to remove all redactions unrelated to  
7 privilege); Bartholomew v. Avalon Capital Group, Inc., 278 F.R.D. 441 (D. Minn. 2011)  
8 (“Redaction is an inappropriate tool for excluding alleged irrelevant information from documents  
9 that are otherwise responsive to a discovery request”); Samantha B. v. Lexington Ins. Co., 2021  
10 WL 8531694, at \*2 (C.D. Cal., Aug. 17, 2021) (“to the extent any portions have been redacted  
11 solely because Defendants believe they are not relevant to this lawsuit,[ ] ‘courts frown upon  
12 the practice of redacting irrelevant information from documents based on one party's unilateral  
13 assessment of relevance.’”) (quoting Shenwick v. Twitter, Inc., 2018 WL 833085, at \*3 (C.D.  
14 Cal. Feb. 7, 2018)); and Doe v. Trump, 329 F.R.D. 262, 275-76 (W.D. Wash. Dec. 20, 2018)  
15 (“redaction is generally an inappropriate tool for excluding information that a party considers to  
16 be irrelevant or non-responsive from documents that are otherwise responsive to a discovery  
17 request”).

18 The Court **OVERRULES** Defendants’ objection as to the time frame of the request. The  
19 incident occurred in 2019 and Defendants state that the records date back to 2014. The Court  
20 finds that a time period of approximately five years prior to the incident is appropriate in this  
21 case. See Rodriguez v. Knight, 2023 WL 3570612, at \*3 (E.D. Cal., May 19, 2023) (noting that  
22 “[o]ther courts have limited the temporal scope of discovery of personnel files for similar claims  
23 (excessive force use of force; failure to protect; and conspiracy to violate Plaintiff’s rights during  
24 the prison disciplinary process) to five years” and “impos[ing] a time limit of five years preceding  
25 the earliest incident alleged”) (citing Wheeler v. Alison, 2015 WL 269148 \* 3 (E.D. Cal. Jan. 21,  
26 2015); Lavenant v. City of Palm Springs, 2019, WL 6139114 \* 4 (C.D. Cal. Aug. 6, 2019);  
27 Hayslett v. City of San Diego, 2014 WL 1154314 \* 4 (S.D. Cal. March 21, 2014); and Lallemant  
28 v. Cnty. of Los Angeles, 2018 WL 6136814, at \*2 (C.D. Cal. Jan. 12, 2018) (compelling discovery

1 after Plaintiff limited the scope of his request to five years). As discussed below, the Court will  
2 allow Defendants to redact personal identifying information.

3 2. Right to Privacy

4 Defendants objected to the request for Defendant McNett's personnel files on privacy  
5 grounds. Oppo. at 8.

6 For the same reason the Court overruled Defendants' privacy objections to Plaintiff's  
7 requests for Internal Affairs documents, the Court **OVERRULES** Defendants' privacy objections  
8 to producing Defendant McNett's personnel files. Defendants have not shown that the files  
9 cannot be safely produced pursuant to a protective order with the redaction of personal  
10 identifying information such as social security numbers, bank account information, gun serial  
11 numbers, and addresses. Additionally, Defendants' privacy concerns do not outweigh Plaintiff's  
12 need for the requested information.

13 3. California Penal Code Section 832.7

14 Defendants also rely on California Penal Code § 832.7 to argue that the requested  
15 documents are privileged and not subject to discovery. Oppo. at 8; Peterson Decl. at ¶ 6  
16 (claiming personnel files "contain confidential, personal information about the officer" and that  
17 releasing the information could "jeopardize the safety of the officer and their family").

18 California Penal Code § 832.7 states that "the personnel records of peace officers and  
19 custodial officers and records maintained by any state or local agency pursuant to Section 832.5,  
20 or information obtained from these records, are confidential and shall not be disclosed in any  
21 criminal or civil proceeding." "Federal courts, however, have found that § 832.7 is not applicable  
22 in evaluating discovery disputes in 42 U.S.C. § 1983 claims." Vargas v. County of Los Angeles,  
23 2020 WL 4032671, at \*4 (C.D. Cal., May 11, 2020) (quoting Anderson v. City of Rialto, 2017 WL  
24 10562686, at \*3 (C.D. Cal. June 28, 2017) (electing to "not apply California Penal Code § 832.7  
25 to its analysis of this matter") (citing Green, 226 F.R.D. at 643-44; Miller, 141 F.R.D. at 298-99  
26 (finding California rules for discovery and privileges, including California Evidence Code § 1043,  
27 referenced in § 832.7 and other sections of the California Penal Code, to be "fundamentally  
28 inconsistent" with federal law and the liberal federal policy on discovery)); see also Medina, 2014

1 WL 4793026, at \*7 ("[t]o the extent the Defendant relies on the privilege set forth in California  
2 Penal Code section 832.7, federal courts do not recognize section 832.7 as relevant to evaluating  
3 discovery disputes in 42 U.S.C. § 1983 cases."). Defendants have not cited any federal law to  
4 support their position that the California statutes protect the documents from disclosure in a  
5 federal civil rights suit. See Oppo. at 7-9. Accordingly, Defendants' objection to producing  
6 Defendant McNett's personnel files on the basis of privilege pursuant to section 832.7 is  
7 **OVERRULED.**

8 **CONCLUSION**

9 Plaintiff's motion to compel is **GRANTED**. The parties must file a Joint Motion for Entry  
10 of Stipulated Protective Order by **April 8, 2024**. Defendants must produce the requested  
11 Internal Affairs documents and Defendant McNett's personnel files by **April 15, 2024**.  
12 Defendants may redact personal identifying information.

13 **IT IS SO ORDERED.**

14  
15 Dated: 3/29/2024

16   
17 Hon. Barbara L. Major  
18 United States Magistrate Judge  
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