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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Russell B. Toomey,
Plaintiff,

Case No.19-cv-00035-TUC-RM (LAB)

v.

**State of Arizona; Arizona Board of Regents,
D/B/A University of Arizona,** a governmental
body of the State of Arizona; et al.,

**PLAINTIFF’S MOTION FOR
ENTRY OF AN ORDER
COMPELLING THE PRODUCTION
OF DOCUMENTS**

Defendants.

Plaintiff, Dr. Russell B. Toomey, on behalf of himself and the certified classes (“Plaintiff”), hereby submits through the undersigned counsel the following Memorandum of Law in support of his Motion For Entry Of An Order Compelling The Production Of Documents (the “Motion”) from the Office of the Governor of the State of Arizona (the “Governor’s Office”) in response to Plaintiff’s Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action, dated February 17, 2021 (the “Subpoena”). This Motion and exhibits hereto are accompanied by the Transmittal Declaration of Christine K. Wee (“Wee Decl.”), and Plaintiff’s LRCiv 7.2(j)-(k) and 37.1 Statement (“Plaintiff’s LRCiv Statement”).

PRELIMINARY STATEMENT

In this class-action lawsuit, Plaintiff challenges the State of Arizona’s categorical exclusion for “gender reassignment surgery” (the “Exclusion”) from coverage under the self-funded health care plan (the “Plan”) controlled by the Arizona Department of Administration

1 (“ADOA”). Although Plaintiff contends that the Exclusion facially discriminates based on
 2 sex and transgender status, in violation of Title VII and the Equal Protection Clause, this
 3 Court has held that whether the Exclusion was adopted or maintained based on a
 4 discriminatory intent may be a dispositive issue in the case.

5 Discovery has revealed that when ADOA considered whether to remove the
 6 Exclusion in 2016, the Governor’s Office—and particularly Senior Health Policy Advisor,
 7 Christina Corieri—played a key role in the State Defendants’ decision to maintain the
 8 Exclusion. (Wee Decl., Ex. 9 at 324:2-325:2 (Marie Isaacson, former Director of ADOA
 9 Benefits Services Division testified that decision to maintain the Exclusion was “an
 10 announcement” from Christina Corieri in the Governor’s Office and that “[t]here wasn’t
 11 really a discussion”); *id.* at 32:7 (testifying that the Governor’s Office was in the “group that
 12 made the decision” regarding the Exclusion); *id.*, (Wee Decl., Ex. 12, at 4 (listing Michael
 13 T. Liburdi, John M. Fry, Nicole A. Ong, and Christina Corieri from the Governor’s Office
 14 as “persons with knowledge of the genesis, formulation, adoption, maintenance, or
 15 continuation of (a) the Challenged Exclusion and (b) any earlier versions of the exclusion”);
 16 *id.*, 10 at 65:5-10 (Scott Bender, current ADOA Plan Administration Manager, testified that
 17 the ADOA reports to the Governor’s Office, and that the Governor’s Office is “the decision
 18 maker[.]” regarding changes to the Plan)).

19 Plaintiff brings this Motion to Compel the Governor’s Office to produce seventeen
 20 documents¹ that are relevant to whether Ms. Corieri and other advisors involved in the
 21

22 ¹ Plaintiff seeks production of the following seventeen documents improperly withheld:

- 23 (1) 06/17/2015 correspondence and attachments from Marks re Healthcare Plans
 24 (2) 01/17/2017 correspondence and attachment from Harding re Department of
 25 Corrections
 26 (3) 01/18/2017 correspondence from Vineyard re Administrative Code
 27 (4) 01/22/2017 correspondence from Fischer re House Bill
 28 (5) 01/23/2017 correspondence from Conger re House Bill
 (6) 01/23/2017 correspondence from Fischer re House Bill
 (7) 01/23/2017 correspondence from Seiden re Proposed Legislation

1 decision to maintain the Exclusion harbored discriminatory intent. The Governor’s Office
2 has withheld these seventeen communications based on a purported “executive
3 communications privilege” for state governors, which has no basis in federal law, and
4 alternatively based on claims of “deliberative process privilege,” which this Court has
5 already rejected. Allowing the Governor’s Office to avoid discovery through these
6 unfounded claims of privilege would result in burying the exact evidence that Plaintiff may
7 need to prove his claim through the discriminatory intent of decision makers.

8 **BACKGROUND**

9 **A. The Factual Disputes at Issue in This Case**

10 Plaintiff alleges that the Exclusion, which categorically excludes surgeries sought by
11 transgender people from coverage under the Plan, violates Title VII of the Civil Rights Act
12 of 1964 and the Equal Protection Clause of the Fourteenth Amendment. In their Joint Status
13 Report dated October 23, 2020, the parties agreed that one of the disputed factual questions
14 in this case is “[w]hether the decision to exclude gender reassignment surgery in the Health
15 Care Plan was actually motivated by a legitimate governmental interest.” (Doc. 128, p. 11.)
16 Although Plaintiff maintains that the Exclusion is facially discriminatory (Doc. 86, pp. 2-
17 15), it is clear that the question of intent may yet be an issue at summary judgment or trial.²

18 _____
19 (8) 01/23/2017 correspondence from Conger re Proposed Legislation

20 (9) 01/23/2017 correspondence from Corieri re Proposed Legislation

21 (10) 01/24/2017 correspondence from Favreau re Proposed Legislation

22 (11) 01/24/2017 correspondence from Corieri re Proposed Legislation

23 (12) 01/25/2017 correspondence from Roemer re Proposed Legislation

24 (13) 01/25/2017 correspondence from Harding re Proposed Legislation

25 (14) [the second, identical log entry for] 01/25/2017 correspondence from Harding re
Proposed Legislation

26 (15) 01/25/2017 correspondence from Conger re Proposed Legislation

27 (16) 08/06/2020 correspondence from Snyder re Healthcare Coverage

28 (17) 08/06/2020 correspondence from Snyder re Administrative Code. (Wee Decl., Ex. 7)

² Magistrate Judge Bowman’s Report & Recommendation regarding Plaintiff’s Motion for a Preliminary Injunction concluded that Plaintiff must prove discriminatory intent by the State Defendants to succeed on his claims. (Doc. 134, pp. 6, 9.) Further, this Court recently ordered that documents concerning “the thought processes and state of mind of the decision

1 Testimony confirming that the Governor’s Office was integral to the decision to
2 maintain the Exclusion evidences further need for the discovery Plaintiff now seeks to
3 determine whether Ms. Corieri and other officials involved in the decision to maintain the
4 Exclusion harbored discriminatory intent. Based on public statements made by Ms. Corieri
5 before she joined the Governor’s Office, Plaintiff has reason to believe that Ms. Corieri may
6 have acted based on her personal opposition to government insurance coverage for
7 transition-related surgery. In 2014, an independent appeals board within the U.S.
8 Department of Health & Human Services struck down Medicare’s exclusion of coverage for
9 transition-related surgery; in response, Ms. Corieri tweeted: “advocates now demanding
10 taxpayer dollars for gender reassignment surgery under Medicare - bet Medicaid is next.”
11 (Wee Decl., Ex. 11)

12 **B. Governor’s Office First Assertion of Privileges**

13 On February 17, 2021, Plaintiff served the Subpoena on the Governor’s Office. (Wee
14 Decl., Ex. 2, at 4) The Subpoena contained one single Request for Production seeking
15 documents and information “regarding surgery to treat gender dysphoria (also referred to as
16 ‘transition related’ surgery, ‘sex reassignment’ surgery, ‘gender reassignment’ surgery, ‘sex
17 change’, ‘transgender surgery’ or ‘transsexual surgery’” including “insurance coverage for
18 such surgeries in health insurance plans administered by the Arizona Department of
19 Administration, Medicaid, Medicare, or any other government health care program.” (Wee
20 Decl., Ex. 2, at 4).

21 On March 10, 2021, the Governor’s Office produced some documents responsive to
22 Plaintiff’s Subpoena, consisting of sixteen documents, totaling four hundred and five pages,
23 along with a corresponding privilege log (the “Original Privilege Log”) which claimed sixty-
24 six documents to be protected by either the attorney-client privilege, executive

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27 makers behind the exclusion” be turned over because they bear directly upon intent as an
28 “indispensable element” of Plaintiff’s claims. It is unsettled what standard the Court will
ultimately apply to Plaintiff’s claims, but for now “the issue of intent remains unresolved,
and the documents remain relevant.” (Doc. 187, p. 5.)

1 communications privilege, or common interest privilege. (Wee Decl., Ex. 3) That same day,
2 the Governor’s Office served Plaintiff with its Responses and Objections to Plaintiff’s
3 Subpoena. (“R&Os”) (Wee Decl., Ex. 4)

4 In its R&Os, the Governor’s Office also objected to the Subpoena claiming it
5 “purport[ed] to impose duties upon the Governor’s Office that are beyond the obligations of
6 Rule 45” and that Plaintiff should turn to the “named Defendants in this action, which are
7 more appropriate recipients of Plaintiff’s requests.” (Wee Decl., Ex. 4, at 2) But the
8 Governor’s Office cannot pretend to be an uninterested third-party, since the State of Arizona
9 is the named Defendant, and both the State Defendants and the Governor’s Office claim to
10 have such congruent interests in this litigation that the common interest doctrine would
11 apply. (Wee Decl., Ex. 7); (Doc. 201, p. 15).

12 Despite this, State Defendants have represented that the Governor’s Office
13 documents are not within their control and that Plaintiffs would need to subpoena the
14 Governor’s Office directly. (Wee Decl., Ex. 8, at General Objections 8, 10) In any event,
15 Rule 45 requires the Governor’s Office to produce documents responsive to the Subpoena.

16 **C. Parties’ Letter Exchange and First Meet And Confer**

17 On April 19, 2021, in response to the Governor’s Office’s R&Os, Plaintiff sent a
18 letter notifying the Governor’s Office of Plaintiff’s objections to the improper assertions of
19 the executive communications, deliberative process, attorney-client, and common interest
20 privileges,³ including specifically the fact that there is no basis in federal law to apply
21 executive communications privilege to state governors. (Wee Decl., Ex. 5)

22 In a letter dated April 30, 2021, counsel for the Governor’s Office reaffirmed the
23 Governor’s Office’s positions on the privilege claims asserted in its Original Privilege Log.
24 (Wee Decl., Ex. 6) The Parties then met and conferred on May 7, 2021 to discuss the pending
25 issues. (Sheets Decl.) However, the parties were unable to reach an agreement as to the
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28 ³ Plaintiff reserves all rights to later challenge the withholding of documents based on the
attorney-client and common interest privileges.

1 applicability of the executive communications and deliberative process privileges to the
2 withheld documents. *Id.*

3 **D. Governor’s Office’s Revised Privilege Log and Second Meet & Confer**

4 Following the meet and confer, the Governor’s Office served Plaintiff with a
5 supplemental and revised privilege log (“Revised Privilege Log”) on May 26, 2021. (Wee
6 Decl., Ex. 7) The Governor’s Office continued to withhold sixty-seven documents, of which
7 Plaintiff currently disputes seventeen as improperly withheld. Specifically, the Governor’s
8 Office is withholding documents under the inapplicable executive communications privilege
9 (or, as they argue in the alternative, the deliberative process privilege because “if the Court
10 concludes an executive communications privilege does not apply to the documents, the
11 deliberative process privilege applies”). (Wee Decl., Ex. 7, at n.2) Notably, the Governor’s
12 Office has continued to assert the executive communications privilege despite the lack of
13 basis in federal law, and has continued to assert (in the alternative) the deliberative process
14 privilege despite the Court’s ruling that “plaintiff’s ‘need for the materials and the need for
15 accurate fact-finding override the government’s interest in non-disclosure.’” (Doc. 187, p.
16 8).

17 The Governor’s Office and Plaintiff again met and conferred on June 1, 2021 but
18 could not reach agreement. (Sheets Decl.)

19 **ARGUMENT**

20 The scope of discovery under Rule 45 is the same as under Rule 26(b). *Evanston Ins.*
21 *Co. v. Murphy*, No. CV-19-04954-PHX-MTL, 2020 WL 6869292, at *2 (D. Ariz. Nov. 23,
22 2020) (“The scope of discovery through a subpoena under Rule 45 is the same as the scope
23 of discovery permitted under Rule 26(b).”) (internal quotations omitted). Plaintiff has a
24 right to “obtain discovery regarding any non-privileged matter that is relevant to any party’s
25 claim or defense and proportional to the needs of the case.” Fed. R. Civ. P. 26(b)(1); *Ocean*
26 *Garden Prods. Inc. v. Blessings Inc.*, No. CV-18-00322-TUC-RM, 2020 WL 4284383, at
27 *1 (D. Ariz. July 27, 2020) (Márquez, J.) Discovery may be compelled by the Court where,
28 as here, the commanded party unjustifiably withholds responsive documents. Fed. R. Civ.

1 P. 45(d)(2)(B).

2 **I. THE DOCUMENTS WITHHELD BY THE GOVERNOR’S OFFICE ARE**
3 **RELEVANT TO ESTABLISH WHETHER THE EXCLUSION WAS**
4 **MAINTAINED FOR DISCRIMINATORY REASONS.**

5 The seventeen documents at issue in this Motion to Compel are relevant to establish
6 whether Christina Corieri and other members of the Governor’s Office acted with
7 discriminatory intent when they made the decision to maintain the Exclusion challenged in
8 this case. All of the documents, identified as responsive to the Subpoena, discuss gender
9 reassignment surgery. Four of the documents are communications between Ms. Corieri and
10 the Arizona Health Care Cost Containment System (“AHCCCS”) and the Department of
11 Corrections, presumably to discuss whether those agencies would be covering surgery for
12 Medicaid recipients or prisoners.⁴ Twelve documents are e-mails among members of the
13 Governor’s Office between 1/22/2017 and 1/25/2017 about proposed legislation.⁵ Those
14 documents likely refer to legislation introduced in January 2017 that would have prohibited
15 Arizona’s Medicaid program and Department of Corrections from providing gender
16 reassignment surgeries.⁶ And another withheld communication between the Arizona
17 Department of Insurance (Gerrie Marks) and Ms. Corieri from 2015 (when the challenged
18 coverage decision was made) bears the telling subject line: “Healthcare Plans.”⁷

19 The Governor’s Office contends that these documents are irrelevant because they do
20 not directly involve ADOA’s Plan at issue in this case. But it is well-established “that
21 evidence of the employer's discriminatory attitude *in general* is relevant and admissible to
22 prove . . . discrimination.” *Heyne v. Caruso*, 69 F.3d 1475, 1479–80 (9th Cir. 1995)
23 (emphasis in original). “[A]n employer's conduct tending to demonstrate hostility towards
24 a certain group is both relevant and admissible where the employer’s general hostility

25 ⁴ See *supra* n.1 (2-3), and (16-17).

26 ⁵ Nine of which have the subject “Proposed Legislation” and three of which have the
27 subject “House Bill.” See *supra* n.1 (4-15).

28 ⁶ <https://www.azcentral.com/story/news/politics/legislature/2017/01/24/arizona-bills-ban-state-coverage-gender-reassignment-surgeries-medicaid-prison-inmates/96966272/>

⁷ See *supra* n.1 (1).

1 towards that group is the true reason behind [adverse action against] an employee who is a
2 member of that group.” *Id.* at 1479. As noted above, Plaintiff already has reason to believe
3 that Ms. Corieri may have acted based on her personal opposition to government insurance
4 coverage for transition-related surgery.

5 The requested documents therefore are highly relevant to show whether Ms. Corieri
6 and other members of the Governor’s Office were ideologically opposed to all instances of
7 using “taxpayer dollars for gender reassignment surgeries,” (Wee Decl., Ex. 11) via state-
8 provided insurance, Medicare, Medicaid, prison health care or otherwise. As Judge
9 Bowman previously recognized in the Report and Recommendation, Plaintiff would be
10 able to establish that the ADOA Exclusion was maintained for a discriminatory purpose if
11 Plaintiff could show “that the Plan exclusion exists because the Plan authors do not like
12 gender transition.” (Doc. 134, p. 6). There is good reason to suspect that the documents at
13 issue in this motion may bear on this exact issue.

14 **II. THE EXECUTIVE COMMUNICATIONS PRIVILEGE IS NOT AVAILABLE** 15 **FOR STATE GOVERNORS UNDER APPLICABLE FEDERAL LAW**

16 Because the legal claims in this case arise under federal law, the Governor’s Office’s
17 claims of privilege are governed by federal common law, not by state law. *See* Fed. R. Evid.
18 501; *Melendres v. Arpaio*, CV-07-2513-PHX-GMS, 2015 WL 12911719, at *1 (D. Ariz.
19 May 14, 2015) (“Issues of privilege in federal question cases are determined
20 by federal law”).

21 The Governor’s Office argues that communications involving the Governor’s
22 advisors are protected from disclosure by an “executive communications privilege.” In
23 doing so, the Governor’s Office invites this Court to create new federal common law which
24 would extend the “presidential communications privilege,” as the Ninth Circuit refers to it,
25 to a state governor. *Karnoski v. Trump*, 926 F.3d 1180, 1205 at n.21 (9th Cir. 2019); *Hobley*
26 *v. Chicago Police Commander Burge*, 445 F. Supp. 2d 990, 998 (N.D. Ill. 2006).

27 But under federal law, the “executive communications privilege” is limited to the
28 President. *Hobley v. Chicago Police Commander Burge*, 445 F. Supp. 2d 990, 998 (N.D.

1 Ill. 2006); *Patterson v. Burge*, 451 F. Supp. 2d 947, 955 (N.D. Ill. 2006), *objections*
2 *sustained*, No. 03 C 4433, 2007 WL 1498974 (N.D. Ill. May 17, 2007). There is simply “no
3 federal authority for extending” the executive communications privilege “to a state
4 governor.” *Hobley*, 445 F. Supp. 2d 990, 998 (N.D. Ill. 2006)); *see also Patterson*, 451 F.
5 Supp. 2d 947, 955 (N.D. Ill. 2006); *Child. First Found., Inc. v. Martinez*, No. CIV. 1:04-
6 CV-0927, 2007 WL 4344915, at *6 n.11 (N.D.N.Y. Dec. 10, 2007); 98 C.J.S. Witnesses §
7 423 at n.3 (March 2021) (finding that “[f]ederal law does not recognize an executive
8 communications privilege for state Governors”). The presidential communications
9 privilege is rooted in concerns about the separation of powers between the President under
10 Article II and federal courts under Article III. *Hobley*, 445 F. Supp. 2d at 997-98. Those
11 separation-of-powers concerns do not apply when a federal court enforces federal law
12 against a state official. The Ninth Circuit recognizes that the privilege protects
13 “communications directly involving and documents actually viewed by the President, as
14 well as documents solicited and received by the President or his immediate White House
15 advisers.” *Karnoski*, 926 F.3d 1180 at 1203 (9th Cir. 2019) (internal quotations omitted).

16 In support of its claims for an executive communications privilege, the Governor’s
17 Office cites to decisions from the supreme courts of other States recognizing an executive
18 communications privilege under state law. *See Cap. Info. Grp. v. State, Off. of Governor*,
19 923 P.2d 29, 34–35 (Alaska 1996); *Republican Party of New Mexico v. New Mexico Tax’n*
20 *& Revenue Dep’t*, 283 P.3d 853, 860–61 (New Mexico 2012); *Freedom Found. v. Gregoire*,
21 310 P.3d 1252, 1260 (Wash. 2013). Even if the Arizona Supreme Court were to adopt a
22 similar privilege under Arizona state law, the privilege would still not apply to the *federal*
23 claims in this case. *See In re TFT-LCD (Flat Panel) Antitrust Litig.*, 835 F.3d 1155, 1159
24 (9th Cir. 2016) (reversing district court for erroneously applying California privilege law to
25 federal claims).⁸

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27 ⁸ The Governor’s Office has also cited a one-off order in *Merritt v. State*, CV17-04540-
28 PHX-DGC (D. Ariz. March 19, 2018), which allowed the Governor to redact personal
information and information allegedly protected by “executive privilege,” and record the

1 In any event, even if Arizona state law was relevant here, the Governor’s Office
2 provides no reason to think that Arizona courts would recognize such a privilege for the
3 Governor. To the contrary, the Supreme Court of Arizona has touted a “strong policy
4 favoring open disclosure and access, as articulated in Arizona statutes and case law.” *Cox*
5 *Arizona Pubs., Inc. v. Collins*, 175 Ariz. 11, 14, 852 P.2d 1194, 1198 (1993). The Arizona
6 state legislature has also declined to grant any statutory authority for the courts to recognize
7 an executive communications privilege. *See* Ariz. Rev. Stat. Ann. § 39-121 (requiring that
8 not only “Public records [but also] other matters in the custody of any officer shall be open
9 to inspection by any person at all times during office hours”). For these reasons, as this
10 Court has recognized, “Arizona state government officials, therefore, should reasonably
11 expect that their deliberations in crafting policy are open to public scrutiny (Doc. 187, p. 8);
12 and that, as this Court has recognized, “persons giving advice to Arizona government
13 officials should ordinarily assume that their advice will not be hidden from the public gaze.”
14 *Id.* (citing *Arizona Dream Act Coal. v. Brewer*, No. CV-12-02546-PHX-DGC, 2014 WL
15 171923, at *3 (D. Ariz. 2014) (citing *Rigel Corp. v. State*, 225 Ariz. 65, 72–73, 234 P.3d
16 633, 640–41 (App.2010)); *See* (Doc. 187, p. 7).

17 Further, if an executive communications privilege were applicable to this case, the
18 privilege would not be absolute. To overcome it, Plaintiff “must make a preliminary
19 showing of need demonstrating ‘that the evidence sought [is] directly relevant to issues that
20 are expected to be central to the trial’ and ‘is not available with due diligence elsewhere.’”
21 *Karnoski*, 926 F.3d 1180 at 1205 (quoting *In re Sealed Case*, 121 F.3d 729 at 754). Plaintiff
22 need not “pinpoint with precision what materials [he is] seeking,” but instead meets his
23 burden so long as his “discovery requests are narrowly tailored to seek evidence that is
24 directly relevant to central issues in the litigation and is not available with due diligence

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26 withheld information on a privilege log. The decision did not rule on the underlying merits
27 of the privilege claims. The court was primarily concerned about whether personal
28 identifying information should be turned over and did not substantively analyze the issue of
executive privilege at all.

1 elsewhere.” *Id.* Once Plaintiff meets this preliminary burden, then the burden shifts and the
2 person asserting executive communications privilege must “invoke the privilege formally
3 and make particularized objections to ‘show that the interest in secrecy or nondisclosure
4 outweighs the need’ for responsive material.” *Id.* (quoting *Dellums v. Powell*, 642 F.2d
5 1351, 1363 (D.C. Cir. 1980)).

6 This Court has already acknowledged the importance of documents that go toward
7 intent of the decision makers. (Doc. 187, at 4-5). (“The documents sought bear directly on
8 the thought processes and state of mind of the decision makers behind the exclusion. As
9 such, they bear directly on the issue of intent. The document request, therefore, concerns an
10 indispensable element of [Plaintiff’s] causes of action and is directed at persons with direct
11 knowledge of this element.”) If the decision to maintain the Exclusion has been made by
12 the Governor’s Office, as witnesses have testified, the continued withholding of responsive
13 documents would unfairly compromise Plaintiff’s right and ability to litigate this case.

14 Plaintiff has demonstrated the need for discovery. The Governor’s Office, however,
15 has not met its burden to justify withholding plainly relevant evidence. Neither the Revised
16 Privilege Log nor any other communication from the Governor’s Office indicates, in a
17 particularized manner, the reasons why—if the executive communications privilege did
18 apply (and it does not)—“‘nondisclosure outweighs the need’ for responsive material.”
19 *Karnoski*, 926 F.3d 1180 at 1205 (quoting *Dellums*, 642 F.2d at 1363).

20 **III. IF DELIBERATIVE PROCESS PRIVILEGE WERE TO APPLY, IT IS** 21 **OVERCOME FOR THE SAME REASONS ARTICULATED BY THE COURT**

22 Because Plaintiff’s (and the Court’s) fact-finding needs surrounding the intent of
23 decision makers remain the same, and because the Governor’s Office has been identified as
24 a heavily involved decision maker, the same arguments from the Motion to Compel filed on
25 March 18, 2021 (Doc. 168) apply to the Governor’s Office.

26 The deliberative process privilege “permits the government to withhold documents
27 that reflect advisory opinions, recommendations and deliberations comprising part of a
28 process by which government decisions and policies are formulated.” *F.T.C. v. Warner*

1 *Commc 'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). “A litigant may obtain deliberative
2 materials if his or her need for the materials and the need for accurate fact-finding override
3 the government’s interest in non-disclosure.” *Id.* “Among the factors to be considered in
4 making this determination are: 1) the relevance of the evidence; 2) the availability of other
5 evidence; 3) the government’s role in the litigation; and 4) the extent to which disclosure
6 would hinder frank and independent discussion regarding contemplated policies and
7 decisions.” *Id.* “The party asserting an evidentiary privilege has the burden to demonstrate
8 that the privilege applies to the information in question.” *Tornay v. United States*, 840 F.2d
9 1424, 1426 (9th Cir.1988).

10 Here, the Governor’s Office failed to properly assert the deliberative process
11 privilege by neglecting to include a sworn declaration from the head of the agency
12 explaining the contents of the withheld documents and/or how the documents were
13 predecisional and deliberative. *EEOC v. Swissport Fueling, Inc.*, No. CV-10-2101-PHX-
14 GMS, 2012 WL 1648416, at *15 (D. Ariz. May 10, 2012) (“[T]he claim of deliberative due
15 process privilege must be raised by a formal claim made by the head of the agency after she
16 has personally considered the material in question *prior* to the invocation of the privilege”
17 (emphasis added)). However, even if the Governor’s Office had properly asserted the
18 privilege, the production of the withheld documents is required here under the *Warner*
19 factors.

20 This Court previously found that all four *Warner* factors cut in favor of production
21 of documents related to intent of decision makers improperly withheld by State Defendants
22 under the deliberative process privilege. (Doc. 187). *First*, this Court articulated that
23 Plaintiff’s request for documents relating to gender surgery exclusion are relevant as they
24 “bear directly on the issue of intent . . . [and] therefore, concerns an indispensable element
25 of Plaintiff’s causes of action . . .” (*Id.* at 5). *Second*, this Court explained that the withheld
26 documents are the “most *reliable* evidence on the issue.” *Third*, this Court reasoned that the
27 government’s role in the litigation “strongly favors the plaintiff.” (*Id.* at 6). *Fourth*, this
28 Court found that disclosure of the documents would only have a “minimal adverse effect on

1 future healthcare coverage deliberations.” (*Id.* at 8). Simply put, this Court’s prior analysis
2 and holding is equally applicable here because Plaintiff’s need for accurate fact-finding of
3 these documents relevant to intent of the decision makers overrides the Governor’s Office’s
4 interest in non-disclosure. For these very same reasons, we ask that the Court grant this
5 Motion to Compel.

6 **CONCLUSION**

7 For all the reasons discussed above, Plaintiff’s Motion should be granted.

8
9 Respectfully submitted this 4th day of June, 2021.

10
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CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2021, I electronically transmitted the attached document to the Clerk’s office using the CM/ECF System for filing. Notice of this filing will be sent by email to all parties by operation of the Court’s electronic filing system.

I, further hereby certify that on June 4, 2021, I emailed the attached document to:

Betsy Lamm
Daniel Dowd
Kaysey L. Fung
Cohen Dowd Quigley
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Attorneys for Office of Governor Douglas A. Ducey

/s/ Christine K. Wee
Christine K. Wee

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Attorneys for Plaintiff Russell B. Toomey

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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Russell B. Toomey,
Plaintiff,

v.
**State of Arizona; Arizona Board of Regents,
D/B/A University of Arizona,** a governmental
body of the State of Arizona; et al.,

Defendants.

Case No.19-cv-00035-TUC-RM (LAB)

**PLAINTIFF’S LRCIV
STATEMENT**

Pursuant to Local Rule of Civil Procedure 7.2(j)-(k), and 37.1(a), Plaintiff Russell B. Toomey (“Plaintiff”) hereby submits the following statement (“Plaintiff’s LRCiv Statement”) in support of his Motion for Entry an Order Compelling the Production of Documents (the “Motion”).

FACTUAL BACKGROUND

On February 17, 2021, Plaintiff served his Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action (“Subpoena”) upon The Office of Governor Douglas A. Ducey (the “Governor’s Office”). On March 10, 2021, the Governor’s Office served its Response and Objection to the Subpoena.

Since the time the Governor’s Office served its response to Plaintiff’s Subpoena, the Governor’s Office has provided two separate privilege logs, most recently on May 26, 2021 (hereinafter “Privilege Log”). Per the Privilege Log, the Governor’s Office, without basis, withhold production of sixty-seven documents on the basis, in whole or in part, of the attorney-

1 client privilege, common interest privilege, executive communications and/or deliberative
2 process privilege, and work product (collectively the “Privilege Assertions”).

3 **LRCIV 7.2(J) STATEMENT**

4 On May 7, 2021, counsel for the Plaintiff and the Governor’s Office (collectively,
5 the “Parties”) met and conferred by telephonic conference on several topics, including the
6 Privilege Assertions. On June 1, 2021, the parties again met and conferred on Plaintiff’s
7 legal objections and authority for the same. At the conferences, Plaintiff reiterated their
8 objections to the Governor’s Office’s Privilege Assertions. The Parties also engaged in
9 written correspondence regarding the Governor’s Office’s Privilege Assertions. Counsel
10 are agreed that the Parties made a sincere effort in good faith to resolve or narrow the dispute
11 concerning the Governor’s Office’s improper Privilege Assertions, but the Parties have been
12 unable to do so.

13 **LRCIV 37.1 STATEMENT**

14 **1. Plaintiff’s Specific Request No. 1**

15 (1) **Request:** “All documents created or transmitted from January 1, 2011,
16 to the present regarding surgery to treat gender dysphoria (also referred to as
17 ‘transition related’ surgery, ‘sex reassignment’ surgery, ‘gender reassignment’
18 surgery, ‘sex change,’ ‘transgender surgery’ or ‘transsexual surgery’), including
19 but not limited to documents regarding insurance coverage for such surgeries in
20 health insurance plans administered by the Arizona Department of Administration,
21 Medicaid, Medicare, or any other government health care program.”

22 (2) **Objection:** “The Governor’s Office incorporates by reference General
23 Objections 1 through 9, *supra*. The Governor’s Office further objects that the time
24 frame covered by the request is unreasonable and overbroad, as the request seeks
25 documents that pre-date (by approximately 4 years) the date upon which Governor
26 Douglas A. Ducey was sworn into office on January 5, 2015. Accordingly, the
27 Governor’s Office’s response to this request is necessarily limited in temporal
28 scope to documents created or transmitted between January 5, 2015 and the

1 present. Subject to the foregoing objections and without waiver thereof, the
2 Governor's Office has made good-faith, reasonable efforts to locate documents
3 responsive to the request. The Governor's Office is producing with this response
4 the resulting non-privileged documents responsive to this request. *See*
5 GOV000001-GOV000405. If any additional responsive, non-privileged
6 documents are located, the Governor's Office will supplement this response. The
7 Governor's Office will further produce a privilege log describing the materials
8 withheld, consistent with Rule 45(e)(2)(A)."

9 **(3) Deficiency:** The Governor's Office's responses and objections are
10 deficient because they improperly cite the Privilege Assertions as a basis for
11 withholding documents from production, when such privileges are inapplicable or
12 have been waived. Further, Plaintiff's need for the documents and/or
13 communications outweighs the Governor's Office desire to withhold.

14 **a. Executive Communications Privilege:** *First*, the Governor's Office's
15 assertion of the executive communications privilege is improper because there
16 is no legal basis in federal common law to apply the presidential
17 communications privilege to a state governor. *Second*, even if state law applied,
18 Arizona state courts have not recognized a governor's communications
19 privilege. *Third*, the Governor's Office concedes that at least some of the
20 documents are responsive but nonetheless withholds the same. As such, the
21 Governor's Office's interest of nondisclosure is outweighed by the need for
22 responsive material. The Governor's Office argues in the alternative that if this
23 Court concludes an executive communications privilege does not apply to the
24 documents, the deliberative process privilege applies. Assuming *arguendo* that
25 this Court does find that the executive communications privilege does not
26 apply, the Governor's Office's argument still fails because this Court
27 previously held that "plaintiff's need for the materials and the need for accurate
28 fact-finding overrides the government's interest in non-disclosure." (Doc. 187,

1 p. 8)

2 **b. Deliberative Process Privilege:** *First*, the Governor’s Office has failed
3 to properly procedurally assert the deliberative process privilege by not putting
4 forth a sworn declaration from the head of the agency. *Second*, even if the
5 privilege did apply, Plaintiffs need for these documents bearing directly on
6 intent overcomes the qualified privilege. *Third*, this Court has already ruled
7 that, in applying the *Warner* factors to similar documents bearing on intent that
8 “plaintiff’s need for the materials and the need for accurate fact-finding
9 overrides the government’s interest in non-disclosure. (Doc. 187, p. 8)

10 **c. Relevancy:** The Governor’s Office identifies each withheld document
11 as “Irrelevant” while simultaneously noting that the withheld documents are
12 “technically responsive.” Regardless of the Governor’s Office’s
13 characterization, the documents Plaintiff seek are highly relevant to show the
14 intent of the Governor’s Office (a key decision maker in this case) in deciding
15 to create and maintain the Exclusion for gender reassignment surgery.

16 Dated this 4th day of June, 2021.

17
18
19 ACLU FOUNDATION OF ARIZONA

20 By /s/ Christine Wee

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CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2021, I electronically transmitted the attached document to the Clerk’s office using the CM/ECF System for filing. Notice of this filing will be sent by email to all parties by operation of the Court’s electronic filing system.

I, further hereby certify that on June 4, 2021, I emailed the attached document to:

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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Russell B. Toomey,

Plaintiff,

v.
**State of Arizona; Arizona Board of Regents,
D/B/A University of Arizona,** a governmental
body of the State of Arizona; et al.,

Defendants.

Case No.19-cv-00035-TUC-RM (LAB)

**DECLARATION OF CHRISTINE K
WEE IN SUPPORT OF
PLAINTIFF’S MOTION TO
COMPEL PRODUCTION OF
DOCUMENTS**

I, Christine K. Wee, submit this declaration under penalty of perjury pursuant to 28 U.S.C. § 1746 and declare as follows:

1. I am a Senior Staff Attorney at ACLU Foundation of Arizona, licensed to practice law in the State of Arizona, and represent Plaintiff Russell B. Toomey (“Dr. Toomey” or “Plaintiff”).

2. I submit this declaration in support of Plaintiff’s Motion for Entry of an Order Compelling the Production of Documents.

3. I base this declaration on my personal knowledge and on information obtained in the course of the above-captioned matter.

4. **Exhibit 1** as attached to Plaintiff’s Motion is a true and correct copy of Victoria A. Sheets’s supplemental declaration, dated June 4, 2021.

5. **Exhibit 2** as attached to Plaintiff’s Motion is a true and correct copy of Plaintiff’s Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises

1 in a Civil Action (“Subpoena”) served upon the Governor of the State of Arizona (the
2 “Governor’s Office”), dated February 17, 2021.

3 6. **Exhibit 3** as attached to Plaintiff’s Motion is a true and correct copy of the
4 Governor’s Responses and Objections to Plaintiff’s Subpoena (“R&Os”), dated March 10,
5 2021.

6 7. **Exhibit 4** as attached to Plaintiff’s Motion is a true and correct copy of the
7 Governor’s Office’s original privilege log corresponding with the R&Os (“Original
8 Privilege Log”), dated March 10, 2021.

9 8. **Exhibit 5** as attached to Plaintiff’s Motion is a true and correct copy of the
10 letter from Plaintiff to Governor’s Office’s counsel, dated April 19, 2021.

11 9. **Exhibit 6** as attached to Plaintiff’s Motion is a true and correct copy of the
12 letter from the Governor’s Office’s counsel, dated April 30, 2021.

13 10. **Exhibit 7** as attached to Plaintiff’s Motion is a true and correct copy of the
14 Governor’s Office’s supplemental and revised privilege log (“Revised Privilege Log”),
15 dated May 26, 2021.

16 11. **Exhibit 8** as attached to Plaintiff’s Motion is a true and correct copy State
17 Defendants’ Responses and Objections to Plaintiff’s Request for Production, dated January
18 21, 2021.

19 12. **Exhibit 9** as attached to Plaintiff’s Motion is a true and correct copy of excerpts
20 of the Marie Isaacson Deposition Transcript, dated March 26, 2021.

21 13. **Exhibit 10** as attached to Plaintiff’s Motion is a true and correct copy of
22 excerpts of the Scott Bender Deposition Transcript, dated March 31, 2021

23 14. **Exhibit 11** as attached to Plaintiff’s Motion is a true and correct copy of
24 Christina Corieri’s Tweet, dated April 23, 2013

25 15. **Exhibit 12** as attached to Plaintiff’s Motion is a true and correct of State
26 Defendants’ Supplemental Responses to Plaintiff’s Interrogatories, dated January 21, 2021.

27 16. **Exhibit 13-A** as attached to Plaintiff’s Motion is a true and correct copy of the
28 Slip Copy of *Evanston Ins. Co. v. Murphy*, No. CV-19-04954-PHX-MTL, 2020 WL

1 6869292 (D. Ariz. Nov. 23, 2020).

2 17. **Exhibit 13-B** as attached to Plaintiff’s Motion is a true and correct copy of the
3 Slip Copy of *Ocean Garden Prods. Inc. v. Blessings Inc.*, No. CV-18-00322-TUC-RM, 2020
4 WL 4284383 (D. Ariz. July 27, 2020).

5 18. **Exhibit 13-C** as attached to Plaintiff’s Motion is a true and correct copy of the
6 unreported decision in *Melendres v. Arpaio*, CV-07-2513-PHX-GMS, 2015 WL 12911719
7 (D. Ariz. May 14, 2015).

8 19. **Exhibit 13-D** as attached to Plaintiff’s Motion is a true and correct copy of the
9 unreported decision in *Walden v. City of Chicago*, No. 04 C 0047, 2009 WL 3679672 (N.D.
10 Ill. Nov. 3, 2009).

11 20. **Exhibit 13-E** as attached to Plaintiff’s Motion is a true and correct copy of the
12 unreported decision in *Child. First Found., Inc. v. Martinez*, No. CIV. 1:04-CV-0927, 2007
13 WL 4344915 (N.D.N.Y. Dec. 10, 2007).

14 21. **Exhibit 13-F** as attached to Plaintiff’s Motion is a true and correct copy of an
15 unpublished order in *Merritt v. State*, CV17-04540-PHX-DGC (D. Ariz. March 19, 2018).

16 22. **Exhibit 13-G** as attached to Plaintiff’s Motion is a true and correct copy of the
17 unreported decision in *Arizona Dream Act Coal. v. Brewer*, 2014 WL 171923 (D. Ariz.
18 2014).

19 23. **Exhibit 13-H** as attached to Plaintiff’s Motion is a true and correct copy of the
20 unreported decision in *EEOC v. Swissport Fueling, Inc.*, No. CV-10-2101-PHX-GMS, 2012
21 WL 1648416 (D. Ariz. May 10, 2012).

22 24. **Exhibit 13-I** as attached to Plaintiff’s Motion is a true and correct copy of an
23 news article published by the Arizona Central, dated January 24, 2017 and last accessed on
24 June 4, 2021.

25 25. **Exhibit 13-J** as attached to Plaintiff’s Motion is a true and correct copy of
26 Corpus Juris Secundum § 423 entitled “Executive Privilege.”

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I declare under penalty of perjury that the foregoing is true is and correct.

Executed this 4th day of June 2021.

/s/ Christine K. Wee
Christine K. Wee

EXHIBIT 1

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Attorneys for Plaintiff Russell B. Toomey

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF ARIZONA

3 **RUSSELL B. TOOMEY,**

No. 4:19-cv-00035

4 Plaintiff,

5 v.

6 **STATE OF ARIZONA; ARIZONA BOARD**
7 **OF REGENTS, D/B/A UNIVERSITY OF**
8 **ARIZONA**, a governmental body of the State
9 of Arizona; **RON SHOOPMAN**, in his official
10 capacity as chair of the Arizona Board of
11 Regents; **LARRY PENLEY**, in his official
12 capacity as Member of the Arizona Board of
13 Regents; **RAM KRISHNA**, in his official
14 capacity as Secretary of the Arizona Board of
15 Regents; **BILL RIDENOUR**, in his official
16 capacity as Treasurer of the Arizona Board of
17 Regents; **LYNDEL MANSON**, in her official
18 capacity as Member of the Arizona Board of
19 Regents; **KARRIN TAYLOR ROBSON**, in
20 her official capacity as Member of the Arizona
21 Board of Regents; **JAY HEILER**, in his official
22 capacity as Member of the Arizona Board of
23 Regents; **FRED DUVAL**, in his official
24 capacity as Member of the Arizona Board of
25 Regents; **ANDY TOBIN**, in his official
26 capacity as Director of the Arizona Department
27 of Administration; **PAUL SHANNON**, in his
28 official capacity as Acting Assistant Director of
the Benefits Services Division of the Arizona
Department of Administration,

**DECLARATION OF VICTORIA
A. SHEETS IN SUPPORT OF
PLAINTIFF’S MOTION FOR
ENTRY OF AN ORDER
COMPELLING THE
PRODUCTION OF
DOCUMENTS**

Defendants.

24 I, VICTORIA A. SHEETS, declare as follows:

25 1. I am a Senior Associate at Willkie Farr & Gallagher LLP, and represent
26 Plaintiff Russell B. Toomey.
27
28

1 2. I submit this declaration in support of Plaintiff’s Motion For Entry Of An
2 Order Compelling The Production Of Documents, filed with this Court on June 4, 2021,
3 together with this declaration.

4 3. I base this declaration on my own personal knowledge and on information
5 obtained in the course of the above-captioned matter.

6 4. On February 17, 2021, Plaintiff served on the Office of the Governor of the
7 State of Arizona (the “Governor’s Office”) a Subpoena to Produce Documents,
8 Information, or Objects or to Permit Inspection of Premises in a Civil Action (the
9 “Subpoena”). (Mot. Ex. 2) The Subpoena contained a single request for production
10 seeking:
11
12

13 All documents created or transmitted from January 1, 2011, to the present
14 regarding surgery to treat gender dysphoria (also referred to as “transition
15 related” surgery, “sex reassignment” surgery, “gender reassignment”
16 surgery, “sex change,” “transgender surgery” or “transsexual surgery”),
17 including but not limited to documents regarding insurance coverage for such
18 surgeries in health insurance plans administered by the Arizona Department
19 of Administration, Medicaid, Medicare, or any other government health care
20 program. (Mot. Ex. 2)

21 5. On March 10, 2021, the Governor’s Office produced some documents
22 responsive to the Subpoena and a corresponding privilege log (“Original Privilege Log”).
23 (Mot. Ex. 4) The Original Privilege Log claimed sixty-six documents to be shielded by
24 the attorney-client privilege, work product privilege, executive communications privilege,
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1 and/or common interest privilege. The Governor's Office also produced The Office Of
2 Governor Douglas A. Ducey's Response And Objections to the Subpoena. (Mot. Ex. 3)

3 6. On April 19, 2021, Plaintiff sent a letter to the Governor's Office responding
4 to the Governor's Office's objections. In that letter, Plaintiff informed the Governor's
5 Office that it was improperly withholding certain documents on the basis of privilege.
6 (Mot. Ex. 5)

7 7. On April 30, 2021, counsel sent a letter reaffirming the Governor's Office's
8 position on the applicable standard in its obligation to reasonably comply with Plaintiff's
9 Subpoena and the privilege claims it asserted in the Original Privilege Log. (Mot. Ex. 6)

10 8. On May 7, 2021, the Plaintiff and the Governor's Office met and conferred
11 telephonically to discuss the pending production issues and the documents withheld on the
12 basis of privilege.

13 9. During the May 7, 2021 meet and confer, Plaintiff informed the Governor's
14 Office that federal law does not recognize the executive communications privilege for state
15 governors. Counsel for the Governor's Office was not persuaded that the executive
16 communications privilege does not apply in this case. Counsel for the Governor's Office
17 also argued that the deliberative process privilege could be asserted in relation to
18 documents claimed to be withheld under the executive communications privilege on the
19 Original Privilege Log. Plaintiff informed the Governor's Office that the documents could
20 not be withheld under the executive communications, deliberative process, or common
21 interest privileges in this case.
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1 10. On May 10, 2021, the Governor’s Office served upon Plaintiff a
2 supplemental and revised privilege log (“Revised Privileged Log”). (Mot. Ex. 7) The
3 Governor’s Office continued to withhold sixty-seven documents under a combination of
4 the executive communications, deliberative process, attorney-client, work product, and
5 common interest privileges.
6

7 11. The Revised Privilege Log also identified certain documents as “Irrelevant”
8 in a column labeled “Additional Bases for Withholding.” (Mot. Ex. 7)
9

10 12. On May 27, 2021, Plaintiff emailed the Governor’s Office and articulated
11 that—given that the privileges were still asserted in the Revised Privilege Log—Plaintiff
12 maintains its previously stated objections.

13 13. On May 28, 2021, in response to Plaintiff’s email, the Governor’s Office
14 requested that Plaintiff further articulate Plaintiff’s previously stated objections.
15

16 14. Later that day, May 28, 2021, Plaintiff responded with a detailed description
17 of its positions as articulated and reiterated its categorical objections to the executive
18 communications privilege, deliberative process privilege, common interest privilege, and
19 relevance issues.
20

21 15. On May 30, 2021, the Governor’s Office requested that Plaintiff further
22 explain Plaintiff’s basis for his continued legal objections and authority upon which they
23 are founded.
24

25 16. On May 31, 2021, in response to the Governor’s Office’s request, Plaintiff
26 further articulated Plaintiff’s continued legal objections and authority for the same.
27 Plaintiff further clarified that the Governor’s Office is improperly withholding documents
28

1 under the inapplicable executive communications privilege (or, as the Governor's Office
2 argues in the alternative, the deliberative process privilege), and common-interest
3 privileges.

4 17. On June 1, 2021, the Plaintiff and the Governor's Office met and conferred
5 once more, including on the topic of the asserted executive communications, deliberative
6 process, and common interest privileges, as well as the relevance of the documents sought.
7 Plaintiff and the Governor's Office were unable to reach an agreement over whether the
8 documents were improperly withheld.
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1 I certify under penalty of perjury, in accordance with 28 U.S.C. § 1746, that the
2 foregoing is true and correct.

3
4 Dated: June 4, 2021

5 By /s/ Victoria A. Sheets

6 WILLKIE FARR & GALLAGHER LLP

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Attorneys for Plaintiff Russell B. Toomey

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

RUSSELL B. TOOMEY,

Plaintiff,

v.

STATE OF ARIZONA; ARIZONA BOARD OF REGENTS, D/B/A UNIVERSITY OF ARIZONA, a governmental body of the State of Arizona; **RON SHOOPMAN**, in his official capacity as chair of the Arizona Board Of Regents; **LARRY PENLEY**, in his official capacity as Member of the Arizona Board of Regents; **RAM KRISHNA**, in his official capacity as Secretary of the Arizona Board of Regents; **BILL RIDENOUR**, in his official capacity as Treasurer of the Arizona Board of Regents; **LYNDEL MANSON**, in her official capacity as Member of the Arizona Board of Regents; **KARRIN TAYLOR ROBSON**, in her official capacity as Member of the Arizona Board of Regents; **JAY HEILER**, in his official capacity as Member of the Arizona Board of Regents; **FRED DUVAL**, in his official capacity as Member of the Arizona Board of Regents; **ANDY TOBIN**, in his official capacity as Director of the Arizona Department of Administration; **PAUL SHANNON**, in his official capacity as Acting Assistant Director of the Benefits Services Division of the Arizona Department of Administration,

Defendants.

No. 4:19-cv-00035

NOTICE OF SUBPOENA

PLEASE TAKE NOTICE that, pursuant to the Federal Rules of Civil Procedure Rules 34(c) and 45 (together, the “Rules”), Plaintiff Russell B. Toomey, on behalf of himself and the certified Classes, by his attorneys the ACLU Foundation of Arizona, the

1 American Civil Liberties Union Foundation, and Willkie Farr & Gallagher LLP, have
2 issued the attached subpoena commanding the production of certain documents by, and
3 will cause such subpoena to be served upon:

4 Office of the Governor
5 c/o Anni Foster
6 General Counsel
7 1700 W. Washington Street
8 Phoenix, Arizona 85007

9 By /s/ Christine K. Wee

10 ACLU FOUNDATION OF ARIZONA
11 Victoria Lopez – 330042
12 Christine K Wee – 028535
13 3707 North 7th Street, Suite 235
14 Phoenix, Arizona 85014

15 AMERICAN CIVIL LIBERTIES UNION
16 FOUNDATION
17 Joshua A. Block
18 Leslie Cooper
19 125 Broad Street, Floor 18
20 New York, New York 10004

21 WILLKIE FARR & GALLAGHER LLP
22 Wesley R. Powell
23 Matthew S. Freimuth
24 Nicholas Reddick
25 787 Seventh Avenue
26 New York, New York 10019

27 *Attorneys for Plaintiff Russell B. Toomey*
28

AO 88B (Rev. 02/14) Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action

UNITED STATES DISTRICT COURT

for the
District of Arizona

Russell B. Toomey

Plaintiff

v.

State of Arizona, et. al.

Defendant

Civil Action No. 4:19-cv-00035 (RM/LAB)

**SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS
OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION**

To: Office of the Governor, c/o Anni Foster, General Counsel, 1700 W. Washington Street, Phoenix, AZ 85007

(Name of person to whom this subpoena is directed)

Production: **YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection, copying, testing, or sampling of the material: SEE ATTACHMENT

Place: Willkie Farr & Gallagher LLP, c/o Jordan C. Wall, 787 Seventh Avenue, New York,	Date and Time: March 3, 2021 5:00 pm
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Inspection of Premises: **YOU ARE COMMANDED** to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place: Willkie Farr & Gallagher LLP, c/o Jordan C. Wall, 787 Seventh Avenue, New York,	Date and Time:
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The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 02/17/2021

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

/s/ Christine Wee

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* Plaintiff, Russell B. Toomey, who issues or requests this subpoena, are:

Christine K Wee, 3707 North 7th Street, Suite 235, Phoenix, Arizona 85014, CWee@acluaz.org, 602-773-6024

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. 4:19-cv-00035 (RM/LAB)

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____

on *(date)* _____ .

I served the subpoena by delivering a copy to the named person as follows: _____

_____ on *(date)* _____ ; or

I returned the subpoena unexecuted because: _____

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day’s attendance, and the mileage allowed by law, in the amount of \$ _____ .

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

Server’s signature

Printed name and title

Server’s address

Additional information regarding attempted service, etc.:

Print

Save As...

Add Attachment

Reset

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)**(c) Place of Compliance.**

(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
 - (i) is a party or a party's officer; or
 - (ii) is commanded to attend a trial and would not incur substantial expense.

(2) For Other Discovery. A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

- (i) disclosing a trade secret or other confidential research, development, or commercial information; or

- (ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

SCHEDULE A

REQUESTS FOR PRODUCTION¹

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2
3
4 1. All documents created or transmitted from January 1, 2011, to the present
5 regarding surgery to treat gender dysphoria (also referred to as “transition related” surgery,
6 “sex reassignment” surgery, “gender reassignment” surgery, “sex change,” “transgender
7 surgery” or “transsexual surgery”), including but not limited to documents regarding
8 insurance coverage for such surgeries in health insurance plans administered by the
9 Arizona Department of Administration, Medicaid, Medicare, or any other government
10 health care program.
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26 _____
27 ¹ These requests are subject to the Definitions and Instructions listed in Exhibits 1 and 2,
28 and Exhibit 3, which are also attached.

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EXHIBIT 1

DEFINITIONS

1. The term “regarding” and its cognates are to be understood in its broadest sense and each means concerning, constituting, identifying, evidencing, summarizing, commenting upon, referring to, relating to, arising out of, describing, digesting, reporting, listing, analyzing, studying, discussing, stating, setting forth, reflecting, interpreting, concerning, recording, including, negating, manifesting, containing or comprising the subject matter identified.

2. The terms “document” and “documents” shall have the broadest meaning allowable under the Rules and applicable case law, and shall include without limitation, electronically stored information and written, printed, typed, recorded, or graphic matter of every kind and description, both originals and copies and all attachments and appendices thereto. Without limiting the foregoing, the terms “document” and “documents” shall include all agreements, contracts, applications, communications, interoffice or intraoffice correspondence, books, letters, telegrams, telexes, messages, memoranda, records, reports, books, summaries, electronic mail, texts, chats, records of telephone conversations or interviews, summaries or other records of personal conversations, minutes or summaries or other records of personal meetings and conferences, summaries or other records of meetings and conferences, summaries, entries, calendars, appointment books, time records, instructions, work assignments, visitor records, forecasts, statistical data, statistical statements, work sheets, drafts, graphs, maps, charts, tables, marginal notations, notebooks,

1 telephone bills or records, bills, statements and records of obligation and expenditure,
2 invoices, lists, journals, advertising, recommendations, files, printouts, compilations,
3 tabulations, purchase orders, receipts, sell orders, confirmations, checks, letters of credit,
4 envelopes or folders or similar containers, vouchers, analyses, studies, surveys, transcripts
5 of hearings, transcripts of testimony, expense reports, microfilm, microfiche, articles,
6 speeches, tape or disc recordings, sound recordings, video recordings, film, tapes,
7 photographs, punch cards, programs, data compilations from which information can be
8 obtained (including matter used in data processing), and other printed, written, handwritten,
9 typewritten, recorded, stenographic, computer-generated, or electronically stored matter
10 (or printouts thereof), however and by whomever produced, prepared, reproduced,
11 disseminated, or made.
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EXHIBIT 2
INSTRUCTIONS

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3 1. If You object to any specific request in whole or in part, state with
4 particularity each objection, the basis for it, and the categories of information to which the
5 objection applies. You must respond to any portion of a request to which You do not object.

6
7 2. If You fail to produce a document or provide information requested on the
8 grounds that such document or information is no longer in Your possession, custody, or
9 control, You shall state what disposition was made of that document or information,
10 including, when applicable, the circumstances of any loss or destruction of such document
11 or information.

12
13 3. Each document requested should be produced in its entirety without deletion
14 or redactions, except as subject to applicable privileges, regardless of whether You
15 consider the entire document to be responsive to these requests or relevant to the claims.

16
17 4. You are required to respond to this Request by drawing upon all materials in
18 Your possession, custody, or control. These sources include, but are not limited to, Your
19 employees, successors, assigns, agents, advisors, accountants, experts, representatives,
20 attorneys and/or consultants, or anyone else acting or purporting to act on Your behalf or
21 remote computing system (such as SharePoint or Gmail) with whom You maintain or
22 maintained an account.

23
24 5. If any document requested is withheld on the grounds of privilege or
25 otherwise, You shall provide a log with the following information relating to each
26 document or portion of a document withheld:
27
28

- 1 a. the kind of document (e.g., memorandum, letter, notes, etc.);
- 2 b. the date of the document or, if no date appears thereon, the
- 3 approximate date the document was prepared;
- 4 c. the identity of the author(s);
- 5 d. the identity of the Person(s) to whom the document is addressed;
- 6 e. the identity of any other recipients of the document that appear on the
- 7 document as having received a copy;
- 8 f. the identity of any attachments to the documents and whether the
- 9 attachments have been produced;
- 10 g. the subject matter or the information contained in the document;
- 11 h. the nature of the privilege or immunity asserted, including the
- 12 attorney and client involved, and the grounds for withholding the
- 13 document; and
- 14
- 15
- 16
- 17 i. the number of pages of the document.

18 If You fail to set forth a sufficient factual basis for the assertion of any claim of privilege
19 or protection, then any arguable claim or privilege or protection shall be waived.

20 Compliance with the above instructions is not to be construed as an admission by Plaintiff
21 that such privilege or protection is valid, and Plaintiff reserves his right to challenge any
22 purported claim of privilege or protection.
23

24 6. If You believe that only a portion of a document is protected by an applicable
25 privilege, the non-privileged portion shall be produced with the allegedly privileged
26 portion redacted and indicated as such. You shall provide the information set forth in
27

1 Instruction No. 5 for each such redaction. Any attachment to an allegedly privileged
2 document shall be produced unless You also contend that the attachment is privileged, in
3 which case the information required in Instruction No. 5 shall be provided separately for
4 each such attachment.
5

6 7. If any documents requested were at one time in existence but no longer are,
7 please so state, specifying in detail for each document: (a) the document type, (b) a specific
8 description of the subject matter of the document, (c) the date upon which the document
9 ceased to exist, (d) the identity of each Person having knowledge of the circumstances
10 under which the document ceased to exist, and (e) the identity of each Person having
11 knowledge or who had knowledge of the contents thereof.
12

13 8. Each Request for Production set forth herein is a request for the original (or
14 copy when the original is not available) of the final version of such document(s), as well
15 as non-identical copies by reason of notations or markings.
16

17 9. The Request for Production set forth herein may call for production of the
18 same document. The presence of such duplication is not intended and shall not be
19 interpreted to narrow or limit in any way the scope of each individual Request for
20 Production set forth herein.
21

22 10. The documents or tangible things produced in response hereto shall be
23 segregated and clearly marked or labeled so as to correspond to the specific production
24 request to which such documents or tangible things are responsive and are being produced.
25 Alternatively, such documents or tangible things shall be produced as they are kept in the
26 usual course of business, including the production of files from which such documents or
27
28

1 tangible things are taken.

2 11. Information shall not be withheld merely because such information is stored
3 electronically (e.g., word processing files, electronic mail, databases, accounting
4 information, and spreadsheets).

5
6 12. In addition to physical documents or objects, each Request for Production set
7 forth herein specifically calls for the production of electronic or magnetic data responsive
8 to the Request, including data that has been deleted.

9
10 13. Each Request for Production set forth herein calls for the following methods
11 of production:

12 a. *Hard Copy Documents.* (i) All black and white hard copy documents will be
13 scanned and produced in electronic form. The hard copy documents shall be
14 converted to a single page TIFF images and produced following the same
15 protocol set forth herein or otherwise agreed to by the parties. (ii) Images of
16 all file labels, file headings, and file folders associated with any hard copy
17 document will be produced with the images of the hard copy documents. (iii)
18 Document breaks for paper documents shall be based on Logical Document
19 Determination (or “LDD”) rather than on physical document breaks. (iv) The
20 database load file shall include the following fields: BEGBATES,
21 ENDBATES, BEGATTACH, ENDATTACH, CUSTODIAN,
22 REDACTED, and CDVOLUME.

23
24
25
26 b. *Metadata Fields and Processing.* Each of the metadata and coding fields set
27 forth in Exhibit 3 that can be extracted shall be produced for that document.
28

1 The parties are not obligated to manually populate any of the fields in Exhibit
2 3 if such fields cannot be extracted from a document, with the exception of
3 the following: BEGBATES, ENDBATES, BEGATTACH, ENDATTACH,
4 and CUSTODIAN. The parties will make reasonable efforts to ensure that
5 metadata fields automatically extracted from the documents are correct.
6

7 c. *TIFFs*. Single page Group IV TIFFs should be provided, at least 300 dots per
8 inch (dpi). Single page TIFF images should be named according to the unique
9 bates number, followed by the extension “.TIF”. Original document
10 orientation should be maintained (*i.e.*, portrait to portrait and landscape to
11 landscape).
12

13 d. *Text Files*. For each document originating in electronic format, a separate
14 text file containing the full text of each document should be provided with a
15 file with the TIFF images and a file with the document metadata. Text of
16 native files should be extracted directly from the native file. The text file
17 should be named according to the unique bates number, followed by the
18 extension “.TXT.” The parties agree that the full text and/or OCR of any
19 document will not be contained within a database load file, but rather as a
20 standalone file with each text file containing the text for an entire single
21 document.
22

23
24 e. *Database Load Files*. An ASCII delimited data file (.txt, .dat, or .csv) that
25 can be loaded into commercially acceptable database software (*e.g.*,
26 Concordance). The first line of each text file must contain a header row
27
28

1 identifying each data field by name. Each document within the database load
2 file must contain the same number of fields as identified in the header row.

- 3 f. *Cross-Reference Image File Registration.* An image load file that can be
4 loaded into commercially acceptable production software (e.g., Opticon,
5 iPro). Each TIFF in a production must be referenced in the corresponding
6 image load file. An exemplar load file format is below.

8 ABC0000001,PROD001,\\IMAGES\001\ABC0000001.tif,Y,,,2
9 ABC0000002,PROD001,\\IMAGES\001\ABC0000002.tif,,,,
10 ABC0000003,PROD001,\\IMAGES\001\ABC0000003.tif,Y,,,1

- 11 g. *Bates Numbering.* All images must be assigned a unique and sequential Bates
12 Number. Each party agrees to use the same Bates Numbering format through
13 its entire production unless a new Bates format is necessary, at which point
14 the party using the new Bates Numbering format will inform the other party
15 of the change.

- 17 h. *Protective Order Designations.* Any document(s) determined by the
18 producing party to fall within the scope of a protective order shall have the
19 appropriate level of designated language (i.e., CONFIDENTIAL,
20 ATTORNEYS' EYES ONLY, OUTSIDE COUNSEL RESTRICTED, etc.)
21 afforded by the protective order endorsed on each TIFF image of said
22 document(s).

- 24 i. *Native File Productions.* The parties agree that when producing a native file,
25 they will include a TIFF image as a placeholder for the file to represent the
26 file in the production set. The TIFF image placeholder for a native file should
27

1 be branded with a unique Bates number and state “See Native Document” on
2 the TIFF image. The native file should then be renamed to match the Bates
3 number assigned to the document with its original file extension. The
4 filename field produced in the production load file that reflects the original
5 metadata should maintain the original file name. If a native file falls within
6 the scope of a protective order (*see* paragraph (h), above), then the
7 appropriate designation is to be included in the filename along with the
8 assigned Bates number (*i.e.*, ABC000001_CONFIDENTIAL.xls).

9
10
11 j. *Microsoft Office files, WordPerfect, and other standard documents (e.g.,*
12 *Google Docs and PDF documents).* MS Office files, WordPerfect, other
13 standard documents, such as PDF documents, will be converted to single-
14 page TIFF images and produced consistent with the specifications herein. If
15 the document contains comments or tracked changes, then the TIFF images
16 shall be generated to include the comments or track changes contained in the
17 file.
18

19
20 k. *Email and attachments.* E-mail and attachments should be converted to
21 single-page TIFF images and produced consistent with the specifications
22 provided herein. Attachments shall be processed as separate documents, and
23 the text database load file shall include a field in which the producing party
24 shall identify the production range of all attachments of each e-mail.
25

26 l. *Microsoft PowerPoint and other Presentation Files.* The parties shall process
27 presentations (*e.g.*, MS PowerPoint, Google Presently) to include hidden
28

1 slides and speaker's notes by imaging in a way that both the slide and the
2 speaker's notes display on the TIFF image.

3 m. *Spreadsheets.* The parties shall produce spreadsheets (*e.g.*, MS Excel,
4 Google Trix) in native format where available. *See paragraph (i) above.* If a
5 spreadsheet requires redaction, the parties will use native file redaction
6 applications (*e.g.*, Blackout).

7
8 n. *Good Cause for Additional Native Files.* If good cause exists to request
9 production of specified files in native format, then the party may request such
10 production and provide an explanation of the need for native file review.

11
12 o. *Other Documents or Data.* If production of certain structured or other
13 electronic data that is not easily converted to static TIFF images, such as
14 databases, CAD drawings, GIS data, videos, audio files, websites, social
15 media, then the parties will meet and confer to discuss an appropriate form
16 of production.

17
18 p. *Social media and other web-based content.* The production of social media
19 or other web-based content should be converted to single-page TIFF images
20 and produced consistent with the specifications provided herein. If the social
21 media and/or web-based content cannot be produced in single-page TIFF
22 images, then the parties shall meet and confer to discuss a form of production.
23 Further, the parties will also confer regarding the specific web location of the
24 social media or other web-based content and agree upon the available
25 metadata that can be produced therewith.
26
27
28

1 q. *Color Documents.* Parties will produce documents in black and white, unless
2 to do so would alter or obscure the substance of the document. A party may
3 request that a reasonable number of documents be produced in a color format
4 upon review of the other party's production.in single page JPEG format.
5

6 r. *Redactions.* In the event that a document requires redaction, the parties agree
7 the native file, if applicable, will be excluded from the production. In
8 addition, any redacted text will be omitted from the full text and/or OCR, and
9 any corresponding metadata fields from the production. The TIFF image will
10 readily identify the redactions.
11

12 s. *Production Media.* Documents and electronically stored information ("ESI")
13 shall be produced on optical media (CD or DVD), external hard drives, or
14 via an FTP site, or similar, readily accessible electronic media.
15

16 t. *Encryption.* Industry-standard encryption tools and practices must be used
17 when transferring data between parties. Passwords must be at least 8
18 characters with a mix of character sets and sent in a separate communication
19 from the encrypted data.
20

21 Among other places, You shall search for electronic documents stored on all servers,
22 networks, hard drives, desktop computers, notebook computers, personal digital devices,
23 all back-up storage media or devices, and with any third-party cloud providers. Each
24 responsive Document shall be produced in its entirety. In producing documents, if an
25 identical copy appears in more than one Person's files, You shall either (1) produce each
26 copy or (2) provide the names of each Custodian in the "Custodian" field.
27
28

1 14. Documents not otherwise responsive to this request shall be produced if such
2 documents concern the documents that are responsive to the request or if such documents
3 are attached to documents called for by these requests and constitute routing slips,
4 transmittal memoranda, letters, emails, comments, evaluations, or similar materials.
5

6 15. Your response to this Request for Production should not be delayed if they
7 cannot be fully complied with by the date set for the presentation of documents for any
8 reason, including, but not limited to, the assertion of any privilege, interposition of any
9 objection, ongoing investigation, or current unavailability of documents. All available
10 documents should be produced on the date set for presentation, and any unavailable
11 documents should be produced as soon as they become available.
12

13 16. This Request for Production are deemed to be continuing in nature so as to
14 require that You supplement Your response if You obtain or discover additional
15 information or documents between the time of the initial response and the time of hearing
16 or trial herein. This paragraph shall not be construed to alter any obligation to comply with
17 all other instructions in this Request for Production.
18

19 17. Plaintiff hereby expressly reserves the right to supplement this Request for
20 Production and to propound new requests, to the extent permitted by applicable law and
21 rules.
22

23 18. In construing any request, instruction or definition, the singular form of a
24 word shall include the plural and the plural form of a word shall include the singular.
25

26 19. The connectives “and” and “or” shall be construed disjunctively or
27 conjunctively as necessary to bring within the scope of the request all documents that might
28

1 otherwise be construed to be outside of its scope.

2 20. The terms “all” and “each” shall be construed as all and each, as necessary
3 to bring within the scope of the request all information that might otherwise be construed
4 to be outside of its scope.
5

6 21. Plaintiff is willing to meet and confer in good faith with respect to any
7 objections set forth by You.
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RELEVANT TIME PERIOD

1. The relevant Time Period for this Request for Production shall be through the date of production, unless otherwise specified.

EXHIBIT 3**METADATA FIELDS**

The production load files produced by You must contain the following metadata fields. Fields with an asterisk (*) are not required to be populated if they otherwise contain redacted material.

Field Name	Field Description
BEGBATES	The first Bates number as stamped on the production image
ENDBATES	The last Bates number as stamped on the production image
BEGATTACH	The first Bates number of the first document in a family
ENDATTACH	The last Bates number of the last document in a family
ATTACH COUNT	The number of attachments in a family
CUSTODIAN	The individual or organization (e.g. company name) from whom the document was collected
RECORD TYPE	The type of document (e.g., Email, Attachment, Edoc)
FILE EXTENSION	The file extension of the document (e.g., .pdf, .doc, .xls, etc.)
PATH*	The full file, folder, or directory structure from which the document was collected.
HASH MD5	The MD5 or SHA-1 hash value
NATIVE PATH*	The path to the native file produced (e.g., Excel files)
SUBJECT*	The subject line of an email
DATE SENT	The date an email was sent (format: MM/DD/YYYY)
TIME SENT	The time an email was sent
TIME RECEIVED	The time an email was received
FAMILY_DATE	The date of the parent document of the family to which the document belongs

TO	The name(s) and email address(es) of the recipient(s) in the “To” line of an email
FROM	The name and email address of the sender of an email
CC	The name(s) and email address(es) of the recipient(s) in the “CC” line of an email
BCC	The name(s) and email address(es) of the recipient(s) in the “BCC” line of an email
AUTHOR	Any value populated in the author field in the file properties of an electronic document
TITLE*	The title of an electronic document.
FILE NAME*	The filename of an electronic document
FILE LENGTH	The size of an electronic document in bytes
DATE LAST MODIFIED	The date an electronic document was last modified (format: MM/DD/YYYY)
TIME LAST MODIFIED	The time an electronic document was last modified
CREATE DATE	The date an electronic document was created (format: MM/DD/YYYY)
CREATE TIME	The time an electronic document was created
PAGE COUNT	The number of pages in a document
TIME ZONE	Eastern Standard Time

CERTIFICATE OF SERVICE

I, Christine K. Wee, hereby certify that on February 17, 2021 I served the foregoing

Notice of Subpoena to Defendants via email:

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/s/ Christine K. Wee
Christine K. Wee

EXHIBIT 3

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6 Kaysey L. Fung (032585)
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8 Attorneys for The Office of
Governor Douglas A. Ducey

9
10 **UNITED STATES DISTRICT COURT**
11 **DISTRICT OF ARIZONA**

12
13 Russell B. Toomey,
14 Plaintiff,
15 vs.
16 State of Arizona, et al.,
17 Defendants.

Case No: 4:19-cv-00035

**THE OFFICE OF GOVERNOR
DOUGLAS A. DUCEY'S RESPONSE
AND OBJECTIONS TO SUBPOENA
TO PRODUCE DOCUMENTS,
INFORMATION, OR OBJECTS OR
TO PERMIT INSPECTION OF
PREMISES IN A CIVIL ACTION**

(Assigned to the Honorable Rosemary Márquez)

19 Pursuant to Federal Rule of Civil Procedure 45, non-party The Office of Governor
20 Douglas A. Ducey (the "Governor's Office") responds and objects to the Subpoena to
21 Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil
22 Action ("Subpoena"), dated February 17, 2021, issued by Plaintiff Russell B. Toomey as
23 follows:

24 **GENERAL OBJECTIONS TO THE SUBPOENA**

25 1. The Governor's Office objects to the Subpoena to the extent it seeks to create
26 or impose duties for the Governor's office beyond those set forth in Federal Rule of Civil
27 Procedure ("Rule") 45. By way of example, the Governor's Office objects to the Subpoena
28 on the grounds that it purports to require the Governor's Office to produce documents at a

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1 location in New York, which is located more than 100 miles away from the Governor's
2 Office or where the Governor's Office regularly transacts business, in violation of Rule 45.
3 *See* Fed. R. Civ. P. 45(c)(2). The Governor's Office further objects to Instructions 1, 2, 4, 5,
4 6, 7, 12 and 13, contained in Exhibit 2 to the Subpoena, and to the Metadata Fields,
5 contained in Exhibit 3 to the Subpoena, on the grounds that they purport to impose duties
6 upon the Governor's Office that are beyond the obligations of Rule 45 and for which literal
7 compliance would require undue and unnecessary burden and expense. *See* Fed. R. Civ. P.
8 45(d)(1). The Governor's Office will produce non-privileged documents responsive to the
9 Subpoena as multiple-page .PDF images, in searchable text format, bearing sequential Bates
10 Numbering.

11 2. The Governor's Office objects to the Subpoena to the extent that it seeks
12 information reasonably available to Plaintiff from sources, including the named Defendants
13 in this action, which are more appropriate recipients of Plaintiff's requests and less
14 burdensome and expensive for the Governor's Office, as a non-party to the litigation. *See*,
15 *e.g.*, Fed. R. Civ. P. 45(d)(1); Fed. R. Civ. P. 26(b)(2)(C)(i). The Governor's Office similarly
16 objects to the Subpoena to the extent that it seeks information that is duplicative of
17 information already produced to the Plaintiff from such sources. *See, e.g.*, Fed. R. Civ. P.
18 45(d)(1); Fed. R. Civ. P. 26(b)(2)(C)(i).

19 3. The Governor's Office objects to the Subpoena to the extent it seeks
20 documents and information that are protected from discovery by statutory or common law
21 privileges, including but not limited to the attorney-client privilege, work-product protection,
22 deliberative process and/or executive communications privilege, and/or common-interest
23 privilege. *See* Fed. R. Civ. P. 45(e)(2); Fed. R. Civ. P. 26(b)(1) (limiting discovery to
24 "nonprivileged matter[s]"); *see also, e.g.*, A.R.S. § 12-2234(B) (recognizing attorney-client
25 privilege extends to governmental entities and their counsel); *In re Sealed Case*, 121 F.3d 729,
26 741, 747-53 (D.D.C. 1997), *Capital Info. Grp. v. Office of Governor*, 923 P.2d 29, 33 (Ala. 1996),
27 *Republican Party of N.M. v. N.M. Taxation & Revenue Dep't*, 283 P.3d 853, 868 (N.M. 2012), and
28 *Freedom Foundation v. Gregoire*, 310 P.3d 1252, 1259 (Wash. 2013) (recognizing the executive

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1 privilege, which grants chief executives qualified power to maintain confidentiality of certain
 2 internal governmental communications); *Ariz. Indep. Redistricting Comm'n v. Fields*, 206 Ariz.
 3 130, 142, ¶ 37, 75 P.3d 1088, 1100 (App. 2003) (quoting Restatement (Third) of Law
 4 Governing Lawyers § 76, cmt. e) and *Lund v. Donahoe*, 227 Ariz. 572, 580, ¶ 30, 261 P.3d 456,
 5 464 (App. 2011) (recognizing that parties sharing a common legal, factual or strategic interest
 6 may enjoy a common interest privilege to permit the sharing of privileged attorney-client and
 7 work-product communications). The Governor's Office further objects to Instruction 4,
 8 attached at Exhibit 2 to the Subpoena, to the extent it purports to require the Governor's
 9 Office to divulge privileged or otherwise protected communications in response to the
 10 Subpoena. In responding to the Subpoena, the Governor's Office does not, nor does it
 11 intend to, waive any applicable privileges or protections from discovery afforded under the
 12 Rules or applicable law. The Governor's Office's response to the Subpoena is not to be
 13 construed as a relinquishment or waiver, express or implied of any such privileges or
 14 protections.

15 4. The Governor's Office objects to Instructions 5-6, attached at Exhibit 2 to the
 16 Subpoena, to the extent they seek to impose broad obligations on the Governor's Office
 17 beyond those required under the Rules with respect to an assertion of privilege. *Compare, e.g.,*
 18 Fed. R. Civ. P. 45(e)(2)(A)(ii) *with* Instructions 5-6. The Governor's Office will comply with
 19 Rule 45 regarding any assertion of privilege.

20 5. The Governor's Office further objects to the definition of "document" and
 21 "documents," included in Exhibit 1 to the Subpoena, and Instruction 12, contained in
 22 Exhibit 2 to the Subpoena, to the extent they purport to require the production of source
 23 code, file fragments, programs, data compilations, backup storage media and other sources
 24 of electronically stored data that are not reasonably accessible to the Governor's Office due
 25 to undue burden or cost, and for which the Governor's Office is not obligated to search and
 26 produce under the Rules.

27 6. The Governor's Office objects to the Subpoena to the extent it seeks "all"
 28 documents or communications relating to the subject of a particular request. Where the

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1 Governor’s Office is producing documents responsive to the Subpoena, it has made good-
2 faith, reasonable efforts to locate and provide documents and things in its possession,
3 custody and control reasonably responsive to the Subpoena, and has searched those places
4 reasonably likely to contain the documents.

5 7. The Governor’s Office objects to the Subpoena to the extent it seeks
6 information or materials not within its possession, custody or control. In particular, the
7 Governor’s Office objects to Instruction 4, attached at Exhibit 2 to the Subpoena, to the
8 extent it seeks to impose obligations upon the Governor’s Office to search for information
9 and materials from broad categories of individuals and from remote computing systems
10 affiliated in some manner, at some time, with the Office of Governor, but over whom the
11 Governor’s Office has no control and/or from which the Governor’s Office is not obligated
12 to search for responsive information or materials. The Governor’s Office will respond to
13 the Subpoena based on the documents within its current possession, custody or control.

14 8. The Governor’s Office objects to Instruction 16, contained in Exhibit 2 to the
15 Subpoena, to the extent it suggests that the Subpoena is “continuing in nature,” and
16 purports to require supplementation of the Governor’s Office’s response to the Subpoena.
17 This Instruction exceeds the duties imposed under Rule 45. The Governor’s Office will
18 comply with Rule 45 with respect to responding to the Subpoena.

19 9. The Governor’s Office has made reasonable efforts to respond to the
20 Subpoena to the extent it has not been objected to, as the Governor’s Office understands
21 and interprets the Subpoena. In responding to the Subpoena, the Governor’s Office does
22 not, nor does it intend to, waive any privileges, objections or protections from discovery
23 afforded under the applicable law or Rules. The Governor’s Office response herein is not to
24 be construed as a relinquishment, waiver, express or implied, of such privileges, objections
25 or protections.

26 **RESPONSE AND OBJECTIONS TO THE SPECIFIC REQUEST**

27 Subject to and without waiver of these General Objections, the Governor’s Office
28 responds to Plaintiff’s specific request as follows:

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1 1. All documents created or transmitted from January 1, 2011, to the present
2 regarding surgery to treat gender dysphoria (also referred to as “transition related” surgery,
3 “sex reassignment” surgery, “gender reassignment” surgery, “sex change,” “transgender
4 surgery” or “transsexual surgery”), including but not limited to documents regarding
5 insurance coverage for such surgeries in health insurance plans administered by the Arizona
6 Department of Administration, Medicaid, Medicare, or any other government health care
7 program.

8 **Objection:** The Governor’s Office incorporates by reference General Objections 1
9 through 9, *supra*. The Governor’s Office further objects that the time frame covered by the
10 request is unreasonable and overbroad, as the request seeks documents that pre-date (by
11 approximately 4 years) the date upon which Governor Douglas A. Ducey was sworn into
12 office on January 5, 2015. Accordingly, the Governor’s Office’s response to this request is
13 necessarily limited in temporal scope to documents created or transmitted between January
14 5, 2015 and the present.

15 Subject to the foregoing objections and without waiver thereof, the Governor’s
16 Office has made good-faith, reasonable efforts to locate documents responsive to the
17 request. The Governor’s Office is producing with this response the resulting non-privileged
18 documents responsive to this request. *See* GOV000001-GOV000405. If any additional
19 responsive, non-privileged documents are located, the Governor’s Office will supplement
20 this response. The Governor’s Office will further produce a privilege log describing the
21 materials withheld, consistent with Rule 45(e)(2)(A).

22 DATED this 10th day of March, 2021.

23 **COHEN DOWD QUIGLEY**
24 The Camelback Esplanade One
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26 Phoenix, Arizona 85016
27 Attorneys for The Office of
28 Governor Douglas A. Ducey

By: /s/ Daniel G. Dowd
Daniel G. Dowd
Betsy J. Lamm
Kaysey L. Fung

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1 A COPY of the foregoing was sent by
2 electronic mail on March 10, 2021 to:

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9 cwee@acluaz.org

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11 Leslie Cooper
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10 /s/ Betsy J. Lamm

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EXHIBIT 4

Privilege Log of the Office of Governor Douglas A. Ducey

re: Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action

Document Date	Document Type	Author/Sender	Recipients	Subject	Privilege Assertion
5/11/2015	Email Correspondence and Attachments	Gina Relkin	Mike Liburdi, Matt Devlin, Monica Coury	Public Records Requests	Attorney-Client Privilege; Executive Communications Privilege; Common Interest Privilege
6/17/2015	Email Correspondence and Attachments	Gerrie Marks	Christina Corieri	Healthcare Plans	Executive Communications Privilege
10/14/2015	Email Correspondence and Attachment	Gina Relkin	Christina Corieri, Tom Betlach, Beth Kohler, Monica Coury, Mike Liburdi, Matt Devlin	Affordable Care Act	Attorney-Client Privilege; Executive Communications Privilege; Common Interest Privilege
10/15/2015	Email Correspondence	Christina Corieri	Gina Relkin, Tom Betlach, Beth Kohler, Monica Coury, Mike Liburdi, Matt Devlin	Affordable Care Act	Attorney-Client Privilege; Executive Communications Privilege
10/15/2015	Email Correspondence	Gina Relkin	Christina Corieri, Tom Betlach, Beth Kohler, Monica Coury, Mike Liburdi, Matt Devlin	Affordable Care Act	Attorney-Client Privilege; Executive Communications Privilege
6/8/2016	Email Correspondence	Dawn Northup	John Fry, Nicole Ong Colyer, Mike Liburdi	Recent Litigation	Attorney-Client Privilege; Executive Communications Privilege; Common Interest Privilege
6/8/2016	Email Correspondence	Nicole Ong Colyer	Dawn Northup, John Fry, Mike Liburdi	Recent Litigation	Attorney-Client Privilege; Executive Communications Privilege; Common Interest Privilege
8/26/2016	Email Correspondence and Attachment	Dominic Draye	Mike Liburdi	Potential Litigation	Attorney-Client Privilege; Executive Communications Privilege
9/1/2016	Email Correspondence and Attachment	Kathryn Hackett King	Christina Corieri	Potential Litigation	Attorney-Client Privilege; Executive Communications Privilege
9/12/2016	Email Correspondence and Attachment	Kathryn Hackett King	Mike Liburdi	Potential Litigation	Attorney-Client Privilege; Executive Communications Privilege
10/12/2016	Email Correspondence	Monica Coury	Daniel Ruiz, Christina Corieri	Media Response	Executive Communications Privilege
10/12/2016	Email Correspondence	Christina Corieri	Monica Coury, Daniel Ruiz	Media Response	Executive Communications Privilege
10/12/2016	Email Correspondence	Christina Corieri	Daniel Scarpinato, Mike Liburdi	Media Response	Attorney-Client Privilege; Executive Communications Privilege

Privilege Log of the Office of Governor Douglas A. Ducey

re: Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action

Document Date	Document Type	Author/Sender	Recipients	Subject	Privilege Assertion
10/12/2016	Email Correspondence	Monica Coury	Christina Corieri	Media Response	Executive Communications Privilege
10/12/2016	Email Correspondence	Mike Liburdi	Daniel Scarpinato, Christina Corieri	Media Response	Attorney-Client Privilege; Executive Communications Privilege
10/12/2016	Email Correspondence	Monica Coury	Christina Corieri, Daniel Ruiz, Kathryn Hackett King, Matt Devlin, Beth Kohler	Media Response	Attorney-Client Privilege; Executive Communications Privilege; Common Interest Privilege
10/12/2016	Email Correspondence	Beth Kohler	Monica Coury, Christina Corieri, Daniel Ruiz, Matt Devlin, Kathryn Hackett King	Media Response	Attorney-Client Privilege; Executive Communications Privilege; Common Interest Privilege
10/12/2016	Email Correspondence	Kathryn Hackett King	Mike Liburdi, Christina Corieri, Daniel Ruiz	Media Response	Attorney-Client Privilege; Executive Communications Privilege
10/12/2016	Email Correspondence	Daniel Ruiz	Kathryn Hackett King, Mike Liburdi, Christina Corieri, Daniel Scarpinato	Media Response	Attorney-Client Privilege; Executive Communications Privilege
10/12/2016	Email Correspondence	Mike Liburdi	Daniel Ruiz, Christina Corieri, Daniel Scarpinato, Kathryn Hackett King	Media Response	Attorney-Client Privilege; Executive Communications Privilege
10/13/2016	Email Correspondence	Kathryn Hackett King	Mike Liburdi, Christina Corieri, Daniel Ruiz, Daniel Scarpinato	Media Response	Attorney-Client Privilege; Executive Communications Privilege
10/13/2016	Email Correspondence	Daniel Scarpinato	Mike Liburdi, Kathryn Hackett King, Christina Corieri, Daniel Ruiz	Media Response	Attorney-Client Privilege; Executive Communications Privilege
10/13/2016	Email Correspondence	Daniel Ruiz	Mike Liburdi, Kathryn Hackett King, Daniel Scarpinato, Christina Corieri	Media Response	Attorney-Client Privilege; Executive Communications Privilege
10/13/2016	Email Correspondence	Christina Corieri	Mike Liburdi, Kathryn Hackett King, Daniel Scarpinato, Daniel Ruiz	Media Response	Attorney-Client Privilege; Executive Communications Privilege
10/13/2016	Email Correspondence	Christina Corieri	Danny Seiden	Media Response	Attorney-Client Privilege; Executive Communications Privilege
10/13/2016	Email Correspondence	Daniel Scarpinato	Mike Liburdi, Kathryn Hackett King, Daniel Ruiz, Christina Corieri	Media Response	Attorney-Client Privilege; Executive Communications Privilege

Privilege Log of the Office of Governor Douglas A. Ducey

re: Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action

Document Date	Document Type	Author/Sender	Recipients	Subject	Privilege Assertion
10/13/2016	Email Correspondence	Daniel Ruiz	Beth Kohler, Monica Coury, Christina Corieri, Kathryn Hackett King, Matt Devlin	Media Response	Attorney-Client Privilege; Executive Communications Privilege; Common Interest Privilege
10/13/2016	Email Correspondence	Monica Coury	Daniel Ruiz, Beth Kohler, Christina Corieri, Kathryn Hackett King, Matt Devlin	Media Response	Attorney-Client Privilege; Executive Communications Privilege; Common Interest Privilege
10/14/2016	Email Correspondence	Monica Coury	Christina Corieri, Daniel Ruiz	Media Response	Executive Communications Privilege
10/14/2016	Email Correspondence	Christina Corieri	Monica Coury, Daniel Ruiz	Media Response	Executive Communications Privilege
10/14/2016	Email Correspondence	Daniel Ruiz	Monica Coury, Christina Corieri	Media Response	Executive Communications Privilege
10/14/2016	Email Correspondence	Monica Coury	Christina Corieri, Daniel Ruiz	Media Response	Executive Communications Privilege
10/14/2016	Email Correspondence and Attachment	Dominic Draye	Mike Liburdi	Potential Litigation	Attorney-Client Privilege; Executive Communications Privilege
10/18/2016	Email Correspondence and Attachment	Michael Bailey	Mike Liburdi	Recent Litigation	Attorney-Client Privilege; Executive Communications Privilege
11/25/2016	Email Correspondence	Marie Isaacson	Christina Corieri, Nicole Ong Colyer	Affordable Care Act	Attorney-Client Privilege; Executive Communications Privilege; Common Interest Privilege
11/28/2016	Email Correspondence	Christina Corieri	Mike Liburdi	Affordable Care Act	Attorney-Client Privilege; Executive Communications Privilege
11/28/2016	Email Correspondence	Christina Corieri	Marie Isaacson, Nicole Ong Colyer	Affordable Care Act	Attorney-Client Privilege; Executive Communications Privilege; Common Interest Privilege
11/28/2016	Email Correspondence	Marie Isaacson	Christina Corieri	Affordable Care Act	Executive Communications Privilege
12/14/2016	Email Correspondence	Marie Isaacson	Christina Corieri	Affordable Care Act	Executive Communications Privilege
12/15/2016	Email Correspondence	Christina Corieri	Marie Isaacson	Affordable Care Act	Executive Communications Privilege

Privilege Log of the Office of Governor Douglas A. Ducey

re: Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action

Document Date	Document Type	Author/Sender	Recipients	Subject	Privilege Assertion
12/15/2016	Email Correspondence	Marie Isaacson	Christina Corieri, Scott Bender, Nicole Ong Colyer	Affordable Care Act	Attorney-Client Privilege; Executive Communications Privilege; Common Interest Privilege
1/1/2017	Email Correspondence and Attachment	Rusty Crandell	Mike Liburdi, Dominic Draye	Recent Litigation	Attorney-Client Privilege; Executive Communications Privilege
1/17/2017	Email Correspondence and Attachment	Art Harding	Christina Corieri, Tim Roemer	Department of Corrections	Executive Communications Privilege
1/18/2017	Email Correspondence	Christopher Vinyard	Christina Corieri	Administrative Code	Executive Communications Privilege
1/19/2017	Email Correspondence	Beth Kohler	Christina Corieri	Media Response	Executive Communications Privilege
1/19/2017	Email Correspondence	Christina Corieri	Katie Fischer, Daniel Ruiz	Media Response	Executive Communications Privilege
1/19/2017	Email Correspondence	Christina Corieri	Beth Kohler	Media Response	Executive Communications Privilege
1/19/2017	Email Correspondence	Beth Kohler	Christina Corieri, Laura Raymond	Media Response	Executive Communications Privilege
1/19/2017	Email Correspondence	Beth Kohler	Christina Corieri, Daniel Ruiz	Media Response	Executive Communications Privilege
1/23/2017	Email Correspondence	Daniel Ruiz	Christina Corieri, Andrew Wilder, Beth Kohler	Proposed Legislation	Executive Communications Privilege
1/23/2017	Email Correspondence	Danny Seiden	Gretchen Conger, Christina Corieri, Katie Fischer	Proposed Legislation	Executive Communications Privilege
1/23/2017	Email Correspondence	Christina Corieri	Daniel Seiden, Gretchen Conger, Katie Fischer	Proposed Legislation	Executive Communications Privilege
1/24/2017	Email Correspondence	Aaron Favreau	Christina Corieri	Proposed Legislation	Executive Communications Privilege
1/24/2017	Email Correspondence	Christina Corieri	Aaron Favreau	Proposed Legislation	Executive Communications Privilege
1/25/2017	Email Correspondence	Tim Roemer	Christina Corieri	Proposed Legislation	Executive Communications Privilege
2/6/2019	Email Correspondence and Attachment	Nicole Colyer	Christina Corieri	Toomey v. State of AZ, et al.	Attorney-Client Privilege; Executive Communications Privilege
6/26/2019	Email Correspondence and Attachment	Anni Foster	Daniel Scarpinato, Gretchen Conger, Patrick Ptak, Daniel Ruiz, Gilbert Davidson, Katie Fischer, Christina Corieri	Toomey v. State of AZ, et al.	Attorney-Client Privilege; Executive Communications Privilege

Privilege Log of the Office of Governor Douglas A. Ducey

re: Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action

Document Date	Document Type	Author/Sender	Recipients	Subject	Privilege Assertion
10/1/2019	Email Correspondence and Attachment	Nicole Colyer	Christina Corieri, Anni Foster	Toomey v. State of AZ, et al.	Attorney-Client Privilege; Executive Communications Privilege
8/6/2020	Email Correspondence	Jami Snyder	Christina Corieri	Healthcare Coverage	Executive Communications Privilege
8/6/2020	Email Correspondence	Anni Foster	Christina Corieri	DH v Snyder	Attorney-Client Privilege; Executive Communications Privilege
8/6/2020	Email Correspondence	Jami Snyder	Christina Corieri	Administrative Code	Executive Communications Privilege
9/28/2020	Email Correspondence and Attachments	Matthew Devlin	Anni Foster, Christina Corieri, Nicole Sornsin	DH v Snyder	Attorney-Client Privilege; Attorney Work Product; Common Interest Privilege
9/28/2020	Email Correspondence	Anni Foster	Matthew Devlin, Christina Corieri, Nicole Sornsin	DH v Snyder	Attorney-Client Privilege; Attorney Work Product; Common Interest Privilege
9/28/2020	Email Correspondence	Matthew Devlin	Anni Foster, Christina Corieri, Nicole Sornsin	DH v Snyder	Attorney-Client Privilege; Attorney Work Product; Common Interest Privilege
9/28/2020	Email Correspondence	Nicole Sornsin	Matthew Devlin, Kimberly Suci, Anni Foster, Christina Corieri	DH v Snyder	Attorney-Client Privilege; Attorney Work Product; Common Interest Privilege
9/28/2020	Email Correspondence	Anni Foster	Matthew Devlin, Christina Corieri, Nicole Sornsin	DH v Snyder	Attorney-Client Privilege; Attorney Work Product; Common Interest Privilege

EXHIBIT 5

WILLKIE FARR & GALLAGHER^{LLP}

1875 K Street, N.W.
Washington, DC 20006-1238

Tel: 202 303 1000
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April 19, 2021

VIA EMAIL

Daniel G. Dowd, Esq.
Betsy J. Lamm, Esq.
Kaysey L. Fung, Esq.
Cohen Dowd Quigley
2425 East Camelback Road, Suite 1100
Phoenix, Arizona 85016

Re: *Russell B. Toomey, v. State of Arizona, et al*, No. CV-19-00035-TUC-RM (LAB)

Dear Daniel, Betsy and Kaysey:

We write with respect to The Office of Governor Douglas A. Ducey (the “Governor’s Office”) Responses and Objections dated March 10, 2021 (the “Governor’s Responses and Objections”) to Dr. Toomey’s Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action, served February 17, 2021 (“Plaintiff’s Subpoena”), the Governor’s Office production of documents on March 10, 2021 (“Governor’s Production”), and the privilege log for the Governor’s Production dated March 10, 2021 (the “Privilege Log”).

I. THE GOVERNOR’S RESPONSES AND OBJECTIONS

The Governor’s Responses and Objections indicate that they are withholding non-privileged documents responsive to Plaintiff’s Subpoena that are relevant to claims and defenses asserted in this matter. The Governor’s Office does not provide a reasonable justification for withholding these documents, reciting instead mere boilerplate objections, lacking all specificity. This is plainly inadequate. See *Norton v. Arpaio*, No. CV-15-00087-PHX-SPL, 2016 WL 11513612, at *1 (D. Ariz. Aug. 4, 2016). The Governor’s Office cannot shield such responsive documents through the mere assertion of rote objections to production.

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The Governor's Office asserts several General Objections without reasonable, credible, or specific bases. We address each in turn.

A. Governor's General Objections

The Governor's Office asserts that it should be treated differently than State Defendants on the basis that it is a third-party to this litigation. This is improper and disingenuous. The State of Arizona is a named defendant in this lawsuit, and the State acts through its agents and instrumentalities, including the Governor's Office. In fact, as you are no doubt aware, at the center of this litigation is a decision made by agents of the Governor's Office to maintain the State's employee health plan's exclusion of gender reassignment surgery. State Defs.' Responses to Pl.'s Interrogatory No. 4. Multiple ADOA deponents have attested to the fact that the Governor's Office was involved in the decision to maintain the discriminatory exclusion. The Governor's Office is clearly as interested in the result of this litigation as is the Arizona Department of Administration. The Governor's Office cannot pretend to be an uninterested third party for the sole purpose of shielding itself from discovery. Further, the scope of discovery is the same under Rule 45 as it its Rule 26(b). *Evanston Ins. Co. v. Murphy*, No. CV-19-04954-PHX-MTL, 2020 WL 6869292, at *2 (D. Ariz. Nov. 23, 2020). The Governor's Office has been duly served with a subpoena pursuant to Rule 45, and it cannot avoid its obligations thereunder. Any objection purporting to limit the Governor's Office's duty to respond to Plaintiff's subpoena and produce documents responsive thereto is unfounded and improper.

The Governor's Office's claims of undue burden and expense, Dr. Toomey remains willing to discuss ways to minimize such burden, but rejects, without more specific information than thus far provided, that any of its requests are on their face broad, undue or unnecessary.

1. General Objections Nos. 1 and 5

In its General Objections No. 1 and 5, the Governor's Office objects to Plaintiff's Subpoena Instructions 1, 2, 7, 12, 13 and Metadata Fields in Exhibit 3. The Governor's Office merely states (without providing any support) that "compliance [with such request] would require undue and unnecessary burden and expense." (General Objection No. 1). The Governor's Office further asserts (again, without providing any support for such assertion) that it will not produce "source code, file fragments, programs, data compilations, backup storage media and other sources of electronically stored data that are not reasonably accessible to the Governor's Office due to undue burden or cost, for which the Governor's Office is not obligated ... under the Rules." (General Objection No. 5)

Dr. Toomey's Instructions and requests are not unfounded. Electronic and magnetic information are important because they speak to the integrity of the data being produced, provides crucial information about its custodian, who worked on it, as well as editorial information about edits and comments made to the document, for example. *Country Vintner of N. Carolina, LLC v. E. & J. Gallo Winery, Inc.*, 718 F.3d 249 at n.4 (4th Cir. 2013). Here, changes to the Plan offered by the State of Arizona are key to the litigation. Knowing the who, when and how of comments, edits or notes with respect to documents responsive to Plaintiff's Subpoena is central to identify the decision makers in this case. *See Kravetz v. Paul Revere Life Ins. Co.*, No. CV-08-1060-PHX-FJM, 2009 WL 1639736 (D. Ariz. June 11, 2009)

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As counsel is certainly aware, parties in a litigation have long requested electronic documents to be processed and produced along with these pieces of information and it is not unreasonable to ask the Governor's Office to do so here. Unless the Governor's Office provide a reasonable and credible basis for the extra burden and cost relating to compliance with Instructions 1, 2, 7, 12 and 13, Plaintiff does not accede to the Governor's Office's objections.

2. General Objection No. 3 and 4

General Objections Nos. 3 and 4 concern privilege claims asserted by the Governor's Office (addressed further below) and the Governor's Office's objections to Instructions Nos. 5 and 6 of Plaintiff's Subpoena. Instruction No. 5 requires the Governor's Office to provide a detailed log of any withheld material under privilege claims. All information requested therein is relevant for Plaintiff's assessment of the privilege claims asserted by the Governor's Office. In turn, Instruction No. 6 requires the Governor's Office to redact privilege content contained in responsive documents that could otherwise be produced. As it is corollary, privileges are to be asserted narrowly and, when possible, parties should give preference to redactions rather than entirely withholding documents or information. *United States v. Ruehle*, 583 F.3d 600, 607-08 (9th Cir. 2009). Therefore, Dr. Toomey does not accede to Governor's Office's General Objections Nos. 3 and 4.

3. General Objection No. 7

In its General Objection No. 7, the Governor's Office asserts that it will not "search for information and materials from broad categories of individuals and from remote computing systems" on the basis that such documents are not in the Governor's Office's control, as per Instruction No. 4 of Plaintiff's Subpoena. The Governor's Office objection is improper and baseless.

First, the listed categories of individuals in Plaintiff's Subpoena refer specifically to persons that generally figured as agents of the Governor's Office – those "acting or purporting to act on [its] behalf" (Plaintiff's Subpoena, Instruction No. 4) – and do not require the Governor's Office to produce any and all information, but only those concerning transgender people and benefits, including gender reassignment surgery and counselling/hormone therapy in connection therewith. The request for information and materials involving employees and agents of the Governor's Office is relevant and proportionate to the needs of this case. Fed. R. Civ. P. 26(b)(1). Internal communications among state employees regarding transgender people and benefits (as covered by Plaintiff's Subpoena) go to the discriminatory intent animating the Plan's exclusion of coverage for gender reassignment surgery, which is at the heart of Dr. Toomey's dispute with the State, as Magistrate Judge Bowman recognized in her recent report and recommendations to the District Court. Dkt. No. 134, at 6-9 (acknowledging that Dr. Toomey may use discovery to investigate the "circumstances surrounding" the creation of the exclusion, and whether the State's alleged rationale for the exclusion is in fact a "mere pretext" for discrimination). The State Defendants themselves have placed their decision-making process directly at issue, claiming that there are legitimate, non-discriminatory, and non-pretextual reasons for the Plan's exclusion. (Dkt. No. 89 at 28.) Further, as the Governor's Office's counsel is well aware,

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collecting internal communications on this limited range of topics can be easily accomplished by applying search terms across the emails of a limited pool of relevant custodians.

Second, the Governor's Office cannot be excused from searching for information and materials in its "remote computing systems with whom the Governor's Office maintain or maintained an account" (Plaintiff's Subpoena, Instruction No. 4) by broadly asserting that these systems are not under its control. Absent a reasonable justification for not being able to access such computer systems (which has not been provided by the Governor's Office to date), any information and material stored therein is considered to be within the possession, custody, and control of the Governor's Office. For the reasons above, Governor's Office's General Objection No. 7 is improper. Dr. Toomey remains open to further conferring on the Governor's Office's compliance with Plaintiff's Subpoena on this topic.

4. General Objection No. 8

In its General Objection No. 8, the Governor's Office objects to Instruction 16 which requires a supplementation of the Governor's Office's response in case additional information or documentation is obtained after the Governor's Office initial response and before trial of the case in reference. The Governor's Office argues that this would exceed its duties under Rule 45. This objection is unreasonable and may limit discovery of documents that are highly relevant for the outcome of this case.

As previously mentioned, the Governor's Office cannot be treated differently than the State of Arizona, the named defendant. Dr. Toomey will not accept that documents in the Governor's Office possession, custody, or control are not also in the possession, custody, or control of the State of Arizona. Dr. Toomey accepted the suggestion of the State Defendants to send a separate subpoena to the Governor's Office to the extent it is a separate instrumentality or agent of the State Arizona than the Arizona Department of Administration. To the extent the State of Arizona has a continuing obligation to supplement its production (as it does), documents held by the Governor's Office are covered by that continue obligation. Therefore, if at any time before trial the Governor's Office obtains access to documents or information responsive to Plaintiff's Subpoena, the Governor's Office must produce such information.

B. Governor's Office's Specific Objection

1. Request No. 1

The Governor's Office's response and objections to Request No. 1 as "unreasonable and overbroad, as the request seeks documents that pre-date (by approximately 4 years) the date upon which Governor Douglas A. Ducey was sworn into office on January 5, 2015" are unfounded and improper. Request No. 1 is in no way unreasonable or overbroad. The Governor's Office is a State body that retains (and should retain) records of current and former administrations of the government. It is irrelevant whether the information responsive to Plaintiff's Subpoena pertains to the current or former administration. To the extent the Governor's Office is in possession, custody or control of materials and information responsive to Plaintiff's Subpoena, it must produce it. *See Fed. R. Civ. P. 45 (a)(1)(A)(iii).*

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Further, the Governor's Office has not provided any support for its burden objection to this request. If the requested information is kept by the Governor's Office in the ordinary course of business, or if it has been stored in the Governor's Office remote systems, we fail to see how collecting and producing information prior to January 5, 2015 would be burdensome at all (or any more burdensome than looking for information post-January 5, 2015).

II. THE GOVERNOR'S PRODUCTION

On March 10, 2021, the Governor's Office produced documents responsive to Plaintiff's Subpoena (i.e., the "Governor's Production"), consisting of 16 documents, worth of 405 pages, along with the corresponding Privilege Log. The Privilege Log claimed 66 documents to be protected by either the attorney-client privilege, executive communications privilege and common interest privilege. Based on the information provided thus far by the Governor's Office, we believe several of these privilege claims are either unfounded or cannot be asserted in this case.

A. General Issues / Attorney-Client Privilege

Neither the Governor's Responses and Objections, nor their Privilege Log, provides sufficient information about the documents being withheld to permit Dr. Toomey to assess the Governor's Office's privilege claims. The Governor's Office has not identified the name and capacity of the attorneys purportedly involved in each entry on the Privilege Log, and they have not provided a summarized description of the content of the document. This information is necessary and helpful. Fed. R. Civ. P. 26(b)(5)(A)(ii); *see Ctr. for Envtl. Health v. Perdue*, No. 18-CV-01763-RS (TSH) (N.D. Cal. Nov. 18, 2019). The entries on the Privilege Log merely provide, presumably, the subject of the correspondence (*see, e.g.*, Privilege Log, document dated 12/15/2016 ("Affordable Care Act") or 10/12/2016 ("Media Response")) and do not otherwise indicate the attorney on the correspondence. Without this information, it is all but impossible to assess the validity of the Governor's Office's privilege claims. This is improper, and a clear violation of the Federal Rules of Civil Procedure.

B. Executive Communications Privilege Claims

The Governor has improperly withheld documents based on a purported executive communications privilege. Although the Governor cites to cases from state supreme courts recognizing such a privilege under state law, the federal claims in this case are governed by the *federal* common law of privilege. Fed. R. Evid. 501. There is no legal basis in federal common law to apply the executive communications privilege to a state governor. *Walden v. City of Chicago*, No. 04 C 0047, 2009 WL 3679672 (N.D. Ill. Nov. 3, 2009); *Child. First Found., Inc. v. Martinez*, No. CIV. 1:04-CV-0927, 2007 WL 4344915, at *6 n.11 (N.D.N.Y. Dec. 10, 2007); *Hobley v. Chicago Police Commander Burge*, 445 F. Supp. 2d 990, 998 (N.D. Ill. 2006); *see also* 98 C.J.S. Witnesses § 423 at n.3 (March 2021) (finding that "[f]ederal law does not recognize an executive communications privilege for state Governors").

The only form of "executive privilege" applicable to governors under federal law is the "deliberative process" privilege that applies to other governmental actors. *Citizens Union of City of New*

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York v. Att’y Gen. of New York, 269 F. Supp. 3d 124, 157 (S.D.N.Y. 2017). Still, the deliberative process privilege is not available for the Governor’s Office either. As discussed at length in Plaintiff’s Motion to Compel (Dkt. 168), the deliberative-process privilege is only a qualified privilege, and it is easily overcome in this case. *F.T.C. v. Warner Commc’ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). Courts have consistently held that the deliberative process cannot stand in the way of disclosure in civil rights cases when the legitimacy of the government’s motive and decision-making process are directly at issue, which is precisely the focal issue here. Further, there is a significant public interest in the disclosure of the documents, since they will speak to a potential violation of Dr. Toomey’s constitutional and civil rights under the Equal Protection Clause of the Fourteenth Amendment and Title VII of the Civil Rights Act of 1964.

C. Common Interest Privilege Claims

There is no such thing as an independent common interest privilege. The common interests doctrine (also known as “joint defense”) is a rule that provides “an exception to ordinary waiver rules designed to allow attorneys for different clients pursuing a common legal strategy to communicate with each other.” *In re Pac. Pictures Corp.*, 679 F.3d 1121, 1129 (9th Cir. 2012). A shared desire in the outcome of a legal matter does not alone warrant the application of the common interest exception. *Id.* Instead, the parties must make the communication in pursuit of a joint strategy in accordance with some form of agreement—whether written or unwritten. *Id.* “Further, the interest in question must relate to a common legal, as opposed to commercial, interest.” *Kleiman v. Wright*, No. 2:20-CV-00593-BJR, 2020 WL 2473552, at *5 (W.D. Wash. May 13, 2020) (quotations omitted)

As an exception to an ordinary waiver, the common interest privilege will only apply to cases in which there is already a valid, underlying claim of privilege. Fatally, there is no valid, underlying privilege to support the application of the exception here. However, even if the documents are indeed found to be privileged, they do not fall within the common interest privilege exception. The common interest privilege cannot purport to protect any and all disclosure of privileged documents, but only those made “in pursuit of a joint strategy in accordance with some form of agreement.” *In re Pac. Pictures Corp.*, 679 F.3d at 1129; *see also Regents of Univ. of California v. Affymetrix, Inc.*, 326 F.R.D. 275, 279 (S.D. Cal. 2018) (“There must be an on-going and joint effort to set up a common defense strategy for the common interest exception to apply.”) (quotations omitted). The documents withheld by the Governor’s Office date to years prior to the commencement of this lawsuit, or threat thereof. And, as the Governor’s Office concedes this communication was made in order to reach a decision on healthcare coverage for transgender people, clearly outside the scope of a joint strategy for litigation. Therefore, the Governor’s Office’s assertion of a common interest privilege to bar discovery is improper.

Absent additional information from the Governor’s Office in support of their privilege claims, Dr. Toomey will move to compel production of these documents.

* * *

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This letter is not intended to address all of Dr. Toomey's issues with the Governor's Office's responses to Plaintiff's Subpoena, the Governor's Production, or any claim of privilege asserted by it. Nothing in this letter is intended to waive or limit in any way Dr. Toomey's rights to raise other issues not stated here.

We are available to meet and confer on these issues on Wednesday April 21, 2021, or Friday, April 23, 2021. Please let us know when works.

Sincerely,

/s/ Wesley R. Powell
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EXHIBIT 6



COHEN
DOWD
QUIGLEY

April 30, 2021

VIA ELECTRONIC MAIL

Wesley R. Powell
WILLKIE FARR & GALLAGHER LLP
787 Seventh Avenue
New York, New York 10019-6099

Re: Russell B. Toomey v. State of Arizona, et al., United States District Court, District of Arizona Cause No. CV-19-00035-TUC-RM (LAB).

Dear Wesley:

This letter responds to your April 19, 2021 correspondence regarding the Subpoena (the “Subpoena”) Plaintiff served on The Office of Governor Douglas A. Ducey (the “Governor’s Office”) and the Governor’s Office’s March 10, 2021 Response and Objections (the “Subpoena Response”). We have reviewed your letter and carefully considered the assertions made and authorities cited therein. The Governor’s Office provides this detailed response as a foundation for the parties’ upcoming meet and confer session.

As an overarching matter, your letter mistakenly suggests that the Governor’s Office has withheld non-privileged documents relevant to the claims and defenses asserted in the underlying litigation and responsive to the Subpoena. That assertion is inaccurate. The Governor’s Office produced with its Subpoena Response all non-privileged documents responsive to the Subpoena identified as of the date of the production. Since the production, the Governor’s Office has continued to search for additional responsive documents. Consistent with the Subpoena Response, the Governor’s Office will make a supplemental production of the additional, responsive, non-privileged documents located since the date of the original

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production. [See Subpoena Response, p. 5.] To be clear, however, the Governor’s Office has not withheld non-privileged documents as your letter suggests.¹

The Governor’s Office is also not “pretend[ing] to be an uninterested third party for the sole purpose of shielding itself from discovery,” as your letter baselessly asserts. The Governor’s Office is a third party to this lawsuit. Through your counsel, Plaintiff brought claims in this action against the State of Arizona and a number of other defendants. The Plaintiff did not allege claims against the Governor, the Governor’s Office, or individual members of the Governor’s Office. More than two years after filing the initial Complaint and nearly a year after filing the Amended Complaint, Plaintiff served the Governor’s Office with the Subpoena pursuant to Federal Rule of Civil Procedure (“Rule”) 45. Plaintiff’s own actions belie the suggestion that the Governor’s Office may be treated as a party to this litigation or has heightened obligations beyond those of an entity served with a subpoena under Rule 45.

Moreover, while we agree with you that the scope of permissible discovery under Rule 45 has been described as coextensive with Rule 26(b), you are incorrect in suggesting that the burdens that may be imposed upon the Governor’s Office as a nonparty to this litigation are co-extensive with the burdens of an actual litigant. Rule 45 and abundant Ninth Circuit precedent dictate otherwise. *See, e.g.*, Fed. R. Civ. P. 45(d)(1) (mandating “reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena” and requiring the imposition of sanctions, “which may include lost earnings and reasonable attorney’s fees—on a party or attorney who fails to comply”); *see also, e.g., Dart Indus. Co., Inc. v. Westwood Chem. Co., Inc.*, 649 F.2d 646, 649 (9th Cir. 1980) (“While discovery is a valuable right and should not be unnecessarily restricted . . . the ‘necessary’ restriction may be broader when a nonparty is the target of discovery. . . . the more appropriate nomenclature is ‘nonparty’ discovery, not ‘third-party’ discovery, as ‘the word nonparty serves as a constant reminder of the reasons for the limitations that characterize ‘third-party’ discovery.’” (internal citations omitted)); *AmSurg Holdings*

¹ Plaintiff’s citation to *Norton v. Arpaio*, 2016 WL 11513612 (D. Ariz. Aug. 4, 2016) is unhelpful. *Norton* addressed concerns relating to (i) the waiver of objections by failing to timely assert them under Rule 34(b)(2) and (ii) a privilege log lacking any subject matter description. Neither concern is present here.

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Inc. v. Anireddy, 2020 WL 1703617, *2 (D. Ariz. Apr. 8, 2020) (“The mere “relevance” standard, however, does not apply to non-parties. To obtain discovery from a nonparty, a party must demonstrate that its need for discovery outweighs the nonparty’s interest in nondisclosure.” (quoting *R. Prasad Indus. v. Flat Iron Envtl. Solutions Corp.*, No. 2014 WL 2804276, *2 (D. Ariz. June 20, 2014))).

As reflected in the Subpoena Response, the Governor’s Office has worked in good faith to identify, collect and produce non-privileged documents responsive to the Subpoena. The Governor’s Office has similarly stated its objections to the Subpoena to the extent the Subpoena exceeds the bounds of Rule 45 and/or seeks to impose undue and unnecessary burdens upon the Governor’s Office. Contrary to your assertion, the Governor’s Office has not, however, asserted “rote objections” or attempted to shield “responsive documents through the mere assertion of rote objections to production.” Again, your aspersions are both unhelpful and unfounded. Below, we turn to each of the general and specific objections outlined in your letter.

1. General Objections 1 and 5.

General Objection 1 “objects to the Subpoena to the extent it seeks to create or impose duties for the Governor’s Office beyond those set forth in” Rule 45. Among other grounds, General Objection 1 objects to the Subpoena on the basis that it violates Rule 45(c)(2)’s limitation on the location of production. General Objection 1 and 5 further objects to the Subpoena’s instructions, definitions, and exhibits, which purport to require the Governor’s Office to produce responsive materials in a particular format, for which literal compliance would require, *inter alia*, (i) the production of hard copy files, converted to .TIFF images; (ii) the extraction of certain information for inclusion in the database load files; (iii) the creation of text files for each responsive document, separate and apart from any “full text” or “OCR” of any document contained in database load files; and (iv) database load files inclusive of 30 separate metadata fields. [See Subpoena, Instructions 12-13 & Exhibit 3.] This production specification (which appears to be “rote” and not designed for the nature or volume of the materials responsive to the Subpoena) violates Rule 45’s mandate to not impose undue burden or expense on a person subject to a subpoena or its prohibition on seeking documents in multiple formats. See Fed. R. Civ. P. 45(e)(1). Moreover, actual compliance with these multi-page instructions would

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require the retention of a third-party vendor and payment of both an hourly rate for tech time, as well as per document or per page charges for the metadata and branding outlined in the Subpoena. We are happy to meet and confer with you regarding these costs and Plaintiff's appetite for paying them. *See, e.g., Legal Voice v. Stormans Inc.*, 738 F.3d 1178, 1184-85 (9th Cir. 2013) (agreeing that Rule 45(d) "requires the district court to shift a non-party's costs of compliance with a subpoena, if those costs are significant" and recognizing that costs of \$9,000 and \$20,000 are significant).²

2. General Objections 3 and 4.

General Objection 3 objects to the Subpoena "to the extent it seeks documents and information that are protected from discovery by statutory or common law privileges, including but not limited to the attorney-client privilege, work-product protection, deliberative process and/or executive communications privilege, and/or common-interest privilege." [Subpoena Response, p. 2.] General Objection 4, in turn, objects to the Subpoena's instructions to the extent they purport to require the Governor's Office to provide information concerning privileged materials that exceed the requirements under Rule 45. The Subpoena Response complies with Rule 45 and provides the requisite information concerning documents withheld from the Governor's Office's production on privilege grounds. The real issue, it seems, is Plaintiff's challenge of the assertions of privilege in the first instance. We address each below.

² Plaintiff's effort to equate the obligations or practice of "parties in a litigation" with demands upon a nonparty is misguided. Reliance on inapposite cases involving disputes between parties to a lawsuit also does not support Plaintiff's position against the Governor's Office. *See Country Vitner of N. Carolina, LLC v. E. & J. Gallow Winery, Inc.*, 718 F.3d 249, 257-61 (4th Cir. 2013) (addressing taxable costs available to a prevailing party under 28 U.S.C. § 1920); *Kravetz v. Paul Revere Life Ins. Co.*, 2009 WL 1639736, *1 (D. Ariz. June 11, 2009) (addressing relevance of electronically stored information contained on plaintiff's computers—not substantive documents themselves—to assessing plaintiff's hours worked following an alleged injury).

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a. Attorney-Client Privilege

On the issue of privilege, your letter first questions the assertion of the attorney-client privilege, claiming that Plaintiff is unable to identify from the privilege log the attorney involved on each communication. Given the length this action has been pending and the discovery pre-dating service of the Subpoena, this assertion does not appear credible or to have been made in good faith. While it seems unnecessary to do so, particularly in view of what we understood to be your familiarity with this action, we identify the following attorneys, whose names appear on the privilege log:

- Anni Foster, General Counsel for the Governor's Office;
- Nicole Ong Colyer, Deputy General Counsel for the Governor's Office and former General Counsel for the Arizona Department of Administration;
- Hon. Mike Liburdi, former General Counsel for the Governor's Office;
- Kathryn Hackett King, former Deputy General Counsel for the Governor's Office;
- John Fry, Section Chief Counsel – Employment Law Section, Arizona Attorney General's Office;
- Rusty Crandall, Deputy Solicitor General, Arizona Attorney General's Office;
- Dominic Draye, former Solicitor General and Deputy Solicitor General, Arizona Attorney General's Office;
- Michael Bailey, former Deputy Chief of Staff, Arizona Attorney General's Office;
- Nicole Sornsins, General Counsel for Arizona Department of Administration and Chair of Governor's Regulatory Review Counsel;
- Kimberly Suciu, Associate General Counsel for Arizona Department of Administration;
- Dawn Northup, General Counsel for Arizona Department of Corrections;
- Matt Devlin, General Counsel for Arizona Health Care Cost Containment System; and
- Gina Relkin, Deputy General Counsel for Arizona Health Care Cost Containment System.

The only entry on the Governor's Office's Privilege Log for which attorney-client privilege is identified, but which does not identify an attorney relates to an October 13, 2016 email from Christina Corieri to Danny Seiden. In that email, Ms. Corieri is

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forwarding privileged communications with Mr. Liburdi and Ms. King to Mr. Seiden, then Deputy Chief of Staff for the Governor's Office. We will revise the privilege log to reflect that clarification.

b. Executive Communications Privilege

Your letter next challenges the Governor's Office's assertion of the executive communications privilege, alleging that "[t]here is no legal basis in federal common law to apply the executive communications privilege to a state governor."³ We respectfully disagree.

The executive communications privilege is rooted in the separation of powers doctrine and "recognizes that a chief executive has a qualified power to keep confidential certain internal governmental communications so as to protect the deliberative and mental processes of decision-makers." *Doe v. Alaska Superior Court, Third Judicial Dist.*, 721 P.2d 617, 622–23 (Alaska 1986); *United States v. Nixon*, 418 U.S. 683, 708 (1974) ("The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution."). The executive communications privilege is founded upon "the necessity of candor" from advisors in order to provide the chief executive "and those who assist him [or her] ... [with] freedom to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." *Am. Civil Liberties Union v. Dep't of Justice*, 2011 WL 10657342, *10 (D.D.C. Feb. 14, 2011) (quoting *Nixon*, 418 U.S. at 708); accord *Nixon*, 418 U.S. at 708 (addressing the expectation of confidentiality of communications with the President which, has "all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking").

³ To be clear, the Governor's Office asserted the executive communications privilege and/or deliberative process privilege, as some courts have used those terms interchangeably. Both are forms of the executive privilege. See *U.S. Fish & Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777, 785 (2021). At a minimum, even if a court were to find that the executive communications privilege does not apply to the Governor's Office, the deliberative process privilege most certainly applies.

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The privilege has been recognized by federal and state courts across the country.⁴ *See, e.g., In re Sealed Case*, 121 F.3d 729, 744 (D.C. Cir. 1997) (recognizing a “presidential communications privilege” when the President is “asked to produce documents or other materials that reflect presidential decisionmaking and deliberations and that the President believes should remain confidential.”); *Judicial Watch, Inc. v. Dep’t of Justice*, 365 F.3d 1108, 1114 (D.C.Cir. 2004) (recognizing the privilege extends to White House advisors formulating policy for the chief executive); *Doe*, 721 P.2d at 623 (“the public policy rationale upon which the Supreme Court relied in *United States v. Nixon* is equally applicable to our state government”); *Freedom Foundation v. Gregoire*, 310 P.3d 1252, 1261-62 (Wash. 2013) (reasoning that the executive privilege, rooted in separation of powers concerns, ensures a governor’s access to frank advice in order to executive his constitutional duties); *Republican Party of New Mexico v. New Mexico Taxation and Revenue Dep’t*, 283 P.3d 853, 868 (N.M. 2012) (extending executive communications privilege to policy communications about activities or matters before the Governor’s Office).

Moreover, the United States District Court for the District of Arizona has applied the executive communications privilege to communications such as those at issue here involving the Governor’s Office. *See Merritt v. State*, CV17-04540-PHX-DGC (D. Ariz. March 19, 2018) (Doc. 62 at ¶ 2(b)) (Order upholding the Governor’s Office’s assertion of executive communications privilege and permitting privileged information to be withheld subject to preparation of a privilege log). As confirmed by Judge Campbell, the rationale for recognizing the executive communications privilege applies with full force to communications with the Governor and those

⁴ Although federal common law applies to privilege claims in connection with the federal causes of action Plaintiff has asserted in the underlying litigation, *see, e.g., Fed. R. Evid. 501; Clarke v. Am. Com. Nat. Bank*, 974 F.2d 127, 129 (9th Cir. 1992), cases decided by state courts are not irrelevant to the analysis. *See, e.g., Tennenbaum v. Deloitte & Touche*, 77 F.3d 337, 340 (9th Cir. 1996) (looking first to federal common law of privilege, but noting that the court may also look to state privilege law if it is enlightening); *Lewis v. United States*, 517 F.2d 236, 237 (9th Cir.1975) (“In determining the federal law of privilege in a federal question case, absent a controlling statute, a federal court may consider state privilege law.”).

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assisting the Governor in making decisions and shaping policy.⁵ Similar to the United States Constitution, the Arizona Constitution firmly embraces – indeed firmly requires – separation of powers. *See Mecham v. Gordon*, 156 Ariz. 297, 300, 751 P.2d 957, 960 (1988) (“Nowhere in the United States is [separation of powers] more explicitly and firmly expressed than in Arizona.”). The communications at issue are precisely the type that are made to “foster sound gubernatorial deliberations, policymaking, or decision-making,” *see Gregoire*, 310 P.3d at 1256, and are communications expressly within the Governor’s obligations under the Arizona Constitution. *See* Ariz. Const. art. 5, § 4.

The executive communications privilege is also not automatically overcome by allegations of misconduct, as such a rule would effectively eviscerate the privilege. *See In re Sealed Case*, 121 F.3d at 746 (“a party seeking to overcome the presidential privilege seemingly must always provide a focused demonstration of need, even when there are allegations of misconduct by high-level officials”). A focused showing of need has not been made with respect to the documents demanded of the Governor’s Office. Moreover, even if Plaintiff is able to provide a “focused demonstration of need,” the materials are not simply released to the Plaintiff. Rather, the court “should then proceed to review the documents *in camera* to excise non-relevant material.” *Protect Democracy Project, Inc. v. U.S. Nat’l Sec. Agency*, 453 F. Supp. 3d 339, 349 (D.D.C. 2020), *hearing in banc denied sub nom. Protect Democracy Project, Inc. v. Nat’l Sec. Agency*, 2020 WL 4135125 (D.C. Cir. July 7, 2020) (*citing In re Sealed Case*, 121 F.3d at 745).⁶

⁵ Judge Campbell’s Order in *Merritt* was decided several years after his Order addressing the deliberative process privilege in *Arizona Dream Act Coalition v. Brewer* (relied upon by the Magistrate in her April 20, 2021 Order granting Plaintiff’s motion to compel documents from the State Defendants). As such, while the Governor’s Office is cognizant of the discussion in *Brewer*, that case does not override the more on-point Order in *Merritt*. Indeed, like *Merritt* and unlike *Brewer*, the Governor’s Office is not a party to the underlying litigation and is asserting not merely the deliberative process privilege, but also the executive communications privilege.

⁶ Reliance on Arizona’s “policy in favor of full and open disclosure, as evidenced by Arizona’s open meetings law,” as referenced in the Magistrate’s April 20, 2021 Order, is also unavailing – particularly where the privilege at issue is grounded in constitutional separation of powers principles. *See Gregoire*, 310 P.3d at

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c. Common Interest Privilege

Your letter next argues – without apposite authority – that the Governor’s Office cannot assert a common interest privilege with respect to attorney-client privileged communications involving counsel for the Governor’s Office, counsel for the State, and/or counsel for State agencies. Again we respectfully disagree. As an initial matter, for each communication for which the Governor’s Office has asserted a common interest privilege, the Governor’s Office has also properly asserted attorney-client privilege. Plaintiff’s statement that there is “no valid, underlying privilege to support the application of the” common interest privilege is incorrect.

Plaintiff’s suggestion that the privilege does not apply to communications pre-dating the commencement of this lawsuit (or threat of the lawsuit) is also incorrect. The common interest privilege is not limited to “joint defense” situations “or even situations in which litigation has commenced.” *See, e.g., U.S. v. Gonzalez*, 559 F.3d 974, 978 (9th Cir. 2012) (holding that common interest agreement “may be implied from conduct and situation, such as attorneys exchanging confidential communications from clients who are or potentially may be codefendants or have common interests in litigation”); *see also, e.g., id.* at 980 (noting that there is no requirement that parties asserting a common interest privilege be defendants in the same action, explaining that “parties in separate actions might nonetheless have reasons to work together toward a common objective, and there is no requirement that actual litigation even be in progress”). Moreover, the “common interests” to which the privilege extends are not limited to “legal” interests, but may also be “factual or strategic in character.” *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76, cmt. e; *see also, e.g., Hunydee v. U.S.*, 355 F.2d 183, 185 (9th Cir. 1965) (affirming that communications may be protected by the common interest privilege, “even though exchanged between attorneys... to the extent they

1257-58 (rejecting argument that public records laws enacted to “ensure governmental transparency” can overcome executive communications privilege; reasoning that executive communications privilege is a constitutional privilege that supersedes any such laws).

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concern common issues and are intended to facilitate representation in possible subsequent proceedings”).⁷

In addition, as the Subpoena was not narrowly tailored to retrieve only documents relevant to Plaintiff’s claims and the Defendants’ defenses, multiple documents identified on the privilege log relate to other lawsuits, claims or common interests separate and apart from Plaintiff’s lawsuit. The fact that they are included on the privilege log is not an acknowledgement that they are relevant to this case. And, critically, the fact that they relate to legal matters or interests separate and apart from Plaintiff’s lawsuit does not somehow undermine the privileges that attach to the communications.

Finally, based on the considerations set forth herein and in your letter, as we noted on April 23, 2021, we are re-reviewing each of the documents for which the Governor’s Office asserted privilege. As soon as that review is complete, we will provide you with any resulting revisions to the Governor’s Office’s privilege log, as well as any appropriate supplemental production.

3. General Objection 7.

General Objection 7 “objects to the Subpoena to the extent it seeks information or materials not within [the Governor’s Office’s] possession, custody or control.” This Objection further clarifies that Instruction 4, as literally drafted, purports to require the Governor’s Office to search for information from categories of individuals or computing systems over which the Governor’s Office no longer has possession, custody or control, or even never had control (e.g., those “purporting to act” on its behalf). [See Subpoena Response, p. 4.] While your letter argues at some length that

⁷ *In re Pac. Pictures Corp.*, 679 F.3d 1121 (9th Cir. 2012) (involving a crime victim’s voluntary waiver of privileged information in response to a government subpoena), *Kleiman v. Wright*, 2020 WL 2473552, *5 (W.D. Wash. May 13, 2020) (rejecting “litigation liaison” argument as grounds for asserting attorney-client and common interest privileges), and *Regents of Univ. of California v. Affymetrix, Inc.*, 326 F.R.D. 275, 280–81 (S.D. Cal. 2018) (holding that party had not met burden of establishing application of common interest privilege where party to the communications was not represented by counsel) are inapposite.

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Plaintiff should be entitled to discovery regarding his claims, it does not provide any authority for the proposition that the Governor's Office must produce materials outside of its possession, custody or control.⁸ If you have any such authority, please provide it. Moreover, while we are willing to confer regarding the information Plaintiff seeks through this Instruction, we suspect there is no actual dispute as to the scope of permissible discovery under Rule 45. *See, e.g.*, Fed. R. Civ. P. 45(a)(1)(A)(iii) (allowing subpoena to seek documents "in that person's possession, custody, or control"). And, unless Plaintiff seeks to exceed the bounds of Rule 45, we suspect there is likewise no actual dispute regarding General Objection 7.

4. General Objection 8.

General Objection 8 objects to Instruction 16 to the extent it suggests, contrary to Rule 45, that the specific document request in the Subpoena is continuing in nature. While your letter asserts that the objection is "unreasonable," Plaintiff provides no authority for his position that a nonparty is required to supplement a subpoena response beyond the parameters set forth under Rule 45 or Rule 26(e). *See* Fed. R. Civ. P. 26(e)(1) (which requires supplementation only by court order or "if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing" (emphasis added)). The Governor's Office is under no duty to continually supplement its Subpoena Response.

5. Specific Objections.

In addition to incorporating the General Objections, the Governor's Office objected to the Subpoena as overbroad and unreasonable to the extent it seeks documents over a more than ten-year period, including approximately 4 years prior to the date upon which Governor Ducey was sworn into office. We understand that this

⁸ Thank you for providing on April 22, 2021 the litigation documents cited at page 2 of your letter. Those documents, while helpful for counsel's general understanding of the relevant issues in this litigation, do not support the specific discovery demands upon the Governor's Office for which you cited the documents or that exceed the scope of permissible discovery under Rule 45.

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timeframe was addressed prior to the Governor's Office's retention of outside counsel in this matter [*see* February 25-26, 2021 Email Correspondence between Nicole Colyer and Christine Wee], yet your letter characterizes the objection as "unreasonable." To be clear, the Governor's Office's agreement to search for responsive documents across a more than six-year period is not what is unreasonable. What is unreasonable here is Plaintiff's demand for documents that predate by more than four years (i) Governor Ducey's election to office; (ii) the appointment of the members of Governor Ducey's staff whom Plaintiff alleges have information relevant to the claims and defenses in this action;⁹ and (iii) the issuance of the health insurance plan we understand to be at the center of Plaintiff's claims. Plaintiff's demand for documents over a ten-year period, without any apparent effort to narrow those documents to the claims and defenses at issue in this litigation, is improper. *See, e.g., Moon v. SCP Pool Corp.*, 232 F.R.D. 633, 637-38 (C.D. Cal. 2005) (holding that subpoena requests seeking "all documents" over a ten year period were overbroad and improper); *see also Oyenik v. Corizon Health Inc.*, 2014 WL 12787872, *2 (D. Ariz. Nov. 20, 2014) (holding that subpoena not tailored to plaintiff's claims and defendant's defenses was facially overbroad and demonstrated that Plaintiff was "trying to engage in a 'fishing expedition'"); *BBK Tobacco & Foods LLP v. Skunk Inc.*, 2020 WL 2395104, *4 (D. Ariz. May 12, 2020) (reasoning that plaintiff's failure to limit subpoena to relevant time period – instead seeking documents both well-before and well-after the start of the alleged relevant conduct – created undue burden).

As set forth in the Subpoena Response and addressed further herein, the Governor's Office has made substantial and good-faith efforts to locate documents responsive to the Subpoena, and has produced non-privileged documents resulting from its search. Moreover, the Governor's Office has continued to search for additional potentially responsive documents and will supplement its production with additional non-privileged documents as soon as its review is complete and the supplemental documents are processed. The Governor's Office has complied with its obligations under the Rules and, in particular, Rule 45.

⁹ The discovery response cited at page 2 of your letter and provided to us on April 22, 2021 identifies Mr. Liburdi and Ms. Corieri as the individuals with knowledge of the issues identified in the discovery requests. Mr. Liburdi and Ms. Corieri did not begin their positions at the Governor's Office until 2015.

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After your good-faith consideration of these matters, we look forward to discussing them with you.

Very truly yours,

A handwritten signature in blue ink that reads "Betsy Lamm". The signature is written in a cursive, flowing style.

Daniel G. Dowd
Betsy J. Lamm

EXHIBIT 7

Toomey v. State of Arizona, et al.
Amended and Supplemental Privilege Log of the Office of Governor Douglas A. Ducey
Re: Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action

Document Date	Document Type	Author/Sender	Recipients	Subject	Privilege Assertion	Additional Bases for Withholding
5/11/2015	Email Correspondence and Attachments	Gina Relkin	Mike Liburdi, Matt Devlin, Monica Coury	Public Records Requests	Attorney-Client Privilege; Common Interest Privilege	Irrelevant ¹
6/17/2015	Email Correspondence and Attachments	Gerrie Marks	Christina Corieri	Healthcare Plans	Executive Communications Privilege ²	Irrelevant
10/14/2015	Email Correspondence and Attachment	Gina Relkin	Christina Corieri, Tom Betlach, Beth Kohler, Monica Coury, Mike Liburdi, Matt Devlin	Affordable Care Act	Attorney-Client Privilege; Attorney Work Product; Executive Communications Privilege; Common Interest Privilege	Irrelevant
6/8/2016	Email Correspondence	Dawn Northup	John Fry, Nicole Ong Colyer, Mike Liburdi	Recent Litigation	Attorney-Client Privilege; Executive Communications Privilege; Common Interest Privilege	Irrelevant
6/8/2016	Email Correspondence	Nicole Ong Colyer	Dawn Northup, John Fry, Mike Liburdi	Recent Litigation	Attorney-Client Privilege; Executive Communications Privilege; Common Interest Privilege	Irrelevant
8/20/2016	Email Correspondence and Attachment	Dominic Draye	Mike Liburdi, John Lopez, Rusty Crandall	Potential Litigation	Attorney-Client Privilege; Attorney Work-Product	Irrelevant
8/26/2016	Email Correspondence and Attachment	Dominic Draye	Mike Liburdi	Potential Litigation	Attorney-Client Privilege; Executive Communications Privilege	Irrelevant

¹ Documents bearing an “Irrelevant” notation are technically responsive to the broad scope of the Subpoena, but not relevant to the claims and defenses the Governor’s Office understands have been asserted in *Russell B. Toomey v. State of Arizona, et al.*, United States District Court for the District of Arizona, Case No. CV 19-0035-TUC-RM (LAB) (concerning the self-funded health plan provided to employees of the State of Arizona).

² For documents bearing an “Executive Communications Privilege” notation, the Governor’s Office has asserted the executive communications privilege and/or deliberative process privilege, both of which are forms of executive privilege. At minimum, if the Court concludes an executive communications privilege does not apply to the documents, the deliberative process privilege applies.

Document Date	Document Type	Author/Sender	Recipients	Subject	Privilege Assertion	Additional Bases for Withholding
9/1/2016	Email Correspondence and Attachment	Kathryn Hackett King	Christina Corieri	Potential Litigation	Attorney-Client Privilege; Executive Communications Privilege	Irrelevant
9/12/2016	Email Correspondence and Attachment	Kathryn Hackett King	Mike Liburdi	Potential Litigation	Attorney-Client Privilege; Executive Communications Privilege	Irrelevant
10/12/2016	Email Correspondence	Christina Corieri	Daniel Scarpinato, Mike Liburdi	Media Response	Attorney-Client Privilege	Irrelevant
10/12/2016	Email Correspondence	Mike Liburdi	Daniel Scarpinato, Christina Corieri	Media Response	Attorney-Client Privilege	Irrelevant
10/12/2016	Email Correspondence	Monica Coury	Christina Corieri, Daniel Ruiz, Kathryn Hackett King, Matt Devlin, Beth Kohler	Media Response	Attorney-Client Privilege; Common Interest Privilege	Irrelevant
10/12/2016	Email Correspondence	Beth Kohler	Monica Coury, Christina Corieri, Daniel Ruiz, Matt Devlin, Kathryn Hackett King	Media Response	Attorney-Client Privilege; Common Interest Privilege	Irrelevant
10/12/2016	Email Correspondence	Kathryn Hackett King	Mike Liburdi, Christina Corieri, Daniel Ruiz	Media Response	Attorney-Client Privilege	Irrelevant
10/12/2016	Email Correspondence	Daniel Ruiz	Kathryn Hackett King, Mike Liburdi, Christina Corieri, Daniel Scarpinato	Media Response	Attorney-Client Privilege	Irrelevant
10/12/2016	Email Correspondence	Mike Liburdi	Daniel Ruiz, Christina Corieri, Daniel Scarpinato, Kathryn Hackett King	Media Response	Attorney-Client Privilege	Irrelevant
10/13/2016	Email Correspondence	Kathryn Hackett King	Mike Liburdi, Christina Corieri, Daniel Ruiz, Daniel Scarpinato	Media Response	Attorney-Client Privilege	Irrelevant
10/13/2016	Email Correspondence	Daniel Scarpinato	Mike Liburdi, Kathryn Hackett King, Christina Corieri, Daniel Ruiz	Media Response	Attorney-Client Privilege	Irrelevant
10/13/2016	Email Correspondence	Daniel Ruiz	Mike Liburdi, Kathryn Hackett King, Daniel Scarpinato, Christina Corieri	Media Response	Attorney-Client Privilege	Irrelevant

Document Date	Document Type	Author/Sender	Recipients	Subject	Privilege Assertion	Additional Bases for Withholding
10/13/2016	Email Correspondence	Christina Corieri	Mike Liburdi, Kathryn Hackett King, Daniel Scarpinato, Daniel Ruiz	Media Response	Attorney-Client Privilege	Irrelevant
10/13/2016	Email Correspondence	Christina Corieri	Danny Seiden	Forwarding attorney-client communication with M. Liburdi and K. King re: Media Response	Attorney-Client Privilege	Irrelevant
10/13/2016	Email Correspondence	Daniel Scarpinato	Mike Liburdi, Kathryn Hackett King, Daniel Ruiz, Christina Corieri	Media Response	Attorney-Client Privilege	Irrelevant
10/13/2016	Email Correspondence	Daniel Ruiz	Beth Kohler, Monica Coury, Christina Corieri, Kathryn Hackett King, Matt Devlin	Media Response	Attorney-Client Privilege; Common Interest Privilege	Irrelevant
10/13/2016	Email Correspondence	Monica Coury	Daniel Ruiz, Beth Kohler, Christina Corieri, Kathryn Hackett King, Matt Devlin	Media Response	Attorney-Client Privilege; Common Interest Privilege	Irrelevant
10/14/2016	Email Correspondence and Attachment	Dominic Draye	Mike Liburdi	Potential Litigation	Attorney-Client Privilege; Executive Communications Privilege	Irrelevant
10/18/2016	Email Correspondence and Attachment	Michael Bailey	Mike Liburdi	Recent Litigation	Attorney-Client Privilege	Irrelevant
11/25/2016	Email Correspondence	Marie Isaacson	Christina Corieri, Nicole Ong Colyer	Affordable Care Act	Attorney-Client Privilege; Executive Communications Privilege; Common Interest Privilege	Already Produced by the State Defendants per Court Order
11/28/2016	Email Correspondence	Christina Corieri	Mike Liburdi	Affordable Care Act	Attorney-Client Privilege; Executive Communications Privilege	
11/28/2016	Email Correspondence	Christina Corieri	Marie Isaacson, Nicole Ong Colyer	Affordable Care Act	Attorney-Client Privilege; Executive Communications Privilege; Common Interest Privilege	Already Produced by the State Defendants per Court Order

Document Date	Document Type	Author/Sender	Recipients	Subject	Privilege Assertion	Additional Bases for Withholding
11/28/2016	Email Correspondence	Marie Isaacson	Christina Corieri	Affordable Care Act	Executive Communications Privilege	Already Produced by the State Defendants per Court Order
12/14/2016	Email Correspondence	Marie Isaacson	Christina Corieri	Affordable Care Act	Executive Communications Privilege	Already Produced by the State Defendants per Court Order
12/15/2016	Email Correspondence	Christina Corieri	Marie Isaacson	Affordable Care Act	Executive Communications Privilege	Already Produced by the State Defendants per Court Order
12/15/2016	Email Correspondence	Marie Isaacson	Christina Corieri, Scott Bender, Nicole Ong Colyer	Affordable Care Act	Attorney-Client Privilege; Executive Communications Privilege; Common Interest Privilege	Already Produced by the State Defendants per Court Order
1/1/2017	Email Correspondence and Attachment	Rusty Crandell	Mike Liburdi, Dominic Draye	Recent Litigation	Attorney-Client Privilege	Irrelevant
1/17/2017	Email Correspondence and Attachment	Art Harding	Christina Corieri, Tim Roemer	Department of Corrections	Executive Communications Privilege	Irrelevant
1/18/2017	Email Correspondence	Christopher Vinyard	Christina Corieri	Administrative Code	Executive Communications Privilege	Irrelevant
1/22/2017	Email Correspondence	Katie Fischer	Gretchen Conger, Daniel Seiden	House Bill	Executive Communications Privilege	Irrelevant
1/23/2017	Email Correspondence	Gretchen Conger	Katie Fischer, Daniel Seiden	House Bill	Executive Communications Privilege	Irrelevant
1/23/2017	Email Correspondence	Katie Fischer	Gretchen Conger, Daniel Seiden	House Bill	Executive Communications Privilege	Irrelevant
1/23/2017	Email Correspondence	Danny Seiden	Gretchen Conger, Christina Corieri, Katie Fischer	Proposed Legislation	Executive Communications Privilege	Irrelevant
1/23/2017	Email Correspondence	Gretchen Conger	Katie Fischer, Daniel Seiden	Proposed Legislation	Executive Communications Privilege	Irrelevant
1/23/2017	Email Correspondence	Christina Corieri	Daniel Seiden, Gretchen Conger, Katie Fischer	Proposed Legislation	Executive Communications Privilege	Irrelevant

Document Date	Document Type	Author/Sender	Recipients	Subject	Privilege Assertion	Additional Bases for Withholding
1/24/2017	Email Correspondence	Aaron Favreau	Christina Corieri	Proposed Legislation	Executive Communications Privilege	Irrelevant
1/24/2017	Email Correspondence	Christina Corieri	Aaron Favreau	Proposed Legislation	Executive Communications Privilege	Irrelevant
1/25/2017	Email Correspondence	Tim Roemer	Christina Corieri	Proposed Legislation	Executive Communications Privilege	Irrelevant
1/25/2017	Email Correspondence	Art Harding	Gretchen Conger, Katie Fischer, Tim Roemer	Proposed Legislation	Executive Communications Privilege	Irrelevant
1/25/2017	Email Correspondence	Art Harding	Gretchen Conger, Katie Fischer, Tim Roemer	Proposed Legislation	Executive Communications Privilege	Irrelevant
1/25/2017	Email Correspondence	Gretchen Conger	Art Harding, Katie Fischer, Tim Roemer	Proposed Legislation	Executive Communications Privilege	Irrelevant
1/24/2019	Email Correspondence	Patrick Ptak	Gilbert Davidson, Anni Foster, Nicole Colyer, Daniel Scarpinato, Daniel Ruiz, Gretchen Conger, Megan Rose	Toomey v. State of AZ, et al.	Attorney Client Privilege; Common Interest Privilege	
1/24/2019	Email Correspondence	Anni Foster	Patrick Ptak, Gilbert Davidson, Nicole Colyer, Daniel Scarpinato, Daniel Ruiz, Gretchen Conger, Megan Rose, Nicole Sornsin	Toomey v. State of AZ, et al.	Attorney Client Privilege; Common Interest Privilege	
1/24/2019	Email Correspondence	Dawn Wallace	Anni Foster, Gilbert Davidson, Daniel Scarpinato, Daniel Ruiz, Patrick Ptak, Gretchen Conger, Katie Fischer	Toomey v. State of AZ, et al.	Attorney Client Privilege	
1/24/2019	Email Correspondence	Gretchen Conger	Anni Foster, Patrick Ptak, Gilbert Davidson, Nicole Colyer, Daniel Scarpinato, Daniel Ruiz, Megan Rose, Nicole Sornsin	Toomey v. State of AZ, et al.	Attorney Client Privilege; Common Interest Privilege	
1/24/2019	Email Correspondence	Daniel Scarpinato	Patrick Ptak, Gilbert Davidson, Anni Foster, Nicole Colyer, Daniel Ruiz, Gretchen Conger, Megan Rose	Toomey v. State of AZ, et al.	Attorney Client Privilege; Common Interest Privilege	
2/6/2019	Email Correspondence and Attachment	Nicole Colyer	Christina Corieri	Toomey v. State of AZ, et al.	Attorney-Client Privilege	

Document Date	Document Type	Author/Sender	Recipients	Subject	Privilege Assertion	Additional Bases for Withholding
6/26/2019	Email Correspondence and Attachment	Anni Foster	Daniel Scarpinato, Gretchen Conger, Patrick Ptak, Daniel Ruiz, Gilbert Davidson, Katie Fischer, Christina Corieri	Toomey v. State of AZ, et al.	Attorney-Client Privilege	
10/1/2019	Email Correspondence and Attachment	Nicole Colyer	Christina Corieri, Anni Foster	Toomey v. State of AZ, et al.	Attorney-Client Privilege	
5/21/2020	Email Correspondence	Anni Foster	Daniel Scarpinato, Gretchen Conger, Patrick Ptak, Katie Fischer, Daniel Ruiz	Recent Court Ruling	Attorney-Client Privilege; Executive Communications Privilege	
5/28/2020	Email Correspondence	Laura Raymond	Anni Foster	Recent Court Ruling	Attorney-Client Privilege; Executive Communications Privilege	Irrelevant
5/28/2020	Email Correspondence	Anni Foster	Laura Raymond, Gretchen Conger, Hannalee Donoso, Alyssa Salvaggio	Recent Court Ruling	Attorney-Client Privilege; Executive Communications Privilege	Irrelevant
8/6/2020	Email Correspondence	Jami Snyder	Christina Corieri	Healthcare Coverage	Executive Communications Privilege	Irrelevant
8/6/2020	Email Correspondence	Anni Foster	Christina Corieri	DH v Snyder	Attorney-Client Privilege; Executive Communications Privilege	Irrelevant
8/6/2020	Email Correspondence	Jami Snyder	Christina Corieri	Administrative Code	Executive Communications Privilege	Irrelevant
9/28/2020	Email Correspondence and Attachments	Matthew Devlin	Anni Foster, Christina Corieri, Nicole Sornsins	DH v Snyder	Attorney-Client Privilege; Attorney Work Product; Common Interest Privilege	Irrelevant
9/28/2020	Email Correspondence	Anni Foster	Matthew Devlin, Christina Corieri, Nicole Sornsins	DH v Snyder	Attorney-Client Privilege; Attorney Work Product; Common Interest Privilege	Irrelevant
9/28/2020	Email Correspondence	Matthew Devlin	Anni Foster, Christina Corieri, Nicole Sornsins	DH v Snyder	Attorney-Client Privilege; Attorney Work Product; Common Interest Privilege	Irrelevant

Document Date	Document Type	Author/Sender	Recipients	Subject	Privilege Assertion	Additional Bases for Withholding
9/28/2020	Email Correspondence	Nicole Sornsin	Matthew Devlin, Kimberly Suciu, Anni Foster, Christina Corieri	DH v Snyder	Attorney-Client Privilege; Attorney Work Product; Common Interest Privilege	Irrelevant
9/28/2020	Email Correspondence	Anni Foster	Matthew Devlin, Christina Corieri, Nicole Sornsin	DH v Snyder	Attorney-Client Privilege; Attorney Work Product; Common Interest Privilege	Irrelevant

EXHIBIT 8

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8 *Attorneys for Defendants State of Arizona,
 Andy Tobin, and Paul Shannon*

9 **UNITED STATES DISTRICT COURT**
 10 **FOR THE DISTRICT OF ARIZONA**

11 Russell B. Toomey,

12 Plaintiff,

13 v.

14 State of Arizona, *et al.*,

15 Defendants.

Case No. CV 19-0035-TUC-RM (LAB)

**STATE DEFENDANTS’
 RESPONSES TO PLAINTIFF’S
 FIRST REQUEST FOR
 PRODUCTION OF DOCUMENTS
 AND TANGIBLE THINGS**

17 Pursuant to Rules of Civil Procedure 26 and 34, Defendants State of Arizona, Andy
 18 Tobin, and Paul Shannon (hereinafter the “State Defendants”) hereby respond to Plaintiff’s
 19 First Request For Production of Documents And Tangible Things, served December 8,
 20 2020, as follows:

21 **PRELIMINARY STATEMENT**

22 The State Defendants have not fully completed their investigation of the facts
 23 relating to this case, discovery is underway, and the State Defendants have not begun
 24 preparing for trial. All answers contained herein are based only upon the information
 25 presently available to and specifically known by the State Defendants and they disclose
 26 only those conclusions and contentions which presently occur to them. Further
 27 investigation, legal research and analysis may supply additional facts, add meaning to the

1 known facts, and may establish entirely new factual conclusions and legal contentions, all
2 of which may lend substantial additions to, changes, and variations from the responses
3 herein set forth.

4 The following answers are given without prejudice to or waiver of the State
5 Defendants' right to introduce evidence of subsequently discovered and developed
6 conclusions or contentions. The answers contained herein are made in a good faith effort
7 to supply as much factual information and as much specification of legal contentions as is
8 presently known, but in no way should be to the prejudice of the State Defendants in relation
9 to discovery, research or analysis. The State Defendants specifically reserve the right to
10 supplement, amend and/or modify any or all of the answers contained herein as discovery
11 progresses.

12 **GENERAL OBJECTIONS**

13 1. These responses are made solely for the purpose of and use in this litigation.
14 Each response is given subject to all appropriate objections (including, but not limited to,
15 objections concerning relevancy, materiality, propriety, and admissibility) that would
16 require the exclusion of any statement contained herein if the request were asked of, or any
17 statement contained herein were made by, a witness testifying in court. The State
18 Defendants reserve all such objections and grounds therefor and may interpose them at the
19 time of trial.

20 2. The State Defendants object to this discovery to the extent it seeks
21 information other than that which may be obtained through a reasonably diligent search of
22 their records.

23 3. The State Defendants object to this discovery as overbroad, unduly
24 burdensome, oppressive, harassing, and seek to impose unreasonable costs on the State
25 Defendants to the extent that it purports to require the State Defendants to conduct a search
26 of all of their files, including all of their electronic files, or to inquire of all their employees,
27 in an attempt to locate each piece of information or every document that might be

1 responsive. The State Defendants further object to this discovery to the extent that the scope
2 of information requested is not proportional to the needs of the case.

3 4. The State Defendants object to this discovery to the extent it seeks
4 information protected by the attorney-client privilege, the “work-product” doctrine, the
5 doctor-patient privilege, the deliberative process privilege, and/or any other applicable
6 protection or privilege. The inadvertent production of any privileged information is not a
7 waiver of the State Defendants’ rights to assert any applicable privilege with respect to such
8 information.

9 5. The State Defendants object to this discovery to the extent it is vague,
10 ambiguous, and unintelligible and requires the State Defendants to speculate as to the nature
11 and scope of the information sought.

12 6. The State Defendants object to this discovery to the extent it seeks
13 information that is in the public domain and/or to which Plaintiff has equal or greater access.

14 7. The State Defendants object to this discovery to the extent it seeks
15 information which is neither relevant nor reasonably related to any claim or defense or is
16 otherwise beyond the scope of discovery contemplated by the Federal Rules of Civil
17 Procedure.

18 8. The State Defendants object to this discovery to the extent it seeks documents
19 or information not in their possession, custody, or control. In particular, State Defendants
20 are producing document in the custody and control of the Arizona Department of
21 Administration. Therefore, documents that may be in the custody and control of the
22 Arizona Governor’s Office, the Arizona Attorney General’s Office, or the Arizona
23 Legislature are not being produced.

24 9. The State Defendants object to this discovery to the extent it seeks
25 information, the production of which would violate any constitutional, statutory or common
26 law privacy interest of any representative of the State Defendants or any other person or
27 entity, including, but not limited to, beneficiaries of the Plan.

1 of the case. The State Defendants further object that the Request seeks documents and
2 communications protected by the attorney-client privilege, the work product doctrine, the
3 deliberative process privilege, and other applicable privileges. The State Defendants further
4 object that the Request seeks information protected by the constitutional, statutory and/or
5 common law privacy rights of the Plan beneficiaries. The State Defendants further object
6 to the Request to the extent that it seeks documents not within the possession, custody, and
7 control of the Arizona Department of Administration. Subject to and without waiving the
8 foregoing objections, the State Defendants respond as follows:

9 The State Defendants will produce non-privileged documents responsive to Request
10 For Production No. 1 in the possession, custody, and control of the Arizona Department of
11 Administration. The State Defendants are not in possession, custody, or control of any
12 Health Plan documents prior to 2005.

13 **REQUEST FOR PRODUCTION NO. 2:** Please produce all documents and
14 communications between Defendants and internal and external persons relating to and
15 regarding the State of Arizona's decision to join the litigation in the Northern District of
16 Texas bearing Case No. 7:16-cv-00108 (originally filed as *Franciscan Alliance, Inc. et al.*
17 *v. Burwell et al.*, later re-designated as *Franciscan Alliance, Inc. et al. v. Price et al.* and
18 *Franciscan Alliance, Inc. et al. v. Azar II et al.*), and the State of Arizona's participation in
19 that litigation.

20 **RESPONSE TO REQUEST FOR PRODUCTION NO. 2:** The State Defendants object
21 to Request For Production No. 2 on the ground that it seeks information which is neither
22 relevant nor reasonably related to any claim or defense in this matter. Any decision made
23 to participate in the aforementioned litigation is irrelevant to the matters at issue in this case.
24 The State Defendants further object that the Request is overbroad, unduly burdensome,
25 oppressive, harassing, and seeks to impose unreasonable costs on the State Defendants. The
26 State Defendants further object that the Request is not proportional to the needs of the case.
27 The State Defendants further object that the Request seeks documents and communications

1 protected by the attorney-client privilege, the work product doctrine, the deliberative
2 process privilege, and other applicable privileges. Moreover, the State Defendants further
3 object that the Request seeks documents not in the possession, custody, or control of the
4 Arizona Department of Administration because such decisions are not made by the Arizona
5 Department of Administration, Defendants Andy Tobin or Paul Shannon in their official
6 capacities, or their predecessors. Subject to and without waiving the foregoing objections,
7 the State Defendants respond as follows:

8 The State Defendants will produce non-privileged documents responsive to Request
9 For Production No. 2 in the possession, custody, and control of the Arizona Department of
10 Administration.

11 **REQUEST FOR PRODUCTION NO. 3:** Please produce all versions and iterations of
12 the Plan's policies/lists of Exclusions and General Limitations (*e.g.*, Article 9.1 of ADOA's
13 PPO and EPO Plans, Article 10.1 of ADOA's HSA Plan) from the years 2010 through
14 present, as well as all documents and communications between Defendants and internal or
15 external persons regarding creating, amending, continuing, or eliminating any exclusion of
16 coverage contained in any version/iteration of the Plan's Exclusions and General
17 Limitations policy, including, but not limited to, the potential costs of enforcing, amending,
18 or eliminating such excluded coverage, the medical necessity, safety, and efficacy
19 (including whether a procedure is deemed experimental or cosmetic) of excluded treatments
20 and services; or the public health effects of enforcing, amending, or eliminating such
21 excluded coverage. Such documents should include any and all actuarial reports, analyses,
22 or memorandums pertaining to such exclusions of coverage.

23 **RESPONSE TO REQUEST FOR PRODUCTION NO. 3:** The State Defendants object
24 to Request For Production No. 3 on the ground that it is overbroad, unduly burdensome,
25 oppressive, harassing, and seeks to impose unreasonable costs on the State Defendants. The
26 State Defendants further object that the Request is vague and ambiguous as to the term
27 "medical necessity." The State Defendants further object that the Request is not
28

1 proportional to the needs of the case. The State Defendants further object that the Request
2 seeks information which is duplicative of Request For Production No. 1. The State
3 Defendants further object that the Request seeks information which is neither relevant nor
4 reasonably related to any claim or defense in this matter. The State Defendants further
5 object that the Request seeks documents and communications protected by the attorney-
6 client privilege, the work product doctrine, the deliberative process privilege, and other
7 applicable privileges. The State Defendants further object that the Request seeks
8 information protected by the constitutional, statutory, and/or common law privacy rights of
9 the Plan beneficiaries. The State Defendants further object to the Request to the extent that
10 it seeks documents not within the possession, custody, and control of the Arizona
11 Department of Administration. Subject to and without waiving the foregoing objections,
12 the State Defendants respond as follows:

13 The State Defendants will produce copies of the Health Plans from 2010 to present.

14 **REQUEST FOR PRODUCTION NO. 4:** Please produce all documents and
15 communications between the Defendants and internal or external persons regarding whether
16 any treatment of gender dysphoria is “Medically Necessary.”

17 **RESPONSE TO REQUEST FOR PRODUCTION NO. 4:** The State Defendants object
18 to Request For Production No. 4 on the ground that it is overbroad, unduly burdensome,
19 oppressive, harassing, and seeks to impose unreasonable costs on the State Defendants. The
20 State Defendants further object that the Request is vague and ambiguous as to the term
21 “medically necessary.” The State Defendants further object that the Request is not
22 proportional to the needs of the case. The State Defendants further object that the Request
23 seeks information which is neither relevant nor reasonably related to any claim or defense
24 in this matter. The State Defendants further object that the Request seeks documents and
25 communications protected by the attorney-client privilege, the doctor-patient privilege, the
26 work product doctrine, the deliberative process privilege, and other applicable privileges.
27 The State Defendants further object that the Request seeks information protected by the
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1 constitutional, statutory, and/or common law privacy rights of the Plan beneficiaries. The
2 State Defendants further object to the Request to the extent that it seeks documents not
3 within the possession, custody, and control of the Arizona Department of Administration.
4 Finally, the State Defendants further object because the Parties already agreed, as set forth
5 in the Joint Status Report to the Court on October 23, 2020 (Doc. 128), to narrow this case
6 by agreeing that the medical necessity of gender transition surgeries will not be an issue in
7 this case. *See* Doc. 128 at 11:11-20.

8 **REQUEST FOR PRODUCTION NO. 5:** Please produce all documents and
9 communications between the Defendants and internal or external persons concerning (a)
10 transgender people, (b) gender transition, (c) change of sex, (d) sex reassignment, (e)
11 transsexualism; or (f) gender reassignment.

12 **RESPONSE TO REQUEST FOR PRODUCTION NO. 5:** The State Defendants object
13 to Request For Production No. 5 on the ground that it is overbroad, unduly burdensome,
14 oppressive, harassing, and seeks to impose unreasonable costs on the State Defendants. The
15 State Defendants further object that the Request is not proportional to the needs of the case.
16 The State Defendants further object that the Request seeks documents and communications
17 protected by the attorney-client privilege, the doctor-patient privilege, the work product
18 doctrine, the deliberative process privilege, and other applicable privileges. The State
19 Defendants further object that the Request seeks information protected by the constitutional,
20 statutory, and/or common law privacy rights of the Plan beneficiaries. The State Defendants
21 further object to the Request to the extent that it seeks documents not within the possession,
22 custody, and control of the Arizona Department of Administration.

23 **REQUEST FOR PRODUCTION NO. 6:** Please produce documents sufficient to show,
24 from 2010 to present:

25 (a) the number of hysterectomies paid for by the Plan each year, the medical reason
26 for the surgery, and the individual and aggregate cost of the surgeries; and

27 (b) the number of medically necessary cosmetic or reconstructive surgical
28

1 procedures paid for by the Plan each year (including but not limited to chest-reconstruction
2 surgery, vaginoplasty, or phalloplasty, or other surgery related to the reproductive or
3 urogenital system) the medical reason for the surgery, and the individual and aggregate cost
4 of the surgeries.

5 **RESPONSE TO REQUEST FOR PRODUCTION NO. 6:** The State Defendants object
6 to Request For Production No. 6 on the ground that it is overbroad, unduly burdensome,
7 oppressive, harassing, and seeks to impose unreasonable costs on the State Defendants. The
8 State Defendants further object that the Request is vague and ambiguous as to the terms
9 “medically necessary,” “cosmetic,” and “reconstructive” procedures. The State Defendants
10 further object that the Request is not proportional to the needs of the case. The State
11 Defendants further object that the Request seeks information which is neither relevant nor
12 reasonably related to any claim or defense in this matter to the extent it is seeking
13 information regarding medical treatment and/or services other than for gender transition
14 surgery. The State Defendants further object that the Request seeks documents and
15 communications protected by the attorney-client privilege, the doctor-patient privilege, the
16 work product doctrine, the deliberative process privilege, and other applicable privileges.
17 The State Defendants further object that the Request seeks information protected by the
18 constitutional, statutory, and/or common law privacy rights of the Plan beneficiaries. The
19 State Defendants further object to the Request to the extent that it seeks documents not
20 within the possession, custody, and control of the Arizona Department of Administration.

21 **REQUEST FOR PRODUCTION NO. 7:** Please produce all documents (to include any
22 formal or informal financial or budgetary or other analyses, plans, actuarial reports, or other
23 reports or memoranda) to show (1) the total annual expenses (*i.e.*, the amounts paid by the
24 Plan to medical providers) for all treatment and services provided under the Plan from 2010
25 to present, including a cost breakdown of the total expenses for each type of treatment or
26 service; and (2) the total annual amounts paid by the Defendants to pay for the Plan for all
27 Plan recipients from 2010 to present, including an itemized breakdown of the total amounts

1 paid to the extent possible, and (3) budget projections and actuarial analyses of the Plan's
2 fiscal soundness.

3 **RESPONSE TO REQUEST FOR PRODUCTION NO. 7:** The State Defendants object
4 to Request For Production No. 7 on the ground that it is overbroad, unduly burdensome,
5 oppressive, harassing, and seeks to impose unreasonable costs on the State Defendants. The
6 State Defendants further object that the Request is vague as to the term "fiscal soundness."
7 The State Defendants further object that the Request is not proportional to the needs of the
8 case. The State Defendants further object that the Request seeks information which is
9 neither relevant nor reasonably related to any claim or defense in this matter to the extent it
10 is seeking information regarding medical treatment and/or services other than for gender
11 transition surgery. The State Defendants further object that the Request seeks documents
12 and communications protected by the attorney-client privilege, the doctor-patient privilege,
13 the work product doctrine, and other applicable privileges. The State Defendants further
14 object that the Request seeks information protected by the constitutional, statutory, and/or
15 common law privacy rights of the Plan beneficiaries. The State Defendants further object
16 to the Request to the extent that it seeks documents not within the possession, custody, and
17 control of the Arizona Department of Administration. Subject to and without waiving the
18 foregoing objections, the State Defendants respond as follows:

19 The State Defendants do not have possession, custody, or control of responsive
20 documents prior to 2013. The State Defendants will produce non-privileged documents
21 responsive to Request For Production No. 7 in the possession, custody, and control of the
22 Arizona Department of Administration.

23 **REQUEST FOR PRODUCTION NO. 8:** All documents or communications you intend
24 to rely on at trial.

25 **RESPONSE TO REQUEST FOR PRODUCTION NO. 8:** The State Defendants object
26 to Request for Production No. 8 on the ground that it is not yet the time for identifying the
27 State Defendants' exhibits for trial and discovery is still ongoing. Subject to and without
28

1 waiving the foregoing objections, the State Defendants respond as follows:

2 The State Defendants have already produced documents responsive to Request For
3 Production No. 8 in the possession, custody, and control of the Arizona Department of
4 Administration. The State Defendants reserve the right to supplement this response as
5 discovery progresses.

6 **REQUEST FOR PRODUCTION NO. 9:** Please produce all documents supporting Your
7 responses to Plaintiff’s First Set of Interrogatories provided to Defendants on June 5, 2020.

8 **RESPONSE TO REQUEST FOR PRODUCTION NO. 9:** The State Defendants object
9 that Request For Production No. 9 is vague and ambiguous as to what documents “support”
10 the State Defendants’ responses. The State Defendants further object to the Request on the
11 ground that it is overbroad, unduly burdensome, oppressive, harassing, and seeks to impose
12 unreasonable costs on the State Defendants. The State Defendants further object that the
13 Request seeks documents and communications protected by the attorney-client privilege,
14 the doctor-patient privilege, the work product doctrine, deliberative process privilege, and
15 other applicable privileges. The State Defendants further object that the Request seeks
16 information protected by the constitutional, statutory, and/or common law privacy rights of
17 the Plan beneficiaries. The State Defendants further object to the Request to the extent that
18 it seeks documents not within the possession, custody, and control of the Arizona
19 Department of Administration. Subject to and without waiving the foregoing objections,
20 the State Defendants respond as follows:

21 The State Defendants have already produced non-privileged documents responsive
22 to Request For Production No. 9 in the possession, custody, and control of the Arizona
23 Department of Administration.

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1 DATED this 21st day of January 2021.

2 FENNEMORE CRAIG, P.C.

3 By: s/ Ryan Curtis
4 Timothy J. Berg
5 Amy Abdo
6 Ryan Curtis
7 Shannon Cohan
8 Attorneys for Defendants State of Arizona,
9 And Tobin, and Paul Shannon

10 COPY of the foregoing e-mailed this
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40 *Arizona; Ron Shoopman; Larry*
41 *Penley; Ram Krishna; Bill Ridenour;*
42 *Lyndel Manson; Karrin Taylor*
43 *Robson; Jay Heiler; and Fred Duval*

44 s/ Ryan Curtis
45 17669405

EXHIBIT 9

In The Matter Of:

Toomey vs.

State of AZ

Marie Frances Isaacson

March 26, 2021

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Original File 032621MI.txt

Min-U-Script® with Word Index

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1 Q. Could you tell us what they are?
 2 A. Aetna, Cigna, Blue Cross Blue Shield of Arizona,
 3 and UnitedHealthcare.
 4 Q. Did any of those companies offer surgery --
 5 surgery for gender dysphoria, on any of their commercial
 6 plans or any plans at all?
 7 A. You know, I know we received the emails, but I
 8 don't remember what the response was.
 9 Q. You don't remember whether you could have asked
 10 Aetna, for example, whether they covered gender dysphoria
 11 surgery and what answer they gave you?
 12 A. I remember asking the question of all four plans.
 13 I don't remember which -- what plan responded with what
 14 answer.
 15 Q. Okay. But you do remember that some of the plans
 16 told you, yes, and we do cover gender dysphoria surgery?
 17 A. My biggest recollection is that it was not
 18 covered, the majority of the response was it was not
 19 covered.
 20 Q. Majority. So that -- Was there a minority that
 21 did cover it?
 22 A. I think so. I --
 23 Q. Okay. Well, we can -- we can look at exhibits to
 24 ferret that out.
 25 Do you recall any states offering surgery

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1 for gender -- gender dysphoria under their State plans?
 2 A. Well, just based on the email from Chanelle that
 3 we just looked at, those states do offer transgender
 4 benefits. But I guess based on this I don't know whether
 5 it's surgery or what the benefits are.
 6 Q. Okay. Was one of the issues in determining
 7 whether the plan offered by the Arizona Department of
 8 Administration for employees of the State of Arizona,
 9 which included the faculty and staff at -- at the
 10 universities, based on the cost of that benefit?
 11 A. I would say that in researching it that was one
 12 of the items that we did research, was the cost of the
 13 benefit.
 14 Q. And you determined that the cost was de minimis,
 15 didn't you?
 16 A. As I recall there was a range of costs.
 17 Q. And based on additions to premiums for those who
 18 participated in the plan, what was the range? Cents per
 19 premium.
 20 A. I -- I know we just reviewed that last Sunday,
 21 but I can't -- I don't remember what the range was.
 22 Q. Well, it was as low as three cents. Do you
 23 recall that?
 24 A. I don't recall.
 25 Q. Okay. But you recall that all the additions were

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1 under a dollar per plan.
 2 A. I --
 3 MR. CURTIS: Objection.
 4 MR. ECKSTEIN: Per employee. Per employee
 5 per plan.
 6 THE WITNESS: I -- I -- I don't remember,
 7 Paul.
 8 Q. BY MR. ECKSTEIN: Okay. Well, we'll -- we'll
 9 take a look.
 10 Thinking back, did you believe that the --
 11 the cost that was estimated was -- was too high to justify
 12 providing that benefit?
 13 A. I don't remember that being -- We discussed cost,
 14 but I don't remember that being the driving factor in the
 15 discussion.
 16 Q. What was the deciding factor?
 17 A. What was required by law. What was required by
 18 law for us to cover.
 19 Q. So as you recall it, if the -- Strike that.
 20 As you recall it, the persons making the
 21 decisions were focused on what was legally required. And
 22 if it wasn't legally required, surgery for gender
 23 dysphoria was not going to be offered in the plan.
 24 A. What I recall is that there was a decision that
 25 had to be made, and reaching out to the health plans,

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1 doing research ourselves to -- to gather as much
 2 information as possible to make a decision.
 3 Q. Do you consider yourself part of the group that
 4 made that decision?
 5 A. I would say no.
 6 Q. Who was in the group that made the decision?
 7 A. Legal counsel and the governor's office and the
 8 director's office.
 9 Q. Did you consult with anyone in the legislature,
 10 particularly the Joint Legislative Budget Committee, JLBC,
 11 as to the wisdom of covering surgery for gender dysphoria?
 12 A. No.
 13 Q. Did anyone from the legislature weigh in and tell
 14 you their thoughts?
 15 A. No.
 16 Q. Did you ever hear that anyone from the
 17 legislature had weighed in and given thoughts on that?
 18 A. No.
 19 Q. Was this considered a political issue of any
 20 kind?
 21 A. Not that anyone raised to me, no.
 22 Q. Did you hear secondhand that there was concern
 23 about the politics of including surgery for gender
 24 dysphoria?
 25 A. No.

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1 Q. What was SALGBA?
 2 A. State and Local Government Benefits
 3 Administrators.
 4 Q. And in the topmost email you direct -- you tell
 5 Mr. Meisner do not post this survey.
 6 Do you see that?
 7 A. I do.
 8 Q. Why did you tell Mr. Meisner not to post that
 9 survey?
 10 A. I don't remember why.
 11 Q. Would information from the group have been
 12 helpful?
 13 A. I guess it would have.
 14 Q. And do you know if that was ever posted to
 15 SALGBA's Website, this survey?
 16 A. I don't remember if it was or not.
 17 Q. Would you turn to Tab 27, for me. Which I'd ask
 18 Madam Reporter to mark as Exhibit 27. The first page
 19 which is Bates AZSTATE.011038. And Ms. Isaacson, this
 20 is -- this appears to be the minutes from a meeting with
 21 the medical directors between the benefit services
 22 division and medical directors.
 23 Do you see that?
 24 A. I do.
 25 Q. And what was this meeting?

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1 A. Looks like the plan design considerations, by
 2 reading the agenda. Or it was probably the quarterly
 3 meeting and that was one of the agenda items.
 4 Q. And who are the medical directors?
 5 A. Dr. Krominga, Dr. Napoli, Dr. (indecipherable) --
 6 THE COURT REPORTER: Say it again.
 7 THE WITNESS: Dr. Rudolph Cane, and
 8 Dr. Thomas B -- I don't know how to pronounce his last
 9 name, Biuso, B-I-U-S-O; and Dr. Mehlem, M-E-H-L-E-M; and
 10 Dr. Peterson.
 11 Q. BY MR. WALL: And are these the individuals who
 12 are reflected as attending this meeting on the front page?
 13 A. Yes.
 14 Q. And how impactful, if at all, would the medical
 15 directors' opinion on whether to -- to remove the
 16 exclusion of transsexual surgery have been to the ADOA?
 17 A. Just more information, good information.
 18 Q. So would you turn to what is the sixth page of
 19 this document. Bates number in the bottom right-hand
 20 corner ending in 011043.
 21 A. Yes, I'm there.
 22 Q. And these appear to be a summary of what the
 23 medical directors from each of the network providers were
 24 reporting about the coverage of transsexual surgery;
 25 correct?

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1 A. Yes.
 2 Q. And so this information here, along with the
 3 charts we reviewed, would this -- would you have
 4 transmitted this information to the Arizona governor's
 5 office?
 6 A. Probably not.
 7 Q. Would you have relayed what this information --
 8 the information contained in here from the medical
 9 directors to them? I'm sorry, I mean to the Arizona
 10 governor's office?
 11 A. I may have provided a summary.
 12 Q. When you -- when there -- When you met with the
 13 Arizona governor's office to decide whether to maintain or
 14 change the plan's exclusion of transsexual surgery, who
 15 was in that meeting?
 16 A. Christina Corieri, Mike Liburdi, Ryan Curtis,
 17 John Fry, I think Nicole Ong, and I think but I'm not
 18 sure, Craig Brown.
 19 Q. And you would have provided a summary of the
 20 ADOA's research into the transgender -- transgender sex
 21 surgery exclusion and whether to cover it?
 22 A. I don't know if that was part of that meeting or
 23 some other discussion.
 24 Q. But in the meeting where the decision was made
 25 did you present any of this information?

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1 A. Not that I recall.
 2 Q. So what was the decision -- the decision -- In
 3 that meeting where the decision was made, what was that
 4 decision based off of?
 5 A. We -- we reviewed the legal advice and -- and I
 6 don't -- I can't -- like I said, I can't remember if we
 7 covered any of the summary information or not, and -- and
 8 then a decision was made.
 9 Q. And who made the decision?
 10 A. The -- the decision was voiced by Christina
 11 Corieri.
 12 Q. And who were the decision-makers in reaching it?
 13 A. That I don't know.
 14 Q. Was there a vote?
 15 A. No.
 16 Q. So did Christina Corieri announce the decision or
 17 was there a conference about the decision?
 18 A. I took it as an announcement.
 19 Q. Was there a discussion in that meeting about it
 20 or was -- did you attend this meeting and you were told
 21 what the decision was?
 22 A. There wasn't really a discussion.
 23 Q. So who do you understand to be the ultimate
 24 decision-makers on the decision of whether to continue the
 25 plan's exclusion of gender reassignment surgery?

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1 A. You know, I -- Christina said it. I don't know
2 who she consulted with.
3 Q. Ms. Isaacson, just to go back, with respect to
4 Kelly Sharritts, was Kelly Sharritts terminated from her
5 position at the ADOA?
6 A. Yes, she was.
7 Q. And why was she terminated?
8 A. There were a number of reasons. Her inability to
9 get along well with others. Lots of upsetment. At some
10 point she went around me on a decision. Just generally I
11 didn't trust her, and she was causing a lot of problems in
12 the division with other people saying they were going to
13 leave if -- if -- they -- they couldn't work with her.
14 Q. And when was she terminated?
15 A. I don't recall.
16 Q. Was Ms. Sharritts terminated -- was her
17 termination, did it have anything to do with her opinion
18 on whether the plan's exclusion on transsexual surgery
19 should be removed?
20 A. No. Absolutely not.
21 MR. WALL: So we are going to pass this
22 witness. I think just to put on the record, we reached
23 out to counsel prior to the deposition stating that we
24 reserved our right to hold it open pending the resolution
25 of our motion to compel and there was (indecipherable)

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1 documents subject thereto, but we are passing the witness
2 for the moment.
3 THE COURT REPORTER: I'm sorry, can you
4 clarify what documents? I -- Motion to compel and there
5 was published documents?
6 MR. WALL: Prior to the deposition we
7 reached out to opposing counsel, counsel for the State
8 defendants, as well as ABOR, to notify them that
9 Professor -- Dr. Toomey reserved his right to hold the
10 deposition open pending resolution of his motion to compel
11 and the Court's decision on the privileged documents that
12 are the subject of that motion, and which involve
13 Ms. Isaacson. And we'd like to be given an opportunity to
14 review those with her.
15 But we are passing the witness for the
16 purpose -- We're not closing the deposition, but we are
17 passing.
18 MR. CURTIS: And we note for the record that
19 we do not consent to additional time. At this point you
20 may need to move the Court if you need additional time for
21 Ms. Isaacson, even though you're holding the deposition
22 open.
23 So, Paul, I think you are -- you have got
24 some questions.
25 THE COURT REPORTER: You're muted.

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1 MR. ECKSTEIN: Okay. Here we go.
2
3 FURTHER EXAMINATION
4 BY MR. ECKSTEIN:
5 Q. Marie, it's getting late and I will try to be as
6 brief as I can. I want to start with the exhibits that
7 Toomey's counsel asked you about. And let's start with
8 the last one, Exhibit 27. Do you have it in front of you?
9 A. I do.
10 Q. And it is a document that purports to be minutes
11 from a meeting on September 29, 2016, that you attended;
12 correct?
13 A. Yes.
14 Q. Do you know who prepared the minutes?
15 A. Probably Nickie Schultz.
16 Q. I'm sorry, who?
17 A. Nickie Schultz.
18 Q. Nickie Schultz. Nickie Schultz. Okay.
19 And there were no lawyers at this meeting --
20 A. No.
21 Q. -- correct?
22 A. Correct.
23 Q. Was -- Do you have an independent recollection of
24 what was discussed at this meeting?
25 A. Not without looking at this document, no.

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1 Q. Well, one of the things that was discussed were
2 the offerings of the various insurance companies; correct?
3 And that's set forth on Page -- Bates page 011043, the
4 page that you were looking at before.
5 A. And I'm sorry, what -- what was your question?
6 Q. Would you take a look at Page 011043.
7 A. Yes, I'm looking at it.
8 Q. And you will see references to what the various
9 insurance providers were providing by way of coverage for
10 gender dysphoria surgery and the costs for that.
11 A. I see that, yes.
12 Q. And I want to direct your attention particularly
13 to the costs.
14 You see that?
15 A. Yes.
16 Q. And I want to direct your attention particularly
17 to Aetna. And it says there [as read]: It's not unusual
18 to see costs over 50,000 for the surgery alone.
19 You see that?
20 A. Yes.
21 Q. Did you have any discussion about that?
22 A. I'm sure that the -- that's why they are in the
23 minutes, so I'm sure it was discussed.
24 Q. Was it your conclusion at the end of this
25 discussion that the costs for these -- for gender --

EXHIBIT 10

In The Matter Of:

Toomey vs.

State of AZ

Scott Bender, Videotaped

March 31, 2021

Glennie Reporting Services, LLC

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Phoenix, Arizona 85020

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Original File 033121SB.txt

Min-U-Script® with Word Index

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1 A. We understand that's part of the process, but,
 2 you know, whatever that committee feels is best for the
 3 State is -- or for the health plans is not necessarily
 4 our driving concern.
 5 Q. What about the opinion of the Arizona
 6 Governor's Office?
 7 A. The director of ADOA reports to the governor's
 8 office, and as part of the ADOA, we do as well. So they
 9 are the decision makers in this, so that is obviously
 10 considered.
 11 Q. So any change to the plan had to be approved by
 12 the Arizona Governor's Office?
 13 A. Correct.
 14 Q. Are there any changes to the plan that the
 15 director of the ADOA can make his or herself?
 16 A. Yeah, I think to some -- to some degree, the
 17 director of ADOA has -- has quite a bit of latitude. If
 18 there's small changes, you know, the selection of vendors
 19 is -- is fairly, usually, fairly simple. And that's
 20 typically not something that has to be approved by the
 21 governor's office. There's a procurement process for
 22 that.
 23 Q. Is there anything else that the director of the
 24 ADOA could approve without the governor office's
 25 approval?

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1 A. I don't know what his particular authority is.
 2 I know he has delegated authority from the governor to
 3 manage the programs. But I know that the -- the
 4 governor's office and staff are involved in making the
 5 changes and the approval of the contribution strategy
 6 every year.
 7 Q. But there's nothing else that comes to mind as
 8 to something specific the director of ADOA could approve
 9 without the governor's office's approval?
 10 A. I'm sure he operates pretty independently
 11 mostly throughout the year. Any -- any major redesigns
 12 or things like that or annual contribution strategy would
 13 have to be approved by the governor's office. And this
 14 is primarily because of budget. The governor's budget --
 15 the budget office is involved in these discussions,
 16 because this is like a \$950 million program each year.
 17 It's a considerable chunk of money. We have
 18 (inaudible) --
 19 THE REPORTER: I'm sorry?
 20 THE WITNESS: And if they have other budgetary
 21 priorities, we need to know about that.
 22 BY MR. WALL:
 23 Q. So the budget is the main concern of the
 24 Arizona Governor's Office in deciding whether to approve
 25 a plan change?

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1 A. The budget is the primary concern of the budget
 2 office, yes.
 3 Q. And IS -- when you say "budget office," are you
 4 using that synonymously with the Arizona Governor's
 5 Office?
 6 A. I'm using that as part of the governor's
 7 office's. It's called the OSPB, the Office of Special
 8 Budgeting and Planning, I believe. And those are the
 9 folks that we work with in the governor's office on a
 10 particular -- proposed changes like we did for 2021,
 11 major plan redesigns, et cetera.
 12 Q. But, Mr. Bender, you said that the governor's
 13 office is primarily involved because of concerns about
 14 the budget; is that right?
 15 A. Yes, that's my opinion, of course.
 16 Q. And that's based on your experience working in
 17 the ADOA?
 18 A. Right.
 19 Q. Mr. Bender, earlier when I asked you about
 20 additional -- when we were talking about the process for,
 21 you know, handling a proposed plan change, you mentioned
 22 that among the differences at the ADOA were the factor --
 23 the JL -- the JLBC factor --
 24 A. Right.
 25 Q. -- but also that there are more layers of

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1 leadership. Do you recall that?
 2 A. Yes.
 3 Q. Are these layers of leadership what you're
 4 referring to when we talk about -- is that what you mean
 5 by -- sorry, let me clarify that.
 6 These layers of leadership, is that the Arizona
 7 Governor's Office involvement in the process of approving
 8 or disproving the plan change?
 9 A. I think it's all levels. I report to a
 10 director who reports to an assistant director, who
 11 reports to the agency director, who reports to the
 12 governor's office. So there's various levels of approval
 13 and everybody has an opinion.
 14 THE REPORTER: Mr. Wall, when you get to a good
 15 stopping point, I'd like to take a break.
 16 MR. WALL: Oh, of course. Give me -- I have
 17 one or two more questions, and then we can probably take
 18 a break.
 19 Q. So, Mr. Bender, when you say everyone has an
 20 opinion, an opinion about what?
 21 A. Everyone has an opinion about employee
 22 benefits. Whether they internalize things or not, I've
 23 seen that happen, you know, people have particular
 24 opinions of any particular vendor, for example, or they
 25 don't like our deductibles, or they're, you know, very

EXHIBIT 11



Tweet



Christina Corieri

@CCorieri



advocates now demanding taxpayer dollars for gender reassignment surgery under Medicare - bet Medicaid is next

amednews.com/article/201304...

2:51 PM · Apr 29, 2013 · Twitter Web Client



EXHIBIT 12

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 2 Amy Abdo (No. 016346)
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8 *Attorneys for Defendants*
 9 *State of Arizona, Andy Tobin, and Paul Shannon*

10 UNITED STATES DISTRICT COURT
 11 DISTRICT OF ARIZONA

12 Russell B. Toomey,
 13 Plaintiff,

14 v.

15 State of Arizona; Arizona Board of Regents
 16 d/b/a University of Arizona, a
 governmental body of the State of Arizona;
 17 Ron Shoopman, in his official capacity as
 Chair of the Arizona Board of Regents;
 18 Larry Penley, in his official capacity as
 Member of the Arizona Board of Regents;
 19 Ram Krishna, in his official capacity as
 Secretary of the Arizona Board of Regents;
 20 Bill Ridenour, in his official capacity as
 Treasurer of the Arizona Board of Regents;
 21 Lyndel Manson, in her official capacity as
 Member of the Arizona Board of Regents;
 22 Karrin Taylor Robson, in her official
 capacity as Member of the Arizona Board
 of Regents; Jay Heiler, in his official
 23 capacity as Member of the Arizona Board
 of Regents; Fred Duval, in his official
 24 capacity as Member of the Arizona Board
 of Regents; Andy Tobin, in his official
 25 capacity as Director of the Arizona
 Department of Administration; Paul
 26

No. 4:19-cv-00035

**DEFENDANTS STATE OF
 ARIZONA’S, ANDY TOBIN’S, AND
 PAUL SHANNON’S FIRST
 SUPPLEMENTAL RESPONSES TO
 PLAINTIFF’S FIRST SET OF
 INTERROGATORIES**

1 Shannon, in his official capacity as Acting
2 Assistant Director of the Benefits Services
3 Division of the Arizona Department of
4 Administration,

Defendants.

5 Propounding Party: Russell B. Toomey

6 Answering Parties: State of Arizona, Andy Tobin, and Paul Shannon

7 Set No.: One

8 **GENERAL STATEMENT AND OBJECTIONS**

9 1. Defendants object to each interrogatory to the extent that it is vague and/or
10 ambiguous and agrees to respond to Plaintiff’s interrogatories based solely on their
11 interpretation of any vague or ambiguous language.

12 2. Defendants object to each interrogatory to the extent that it is overly broad,
13 unduly burdensome, or oppressive.

14 3. Defendants object to each interrogatory to the extent that it seeks confidential,
15 proprietary, private, or privileged information and will respond to any such interrogatory,
16 if otherwise discoverable, after the parties have agreed to a protective order.

17 4. Defendants object to each interrogatory to the extent that it seeks information
18 that is irrelevant to Plaintiff’s claims or Defendants’ defenses and is not reasonably
19 calculated to lead to the discovery of admissible evidence.

20 5. Defendants object to each interrogatory to the extent that it requires any action
21 or response beyond that required by the Federal Rules of Civil Procedure, the Scheduling
22 Order, or the Local Rules.

23 **ANSWERS TO INTERROGATORIES**

24 **INTERROGATORY NO. 1:** Identify and describe all reasons why the State of
25 Arizona’s self-funded health plan controlled by the Arizona Department of Administration
26 (the “Plan”) excludes coverage for “[g]ender reassignment surgery” (the “Challenged

1 Exclusion”) including, but not limited to, (a) each and every State or governmental interest
2 that you contend is advanced by the exclusion, (b) a detailed explanation for why you
3 contend that the exclusion furthers that state interest, and (c) all facts in support of your
4 explanation.

5 **ANSWER:** The State of Arizona’s self-funded health plan excludes coverage for
6 gender reassignment surgery because the State concluded, under the law, that it was not
7 legally required to change its health plan to provide such coverage under either Title VII of
8 the Civil Rights Act or under the Equal Protection Clause of the Fourteenth Amendment to
9 the United States Constitution. Specifically, prior to the Supreme Court’s ruling in *Bostock*
10 *v. Clayton County*, Title VII protections on the basis of sex had not been applied to
11 individuals based on their sexual orientation or transgender status. Further, rules
12 promulgated by the Department of Health and Human Services (“HHS”) regarding
13 nondiscrimination provisions under Section 1557 of the Affordable Care Act prohibited
14 blanket exclusions of all treatments of gender dysphoria, but did not require plans subject
15 to the law to cover all treatments for gender dysphoria or gender transition services. The
16 legal advice that the State received regarding this issue is covered by the attorney-client
17 privilege.

18 The State or governmental interests advanced by the exclusion are cost containment
19 and reducing health care costs. The State gathered information from private insurers and
20 public entities who did provide coverage for gender reassignment surgery in an effort to
21 determine how its own health care costs would be impacted. Although the cost estimates
22 varied, they unquestionably showed that removing the exclusion for gender reassignment
23 surgery would increase costs and that such increases could be significant.

24 **FIRST SUPPLEMENTAL ANSWER:** At some point prior to 2005, the State of
25 Arizona moved its healthcare coverage for employees to a self-funded health plan. At that
26 time, the State maintained the same plan documents, including the same exclusions, as was

1 utilized by the prior insurance providers. The plan documents included an exclusion for
2 “transsexual surgery including medical or psychological counseling and hormonal therapy
3 in preparation for, or subsequent to, any such surgery.”

4 **INTERROGATORY NO. 2:** Identify all persons with knowledge of the reasons
5 why the Plan excludes coverage for “[g]ender reassignment surgery,” and state what each
6 such person knows.

7 **ANSWER:** Defendants object to this interrogatory because it seeks information
8 covered by the attorney-client privilege. Subject to and without waiving this objection,
9 Defendants state that Michael T. Liburdi, the former General Counsel for the Office of the
10 Arizona Governor, John M. Fry of the Arizona Attorney General’s Office, Nicole A. Ong,
11 the former General Counsel of the ADOA, Christina Corieri, a licensed attorney and Senior
12 Policy Advisor Office of the Arizona Governor, Marie Isaacson, the former Director of the
13 Benefits Services Division of the ADOA, and Scott Bender, the Plan Administrator for the
14 ADOA have knowledge of why the Plan excludes coverage for gender reassignment surgery
15 as described in the response to Interrogatory No. 1 above. ADOA also received attorney-
16 client privileged legal advice from Ryan C. Curtis at Fennemore Craig, P.C., as well as now
17 former Fennemore Craig attorney Erwin Kratz.

18 **INTERROGATORY NO. 3:** Identify all persons with knowledge of the genesis,
19 formulation, adoption, maintenance, or continuation of (a) the Challenged Exclusion and
20 (b) any earlier versions of the exclusion before the current language was adopted, and state
21 what each such person knows.

22 **ANSWER:** Defendants object to this interrogatory because it seeks information
23 covered by the attorney-client privilege. Subject to and without waiving this objection,
24 Defendants state that Michael T. Liburdi, the former General Counsel for the Office of the
25 Arizona Governor, John M. Fry of the Arizona Attorney General’s Office, Nicole A. Ong,
26 the former General Counsel of the ADOA, Christina Corieri, Senior Policy Advisor Office

1 of the Arizona Governor, Marie Isaacson, the former Director of the Benefits Services
2 Division of the ADOA, and Scott Bender, the Plan Administrator for the ADOA have
3 knowledge regarding the Challenged Exclusion. ADOA also received attorney-client
4 privileged legal advice from Ryan C. Curtis at Fennemore Craig, P.C., as well as now
5 former Fennemore Craig attorney Erwin Kratz.

6 **INTERROGATORY NO. 4:** Identify all persons who participated in formulating,
7 adopting, maintaining, reviewing, approving, or deciding to continue the exclusion of
8 coverage for “[g]ender reassignment surgery” from the Plan, including any experts
9 consulted, and state what each such person knows.

10 **ANSWER:** Defendants object to this interrogatory because it seeks information
11 covered by the attorney-client privilege. Subject to and without waiving this objection,
12 Defendants state that Michael T. Liburdi, the former General Counsel for the Office of the
13 Arizona Governor, John M. Fry of the Arizona Attorney General’s Office, Nicole A. Ong,
14 the former General Counsel of the ADOA, Christina Corieri, Senior Policy Advisor Office
15 of the Arizona Governor, Marie Isaacson, the former Director of the Benefits Services
16 Division of the ADOA, and Paul Shannon, the Director of the Benefits Services Division
17 of the ADOA participated in these decisions.

18 **INTERROGATORY NO. 5:** Identify all persons who assisted in preparing the
19 answers to these Interrogatories or provided information contained in the answers, and state
20 his or her title, duties, role in preparing the answers, and the interrogatory answer(s) to
21 which he or she provided information or assistance. This identification should also indicate
22 whether the information provided is within his or her knowledge or was obtained from some
23 other person or source; if the information was obtained from another person or source, that
24 person or source should also be identified.

25 **ANSWER:** Defendants object to this interrogatory because it violates the work-
26 product doctrine as set forth in *Hickman v. Taylor*, 329 U.S. 495 (1947). Several courts

1 have held that the work product doctrine covers various aspects of an attorney's
2 investigation, including the witnesses who were interviewed, how long they were
3 interviewed, and when they were interviewed. *See, e.g., Commonwealth of Massachusetts*
4 *v. First Nat'l Supermarkets, Inc.*, 112 F.R.D. 149, 153 (D. Mass. 1986) (holding it was
5 improper to seek disclosure of "the names of persons interviewed by an adverse party's
6 attorney together with the dates and places of such interviews."); *Board of Ed. of Evanston*
7 *TP v. Admiral Heating*, 104 F.R.D. 23, 32 (N.D. Ill. 1984) (to tell plaintiffs whom
8 defendants have interviewed, where and when such interviews took place, and whether or
9 not a record was made is to give plaintiffs no more knowledge of substantive relevant facts,
10 but rather to afford them the potential for significant insights into the defendant lawyers'
11 preparation of their case and their mental processes); *Besley-Welles Corp. v. Balax, Inc.*, 43
12 F.R.D. 368, 371 (E.D. Wis. 1968) (interrogatory seeking statement as to adverse party's
13 efforts to locate witnesses goes to attorney's preparation for trial and comes under the
14 *Hickman* rule that gives an attorney's work product qualified immunity from discovery);
15 *Uinta Oil Refining Co. v. Continental Oil Co.*, 226 F. Supp. 495, 506 (D. Utah 1964)
16 (sustaining objection to interrogatory seeking names of all persons from whom plaintiffs
17 had taken or requested statements, explaining that "[t]he detailed pattern of investigation
18 and exploration in and of itself is not a proper subject for discovery.").

19 **INTERROGATORY NO. 6:** Identify all public or non-public meetings of
20 Defendants in which the Challenged Exclusion and/or the Plan's coverage for medical or
21 surgical treatments or services to treat gender dysphoria (or "transition-related care") was
22 discussed, listing the date of each meeting, the nature of each meeting, and the attendees of
23 the meeting; and identifying any documents or other materials relating to those meetings in
24 Defendants' custody or control.

25 **ANSWER:** Defendants object to this interrogatory because it seeks information
26 covered by the attorney-client privilege. Subject to and without waiving this objection,

1 Defendants state that the individuals identified in response to Interrogatory No. 2 who were
2 employees of ADOA or the Governor's Office above held meetings and discussions
3 regarding the Plan's surgical treatments or services to treat gender dysphoria between June
4 and November 2016, some of which included the participation of outside counsel from
5 Fennemore Craig, P.C. Defendants possess documents regarding these meetings that will
6 be identified in their privilege log.

7 **FIRST SUPPLEMENTAL ANSWER:** No meetings were held regarding the prior
8 iteration of the exclusion for gender reassignment surgery. The exclusion was adopted
9 when the State of Arizona transferred its healthcare coverage to a self-funded health plan.
10 However, at that time, the State merely continued the coverages and exclusions utilized by
11 its prior insurance providers. No known meetings were held to discuss the transgender care
12 exclusion until the issuance of Patient Protection and Affordable Care Act ("ACA") Rule
13 1557.

14 **INTERROGATORY NO. 7:** Identify all research, studies, data, reports,
15 publications, testimony, or other documents considered, reviewed, or relied on by
16 Defendants relating to the Challenged Exclusion, including identifying the date or
17 approximate date of consideration, review, or reliance by the Arizona Board of Regents
18 ("ABOR") and the Arizona Department of Administration (the "ADOA"); and the ADOA
19 and ABOR employee(s) who considered, reviewed, or relied on such documents and their
20 role(s). A complete answer to this interrogatory should include documents relating to the
21 medical necessity, safety, and efficacy (including whether a procedure is deemed
22 experimental) of excluded treatments and services; the public health effects of enforcing,
23 amending, or eliminating the Challenged Exclusion; and the cost/fiscal impact to ADOA or
24 ABOR of enforcing, amending, or eliminating the Challenged Exclusion.

25 **ANSWER:** Defendants considered a Memorandum from Marie Isaacson to Mike
26 Liburdi, General Counsel at the Governor's Office dated August 3, 2016 regarding

1 Affordable Care Act § 1557, and a Memorandum regarding Non-discrimination—
2 Transgender Coverage and a Memorandum from outside legal counsel at Fennemore Craig
3 to Marie Isaacson dated July 20, 2016 regarding Summary and Implications of § 1557 and
4 Transgender Coverage Requirements. Both of these documents are covered by the attorney-
5 client privilege. Defendants also gathered information and data from insurers and other
6 entities regarding their experience providing transgender benefits, including reassignment
7 surgery. Plaintiffs may ascertain the non-privileged information requested in this
8 Interrogatory from the documents that Defendants have produced in this action.

9 **FIRST SUPPLEMENTAL ANSWER:** When the State of Arizona transferred its
10 healthcare coverage to a self-funded health plan, it adopted the coverages and exclusions
11 utilized by its prior insurance providers, which included the prior iteration of the exclusion
12 for gender reassignment surgery. No known additional documents were reviewed in
13 relation to the transgender care exclusion until the issuance of ACA Rule 1557.

14 **INTERROGATORY NO. 8:** Identify and describe any formal or informal
15 consideration by Defendants of amending or eliminating the Challenged Exclusion,
16 including identifying the date or approximate date of consideration, the ADOA and ABOR
17 employees or offices involved in such consideration and their role(s), the nature of the
18 considered changes, and what (if any) actions were taken by ADOA and ABOR.

19 **ANSWER:** Defendants object to this interrogatory because it seeks information
20 covered by the attorney-client privilege. Subject to and without waiving this objection,
21 Defendants state that they have informally considered amending or eliminating the
22 Challenged Exclusion after Plaintiff filed this action and since the Supreme Court’s decision
23 in *Bostock v. Clayton County*. Paul Shannon, Scott Bender, and Defendants’ counsel have

24 ...
25 ...
26 ...

1 been involved in such considerations.

2 DATED this 21st day of January, 2021.

3 FENNEMORE CRAIG, P.C.

4

5

By: s/ Ryan Curtis

6

Timothy J. Berg

7

Amy Abdo

8

Ryan Curtis

9

Shannon Cohan

10

COPY of the foregoing e-mailed this
21st day of January, 2021 to:

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5 *Penley; Ram Krishna; Bill Ridenour;*
Lyndel Manson; Karrin Taylor
6 *Robson; Jay Heiler; and Fred Duval*

7 s/ Ryan Curtis

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EXHIBIT 13-A

2020 WL 6869292

Only the Westlaw citation is currently available.
United States District Court, D. Arizona.

EVANSTON INSURANCE
COMPANY, Plaintiff,

v.

Tracey Portee MURPHY, et al., Defendants.

No. CV-19-04954-PHX-MTL

|
Signed 11/23/2020

Attorneys and Law Firms

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[C. Lincoln Combs](#), [Katherine Bool Krukowski](#), Gallagher & Kennedy PA, Phoenix, AZ, for Defendants.

ORDER

[Michael T. Liburdi](#), United States District Judge

*1 Before the Court is the Motion for Protective Order filed by non-party Ryan McCarthy. (Doc. 112.) For the following reasons, the motion is granted in part and denied in part.¹

I. BACKGROUND

As relevant to the pending motion,² non-party Ryan McCarthy is an attorney at the law firm Jones, Skelton & Hochuli, PLC. He defended Pearce Lincoln Properties LLC (“Pearce Lincoln”), Par-Tech Limited Partnership (“Par-Tech”), and Art’s Fisheries II, LLC (“Arts Fisheries”), in connection with the underlying wrongful death matter in the Superior Court of Arizona for Maricopa County (the “Underlying Action”). See *Murphy v. Pearce Lincoln Proprs., LLC*, No. CV2019-001932 (Ariz. Super. Ct. July 1, 2020). Mr. McCarthy’s clients owned and operated the property at which Arthur Murphy, Jr. was fatally shot on April 6, 2017. An associate attorney, Sam Arrowsmith, who is no longer

affiliated with Jones, Skelton & Hochuli, was also counsel to these entities.

Plaintiff/Counter-Defendant Evanston Insurance Company (“Evanston”) filed its complaint for declaratory relief in the present action on August 13, 2019. (Doc. 1.) It initially named Mr. McCarthy’s clients as defendants; they have since been dismissed. (Doc. 47.)

On November 25, 2019, the adverse parties in the Underlying Action entered into a *Damron* agreement.³ It assigned a \$9 million stipulated judgment against the insureds, including Mr. McCarthy’s clients, to Tracee Portee Murphy (“Murphy”), a defendant and counter-claimant in the present action.

Evanston issued a subpoena for Mr. McCarthy’s deposition on July 17, 2020. (Doc. 72.) On July 31, Mr. McCarthy’s counsel sent a letter to Evanston’s counsel asserting, in part, that they had not received the deposition “topics, questions, or subject matter.” (Doc. 112-1 at 7.) Mr. McCarthy’s counsel intended “to object to any line of questioning that seeks to violate the attorney-client privilege, work-product privilege, or ER 1.6, Arizona Rules of Professional Conduct.” (*Id.*) On August 20, Evanston’s counsel sent an outline of anticipated deposition topics. Counsel also met and conferred that same day. (*Id.* at 12.)

*2 Evanston’s counsel deposed Mr. McCarthy on September 14, 2020. Although Mr. McCarthy answered multiple questions during the deposition, his counsel asserted privilege objections in response to 19 questions. Those objections are the subject of the present motion. Following the deposition, Evanston’s counsel asserted that the privilege objections were improper. (Doc. 112 at 6.) The parties have since conferred “multiple times.” (*Id.*)

Mr. McCarthy filed the present motion on October 30, 2020. (Doc. 112.) He attached, as Exhibit 10 to the motion, a numbered list of the 19 questions to which his counsel asserted privilege objections. (Doc. 112-1 at 63.) The motion is now fully briefed. (Docs. 121, 125.) Murphy also filed a joinder in support of the motion. (Doc. 118.)

II. LEGAL STANDARD

[Rule 45 of the Federal Rules of Civil Procedure](#) governs discovery of non-parties by subpoena. [Rule 45](#) provides, in relevant part, that a party may command a non-party to

testify at a deposition. Fed. R. Civ. P. 45(a)(1)(A)(iii). The scope of discovery “through a subpoena under Rule 45 is the same as the scope of discovery permitted under Rule 26(b).” *Intermarine, LLC v. Spliethoff Bevrachtungskantoor, B.V.*, 123 F. Supp. 3d 1215, 1217 (N.D. Cal. 2015). Under Rule 26(b), a party may obtain discovery “regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.” Fed. R. Civ. P. 26(b)(1). The limitations set forth in Rule 26(b)(2)(C) apply to discovery served on non-parties. See *Amini Innovation Corp. v. McFerran Home Furnishings, Inc.*, 300 F.R.D. 406, 409 (C.D. Cal. 2014).

A district court has “broad discretion” to permit or deny discovery. *Hallett v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002). The “discovery process in theory should be cooperative and largely unsupervised by the district court.” *Sali v. Corona Reg. Med. Ctr.*, 884 F.3d 1218, 1219 (9th Cir. 2018). Nonetheless, a party from whom discovery is sought may move for a protective order to prevent annoyance, embarrassment, oppression, or undue burden or expense. Fed. R. Civ. P. 26(c)(1). The party seeking a protective order bears the burden of persuasion to show “good cause” for its issuance. *U.S. E.E.O.C. v. Caesars Entm’t, Inc.*, 237 F.R.D. 428, 432 (D. Nev. 2006).

III. DISCUSSION

Mr. McCarthy moves for a protective order shielding himself, and all other attorneys and staff associated with Jones, Skelton & Hochuli, from attempts to gather privileged information. As noted, he has provided 19 deposition questions to which his counsel objected on the basis of the attorney-client privilege and work-product doctrine. (Doc. 112 at 8; 112-1 at 64-68.) Evanston responds that Mr. McCarthy should be required to answer the questions for various reasons. The Court addresses these arguments in turn.

A. Attorney-Client Privilege

Mr. McCarthy identifies five deposition questions—designated as numbers 5, 6, 9, 10, and 16—to which his counsel asserted an attorney-client privilege objection. Evanston responds that the objections “at dispute were pursuant to the work-product doctrine, not attorney-client

privilege. Accordingly, only the protections of the work-product doctrine will be discussed here.”⁴ (Doc. 121 at 2-3.) This is not accurate.

*3 As identified in his motion, Mr. McCarthy’s counsel invoked the attorney-client privilege in the following portions of his deposition:

Q: And were you -- did you have information that Art’s Fisheries had done business with Soul Brothers for a number of years involving prior events?

MR. RAPPAZZO: I’m just going to object there real quick. Gary, if you are asking about attorney-client privileged information or communications he had with his client, I’m going to instruct him not to respond. Maybe you can rephrase it.

...

Q: Okay. We will get to that... All right. Let me -- so a couple of other general questions. So you were ultimately retained to represent the three defendants: Art’s Fisheries, Pearce Lincoln, and Par-Tech. And my question is, did you obtain a written waiver of any conflict or potential conflict from them?

MR. RAPPAZZO: I’m gonna object to the extent that’s calling for communications he had with his clients, Gary. It’s privileged.

MR. HAMBLET: It’s not. A waiver of a conflict, I don’t think that’s privileged.

MR. RAPPAZZO: It’s attorney-client communication.

...

Q: Was Deans & Homer or -- or Indian Harbor Insurance Company a client of yours?

MR. RAPPAZZO: That’s attorney-client privilege. It’s a duty of confidentiality, Gary. I’m sorry, he can’t respond to that.

...

Q: And the first one is that defendants failed to provide metal detectors or security staff to arriving guests for weapons or other threats. Did you have any information in your file one way or another as to whether that was true?

MR. RAPPAZZO: I'm just going to object to the extent it's calling for attorney-client privilege communications that he may have had with his clients.

...

Q: Okay. Why not just try the case or settle the case within your 9 million policy limits?

MR. RAPPAZZO: Form and foundation. You are asking for attorney-client potentially and work product privilege response there.

(Doc. 121-1 at 65-67.⁵) These responses invoke the attorney-client privilege. Mr. McCarthy emphasizes in his reply that because Evanston did not address the attorney-client privilege argument, it has waived any objection. (Doc. 125 at 2-3.) See LRCiv 7.2(i); *E.E.O.C. v. Walgreen Co.*, No. CIV 05-1400 PCTFJM, 2007 WL 926914, at *1 n.2 (D. Ariz. Mar. 26, 2007) (deeming plaintiff's failure to respond to an argument as consent to the granting of a motion on this ground). The Court agrees that Evanston failed to address this argument. Nonetheless, the Court will consider whether Mr. McCarthy's counsel properly raised the attorney-client privilege objection before issuing a protective order.

Federal courts look to state law to determine the applicability of evidentiary privileges in diversity actions. See *Fed. R. Evid.* 501. Under Arizona law, “an attorney shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment.” A.R.S. § 12-2234(A). The party asserting the privilege has the burden of making a prima facie showing that it applies to a specific communication. See *State ex rel. Babbitt v. Arnold*, 26 Ariz. App. 333, 336 (1976). The proponent must show that “(1) there is an attorney-client relationship, 2) the communication was made to secure or provide legal advice, 3) the communication was made in confidence, and 4) the communication was treated as confidential.” *Clements v. Bernini in & for Cty. of Pima*, 471 P.3d 645, 651 ¶ 8 (Ariz. 2020). A court has broad discretion in reviewing an assertion of privilege. *State Farm Mut. Auto. Ins. Co. v. Lee*, 13 P.3d 1169, 1174 (Ariz. 2000).

*4 First, the Court notes that the objections at issue were procedurally proper. Rule 30(c)(2) permits objections, “whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition.” *Fed. R. Civ. P.* 30(c)(2). Such objection “must be stated concisely in a nonargumentative and nonsuggestive matter.” *Id.* Further,

a “person may instruct a deponent not to answer only when necessary to preserve a privilege ...” *Id.* A review of the deposition transcript indicates no procedural issues with Mr. McCarthy's counsel's objections.

The Court now turns to the merits of the objections. Mr. McCarthy has demonstrated the existence of an attorney-client relationship with Pearce Lincoln, Par-Tech, and Art's Fisheries. Mr. McCarthy represented these entities at the time of his deposition and “continues to represent them” at present. (Doc. 112 at 3.) He “has not, at any point, had consent to discuss any privileged topics and/or to respond to any of the questions that drew privilege objections during his deposition.” (*Id.* at 9.) Further, Mr. McCarthy has asserted that the topics at issue involved communications that were “performed confidentially, with an expectation of confidentiality, and without disclosure to third parties (such as Evanston).”⁶ (Doc. 112 at 10.) The Court agrees, generally, that the topics at issue would invoke privileged communications. For example, the answer to the question, “Why not just try the case or settle the case within your 9 million policy limits?” would conceivably entail attorney-client privileged communications and strategies. (Doc. 112-1 at 67.)

The Court finds one exception. Mr. McCarthy's counsel objected to what is identified as question 9: “Was Deans & Homer or -- or Indian Harbor Insurance Company a client of yours?” (Doc. 112-1 at 66.) Generally, the “identity of an attorney's client” and the nature of the fee arrangement between an attorney and his client are not privileged. *In re Grand Jury Subpoenas*, 803 F.2d 493, 496 (9th Cir. 1986), opinion corrected, 817 F.2d 64 (9th Cir. 1987). Mr. McCarthy provides no reason to stray from this general rule. Accordingly, the Court finds that Mr. McCarthy's counsel properly objected to four questions (numbers 5, 6, 10, and 16) because their answers would involve attorney-client privileged material. Question number 9, regarding whether “Deans & Homer” or “Indian Harbor Insurance Company” were clients, did not involve privileged material.⁷

B. Work-Product Doctrine

Mr. McCarthy argues that the remaining questions at issue—designated as numbers 1-4, 7, 8, 11-15, and 17-19—are protected by the work-product doctrine. Evanston argues that “an attorney's thought processes regarding a settlement agreement are not work product,” that the protection has been waived, and that the need for the information outweighs the

protection. (Doc. 121 at 2.) The Court agrees with Evanston that the questions at issue do not involve protectable work product.

*5 Federal law governs the application of the work-product doctrine, which protects from discovery documents and tangible things that are prepared by or for a party or its representative “in anticipation of litigation.” See *City of Glendale v. Nat'l Union Fire Ins. Co. of Pittsburgh*, No. CV-12-380-PHX-BSB, 2013 WL 1797308, at *11 (D. Ariz. Apr. 29, 2013); Fed. R. Civ. P. 26(b)(3)(A). The party invoking work-product protection bears the burden of proof. *Conoco Inc. v. U.S. Dep't of Justice*, 687 F.2d 724, 728 (9th Cir. 1982).

In the context of depositions, “the work product doctrine operates in a very limited way.” *Schreib v. Am. Family Mut. Ins. Co.*, 304 F.R.D. 282, 287 (W.D. Wash. 2014) (quotations and citation omitted). It specifically “protects against questions which improperly tend to elicit the mental impressions of the parties’ attorneys.” *Id.* Courts have “consistently held” that the work product doctrine does not shield from deposition “the facts that the adverse party’s lawyer has learned, or the person from whom he has learned such facts, or the existence or nonexistence of documents, even though the documents themselves may not be subject to discovery.” *Pastrana v. Local 9509, Commc'ns Workers of Am., AFL-CIO*, No. CIV. 06CV1779 W AJB, 2007 WL 2900477, at *5 (S.D. Cal. Sept. 28, 2007) (citation omitted).

1. Relevance

Mr. McCarthy first argues that questions regarding his evaluation of the Underlying Action have “no relevance to the pending coverage action” under Rule 26(b)(1). (Doc. 12 at 19.) He states that his “evaluation and personal view of ‘reasonableness’ as it relates to the value of the wrongful death claims for a spouse and eleven children are irrelevant to the pending coverage dispute.” (*Id.*) The Court notes that this argument is not necessarily related to whether protectable work product exists, but will address it nonetheless.

Rule 26(b) is “liberally interpreted to permit wide-ranging discovery of information even though the information may not be admissible at the trial.” *Bible v. Rio Properties, Inc.*, 246 F.R.D. 614, 617 (C.D. Cal. 2007) (citation omitted). “Relevant information for purposes of discovery is information ‘reasonably calculated to lead to the discovery

of admissible evidence.’” *Survivor Media, Inc. v. Survivor Prods.*, 406 F.3d 625, 635 (9th Cir. 2005) (citation omitted). Evanston has taken the position in this case that the *Damron* agreement was fraudulent and “collusive because McCarthy elected to ‘lie down’ instead of mounting a defense.” (Doc. 121 at 7; see also Doc. 26 at 8; Doc. 69 at 5.) The Court finds that the questions to which Mr. McCarthy’s counsel objected on work-product grounds—including, for example, “You weren’t concerned that you didn’t want to be seen as approving the form of this [*Damron*] agreement?”—could possibly lead to the discovery of admissible evidence. The Court will not issue a protective order on grounds that the remaining questions are irrelevant to this case. See *Columbia Cmty. Credit Union v. Chicago Title Ins. Co.*, No. C09-5290 RJB, 2010 WL 11561789, at *3 (W.D. Wash. Jan. 21, 2010) (permitting a line of questioning in a deposition because it was “arguably relevant and should be allowed under the broad scope of discovery”).

2. Applicability

In its response, Evanston argues that Mr. McCarthy’s motion “fails to address the application of the work-product doctrine to the material at hand.” (Doc. 121 at 2.) The Court largely agrees. Mr. McCarthy’s motion does state that the “questions that drew objections during McCarthy’s deposition targeted information that is at the heart of McCarthy’s litigation strategy. The questions pertain to both the [Underlying Matter] and the pending federal litigation initiated by Evanston.” (Doc. 112 at 11.) Nonetheless, the Court is not convinced that Mr. McCarthy has met his burden to prove that the work-product protection applies to the questions at issue. *Conoco Inc.*, 687 F.2d at 728.

*6 Although neither party addresses this argument, the Ninth Circuit has held that Rule 26(b)(3), “on its face, limits its protection to one who is a party ... to the litigation in which the discovery is sought.” *In re Cal. Pub. Utils. Comm’n*, 892 F.2d 778, 781 (9th Cir. 1989). See also Fed. R. Civ. P. 26(b)(3) (“Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative”) (emphasis added); C. Wright & A. Miller, *Federal Practice and Procedure* § 2024 (3d ed.) (“Documents prepared for one who is not a party to the present suit are wholly unprotected by Rule 26(b)(3) even though the person may be a party to a closely related lawsuit in which he will be disadvantaged if he must disclose in the present suit.”). Neither Mr. McCarthy

nor his clients are parties to the present suit.⁸ For this independent reason, the Court will not grant a protective order as to the purportedly work-product protected information. See *Loustalet v. Refco, Inc.*, 154 F.R.D. 243, 247 (C.D. Cal. 1993) (“Because Wymer is not a party to the present suit, documents prepared on his behalf are wholly unprotected despite the fact that he was a party in closely related lawsuits.”).

The Court also finds that Mr. McCarthy has not demonstrated that the underlying materials were prepared or obtained *because of* the prospect of litigation. As noted, the work-product protection applies to those documents “prepared in anticipation of litigation.” Fed. R. Civ. P. 26(b)(3). In circumstances in which a document serves more than one purpose, “that is, where it was not prepared exclusively for litigation, then the ‘because of’ test is used.” *United States v. Richey*, 632 F.3d 559, 567-68 (9th Cir. 2011). Dual-purpose documents are deemed prepared “because of” litigation if “in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained because of the prospect of litigation.” *In re Grand Jury Subpoena*, 357 F.3d 900, 907 (9th Cir. 2004) (citation omitted). Here, Evanston argues that Mr. McCarthy’s “opinions and thought processes leading to a settlement agreement, in this case a *Damron* Agreement, cannot logically qualify as ‘trial preparation materials.’” (Doc. 121 at 3.)

The Court recently addressed a similar issue in this case. Evanston previously moved the Court to compel the production of documents subpoenaed from an investigator, Keith Tolhurst, and his firm. *Evanston Ins. Co. v. Murphy*, No. CV-19-04954-PHX-MTL, 2020 WL 4429022 (D. Ariz. July 31, 2020); (Doc. 69). Murphy’s counsel had hired Mr. Tolhurst to locate Mr. Canty “in order to negotiate a *Damron* agreement between the adverse parties in the Underlying Action.” *Id.* at *1. Murphy argued, in response, that the material was shielded from discovery as protectable work product. The Court agreed with Evanston, concluding, “[a]s documents related to the *Damron* settlement agreement, not made in anticipation of litigation, they would be discoverable.” *Id.* at *3; Doc. 74 at 5.

The same is true here. Although Mr. McCarthy asserts that Evanston seeks his “case evaluations, litigation strategy, [and] motivations,” (Doc. 112 at 11), he has not demonstrated that the questions at issue relate to documents that “can be fairly said to have been prepared or obtained *because of* the prospect of litigation.” *In re Grand Jury Subpoena*, 357 F.3d at 907

(emphasis added). A number of the deposition questions directly relate to the *Damron* agreement and resulting stipulated judgment. As examples, Evanston’s counsel asked Mr. McCarthy, “And what’s the basis for your agreeing that [the stipulated judgment] was fair and reasonable?” and “[D]id you consider that sufficient information to evaluate whether \$9 million was a reasonable amount?” (Doc. 121-1 at 68.) There “is no federal privilege preventing the discovery of settlement agreements and related documents.” *Board of Trustees of Leland Stanford Junior Univ. v. Tyco Int’l Ltd.*, 253 F.R.D. 521, 523 (C.D. Cal. 2008). See also *Redding v. ProSight Specialty Mgmt. Co., Inc.*, No. CV 12-98-H-CCL, 2014 WL 11412743, at *6 (D. Mont. July 2, 2014) (“Furthermore, the Court doubts whether this document was prepared in anticipation of litigation or for trial, since it clearly was prepared in anticipation of settlement.”). Accordingly, for all of these reasons, Mr. McCarthy has not met his burden to demonstrate that the questions at issue involve protectable work product.

3. Other Arguments

*7 The parties also dispute whether Mr. McCarthy waived the work-product doctrine. Because Mr. McCarthy has not met his burden to prove that the testimony at issue involves work-product protected material, it is not necessary to consider Evanston’s “burden in proving any exception to work-product protection—whether through waiver or otherwise—because [Mr. McCarthy] has not met [his] burden of proving that it is indeed work product.” *Evanston Ins. Co.*, 2020 WL 4429022, at *3. Thus, the Court will not grant a protective order as to the questions objected to on the basis of the work-product doctrine.

IV. CONCLUSION

Accordingly,

IT IS ORDERED granting the Motion for Protective Order by Non-Party Attorney Ryan McCarthy (Doc. 112) to the extent that the attorney-client privilege objections raised during Mr. McCarthy’s deposition to questions 5, 6, 10, and 16 (Doc. 112-1 at 65-68) are sustained. Ryan McCarthy, Sam Arrowsmith, and any attorneys or staff affiliated with Jones, Skelton & Hochuli, PLC shall not be required to respond to these questions in any form.

IT IS FURTHER ORDERED denying the Motion in all other respects.

All Citations

Slip Copy, 2020 WL 6869292

Footnotes

- 1 Mr. McCarthy requested oral argument. Both parties have submitted legal memoranda and oral argument would not have aided the Court's decisional process. See [Partridge v. Reich](#), 141 F.3d 920, 926 (9th Cir. 1998); see also LRCiv 7.2(f); Fed. R. Civ. P. 78(b).
- 2 The Court has previously provided general background information on this case. (See Docs. 74, 100.) It need not repeat the same here.
- 3 Under Arizona law, a *Damron* agreement is a “settlement agreement between an insured and an injured party in circumstances where the insurer has declined to defend a suit against the insured. In such an agreement, the insured agrees to liability for the underlying incident and assigns all rights against the insurance company to the injured party.” [Quihuis v. State Farm Mut. Auto Ins. Co.](#), 748 F.3d 911, 912 n. 1 (9th Cir. 2014). *Damron* agreements do not “create coverage that the insured did not purchase ... To the contrary, [the insurer] is liable for the stipulated judgment only if the judgment constituted a liability falling within its policy.” [Colorado Casualty Ins. Co. v. Safety Control Co.](#), 230 Ariz. 560, 567, 288 P.3d 764, 771 (Ct. App. 2012) (internal quotations and citations omitted).”
- 4 The Court notes that Evanston provided a copy of the deposition transcript as Exhibit A to its response. Evanston's response states that “[f]or the Court's convenience, all 18 of the work-product objections interposed by McCarthy's counsel have been highlighted in yellow in the attached Exhibit A.” (Doc. 121 at 2.) Only some of the questions identified by Mr. McCarthy are highlighted. This is Mr. McCarthy's motion, and the Court will address the questions he has raised.
- 5 These questions were labeled as numbers 5, 6, 9, 10, and 16 in Exhibit 10 to Mr. McCarthy's motion, respectively.
- 6 In addition to A.R.S. § 12–2234(A), Rule 1.6(a) of the Arizona Rules of Professional Conduct states that a “lawyer shall not reveal information relating to the representation of the client unless the client gives informed consent....”
- 7 Question 6 involved whether Mr. McCarthy obtained a conflict waiver as to his three clients. Evanston's counsel asserted during the deposition that this was not a privileged communication. The attorney-client privilege and conflicts of interest are “distinct [rules] and regulate different ethical principles.” [Ragasa v. Cty. of Kauai](#), No. CV 14-00309 DKW-KJM, 2016 WL 11597768, at *8 (D. Haw. July 6, 2016). Seeing no further argument from Evanston, and the possibility that this question would involve privileged material, the Court will grant a protective order as to question 6.
- 8 As noted, although Pearce Lincoln, Par-Tech, and Art's Fisheries were previously parties to the present case, they were dismissed on April 15, 2020. (Doc. 47.) This was five months before Mr. McCarthy's September 14, 2020 deposition.

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EXHIBIT 13-B

2020 WL 4284383

Only the Westlaw citation is currently available.
United States District Court, D. Arizona.

OCEAN GARDEN PRODUCTS
INCORPORATED, Plaintiff,
v.
BLESSINGS INCORPORATED,
et al., Defendants.

No. CV-18-00322-TUC-RM Consolidated
with: No. CV-19-00284-TUC-RM

|
Signed 07/27/2020

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ORDER

Rosemary Márquez, United States District Judge

*1 Pending before the Court are Plaintiff Ocean Garden Products Incorporated's ("OG") Motions to Compel and for Sanctions against ADAB Ocean Harvest, S. De R.L. De C.V. ("ADAB Mexico") (Doc. 341)¹ and Pacific Ocean Harvest, S. De R.L. De C.V. ("Pacific Ocean") (Doc. 396). The Motions are fully briefed. (Docs. 352, 365, 398, 399.)²

I. Legal Standard

Rule 26 provides that "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). "Information within this scope of discovery need not be admissible in evidence to be discoverable." *Id.* In determining whether discovery is proportional to the needs of the case, courts consider "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." *Id.*

A party may serve on any other party a request for production that is within the scope of Rule 26(b). Fed. R. Civ. P. 34(a). A party may serve an interrogatory relating "to any matter that may be inquired into under Rule 26(b)." Fed. R. Civ. P. 33(a)(2). "An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact." *Id.* Responses to interrogatories and requests for production are due within 30 days of the

date of service. Fed. R. Civ. P. 33(b)(2); Fed. R. Civ. P. 34(b)(2)(A). If objection is made, the grounds and reasons for the objection must be stated “with specificity.” Fed. R. Civ. P. 33(b)(4); Fed. R. Civ. P. 34(b)(2)(B). An “evasive or incomplete disclosure, answer or response” is “treated as a failure to disclose, answer, or respond.” Fed. R. Civ. P. 37(a)(4).

“It is well established that a failure to object to discovery requests within the time required constitutes a waiver of any objection.” *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1473 (9th Cir. 1992). However, Rule 33 allows courts to excuse such a waiver “for good cause.” Fed. R. Civ. P. 33(b)(4). Although Rule 34 does not contain an analogous provision, courts “generally agree that there is no reason to treat waiver under Rule 34 any different than Rule 33.” *Liguori v. Hansen*, No. 2:11-cv-00492-GMN-CWH, 2012 WL 760747, at *12 (D. Nev. Mar. 6, 2012). Accordingly, courts “retain discretion to relieve a late or non-responding party from the potentially harsh consequences associated with waiver.” *Id.* at *11.

On motion or *sua sponte*, a court must limit the frequency or extent of discovery if it determines that:

- *2 (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
 - (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
 - (iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).
- Fed. R. Civ. P. 26(b)(2)(C).

A party may move under Rule 37 of the Federal Rules of Civil Procedure for an order compelling disclosure or discovery. Fed. R. Civ. P. 37(a)(1). A motion to compel may be made if a party fails to answer an interrogatory submitted under Rule 33 or fails to produce documents as requested under Rule 34. *Id.* at 37(a)(3)(B)(iii)-(iv). The moving party generally bears the burden of showing why the non-moving party's responses were deficient or objections unjustified. *Womack v. Virga*, No. CIV S-11-1030 MCE EFB P, 2011 WL 6703958, at *3 (E.D. Cal. Dec. 21, 2011).

If a motion to compel “is granted—or if the disclosure or requested discovery is provided after the motion was filed—the court must, after giving an opportunity to be heard,

require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees.” Fed. R. Civ. P. 37(a)(5). However, such payment must not be ordered if “the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action”; if “the opposing party's nondisclosure, response, or objection was substantially justified”; or if “other circumstances make an award of expenses unjust.” *Id.*

II. Motion to Compel and for Sanctions Against Pacific Ocean

A. Background

In July 2018, OG initiated a lawsuit against Blessings, Inc. (“Blessings”) and David Mayorquin in case number CV-18-322. (Doc. 1.) OG later initiated a separate lawsuit alleging claims under Arizona's Uniform Fraudulent Trade Act (“UFTA”) against numerous defendants, including Pacific Ocean, in case number CV-19-284. (Doc. 1 in CV-19-284) (the “UFTA Action”). After case numbers CV-18-322 and CV-19-284 were consolidated, OG filed a First Amended Complaint in the UFTA Action (“UFTA FAC”). (Doc. 154.) Pacific Ocean moved to dismiss for lack of personal jurisdiction the claims asserted against it in the UFTA FAC. (Doc. 157.) In an Order filed on October 25, 2019, this Court granted Pacific Ocean's Motion to Dismiss the UFTA FAC but gave OG leave to file a Second Amended UFTA Complaint (“UFTA SAC”). (Doc. 239.) OG filed its UFTA SAC on November 25, 2019. (Doc. 260.) Pacific Ocean again moved for dismissal. (Doc. 299.) On February 18, 2020, the Court denied Pacific Ocean's Motion to Dismiss the UFTA SAC. (Doc. 338.)

B. Discovery Responses

In the pending Motion to Compel and for Sanctions Against Pacific Ocean, OG avers that it served discovery requests on Pacific Ocean in August and September 2019, and that Pacific Ocean's sole objection was that it had a dismissal motion pending. (Doc. 396 at 3; *see also* Doc. 396-1 at 2-7.) OG argues that the objection was frivolous when made and has been moot since the February 2020 denial of Pacific Ocean's Motion to Dismiss the UFTA SAC, but that Pacific Ocean “continues to stonewall discovery.” (*Id.* at 3, 13-14.) OG further notes that Pacific Ocean has failed to serve any MIDP responses, in violation of General Order 17-08. (*Id.* at 15; *see also* Doc. 5.) OG requests that Pacific Ocean be compelled to

respond to the August and September 2019 discovery requests and that it be required to reimburse OG for the cost of filing the Motion to Compel. (*Id.* at 15-18; *see also* Doc. 396-1 at 2-7.)

*3 OG's LRCiv 37.1 Statement avers that the following discovery requests are at issue:

- Request for Production (“RFP”) numbers 21, 22, 23, 26, and 27 from OG's August 30, 2019 First Consolidated Requests for Production
- Interrogatory numbers 1, 2, and 3 from OG's August 30, 2019 First Set of Interrogatories to Pacific Ocean
- Interrogatory numbers 4, 5, 6, 7, and 8 from OG's September 13, 2019 Second Set of Interrogatories to Pacific Ocean

(Doc. 396-1 at 2-7.) To each of these discovery requests, Pacific Ocean objected that the request was premature because its dismissal motion was awaiting decision by the Court. (*Id.*)

In response to OG's Motion to Compel, Pacific Ocean argues that the discovery requests at issue were mooted by the granting of its first dismissal motion and were not resurrected by the filing of OG's UFTA SAC. (Doc. 398 at 2-5.) Pacific Ocean avers that it timely responded, on February 3, 2020, to discovery requests served by OG on January 6, 2020, which Pacific Ocean argues are the only requests served pursuant to the UFTA SAC. (*Id.* at 3.) In support of its argument that the granting of its first dismissal motion mooted any then-pending discovery requests, Pacific Ocean cites *Clardy v. Gaunt*, No. 3:14-cv-01055-CL, 2016 WL 5858673 (D. Or. Oct. 3, 2016); *Parkinson v. United States*, 175 F. Supp. 2d 1233, 1247 (D. Idaho 2001); and *Handy v. Price*, 996 F.2d 1064, 1068 (10th Cir. 1993). (*Id.* at 4-5.)

In reply, OG argues that the case law is contrary to Pacific Ocean's position that the granting of its first dismissal motion with leave to amend rendered OG's pending discovery requests permanently moot. (Doc. 399 at 2-7) (citing *Adams v. Kraft*, No. C10-00602 LHK (HRL), 2011 WL 1522407 (N.D. Cal. Apr. 21, 2011).) OG also complains that Pacific Ocean never asserted its mootness argument during the parties' personal consultation regarding OG's discovery requests, evidencing a failure to participate in the meet-and-confer process in good faith. (*Id.* at 2, 7-9.) OG notes that Pacific Ocean does not address in its Response to the Motion to Compel its failure to serve any MIDP responses. (*Id.* at 2.)

OG further notes that Pacific Ocean served objections to OG's January 3, 2020 discovery requests but no substantive responses. (*Id.* at 3.)³

The Court will order Pacific Ocean to respond to OG's RFP numbers 21, 22, 23, 26, and 27, and interrogatory numbers 1-8. Pacific Ocean's original objections to these discovery requests argued that the requests were premature because Pacific Ocean had a pending dismissal motion. After the Court granted Pacific Ocean's Motion to Dismiss the UFTA FAC, Pacific Ocean failed to supplement its objections to raise the mootness argument that it now asserts in response to OG's Motion to Compel. Neither Pacific Ocean's original prematurity objection, nor its current mootness objection, is supported by the case law.

A district court may “stay discovery when it is convinced that the plaintiff will be unable to state a claim for relief.” *Wood v. McEwen*, 644 F.2d 797, 801 (9th Cir. 1981). However, “[d]iscovery stays are not automatic.” *Optronic Techs., Inc. v. Ningbo Sunny Elec. Co.*, No. 5:16-cv-06370-EJD, 2018 WL 1569811, at *1 (N.D. Cal. Feb. 16, 2018); *see also Holmes v. McMillan*, No. CIV 09-00225 PHX MEA, 2009 WL 10673424, at *3 (D. Ariz. Nov. 24, 2009). The notion that discovery is automatically stayed upon the filing of a dismissal motion is not supported by the Federal Rules of Civil Procedure and is “directly at odds with the need for expeditious resolution of litigation.” *Skellerup Indus. Ltd. v. City of Los Angeles*, 163 F.R.D. 598, 600-01 (C.D. Cal. 1995).

*4 Pacific Ocean's filing of dismissal motions did not automatically relieve it of its obligation to respond to OG's discovery requests, and Pacific Ocean failed to seek a protective order and/or a stay of discovery pending resolution of the dismissal motions. Accordingly, the Court finds that Pacific Ocean's prematurity objections to OG's discovery requests were legally unsupported.⁴

Furthermore, the granting of Pacific Ocean's first dismissal motion with leave to amend did not render OG's August and September 2019 discovery requests permanently moot. *See Adams*, 2011 WL 1522407 at *1-2 (ordering a party to respond to discovery requests served prior to the filing of an amended complaint where the requests pertained to claims that had been revived in the amended complaint and encompassed information relevant to the allegations of the amended complaint). OG's UFTA SAC included additional allegations to establish this Court's personal jurisdiction over Pacific Ocean; however, the UFTA SAC repeated the same

substantive UFTA allegations against Pacific Ocean, and the discovery requests at issue seek information pertinent to those allegations. Accordingly, the granting of Pacific Ocean's first dismissal motion with leave to amend and the filing of the UFTA SAC did not render the discovery requests permanently moot.

The cases relied upon by Pacific Ocean do not hold to the contrary. In *Clardy* and *Parkinson*, discovery requests were found to be moot where they pertained to the conduct of defendants whose motions to dismiss had been granted *without* leave to amend. *Clardy*, 2016 WL 5858673, at *2; *see also Clardy v. Gaunt*, No. 3:14-cv-01055-CL, 2015 WL 1058970, at *1 (D. Or. Mar. 6, 2015); *Parkinson*, 175 F. Supp. 2d 1233 at 1241, 1247. In *Handy*, the court found that the granting of the defendant's summary judgment motion rendered moot the plaintiff's request for injunctive relief. 996 F.2d at 1068. None of the three cases hold that the granting of a motion to dismiss *with leave to amend* renders discovery requests moot even after the filing of an amended complaint that reiterates the same substantive allegations. The Court will grant OG's Motion to Compel.

C. MIDP Responses

General Order 17-08 requires parties to serve mandatory initial discovery responses containing specified categories of information. "A party filing a responsive pleading ... must serve its initial discovery responses no later than 30 days after it files its responsive pleading under Rule 12(a)." Gen. Ord. 17-08(A)(6). Parties must file answers within 14 days after notice of the Court's denial of a Rule 12 motion to dismiss. *Fed. R. Civ. P. 12(a)(4)(A)*. The Court denied Pacific Ocean's Motion to Dismiss OG's UFTA SAC on February 18, 2020. (Doc. 338.) The Court's review of the docket indicates that, to date, Pacific Ocean has not filed an answer, nor has it served any MIDP responses. Even though OG's Motion to Compel highlighted Pacific Ocean's failure to serve MIDP responses, Pacific Ocean did not make any attempt to address that failure in its Response to the Motion to Compel. The Court will order Pacific Ocean to serve MIDP responses in compliance with General Order 17-08.

D. Fee-Shifting Sanctions

*5 The record before the Court shows that OG attempted in good faith to obtain the discovery at issue from Pacific Ocean prior to filing its Motion to Compel. *See Fed. R. Civ. P. 37(a)(5)(A)(i)*. The record does not show that Pacific Ocean's failure to respond to OG's discovery requests was

substantially justified or that a fee-shifting award would be unjust under the circumstances. *See Fed. R. Civ. P. 37(a)(5)(A)(ii)-(iii)*. Accordingly, the Court finds that a fee-shifting order under *Rule 37(a)(5)(A)* is appropriate.

Rule 37(b)(2) provides that, if a party fails to obey an order to provide discovery, the Court may issue "further just orders" and "must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust." *Fed. R. Civ. P. 37(b)(2)(A), (C)*. *Rule 37(b)(2)* applies to MIDP responses. Gen. Ord. 17-08(A)(11). Pacific Ocean has not addressed its failure to serve MIDP responses, much less shown that "the failure was substantially justified" or that "other circumstances make an award of expenses unjust." *Fed. R. Civ. P. 37(b)(2)(C)*. Accordingly, although it declines at this time to take any of the actions listed under *Rule 37(b)(2)(A)(i)-(vii)*, the Court finds that a fee-shifting award is appropriate under *Rule 37(b)(2)(C)*, in addition to being appropriate under *Rule 37(a)(5)(A)*.

III. Motion to Compel and for Sanctions Against ADAB Mexico

At issue in OG's Motion to Compel and for Sanctions Against ADAB Mexico are OG's RFP numbers 18, 26, 27, 29, and 30, and interrogatory numbers 1, 6, 8, 9, 10, 11, 12, and 13. (Doc. 341-1 at 2-15.) These discovery requests primarily seek information and documents pertaining to a loan from Blessings to ADAB Mexico—including information about a ledger known as Account No. 1322 and information about Blessings' Exhibit 109 from the injunction hearing held on July 23, 2019 and August 22-23, 2019. (Doc. 341 at 5-7, 9-10.) The requests also seek information regarding the maquiladora agreement(s) entered into by Blessings and ADAB Mexico, information about ADAB Mexico's bank accounts and customers, and information about a lease between ADAB Mexico and Pacific Ocean. (*Id.* at 7-11.)

OG argues that the majority of ADAB Mexico's objections to the discovery requests at issue have been waived due to untimeliness and because they are boilerplate. (*Id.* at 12-13.) OG further argues that ADAB Mexico is obligated to produce information that it claims is in Blessings' possession. (*Id.* at 13-14.) OG asks the Court to order ADAB Mexico to answer its interrogatories in the narrative instead of invoking *Rule 33(d)*, and it argues that ADAB Mexico should be prohibited from incorporating by reference other materials when answering the interrogatories. (*Id.* at 14-15.) OG

contends that any confidentiality concerns are adequately addressed by the Court's protective order, and it requests a fee-shifting order under [Rule 37](#). (*Id.* at 15-17.)

In response to the Motion to Compel, ADAB Mexico avers that it has been serving discovery responses on a rolling basis and that it intends to continue doing so but needs more time. (Doc. 352 at 2.) ADAB Mexico argues that it is entitled to special consideration as a foreign litigant, it accuses OG of “abusive discovery practices,” and it argues that OG failed to fully participate in the meet-and-confer process. (*Id.* at 2-3, 8-9, 13, 17.) ADAB Mexico further argues that it has no obligation to respond to discovery requests requiring the production of Blessings’ records or the disclosure of information controlled by Blessings. (*Id.* at 4-6, 9-11.) Furthermore, ADAB Mexico contends that OG already received information responsive to some of the discovery requests at issue. (*Id.* at 7, 12.) ADAB Mexico disputes OG's waiver arguments and contests the relevance and proportionality of certain interrogatories. (*Id.* at 11-12, 14-17.) Finally, ADAB Mexico argues that a fee-shifting award would be unjust. (*Id.* at 17.)

*6 The parties attach numerous exhibits to their briefs, including Declarations by David Mannion (Doc. 341-2; Doc. 373), David Boden (Doc. 341-22), William Klain (Doc. 352-2), Erin McGinnis (Doc. 352-4), and Jonathan Saffer (Doc. 352-5); documentation of the parties’ discovery responses and discovery-dispute communications (Doc. 341-13 to 341-21; Doc. 352-3; Doc. 365-5; Doc. 373-1 to 373-2), and a statement of facts submitted by ADAB Mexico concerning the parties’ discovery disputes (Doc. 352-1).

A. Waiver—Boilerplate Objections

As an initial matter, the Court rejects OG's argument that ADAB Mexico's objections to the discovery requests at issue have been waived because they are boilerplate. (Doc. 341 at 13.) In support of this argument, OG relies upon *Blemaster v. Sabo*, No. 2:16-cv-04557 JWS, 2017 WL 4843241, at *4 (D. Ariz. Oct. 25, 2017); *Reinsdorf v. Skechers U.S.A., Inc.*, No. CV 10-7181 DDP (SSx), 2013 WL 12116416, at *8 (C.D. Cal. Sept. 9, 2013); *A. Farber & Partners, Inc. v. Garber*, 234 F.R.D. 186, 188 (C.D. Cal. 2006); and *Ramirez v. County of Los Angeles*, 231 F.R.D. 407, 409 (C.D. Cal. 2005). (Doc. 341 at 13.) These cases recognize the impropriety of boilerplate objections, but they do not support OG's position. Boilerplate objections do not result in an automatic waiver. *Del Socorro Quintero Perez v. United States*, No. 13cv1417-WQH-BGS, 2016 WL 304877, at *1-2 (S.D. Cal. Jan. 25,

2016). In *A. Farber & Partners*, the court found boilerplate objections improper but did not find that they resulted in waiver. See 234 F.R.D. at 188. While the other cases cited by OG do recognize that objections that are “are too general to merit consideration” are waived, *Ramirez*, 231 F.R.D. at 409, ADAB Mexico's objections to the discovery requests at issue here are sufficiently tailored to allow for consideration on their merits, unlike the litany of copy-pasted, nonsensical boilerplate objections at issue in *Blemaster* and *Reinsdorf*. See *Blemaster*, 2017 WL 4843241 at *3-4; *Reinsdorf*, 2013 WL 12116416 at *8-11.

B. Meet-and-Confer Requirement

The parties dispute whether OG engaged in the meet-and-confer process in good faith with respect to ADAB Mexico's December 19, 2019 discovery responses. (Doc. 352 at 8-9; Doc. 365 at 12.) A motion to compel “must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.” [Fed. R. Civ. P. 37\(a\)\(1\)](#). OG's Motion to Compel includes a certification by Plaintiff's attorney David Mannion detailing the party's discussions regarding ADAB Mexico's discovery responses. (Doc. 341-2.) Upon consideration of David Mannion's [Rule 37\(a\)\(1\)](#) Certification (Doc. 341-1), ADAB Mexico's statement of facts (Doc. 352-2), and the other materials of record (*see, e.g.*, Doc. 341-13 at 10-12), the Court finds that OG has satisfied the meet-and-confer requirement. Although the [Rule 37\(a\)\(1\)](#) Certification does not indicate that OG continued the meet-and-confer process after December 19, 2019, the materials of record sufficiently show that OG attempted in good faith to resolve the substance of the parties’ discovery disputes prior to filing its Motion to Compel.

C. OG's First Consolidated RFPs

OG served its First Consolidated RFPs on August 30, 2019, including RFP numbers 18, 26, and 27. (Doc. 341-1 at 2-3; Doc. 352-1 at 3.) ADAB Mexico timely responded on September 30, 2019. (Doc. 341-1 at 2-3; Doc. 352-1 at 3.)

1. RFP Number 18

*7 RFP number 18 sought “[a]ll banking documents for ADAB Mexico for the period January 1, 2011, onwards, including bank statements, wire transfer documents, and copies of cancelled checks (front and back).” (Doc. 341-1

at 2.) ADAB Mexico timely objected that the request was “overly broad” and “unduly burdensome,” that it was “disproportionate to the legitimate needs of the case” and “not reasonably calculated to lead to the discovery of admissible evidence,” and that it sought “documents that contain highly confidential financial and business information.” (*Id.*) OG argues that these objections are waived because they are boilerplate, and that any confidentiality concerns are adequately addressed by this Court's protective order. (*Id.*) ADAB Mexico disputes OG's contention that its objections are waived for being boilerplate, and it asks the Court to review RFP number 18 for relevance, over-broadness, and proportionality. (Doc. 352 at 14, 16-17.) ADAB Mexico argues that the Court should deny OG's Motion to Compel as to RFP number 18 or, alternatively, limit its order of production to bank records in ADAB Mexico's possession or control from 2014 to 2018. (*Id.* at 16-17.) ADAB Mexico argues that it should not be required to produce any information pre-dating late 2014, because that is the year in which OG alleges fraudulent transfers to ADAB Mexico began. (*Id.* at 16.) OG contends that bank account information from 2011 onwards is relevant because Defendants claim that Blessings loaned ADAB Mexico money to get it set up as a maquiladora in the 2011-2012 time frame. (Doc. 341 at 10.)

As an initial matter, ADAB Mexico's objection that RFP number 18 seeks documents “not reasonably calculated to lead to the discovery of admissible evidence” is based on an outdated version of [Rule 26](#). [Rule 26](#) was amended on December 1, 2015. Prior to the 2015 amendments, [Rule 26\(b\)\(1\)](#) stated that inadmissible evidence was discoverable if it “appears reasonably calculated to lead to the discovery of admissible evidence.” The “reasonably calculated” phrase was eliminated by the 2015 amendments and is no longer the governing standard. *In re Bard IVC Filters Prods. Liability Litig.*, 317 F.R.D. 562, 563-64 (D. Ariz. Sept. 16, 2016). “The test going forward is whether evidence is ‘relevant to any party's claim or defense,’ not whether it is ‘reasonably calculated to lead to the discovery of admissible evidence.’” *Id.* at 564.

The documents requested in RFP number 18 are relevant to OG's UFTA claims. At the injunction hearing, Defendants represented that Blessings set up ADAB Mexico as a maquiladora in the 2011-2012 time frame. (*See* Doc. 218 at 2.) OG alleges that Blessings was in serious financial distress and faced an existential threat from an ongoing criminal investigation from at least 2012 onwards, and that Defendants began “systematically transferring Blessings' assets down to

ADAB Mexico” before the criminal investigation became public. (Doc. 423 ¶¶ 4-5, 43-44.) OG has also contended that Defendants' transfer of assets has continued during the course of this litigation. ADAB Mexico's banking documents from 2011 onwards are relevant to show how much money Blessings transferred to ADAB Mexico and when the transfers occurred. ADAB Mexico has not shown that it lacks the ability to request copies of its banking documents from its banks, nor that doing so would be particularly burdensome. Considering the importance of the issue of cash transfers, the significant amount in controversy, the parties' relevant access to ADAB Mexico's banking documents, and the limited burden or expense to ADAB Mexico of requesting copies of those documents, the Court finds that RFP number 18 is proportional to the needs of this case. [Fed. R. Civ. P. 26\(b\)\(1\)](#). Furthermore, the Court finds that its protective order adequately addresses concerns regarding the confidential nature of the documents. Accordingly, the Court will order ADAB Mexico to produce the documents requested by RFP number 18.

2. RFP Number 26

RFP number 26 sought a “copy of any leases between Pacific Mexico, ADAB Mexico, and/or Blessings concerning Pacific Mexico's use of any shrimp processing equipment in Mexico.” (Doc. 341-1 at 2.) ADAB Mexico timely objected that the request was “premature” because Pacific Mexico had filed a then-pending dismissal motion. (*Id.*) In response to OG's Motion to Compel, ADAB Mexico concedes that its response to RFP number 26 should be supplemented but complains of OG's “abusive discovery practices.” (Doc. 352 at 15-16.)

For the reasons discussed above, ADAB Mexico's prematurity objection was invalid when made and, in any case, has been moot since February 2020, when the Court denied Pacific Mexico's Motion to Dismiss the UFTA SAC. ADAB Mexico has not shown that providing copies of the leases requested in RFP number 26 would be difficult or burdensome. ADAB Mexico must produce the documents requested by RFP number 26, and it should have done so before OG filed its Motion to Compel.

3. RFP Number 27

*8 RFP number 27 sought “[c]opies of all appraisals, opinions, emails, and any other advisory documents showing that reasonably equivalent value was given in connection with the lease pursuant to which Pacific Mexico is using processing equipment in Mexico.” (Doc. 341-1 at 3.) ADAB Mexico again objected on the grounds that the request was “premature” due to Pacific Mexico’s then-pending Motion to Dismiss. (*Id.*) In response to OG’s Motion to Compel, ADAB Mexico again concedes that its response should be supplemented. (Doc. 352 at 15-16.)

ADAB Mexico’s prematurity objection was invalid when made and has been moot since February 2020. ADAB Mexico has not shown that responding to RFP number 27 would be difficult or burdensome. ADAB Mexico must produce the documents requested by RFP number 27, and it should have done so prior to the filing of OG’s Motion to Compel.

D. OG’s Second Consolidated RFPs

OG served its Second Consolidated RFPs on September 27, 2019, including RFP numbers 29 and 30. (Doc. 341-1 at 14-15.) RFP number 29 requested documents backing up every entry on Exhibit 109. (Doc. 341-1 at 14.) RFP number 30 requested all documents Blessings’ comptroller Erin McGinnis used to prepare Exhibit 109. (*Id.* at 15.) ADAB Mexico did not respond to either RFP. (*Id.* at 14-15.)

In response to OG’s Motion to Compel, ADAB Mexico argues that it is not required to respond to the requests in OG’s Second Consolidated Requests for Production because it is not required to produce Blessings’ records. (Doc. 352 at 4-6.) According to ADAB Mexico, the practical ability to obtain documents or an inherent relationship are insufficient to establish that it has a legal right to obtain Blessings’ documents. (*Id.* at 6.) ADAB Mexico further argues that Blessings served supplemental discovery responses that provided the information sought in RFP numbers 29 and 30. (*Id.* at 7.)

OG disputes that it has already received information responsive to RFP numbers 29 and 30, averring that Blessings’ document production accounts for only around \$20,000 of the \$2,677,683 ADAB loan shown on Exhibit 109. (Doc. 365 at 10.) OG also argues that David and Abraham Mayorquin, as the owners of both Blessings and ADAB Mexico, have the legal right to get information from their own companies, and that ADAB Mexico, as the borrower of the ADAB loan, should have actual possession of documents and information concerning that loan. (*Id.* at 2-3, 10-11; *see also*

Doc. 341 at 13-14.) Finally, OG argues that ADAB Mexico has failed to explain its failure to serve any objections to RFP numbers 29 and 30. (Doc. 365 at 4.)

ADAB Mexico has not shown good cause to excuse its failure to timely object to RFP numbers 29 and 30. *See Liguori, 2012 WL 760747, at *11-12.* By failing to timely object, ADAB Mexico has waived its objections. *See Richmark Corp., 959 F.2d at 1473.* Accordingly, the Court declines to consider ADAB Mexico’s objections and will require ADAB Mexico to produce the documents requested by RFP numbers 29 and 30.⁵

E. OG’s First Set of Interrogatories to ADAB Mexico

According to OG’s LRCiv 37.1 Statement, OG served its First Set of Interrogatories to ADAB Mexico on August 30, 2019, including interrogatory numbers 1 and 6. (Doc. 341-1 at 4-5; Doc. 352-1 at 3.) Other materials in the record indicate that interrogatory number 6 was served as part of OG’s September 27, 2019 Second Set of Interrogatories to ADAB Mexico. (*See* Doc. 352-1 at 3; Doc. 365-5.) ADAB Mexico served its initial response to interrogatory number 1 on September 30, 2019, and served a supplemental response on December 19, 2019. (Doc. 341-1 at 4-5; Doc. 352-1 at 3.) ADAB Mexico served its response to interrogatory number 6 on October 17, 2019. (Doc. 341-1 at 5.)⁶

1. Interrogatory Number 1

*9 Interrogatory number 1 requested that ADAB Mexico provide “the bank name, branch address, and account number for all bank accounts used by ADAB Mexico for the period January 1, 2011, onwards.” (Doc. 341-1 at 4.) ADAB Mexico timely objected that the interrogatory was “overly broad” and sought “information that is not relevant and not reasonably calculated to lead to the discovery of admissible evidence,” but it provided the name and address of one bank. (*Id.*) In an amended response served on December 19, 2019, ADAB Mexico reiterated its prior objection but provided bank account numbers from two banks. (*Id.*; *see also* Doc. 366-1) OG argues that ADAB Mexico’s objections are waived because they are boilerplate, that ADAB Mexico’s December 19, 2019 supplemental response was untimely and that it is deficient because it only identifies bank accounts that ADAB Mexico currently uses and does not identify the bank account number for the account identified in ADAB Mexico’s initial response. (Doc. 341-1 at 5.) ADAB Mexico argues that

it already provided OG with the information OG's counsel requested during the parties' meet-and-confer, that OG has not contacted ADAB Mexico to address the issues raised in the Motion to Compel, and that OG failed to engage in the meet-and-confer process regarding the supplemental December 19, 2019 response. (Doc. 352 at 8-9, 13.)

For the reasons discussed above, the Court rejects OG's argument that OG waived its objections to interrogatory number 1 because they are boilerplate. The Court also rejects ADAB Mexico's argument concerning the parties' meet-and-confer efforts, and it finds that ADAB Mexico's objection concerning information "not reasonably calculated to lead to the discovery of admissible evidence" is based on an outdated version of Rule 26. The Court finds that interrogatory number 1 is relevant for the reasons discussed above, and that it is proportional to the needs of the case. Accordingly, the Court will order ADAB Mexico to substantively respond to interrogatory number 1. Although the Court rejects OG's request to prophylactically preclude ADAB Mexico from invoking Rule 33(d) or incorporating materials by reference in its response, the response should be clear and understandable.

2. Interrogatory Number 6

Interrogatory number 6 requested "the name and address of ADAB Mexico's customers." (Doc. 341-1 at 5.) ADAB Mexico objected that the interrogatory sought "confidential and highly proprietary" "commercial business information" "that is not relevant to any issue in the case" and "not proportionate to the legitimate needs of the case." (*Id.*) OG argues that ADAB Mexico's objection is waived because it is boilerplate, and that any confidentiality concerns are adequately addressed by the Court's protective order. (*Id.*; *see also* Doc. 365 at 12.) In response to OG's Motion to Compel, ADAB Mexico argues that interrogatory number 6 is irrelevant and disproportionate to the legitimate needs of the case. (Doc. 352 at 15.)

The Court rejects OG's argument that ADAB Mexico's objection to interrogatory number 6 is waived for being boilerplate, but it agrees with OG that interrogatory number 6 is relevant to the issue of whether intangible assets in the form of customer relationships were fraudulently transferred. ADAB Mexico has not shown that disclosing the names and addresses of its customers would be particularly difficult or burdensome, and given the importance of the issue of whether

intangible assets were fraudulently transferred, the significant amount of money in controversy, and the parties' relevant access to this information, the Court finds interrogatory number 6 to be proportional to the needs of the case. *See Fed. R. Civ. P. 26(b)(1)*. Although the Court recognizes that the identity of ADAB Mexico's customers is proprietary information, it agrees with OG that any confidentiality concerns are adequately addressed by the Court's protective order. Accordingly, the Court will order ADAB Mexico to substantively respond to interrogatory number 6. Although the Court rejects OG's request to prophylactically preclude ADAB Mexico from invoking Rule 33(d) or incorporating materials by reference in its response, the response should be clear and understandable.

F. OG's Third Set of Interrogatories to ADAB Mexico

OG served its Third Set of Interrogatories to ADAB Mexico on September 27, 2019, including interrogatory numbers 8-13. (Doc. 341-1 at 6-13; Doc. 352-1 at 3.) Interrogatory number 8 requested "the section/paragraph number of all Maquiladora agreement(s), contracts, addenda, minutes, and any other agreements between Blessings and ADAB Mexico that authorized" payments listed in Defendants' Exhibit 109 from the preliminary injunction hearing. (Doc. 341-1 at 6.) Interrogatory number 9 requested a detailed explanation of what the entry for \$1,065,067 in Exhibit 109 is made up of. (*Id.* at 8.) Interrogatory number 10 requested an explanation of the purpose of the entries for "2015 Loan to ADAB" in Exhibit 109. (*Id.* at 9.) Interrogatory number 11 requested a detailed explanation of what the entry for \$367,310.10" in Exhibit 109 is made up of. (*Id.* at 10.) Interrogatory number 12 requested "the section/paragraph number of all Maquiladora agreement(s), contracts, addenda, minutes, and any other agreements that authorized Blessings' payment of processing fees to ADAB Mexico from January 1, 2013, onwards." (*Id.* at 11.) Interrogatory number 13 requested the bates numbers of all documents responsive to OG's September 27, 2019 Second Consolidated Requests for Production. (*Id.* at 12.)

*10 ADAB Mexico served responses and objections to OG's Third Set of Interrogatories on December 19, 2019. (Doc. 341-1 at 7-13; Doc. 352-1 at 3.) In its December 19, 2019 objections, and in response to OG's Motion to Compel, ADAB Mexico argues that OG's Third Set of Interrogatories seeks information outside of ADAB Mexico's control. (Doc. 341-1 at 7-13; Doc. 352 at 10-11.) ADAB Mexico also argues in response to OG's Motion to Compel that interrogatory numbers 8 and 12 require it to give a legal opinion, perform an extensive investigation, and conduct complex research;

ADAB Mexico did not make those arguments in its December 19, 2019 objections. (Doc. 352 at 11-12; *see also* Doc. 341-1 at 7, 11.) OG argues that ADAB Mexico's objections have been waived due to untimeliness. (Doc. 341 at 12-13; *see also* Doc. 365 at 3-4, 11-12.)

ADAB Mexico's response to OG's Third Set of Interrogatories was due on October 27, 2019, but ADAB Mexico did not serve its objections until December 19, 2019. Furthermore, it raised its arguments concerning legal opinions and extensive investigation and research for the first time in response to OG's Motion to Compel, approximately five months after objections were due. ADAB Mexico has not shown good cause to excuse its failure to timely object to OG's Third Set of Interrogatories. *See Liguori, 2012 WL 760747, at *11-12.* By failing to timely object, ADAB Mexico has waived its objections. *See Richmark Corp., 959 F.2d at 1473.* Accordingly, the Court declines to consider ADAB Mexico's objections and will require ADAB Mexico to substantively respond to the interrogatories contained in OG's Third Set of Interrogatories. Although the Court rejects OG's request to prophylactically preclude ADAB Mexico from invoking [Rule 33\(d\)](#) or incorporating materials by reference in its responses, the responses should be clear and understandable.

G. Fee-Shifting Sanctions

OG requests fee-shifting sanctions and argues that, if nothing else, sanctions are warranted for ADAB Mexico's unexplained refusal to serve timely objections to interrogatory numbers 8-13, any objections to RFP numbers 29-30, any bank statements, and a copy of its Pacific Ocean lease. (Doc. 365 at 4-6, 8-12 (citing [Fed. R. Civ. P. 37\(b\)\(2\)](#); [Fed. R. Civ. P. 37\(d\)\(1\)\(A\)\(ii\)](#)); *see also* Doc. 341 at 16-17.)

Under [Federal Rule of Civil Procedure 37\(d\)\(1\)\(A\)\(ii\)](#), a court may order sanctions if “a party, after being properly served with interrogatories under [Rule 33](#) or a request for inspection under [Rule 34](#), fails to serve its answers, objections, or written response.” Such a failure “is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under [Rule 26\(c\)](#).” [Fed. R. Civ. P. 37\(d\)\(2\)](#). Sanctions may include any of the orders listed in [Rule 37\(b\)\(2\)\(A\)\(i\)-\(vi\)](#) and/or an order requiring “the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.” [Fed. R. Civ. P. 37\(d\)\(3\)](#).

The record before the Court does not show that ADAB Mexico's failure to serve any objections to RFP numbers 29-30 was substantially justified. The record also does not reveal substantial justification for ADAB Mexico's failure to timely respond to interrogatory numbers 8-13 or to provide the other substantive discovery responses required by this Order. *See Fed. R. Civ. P. 37(a)(5)(A)(ii)*. Under the circumstances presented by the record before the Court, neither ADAB Mexico's status as a foreign litigant nor its allegations of abusive discovery practices are sufficient to justify its recalcitrance in responding to OG's discovery requests. A fee-shifting award would not be unjust. *See Fed. R. Civ. P. 37(a)(5)(A)(ii)*; [Fed. R. Civ. P. 37\(d\)\(3\)](#). The Court will order ADAB Mexico to reimburse OG for the costs of litigating the Motion to Compel.

***11 IT IS ORDERED** that Plaintiff's Motion to Compel and for Sanctions Against Pacific Ocean Harvest, S. De R.L. De C.V. (Doc. 396) is **granted**, as follows:

- Within fourteen (14) days of the date this Order is issued, Pacific Ocean shall substantively respond to Plaintiff's RFP numbers 21, 22, 23, 26, and 27 and interrogatory numbers 1-8;
- Within fourteen (14) days of the date this Order is issued, Pacific Ocean shall answer the UFTA SAC and serve its initial MIDP responses, in compliance with General Order [17-08](#) and the [Federal Rule of Civil Procedure](#);
- Pacific Ocean shall reimburse Plaintiff for the reasonable expenses, including attorneys' fees, incurred in litigating the Motion to Compel (Doc. 396). The parties are directed to confer with one another to determine whether they can agree to a stipulation concerning the amount of those expenses. If the parties are unable to so stipulate, Plaintiff may file an appropriate motion.

IT IS FURTHER ORDERED that Plaintiff's Motion to Compel and for Sanctions Against ADAB Ocean Harvest, S. De R.L. De C.V. (“ADAB Mexico”) (Doc. 341) is **granted**, as follows:

- Within fourteen (14) days of the date this Order is issued, ADAB Mexico shall substantively respond to Plaintiff's RFP numbers 18, 26, 27, 29, and 30, and interrogatory numbers 1, 6, and 8-13.
- ADAB Mexico shall reimburse Plaintiff for the reasonable expenses, including attorneys' fees, incurred in litigating the Motion to Compel (Doc. 341). The

parties are directed to confer with one another to determine whether they can agree to a stipulation concerning the amount of those expenses. If the parties are unable to so stipulate, Plaintiff may file an appropriate motion.

All Citations

Slip Copy, 2020 WL 4284383

Footnotes

- 1 All record citations refer to the page numbers generated by the Court's electronic filing system and, unless otherwise noted, the docket in case number CV 18-322.
- 2 The Court finds the Motions suitable for resolution without oral argument.
- 3 To support this averment, OG attaches as an exhibit to its Reply Pacific Ocean's objections to OG's January 3, 2020 Third Set of Interrogatories. (Doc. 399-2.)
- 4 The Court also notes that Pacific Ocean appears to have abandoned its position that discovery requests need not be responded to when a dismissal motion is pending, as it served timely objections to OG's January 3, 2020 discovery requests before this Court had resolved its Motion to Dismiss the UFTA SAC. (See Doc. 324; Doc. 338; Doc. 398 at 3.)
- 5 Though ADAB Mexico contests, in its untimely objections, whether it has the legal right to obtain documents from Blessings, it appears that ADAB Mexico does have the practical ability to obtain such documents. Furthermore, as OG notes, it stands to reason that ADAB Mexico should have in its possession documentation concerning the ADAB loan, because it is the borrower of that loan.
- 6 OG does not contest the timeliness of the October 17, 2019 response. (*Id.*) Assuming that interrogatory number 6 was served as part of OG's Second Set of Interrogatories to ADAB Mexico, the October 17, 2019 response was timely.

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EXHIBIT 13-C

2015 WL 12911719

Only the Westlaw citation is currently available.
United States District Court, D. Arizona.

Manuel de Jesus Ortega MELENDRES,
on behalf of himself and all others
similarly situated; et al., Plaintiffs,

v.

Joseph M. ARPAIO, in his individual
and official capacity as Sheriff of
Maricopa County, AZ; et al., Defendants.

No. CV-07-2513-PHX-GMS

Signed 05/14/2015

Attorneys and Law Firms

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ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR DISCOVERY

Honorable G. Murray Snow, United States District Judge

*1 Plaintiffs seek leave to take document discovery and deposition testimony from Maricopa County Sheriff's Office personnel and counsel for Defendants Sheriff Arpaio and the MCSO concerning communications relating to the Court's December 23, 2011 Preliminary Injunction and May 14, 2014 orders on the collection of traffic stop recordings. (Doc. 1045.) The information sought is potentially subject to attorney-client privilege and/or the work-product doctrine. In particular, Plaintiffs request all e-mails and other documents in Defendants' possession or within their control relating to Defendants' interpretation of or compliance with the Preliminary Injunction and the May 14, 2014 orders, without regard to any assertable privilege/immunity, that were (1) held, sent, or received by MCSO personnel; (2) in Timothy Casey's client file, in paper or electronic form; (3) in the paper or electronic files of the Maricopa County Attorney's Office; (4) held, sent, or received by Mr. Casey, Thomas Liddy, Christine Stutz, or other relevant attorneys; or (5) listed on either Defendants' April 17, 2015 or previously produced privilege logs. (*Id.* at 14–15.) For the following reasons, the Court finds that Defendants have waived privilege over at least some of the materials in question by invoking their reliance on advice of counsel as a defense to their non-compliance with the orders of the Court. Plaintiffs are also entitled to depose defense counsel on the subject of any legal advice given or sought by Defendants pertaining to their implementation or disregard of the Preliminary Injunction and the Court's May 14, 2014 orders.

In addition, consistent with this Court's document production orders, rulings on attorney-client privilege and work-product immunity, and discussions with the Parties at the status conferences held in these matters on May 08 and 14, 2015, Plaintiffs may question counsel on the subject of any legal advice given or sought by Defendants pertaining to the Grissom inquiry and the retention of Don Vogel to conduct that inquiry. (*See* Docs. 1046, 1053.)

DISCUSSION

Issues of privilege in federal question cases are determined by federal law. *Fed. R. Evid. 501*. The proponents of the privilege bear the burden of establishing its existence as to each communication being withheld. *See United States v. Ruehle*, 583 F.3d 600, 608 (9th Cir. 2009) (citing *United States v. Munoz*, 233 F.3d 1117, 1128 (9th Cir. 2000)). In the Ninth Circuit, “[w]here legal advice of any kind is sought from a professional legal advisor in his capacity as such, communications relating to that purpose made in confidence by [a] client are, at his instance, permanently protected from disclosure by himself or by the legal advisor, unless protection be waived.” *In re Fischel*, 557 F.2d 209, 211 (9th Cir. 1977) (internal numbering omitted). A related, qualified immunity also protects discovery of “documents and tangible things that are prepared in anticipation of litigation or for trial” by a party or his representative, absent a showing of special need by the requesting party. *Fed. R. Civ. P. 26(b)(3)(A)*; *Admiral Ins. Co. v. U.S. Dist. Ct. for Dist. of Ariz.*, 881 F.2d 1486, 1494 (9th Cir. 1989).

*2 The doctrines that “protect[] attorney-client communications may not be used both as a sword and a shield.” *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992) (citing *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991)). The safeguards afforded confidential materials by virtue of the attorney-client privilege or work-product immunity are forfeited when a party, in the course of litigation, (1) makes an affirmative act injecting privileged materials into a proceeding, (2) thereby putting the materials at issue, (3) where application of the privilege would deny the opposing party access to information needed to effectively litigate its rights in the adversarial system. *United States v. Amlani*, 169 F.3d 1189, 1195 (9th Cir. 1999) (quoting *Home Indem. Co. v. Lane Powell Moss & Miller*, 43 F.3d 1322, 1326 (9th Cir. 1995)). For example, it is axiomatic that the intentional disclosure of the content of a protected attorney communication in a selective, misleading, or unfair manner effects a waiver of the privilege or immunity as to all communications on the subject of the disclosure. *Weil v. Inv./Indicators, Research & Mgmt.*, 647 F.2d 18, 24 (9th Cir. 1981).

Similarly, when a client raises a claim or defense that puts protected information at issue, such as a client's assertion that it relied on legal counsel's advice in defense of its allegedly infringing behavior, the client also waives any attorney-client privilege that may have existed as to communications with counsel relevant to that claim or defense. *Kaiser Found. Health Plan, Inc. v. Abbott Labs., Inc.*, 552 F.3d 1033, 1042

(9th Cir. 2009). Under *Federal Rule of Evidence 502*, a waiver of privilege/immunity extends to all other documents on the same topic of a protected communication that the party selectively disclosed, or otherwise placed at issue, that should in fairness be considered along with the voluntary disclosure. *Fed. R. Evid. 502(a)*. “[A]n overarching consideration is whether allowing the privilege to protect against disclosure of the information would be ‘manifestly unfair’ to the opposing party.” *Home Indem. Co.*, 43 F.3d at 1326. Nevertheless, the Ninth Circuit has cautioned against finding a complete waiver of the attorney-client privilege, noting that “[t]he breadth of the waiver finding, untethered to the subject-matter disclosed, constitutes a particularly injurious privilege ruling.” *Hernandez v. Tanninen*, 604 F.3d 1095, 1101 (9th Cir. 2010).

I. Subject-Matter Waiver

As noted, a holder of the attorney-client privilege or work-product immunity cannot claim that legal advice from his attorney justifies his actions while simultaneously shielding that advice from disclosure. *Chevron*, 974 F.2d at 1156. Whether Plaintiffs are entitled to the discovery they seek turns on whether the documents sought by Plaintiffs are subject to attorney-client privilege or work-product doctrine, and, if so, whether Defendants placed their communications with counsel at issue in the evidentiary hearing (or elsewhere) in a way that constituted a waiver of the privilege/immunity. Because the circumstances surrounding Defendants' possible reliance on advice of counsel with respect to the Preliminary Injunction and the May 14, 2014 orders trigger different considerations, the Court will separately address them.

A. Preliminary Injunction

As a threshold matter, this Court has previously found that communications regarding the Preliminary Injunction similar to those that Plaintiffs now request may be privileged from discovery based on the attorney-client privilege or work-product doctrine. (*See Docs. 986, 1000.*) Defendants assert, and Plaintiffs do not challenge, that the documents in question were made for the purpose of giving or obtaining legal counsel on behalf of Defendants or in anticipation of litigation, bringing them within the scope of materials protected from compelled disclosure, absent a showing of waiver. However, for the reasons set forth below, the Court finds the three-prong waiver test, *see Amlani*, 169 F.3d at 1195, has been satisfied because MCSO command staff and personnel have raised advice of counsel as a defense in the contempt hearing.

*3 First, Defendants affirmatively brought information subject to attorney-client privilege and/or the work-product doctrine to the forefront of the contempt proceedings. Defendant Sheriff Arpaio implicitly invoked the defense of advice of counsel by testifying that he delegated MCSO's compliance with the Preliminary Injunction to "counsel and relied on them to abide by this order." (Evidentiary Hr'g Tr. 482:22–25, April 21–24, 2015, ECF No. 1051.) Sheriff Arpaio testified that his "attorneys look into" orders issued by judges in cases involving MCSO, and that the way he gleans information regarding lawsuits is "usually the attorney." (Hr'g Tr. 593:22–594:1, ECF No. 1027.) Further, when asked if he could recall taking any steps to ensure that his office complied with the Preliminary Injunction, Sheriff Arpaio replied, in part, that "counsel was looking into it" and that counsel "reviewed" the order. (Hr'g Tr. 483:22–484:12, ECF No. 1051.) Sheriff Arpaio also testified that he directed Executive Chief Brian Sands to disseminate the Preliminary Injunction only to members of the HSU, rather than the entire MCSO, "[p]ursuant to the advice of [his] attorney." (Hr'g Tr. 487:13–18, ECF No. 1051.)

At various times during direct and cross examination, Sheriff Arpaio also referenced consulting with counsel on the legal aspects of MCSO's policies and practices during the time that the Preliminary Injunction had enjoined the agency from enforcing federal immigration law or detaining persons for whom there was no state law basis for detention. In particular, Sheriff Arpaio stated that he "may have talked to counsel" about what to do with undocumented immigrants against whom MCSO could not bring state charges, and that he also may have consulted counsel on "some legal aspects" of his so-called back-up plan to transfer undocumented immigrants to Border Patrol when Immigrations and Customs Enforcement began to decline custody. (Hr'g Tr. 489:19–22, 558:21–559:6, ECF Nos. 1027, 1051.)

Defense counsel's examination of other MCSO personnel voluntarily injected privileged communications into the litigation as well. During questioning by counsel for Sheriff Arpaio and MCSO, Lieutenant Sousa¹ explained that he spoke with Mr. Casey regarding the Preliminary Injunction and was not directed to change anything with respect to how HSU was operating after December 23, 2011. (Hr'g Tr. 758:19–25, ECF No. 1027.) Counsel for Defendants further prompted testimony that implied Mr. Casey's non-responsiveness was a reason training scenarios drafted by Lieutenant Sousa and Sergeant Brett Palmer were never

completed and implemented throughout the HSU or the MCSO generally.

¹ Defendants argue that Lieutenant Sousa has no right to assert an advice-of-counsel defense nor waive attorney-client privilege on behalf of Sheriff Arpaio and MCSO. (Doc. 1056 at 4–5.) Nevertheless, in the context that the Court is concerned with here, it is Sheriff Arpaio and MCSO that placed advice of counsel at issue by having counsel solicit the contested testimony from individuals like Lieutenant Sousa and, later, Chief Deputy Sheridan for the benefit of Sheriff Arpaio and MCSO. It would eviscerate the privilege and waiver doctrines if a party could immunize its voluntary disclosure in contravention of privilege simply by doing so through a strategic spokesperson.

Second, through this testimony, Defendants placed the content of privileged discussions between counsel and MCSO personnel at issue. In general, disclosing that legal counsel was consulted, the subject about which advice of received, or that action was taken based on that advice, does not necessarily waive the privilege protection. *See in re Cnty. of Erie*, 546 F.3d 222 (2d Cir. 2008) (concluding in the context of the legality of strip searches in a prison that the fact that a prison official revealed that legal counsel was consulted about the legality of the practice did not waive the privilege protection for those communications because the success of the defense turned on the objective legality of what was done, not the subjective state of mind of the prison officials). In this case, by comparison, Defendants' affirmative use of attorney-client communications went beyond divulging the general character of the legal services provided by defense counsel. Rather, Defendants' questioning and the responsive testimony given touched on the role counsel played in informing key MCSO executives on the existence and terms of the Preliminary Injunction and the directions given by counsel as to the constitutionality of MCSO's continued patrol operations. Furthermore, by eliciting testimony that suggested the necessity for action by counsel in the chain of approving court-compliance mechanisms within MCSO, Defendants inserted into the litigation factual issues relevant to the Court's assessment of the reasonableness of steps taken by Defendants to comply with the Preliminary Injunction that can only be resolved by inquiring further into protected communications.

*4 Third, a result of Defendants' assertion of attorney-client privilege has been to deprive Plaintiffs of information necessary to respond to Defendants' advice of counsel defense. Even though Defendants' intent is not technically

an element that Plaintiffs must prove in order for the named contemnors to be found in civil contempt, *Stone v. City of San Francisco*, 968 F.2d 850, 856 (9th Cir. 1992), the protected information is germane to Plaintiffs' burden of proving Defendants failed to take all reasonable steps to comply with the Court's December 23, 2011 order. Plaintiffs also bear the responsibility of laying a sufficient evidentiary foundation such that the Court can make findings of fact that support any relief it orders. Contempt proceedings are driven and shaped by the purpose sought to be accomplished by the punishment imposed. *Shillitani v. United States*, 384 U.S. 364, 369 (1996); *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702, F.2d 770, 778 (9th Cir. 1983). The state of mind of Sheriff Arpaio and other MCSO officials impacts the Court's ability to craft remedies that are tailored to the particular problems that gave rise to the contemptuous act in the first place. Accordingly, all of the elements of an implied waiver have been met and Defendants have waived their right to withhold documents pertaining to MCSO's implementation of the Preliminary Injunction on the grounds of attorney-client privilege or work-product immunity. Because Defendants placed the privileged materials at issue, it must reveal the legal advice it received with respect to the Preliminary Injunction.

Fairness requires that Plaintiffs be given the opportunity to fully test the legitimacy of Defendants' advice of counsel defense, *Fed. R. Evid. 502(a)*, which involves permitting Plaintiffs inquiry into the basis and facts surrounding the advice provided by counsel, not just those materials that communicated the advice to Defendants. *See Dunhall Pharm., Inc. v. Discus Dental, Inc.*, 994 F. Supp. 1202, 1204 (C.D. Cal. 1998).² Work product, including uncommunicated work product, may reveal communications between Defendants and their counsel and would be highly probative of what information Defendants' counsel considered, the reasonableness of its advice, and whether Defendants relied on the advice in good faith. Plaintiffs' need to discover this information, out of fairness, outweighs Defendants' interest in protecting work product, especially considering that counsel's litigation strategy as it relates to these matters has long since been made irrelevant by the Court's entering of a Permanent Injunction. Accordingly, the Court finds that Defendants' reliance on advice of counsel waives work-product protection over all materials generated by counsel relating to the Preliminary Injunction.

² Waiver of the attorney-client privilege does not necessarily lead to waiver of work-product immunity. *Handgards, Inc. v. Johnson & Johnson*, 413 F. Supp. 926,

926 (N.D. Cal. 1976). However, like with waiver of the attorney-client privilege, fairness principles should be applied in considering whether work product immunity has been waived. *Fed. R. Evid. 502(a)*; *Mushroom Associates v. Monterey Mushrooms, Inc.*, No. C-91-1092 TEH (PJH), 1992 WL 442892 (N.D. Cal. May 19, 1992).

In sum, Defendants' advice-of-counsel defense waived attorney-client privilege and the work-product doctrine for all attorney-client communications on the subject matter of the Preliminary Injunction, for all work product which referenced such communications, and for all work product on the Preliminary Injunction which was used by defense counsel in formulating the advice communicated to Defendants. Because the Court finds Defendants' waived privilege/immunity by testifying about its reliance on advice of defense counsel, it does not reach Plaintiffs' narrower argument that Defendants waived the privilege by selectively disclosing the content of particular confidential communications, except to incorporate by reference the conclusions previously set forth in its April 2, 2015 Order Denying Defendants' Motion for a Protective Order. (Doc. 986.)

B. May 14, 2014 Orders

On the other hand, Plaintiffs have failed to demonstrate that Defendants have expressly or implicitly waived attorney-client privilege or work-product immunity with respect to all communications between Defendants and counsel regarding the Court's May 14, 2014 orders. But, neither have Defendants met their burden of establishing that any communications with counsel pertaining to the Court's directives earlier that day were ever made in confidence for the purpose of securing legal advice, or with an eye toward future litigation. As the Court noted during the evidentiary hearing with respect to Ms. Stutz, the mere presence of an attorney during a conversation related to ongoing litigation does not bring that communication within the attorney-client privilege. *See Fischel*, 557 F.2d at 212 (explaining that the attorney-client privilege does "not conceal everything said and done in connection with an attorney's legal representation of a client in a matter"). Because waiver principles should not be applied in the abstract and must be considered in the context of the relevant issues in each case, the Court reserves its determination as to whether any attorney-client privilege or work-product immunity exists as to the documents requested by Plaintiffs concerning the Court's May 14, 2014 orders pending specific objections to disclosure by Defendants with an accompanying privilege log.

II. Depositions of Attorneys of Record

*5 There is no express prohibition in the Federal Rules of Civil Procedure against deposing an attorney of record in a case. See *Fed. R. Civ. P. 30(a)(1)* (a party may take the deposition of “any person”). Nevertheless, the Supreme Court has suggested that the practice of deposing counsel is general disfavored, because forcing attorneys to testify may have a negative impact on the litigation process and compromises the standards of the legal profession. See *Hickman v. Taylor*, 329 U.S. 495, 510–12 (1947). For this reason, some courts have allowed attorney depositions, even for fact discovery, only in the limited instances when the party seeking the deposition shows that no other means exist to obtain the information, the information sought is relevant and non-privileged, and the information is crucial to the preparation of the case. *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986). The Ninth Circuit has never adopted the *Shelton* rule, and sister Courts of Appeals have reasoned that the standards set forth in *Federal Rule of Civil Procedure 26* require a more flexible approach to lawyer depositions whereby the judicial body overseeing discovery takes into consideration all of the relevant facts and circumstances to determine whether the proposed deposition would entail an inappropriate burden or hardship. See *in re Friedman*, 350 F.3d 65, 72 (2d Cir. 2003). These considerations include “the need to depose the lawyer, the lawyer’s role in connection with the matter on which discovery is sought and in relation to the pending litigation, the risk of encountering privilege and work-product issues, and the extent of discovery already conducted.” *Id.*

In the context of the instant proceedings, *Shelton* does not provide the appropriate framework for determining whether to permit Plaintiffs to depose members of Defendants’ legal team. The primary interest underlying the *Shelton* test was protecting against the “ills of deposing opposing counsel in a pending case which could potentially lead to the disclosure of the attorney’s litigation strategy,” added time and expense for the litigants, and encouraging other abuses of the discovery process. *Pamida, Inc. v. E.S. Originals, Inc.*, 281 F.3d 726, 730 (8th Cir. 2002). *Shelton* is distinguishable from cases, such as this, where Plaintiffs only seek information about earlier stages of litigation, factually relevant to the pending action and uniquely known by defense counsel.

The balance of factors weighs in favor of permitting Plaintiffs to take limited depositions of Mr. Casey and specified members of the MCAO. First, none of the attorneys whom Plaintiffs seek to depose are actively involved in Defendants’ ongoing defense. Mr. Casey withdrew from this case in

November 2014, prior to the instigation of the show cause proceedings, and Mr. Liddy and several of his colleagues filed a similar motion last month. (See Docs. 773, 795, 1015, 1028.) Moreover, the scope of representation that is at issue is narrow and relates mostly to objective events that occurred before—in some cases, years before—they became relevant in the context of the current contempt hearings. Therefore, the depositions are unlikely to have a disruptive effect on the attorney-client relationship or ongoing aspects of the litigation.

Second, counsel’s testimony on communications between or concerning counsel, the named contemnors, and their agents is of critical importance to Plaintiffs’ case. Defendants have engaged in a course of witness examination that raises the legal advice given, or omitted, by Mr. Casey and/or the MCAO as a defense to liability in contempt for Defendants’ failure to observe the terms of the Preliminary Injunction. Courts may allow depositions of counsel relied on for an advice of counsel defense, which, as noted above, waives attorney-client privilege. Cf. *Friedman*, 350 F.3d at 72 (discussing attorney depositions in cases where party had asserted affirmative defenses based on the business judgment rule and advice of counsel). In addition, Defendants elicited testimony from Sheriff Arpaio regarding counsel’s purported failure to object to Chief Deputy Sheridan’s order that Chief Trombi send an e-mail to all MCSO command staff, which is the factual predicate underlying one of the three bases for contempt in the Order to Show Cause. Ms. Stutz has further been identified on the record as a percipient witness to later conversations between Chief Deputy Sheridan and Chief Trombi regarding Sheridan’s directions to e-mail command staff, certain aspects of which are contested. See *Arizona ex rel. Goddard v. Frito-Lay, Inc.*, 273 F.R.D. 545, 558 (D. Ariz. 2011) (permitting deposition of agency attorney where party asserting privilege waived attorney-client privilege by injecting the attorney into the litigation as a fact witness); accord *Younger Mfg. Co. v. Kaenon, Inc.*, 247 F.R.D. 586 (C.D. Cal. 2007) (citing *Friedman* and allowing the deposition of general counsel who was a witness to communications between parties). Moreover, the manner in which Defendants have invoked the advice of counsel defense tends to inform the appropriateness of particular remedies the Court could impose. However, all of Defendants’ witnesses testified that they have little to no memory of the events in question, including the cited discussions with counsel. Under these circumstances, deposing counsel, especially those relied on for an advice of counsel defense, is the only realistically available approach to developing a complete evidentiary

record. Counsel's testimony is relevant to Plaintiff's case-in-chief for impeachment purposes as well.

*6 Third, the discovery Plaintiffs have already conducted has proved insufficient to provide comprehensive answers to several issues central to the Court's determination of liability and the scope of remedies to impose concomitant with any findings of civil contempt. Defendants persist in failing to produce the full catalog of documents responsive to Plaintiffs' outstanding requests, and engaged in prolonged and inconsistent assertions of attorney-client and purported statutory privileges in the months leading up to the contempt hearing. Further, with respect to matters on which counsel's testimony is sought, there does not appear to be any alternative record available and the other parties involved have disclaimed any recollection of the meetings, conversations, or correspondence at issue. Deposing the attorneys is the only way Plaintiffs can obtain this information prior to the hearing and conduct any prudent follow-up discovery in time to resume the contempt proceedings in June.

Lastly, although deposing counsel presents a risk of encountering privilege issues, the risk of actually exposing any privileged matter is de minimis in light of the Court's previous rulings on these matters and the aforementioned discussion of subject-matter waiver resulting from Defendants' election to advance an advice of counsel defense. To the extent that Plaintiffs' line of inquiry during the attorneys' depositions impinges on either the attorney-client privilege or work-product doctrine, the deponents may make objections to improper questions at that time. The only perceived "risk" involving work-product or information subject to privilege in this context is the possibility of devoting substantial judicial time and resources to litigating privilege issues if and when they arise, *see Friedman*, 350 F.2d at 72, which itself does not justify withholding otherwise discoverable information from Plaintiffs. Accordingly, Plaintiffs may take depositions of defense counsel concerning any advice given by Mr. Casey and attorneys with the MCAO that relates to Defendants' compliance with the Preliminary Injunction or the May 14, 2014 orders.

Plaintiffs may also inquire of counsel information regarding the Grissom investigation. Although the majority of disclosures pertaining to the Grissom investigation and the Court's assessment of its relevance to the contempt proceedings occurred after Plaintiffs filed their Motion for Discovery, Plaintiffs have indicated their intention to depose

counsel on these matters at the status conferences held on May 08 and 14, 2015. Although the attorney-client privilege and work-product immunity may have once applied to communications between Mr. Casey and Defendants as to the Grissom inquiry, the Court has already determined that any such privilege and immunity was waived, at least in large part, by the testimony of Sheriff Arpaio and Chief Deputy Sheridan at the show cause proceedings. (*See* Doc. 1053.) Any lingering work-product immunity has been further impinged by Chief Deputy Sheridan's voluntary disclosure of Mr. Casey's mental impressions or opinions during an interview with the *Arizona Republic*.³ As it stands, Mr. Casey has factual knowledge of these events that is relevant to the issues to be presented at the resumed contempt hearing and that bears on the credibility of other witnesses. The other factors discussed above apply with equal measure here, and compel the conclusion that the Grissom matter is fairly within the scope of any deposition Plaintiffs may seek to take of Mr. Casey.

³ *See* Yvonne Wingett Sanchez, *How Mexican Food Drew Couple Into Heart of Arpaio Case*, *Ariz. Republic*, May 08, 2015, available at <http://www.azcentral.com/story/news/local/phoenix/2015/05/07/mexican-fooddraw%20-grissom-couple-heart%20-sheriff%20-joe-arpaio-civil-contempt%20-case/70990098/>.

CONCLUSION

Throughout the show cause proceedings in April 2015, Defendants raised the legal advice they received from counsel as a defense or mitigating factor to their failure to take any steps to implement the December 23, 2011 Preliminary Injunction. In so doing, Defendants waived the attorney-client privilege and work-product doctrine as to communications on the subject matter of the Preliminary Injunction necessary to Plaintiffs' evaluation or refuting of this advice of counsel defense. Plaintiffs may also depose defense counsel on whose legal advice Defendants claim to have relied regarding the implementation of the Preliminary Injunction or the Court's May 14, 2014 directives, or on the subject of the Grissom inquiry.

*7 **IT IS THEREFORE ORDERED** that Plaintiffs' Motion for Discovery (Doc. 1045) is **GRANTED** in part and **DENIED** in part.

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EXHIBIT 13-D

2009 WL 3679672

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United States District Court,
N.D. Illinois,
Eastern Division.

Oscar WALDEN Jr., Plaintiff,

v.

CITY OF CHICAGO, et al., Defendants.

No. 04 C 0047.

|

Nov. 3, 2009.

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MEMORANDUM, OPINION AND ORDER

[WAYNE R. ANDERSEN](#), District Judge.

*1 Before the court are objections filed by former Illinois Governor George Ryan and the Illinois Prison Review Board ("PRB") to Magistrate Judge Mason's October 18, 2006 order denying Governor Ryan and the PRB's motions to quash subpoenas. For all of the reasons set forth below, the objections [112, 114] are denied.

BACKGROUND

Plaintiff Oscar Walden Jr. has sued the City of Chicago, among other defendants, alleging multiple claims of police misconduct relating to his arrest and prosecution for rape in 1952. After a jury trial, Walden was convicted of rape, and his conviction was affirmed on appeal. Walden served almost fourteen years of his 75-year sentence and was released on parole in 1965. Walden received a general pardon

in 1978 from Governor James Thompson. Then in 2003, Governor Ryan granted Walden a pardon for innocence. Prior to issuing the pardon, the PRB had provided Governor Ryan a clemency recommendation to use in deciding whether to pardon Walden.

Over the passage of time, all of the witnesses with knowledge of the facts underlying Walden's allegations in this case, including the victim who identified Walden as her assailant both prior to and during the criminal trial and all of the police officers involved in his arrest and prosecution have died. Consequently, other than Walden himself, there is no one alive with personal knowledge of the relevant facts. Walden has stated his intention to offer his 2003 pardon for innocence as proof of his innocence in support of his claims in this case.

The City of Chicago issued subpoenas to both Governor Ryan and the PRB seeking information relating to the PRB's findings and recommendations to Governor Ryan and the reasons behind Governor Ryan's decision to grant a pardon to Walden. Both Governor Ryan and the PRB argued that the discovery sought by the City is not relevant, and even if it were relevant, it is privileged. The City claimed that the information is relevant because Walden has stated his intention to offer his 2003 pardon as proof of his innocence in support of his claims in this case. The City also argued that in order to defend itself it needs to know what information Governor Ryan considered and relied on to grant the pardon and that the Governor is the only source of that information.

On October 18, 2006, Judge Mason denied Governor Ryan's motion to quash the City's subpoena seeking discovery related to his decision as Illinois governor to grant a pardon to Walden. Judge Mason also denied the PRB's motion to quash the City's subpoena seeking discovery of the PRB's findings and recommendations to Governor Ryan concerning Walden's pardon and granted the City's motion to compel. Governor Ryan and the PRB have filed objections to Judge Mason's order and request that this court overturn Judge Mason's ruling and quash the subpoenas served upon them.

DISCUSSION

The standard of review of a magistrate judge's ruling on pretrial discovery issues is whether the order is clearly erroneous or contrary to law. [Fed. R. Civ. P. 72\(a\)](#). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with the definite and firm

conviction that a mistake has been committed. *United States v. U.S. Gypsum Co.*, 33 U.S. 364, 395 (1948).

I. The Subpoenas Issued by the City of Chicago Seek to Discover Relevant Information

*2 Discovery must be “relevant to the subject matter involved in the action.” *Fed. R. Civ. P. 26(b)(1)*. The scope of relevant discovery is not limited to evidence admissible at trial but extends to “discovery [that] appears reasonably calculated to lead to admissible evidence.” *Id.* However, a court may quash or modify a subpoena if it “requires disclosure of privileged or other protected matter and no exception or waiver applies, or subjects a person to undue burden.” *Fed. R. Civ. P. 45(c)(3)(A)(iii), (iv)*.

This court has no doubt that the information sought under the subpoenas is relevant to the claims at issue in this lawsuit. Clearly, there is relevant information contained in the PRB's findings and recommendations pertinent to Governor Ryan's decision to pardon Walden, and the reasoning and information behind Governor Ryan's decision to pardon Walden bear directly on the weight that his pardon should be given in this case.

Under the broad scope allowed for discovery, the City of Chicago is entitled to inquire about such information since Walden has stated that he intends to present it at trial. However, it is important to clarify what is not at issue in these subpoenas. First, the City is not questioning the power of the governor of Illinois to pardon, nor does the City seek to challenge or attack the validity of the pardon Governor Ryan granted to Walden. These subpoenas and subsequent motions concern only the discoverability of the information sought in the subpoenas not whether that information will be admitted as evidence at trial. Decisions about the admissibility of evidence will be determined at a later time.

II. The City's Subpoena Will Not Hinder the Exercise of a Core Constitutional Power

Governor Ryan's first argument is that the subpoena improperly seeks to inquire into his exercise of core constitutional power. It is not disputed that a governor's power to pardon is unfettered and may not be overturned. *See People v. ex rel. Madigan v. Snyder*, 208 Ill.2d 457, 281 Ill.Dec. 581, 804 N.E.2d 546, 556 (Ill.2004). However, the City is not seeking to challenge or overturn the pardon. To the contrary, the City seeks to inquire about whether the pardon was based upon actual evidence of innocence, and if so, what that

evidence is. Judge Mason specifically recognized in his order that “the power of the Governor is *not* at issue.” 10/18/06 Order at 2.

The City of Chicago faces serious allegations of misconduct, including allegations that its policies, customs and practices caused now-deceased police officers to coerce Walden into confessing to a rape he did not commit, for which he is seeking millions of dollars in damages. We agree with Judge Mason and believe that fundamental fairness entitles the City to explore the basis for the pardon as it is the sole basis that permits him to sue in the first place. Moreover, there is no other witness from which to get this information.

III. Information Sought from Governor Ryan Is Not Protected by Any Privilege

*3 Governor Ryan seeks to prevent his testimony pursuant to the City's subpoena under a claim of executive privilege. Because this case arises under the court's federal question jurisdiction, all questions of privilege are governed by federal law. *See Memorial Hosp. for McHenry County v. Shadur*, 664 F.2d 1058, 1061 (7th Cir.1981). Here, Governor Ryan attempts to invoke two forms of executive privilege: the deliberative process privilege and the executive communications privilege. Judge Mason rejected both arguments, and we find nothing clearly erroneous or contrary to the law in Judge Mason's ruling.

A. The information requested is not protected by the deliberative process privilege

The deliberative process privilege extends only to communications that are predecisional, that is, generated before the adoption of agency policy, and deliberative, that is, reflecting the give-and-take of the consultative process. *United States v. Bd. of Educ. of City of Chicago*, 610 F.Supp. 695, 698 (N.D.Ill.1985). In determining whether the deliberative process privilege applied, Judge Mason relied on *Evans v. City of Chicago*, 231 F.R.D. 302 (N.D.Ill.2005) (J. Schenkier). In *Evans*, a pardoned former inmate brought a civil rights claim against the City of Chicago and several police officers. *Id.* at 315–16. In that case, Judge Schenkier rejected Governor Ryan and the PRB's claim of deliberative process privilege and ordered Governor Ryan's deposition and the PRB to produce the requested documents, including the PRB's recommendation memorandum. *Id.* at 318–19. At the same stage of the proceedings here, the court in *Evans* rejected the same argument that Governor Ryan and the PRB advance in this case: “[W]e cannot say that the information

sought by the police officer defendants is outside the scope of 'relevance' as defined in [Rule 26](#), at least insofar as the police officer defendants seek documents and testimony to probe the basis of the pardon. Accordingly, the Court overrules the Respondents' arguments that none of the requested documents or testimony is relevant." *Id.* at 310.

To satisfy the threshold showing of whether the privilege applies to information sought to be protected, three elements must be shown to assert the privilege: (1) the department head with control over the information must make a formal claim of privilege; (2) the responsible official must demonstrate, typically by affidavit, precise and certain reasons for preserving the confidentiality of the documents in question; and (3) the official must specifically identify and describe the documents. See *Ferrell v. U.S. Dept. of Housing and Urban Development*, 177 F.R.D. 425, 428 (quoting *K.L., L.F. & R.B. v. Edgar*, 964 F.Supp. 1206, 1209 (N.D.Ill.1997)). If the threshold showing is satisfied, then the party seeking the documents has the burden of showing a "particularized need" for the documents. *United States v. Farley*, 11 F.3d 1385, 1389 (7th Cir.1993).

*4 Judge Mason rejected Governor Ryan's assertion of the deliberative process privilege finding that he failed to submit an affidavit regarding the reasons for asserting the privilege, failed to demonstrate any precise and certain reasons for preserving the confidentiality and failed to specifically identify and describe the protected information about which he will be asked at his deposition. 10/18/06 Order at 3. Because Governor Ryan failed to satisfy the threshold requirements, Judge Mason did not consider the City's particularized need for the documents.

Specifically, Judge Mason recognized that Governor Ryan had failed to file an affidavit in support of his claim of privilege. Judge Mason concluded that even if Governor Ryan's motion to quash the subpoena could be construed as a formal claim of privilege, he had failed to demonstrate any precise and certain reasons for preserving the confidentiality. Judge Mason also concluded that Governor Ryan failed to specifically identify and describe the protected information about which he will be asked during his deposition. Judge Mason held that it is unlikely "that Governor Ryan would be unable to give any testimony that would fall outside an applicable privilege." 10/18/06 Order at 4. Judge Mason held that taken as a whole, Governor Ryan failed to satisfy the threshold showing necessary to make a prima facie showing that the deliberative process privilege applies. *Id.* We find

nothing clearly erroneous or contrary to the law in Judge Mason's ruling.

B. *The executive communications privilege does not apply*
Governor Ryan also claims that the information sought by the City of Chicago's subpoena is protected by the executive communications privilege. Judge Mason found no federal authority for extending to a state governor the Presidential communications privilege. 10/18/06 Order at 3. Neither has this court. Federal courts have recognized the presidential communications privilege as belonging only to the [President of the United States](#). *Cheney v. U.S. Dist. Ct. for Dist. of Columbia*, 542 U.S. 367, 381–82, 124 S.Ct. 2576, 159 L.Ed.2d 459 (2004) (citing cases). Therefore, the information sought by the City's subpoena is not protected by the executive communication privilege.

IV. Information Sought from the PRB Also Is Not Protected by Any Privilege

The PRB also asserts the deliberative process privilege in response to the City's subpoenas. Judge Mason similarly concluded that the privilege did not attach to any of the documents the PRB withheld from production because the PRB also failed to properly assert the privilege. 10/18/06 Order at 4. We find nothing clearly erroneous nor contrary to the law. Under the broad scope of what is discoverable information, the City of Chicago is entitled to the information requested from the PRB in the subpoenas at issue.

In addition to the deliberative process privilege, the PRB asserts six other "privileges": (1) the executive communications privilege; (2) the attorney-client privilege; (3) the work product privilege; (4) [730 ILCS 5/3–3–13](#); (5) [20 Ill. Admin. Code 1610.180](#) and [20 Admin. Code 1610.30\(b\)\(1\)\(\)](#); and (6) HIPPA. Although the PRB asserted these privileges, it did not submit any argument whatsoever in support of these privileges. Therefore, Judge Mason concluded that the PRB had waived these privilege arguments. We agree.

*5 Finally, the City of Chicago's motion also seeks to compel the deposition of a PRB member involved with its decision to recommend Walden's pardon to Governor Ryan. Although the PRB provided no argument to Judge Mason against making a PRB board member available for deposition and Judge Mason concluded that the PRB had waived any argument with respect to deposing a PRB board member, this court declines to compel the deposition of a PRB member at this time. This

issue may be raised again, if necessary, at a later date after the City of Chicago has had an opportunity to review the documents produced by the PRB and to depose Governor Ryan about his decision.

V. The City's Need for the Information Outweighs any Assertion of Privilege

The City's need for the information also is an important consideration in our analysis. Even if we were to find that Governor Ryan and the PRB properly asserted their claims of privilege, the assertion of privilege is not absolute. As stated above, if the threshold showing for the assertion of a privilege is satisfied, then the party seeking the documents has the burden of showing a “particularized need” for the documents. [Farley](#), 11 F.3d at 1389.

In this case, Governor Ryan pardoned Walden based on a finding of innocence. It is clear that the premise of Walden's claims is that he is actually innocent of the crime for which he was convicted. We agree with Judge Mason that there is no other source to which the City can go to discover the basis of that determination but Governor Ryan and the findings and recommendation of the PRB. In this case, Governor Ryan's testimony and the PRB's findings and recommendations to the former Governor are the only sources of information which will allow the City to explore the basis and merits of Walden's pardon as proof of his actual innocence. This is a unique case with a particularized need given the specific circumstance of

this case. Governor Ryan argues that his compelled testimony concerning Walden's pardon will create a chilling effect on future governors. We disagree. This is a narrow request in a unique case. The risk that future pardon decisions will be chilled by requiring Governor Ryan to be deposed in the unusual circumstance of this case is small and is certainly outweighed by the City's particularized need in this case. Therefore, we conclude that the City of Chicago's need for the specific information it seeks—Governor Ryan's deposition testimony and the PRB's documents relating to Walden—outweighs the arguments for the application of any privilege in the particular circumstances of this case.

CONCLUSION

For all of the reasons stated in this court's Memorandum Opinion and Order, the objections [112, 114] filed by former Illinois Governor George Ryan and the Illinois Prison Review Board to Magistrate Judge Mason's October 18, 2006 order denying Governor Ryan and the PRB's motions to quash subpoenas are denied. This matter is referred to Magistrate Judge Mason for the purposes of discovery supervision and settlement.

All Citations

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EXHIBIT 13-E



KeyCite Yellow Flag - Negative Treatment

Declined to Follow by [National Rifle Association of America v. Cuomo](#), N.D.N.Y., August 8, 2019

2007 WL 4344915

Only the Westlaw citation is currently available.
United States District Court,
N.D. New York.

The CHILDREN FIRST
FOUNDATION, INC., a New York
non-profit organization, Plaintiff,

v.

Raymond P. MARTINEZ, individually;
David J. Swartz, in his official capacity
as Commissioner of the New York
Department of Motor Vehicle; Jill A. Dunn,
individually; Neal Schoen, in his official
capacity as Deputy Commissioner and
Counsel for the New York Department
of Motor Vehicles; George E. Pataki,
individually, and Eliot Spitzer, in
his official capacity as Governor of
the State of New York, Defendants.

Civ. No. 1:04-CV-0927 (NPM/RFT).

|
Dec. 10, 2007.

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Hon. [Andrew M. Cuomo](#), Attorney General for the State of New York, [Senta B. Siuda, Esq.](#), Asst. Attorney General, of Counsel, Albany, NY, for Neal Schoen, Eliot Spitzer, and David J. Swartz, in their official capacities.

MEMORANDUM-DECISION AND ORDER

[RANDOLPH F. TREECE](#), United States Magistrate Judge.

*1 The State Defendants served upon Children First Foundation (CFF) a privilege log. *See* Dkt. No. 114-13, Privilege Log. After engaging in conferences with the other parties and the Court about the State Defendants' asserted privileges and their impact upon future disclosure and depositions, CFF filed a Motion to Compel the disclosure of approximately 374 pages of documents, which the the State Defendants claim are privileged under various legal doctrines. Dkt. No. 113, Pl's. Mot. to Compel, dated June 1, 2007. The State Defendants oppose CFF's Motion and, in doing so, provided a privilege log and submitted to the Court for an *in camera* review those documents designated as privileged.¹ Dkt. No. 114. Defendant Pataki joins the State Defendants in opposing the Motion to Compel. Dkt. No. 118, Ira J. Lipton, Esq. Decl., dated July 20, 2007. Other than recognizing that the privileges were properly asserted by the State Defendants, Defendant Martinez takes no further position with respect to the pending Motion. Dkt. No. 122, Mark J. McCarthy, Esq. Decl., dated July 20, 2007. As to Defendant Dunn, she filed, under seal, a Response to Plaintiff's Motion to Compel which, in essence, is a Cross Motion asserting that the privileges cloaking selected documents should be waived. Dkt. No. 116, Linda J. Clark, Esq. Decl., dated July 19, 2007, & Dkt. No. 117, Dunn's Mem. of Law, dated July 19, 2007. Because of the complexity of the Motions, the Court granted CFF and the State Defendants the opportunity to file a Reply and Sur-Reply, respectively. On July 20, 2007, CFF filed a Reply to the State Defendants' Opposition (Dkt. No. 121), and the State Defendants filed their Reply (Dkt. No. 147) to Dunn's Cross Motion on September 20, 2007.

I. BACKGROUND

Even though familiarity with the facts could be presumed, a brief recitation of the case history is warranted.²

A. CFF's Complaint

Pursuant to [New York's Vehicle and Traffic Law § 401 et seq.](#), the Commissioner of the Department of Motor Vehicles (hereinafter "DMV") was granted authority to establish three distinct categories of custom license plates: "Historical and Vintage Plates," "Special Number Plates," and "Picture Plates." Dk. No. 49, First Am. Compl. at ¶¶ 10-13.³ Basically, picture plates are commonly known as logo plates which permit a picture or logo in addition to an identification plate number. *Id.* at ¶ 16. As a part of the picture plate program, there are several sub-categories, which include, *inter alia*, "Organizations and Causes." *Id.* at ¶ 17. A significant feature of this program permits picture plates to be used to raise funds for non-profit agencies. Although many of these "Organizations and Causes" picture plates have already been approved by the State Legislature, the majority are approved by the New York Department of Motor Vehicles (DMV). *Id.* at ¶¶ 21-27.

CFF, a New York not-for-profit corporation, submitted an application to the DMV for a picture plate that would have the tag line "Choose Life." *Id.* at ¶¶ 33, 39 & 50-55. CFF's application for this plate was rejected repeatedly by the Commissioner of the DMV, modifications notwithstanding. *Id.* at ¶¶ 50-70, Exs. to Am. Compl.

*2 On August 4, 2004, CFF filed a civil rights action, pursuant to [42 U.S.C. § 1983](#), against the Defendants in their various capacities alleging that they violated CFF's constitutional rights to freedom of speech, due process, and equal protection of the law. Dkt. Nos. 1, Compl., & 49, First Am. Compl. The crux of CFF's Complaint is that the rejections of their proposed picture plate with the tag line "Choose Life" were content-based and constituted viewpoint discrimination. First Am. Compl. at ¶ 109.

Rather than serve an Answer, Defendants filed a Motion to Dismiss, pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#). Dkt. No. 7, Defs.' Mot. to Dismiss, dated Nov. 15, 2004. Among the many issues presented to the Honorable Neal P. McCurn, Senior District Judge, were the doctrine of qualified immunity and whether Defendants' actions, particularly Martinez's, were reasonable and viewpoint neutral. After hearing oral arguments, Judge McCurn ruled that CFF had sufficiently alleged violations of the First and Fourteenth Amendments

to the United States Constitution, though claims for money damages against Defendants in their official capacities were dismissed. Dkt. Nos. 16, Min. Entry, dated Jan. 4, 2005, 17, & Hr'g Tr. at pp. 70-73. In terms of Defendants' qualified immunity defense, Judge McCurn decided not to consider the qualified immunity defense under a [Rule 12\(b\)\(6\)](#) motion to dismiss analysis and suggested that this affirmative defense could be asserted within an answer and raised later during a motion for summary judgment. Hr'g Tr. at p. 76.

Shortly thereafter, the State Defendants filed a Motion for Reconsideration of the January 4, 2005 Ruling and Order, pursuant to [Fed. R. Civ. P. 54\(b\)](#), primarily raising the matter of qualified immunity again and arguing that such defense should be addressed within a motion to dismiss context. Dkt. No. 18, Defs.' Mot. to Recons. In addressing this issue, Judge McCurn found that "[D]efendants have not established that the facts on the face of the [C]omplaint support a qualified immunity defense." Dkt. No. 31, Mem.-Decision & Order, dated Mar. 14, 2005, at p. 5 (citations omitted). Defendants immediately filed a Notice of Appeal as to both the January 5 and March 14, 2005 Orders. Dkt. Nos. 23 & 32.

On March 6, 2006, the Second Circuit issued a Summary Order dismissing Defendants' appeal. Dkt. No. 35, Second Circuit Mandate; [Children First Foundation, Inc., et. al. v. Martinez, et. al.](#), 169 Fed. Appx. 637 (2d Cir.2006). "Because the facts supporting the defense of qualified immunity do not appear on the face of the complaint," the Second Circuit decided it lacked appellate jurisdiction to address this defense at that juncture. *Id.* Accordingly, the Second Circuit remanded the action back to the District Court.

As noted above, the First Amended Complaint was filed on September 8, 2006 (Dkt. No. 49; *see supra* note 1), and an Answer to the Amended Complaint was filed on October 11, 2006 (Dkt. No. 51). Within that Answer, and in addition to denials of the allegations, the State Defendants pled affirmative defenses, including the qualified immunity defense. Dkt. No. 51 at ¶ 131 ("At all relevant times, defendants acted under the reasonable belief that their conduct was in accordance with clearly established law. They are, therefore, protected under the doctrine of qualified immunity.")⁴

*3 From this lawsuit's inception until approximately January 31, 2007, Defendants have had only one attorney, the Attorney General. However, on January 31, 2007, the law firm of Houguet Newman & Regal, LLP, Ira J. Lipton, Esq.,

of counsel, filed a Notice of Appearance on behalf of George E. Pataki in his individual capacity. Dkt. No. 59. A month later, the law firm of Hiscock & Barclay, Linda J. Clark, Esq., of counsel, filed a Notice of Appearance on behalf of Jill A. Dunn, in her individual capacity. Dkt. No. 61. And most recently, the law firm of Harris Beach PLLC, Mark J. McCarthy, Esq., of counsel, filed a Notice of Appearance on behalf of Raymond P. Martinez in his individual capacity. Dkt. No. 106. Shortly after Dunn was represented in her individual capacity by a private firm, she sought to amend her Answer to add the government speech doctrine and establishment clause neutrality defense as affirmative defenses in this action. Dkt. No. 67, Dunn's Mot. to Amend Answer, dated Mar. 22, 2007. On August 3, 2007, this Court granted Dunn the right to amend her Answer to add the establishment clause neutrality defense but denied her the right to plead the government speech doctrine. Dkt. No. 128, Mem-Decision & Order.⁵

B. Pending Motions

We are uncertain when the State Defendants' served their privilege log (Dkt. No. 114-13), wherein they asserted the deliberative process privilege, the attorney-client privilege, and the work product doctrine, upon all other parties. But we do know that the service of the log did not initially trigger either a motion to compel from opposing parties nor a motion for protective order from the the State Defendants. It appears likely that the current wave of motions were triggered by the State Defendants' Letter-Brief, dated March 23, 2007 (Dkt. No. 70), that eventually segued into a Discovery Hearing held on March 30, 2007. *See* Dkt. No. 154, Hr'g Tr. Several complex and sensitive issues related to the State Defendants' asserted privileges were discussed during this Discovery Hearing. Yet, the most sensitive and prominent topic discussed during the Hearing involved Dunn and whether she could pierce her client's (DMV) and the State Defendants' asserted privileges in order to defend herself. Such piercing, of course, would be compounded by the matter of an attorney's ethical obligations to her client. Based upon the nature and complexity of these issues, we issued an Order granting Dunn permission to file a Motion for a Privilege Ruling. Dkt. No. 83, Order, dated Mar. 30, 2007. Because the parties would be delving into sensitive issues and facts, the Court also directed, in accordance with *In re New York Times Co.*, 828 F.2d 110 (2d Cir.1987) and *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110 (2d Cir.2006), that the motions be filed under seal, with redacted memoranda of law to be filed on the Court's Docket and served on Plaintiff's and Pataki's counsel. *Id.* at pp. 2-3. Furthermore, the documents

and communications at issue with respect to the asserted privileges, along with supporting affidavits providing, *inter alia*, an explanation of why the specific document is protected by one of the privileges, were to be filed under seal for an *in camera* review. *Id.* at p. 3.⁶

*4 At the time this Order was issued, we were under the impression that only Dunn was anxious to address the privilege issues and our briefing schedule reflected that belief. *Id.* at pp. 3-4. However, Dunn submitted a Letter Motion mentioning that the normal sequence of a motion that pertains to privileged documents should be commenced by the Plaintiff as well as raising reasons why Dunn should not take the lead on such a motion because of attorney-client ethical considerations. Dkt. No. 85. Shortly thereafter the parties submitted a new briefing stipulation (Dkt. No. 89), which was granted. Dkt. No. 90, Text Order, dated Apr. 16, 2007.⁷

There are 374 pages of documents that the State Defendants assert are protected by one or more privileges, which were submitted for an *in camera* review. Dkt. No. 114-13, Privilege Log. CFF filed its Motion to Compel and, obviously, not being privy to the documents claimed to be privileged, CFF was relegated to discussing the legal issues broadly. Dkt. No. 113-2, Pl.'s Mem. of Law. In turn Dunn, seeking disclosure of privileged documents and permission to testify accordingly in order to defend herself, raises two grounds in her Cross Motion namely that such disclosure is permitted pursuant to (1) New York Disciplinary Rule 4-101(C)(4) (attorney may pierce the attorney-client privilege in order to defend herself) and (2) an "at issue" waiver has resulted from the assertion of the qualified immunity affirmative defense. Dkt. Nos. 116 & 117. The State Defendants oppose both Applications and have submitted the requisite affidavit elaborating on the nature and the circumstances of the asserted privileges. Dkt. Nos. 114 & 147.

II. DISCUSSION

A. Privilege Log

Plaintiff stakes the position that these Logs fail to comport with statutory requirements and because of the inadequacy of the Logs this Court should deem all of the privileges listed therein waived for all purposes. Controverting Plaintiff's position, Defendants defend the adequacy of the Logs, however, if the adequacy of the Logs is found to be unsatisfactory, Defendants argue vociferously that

the suggested remedy of a wholesale waiver is drastic, unwarranted, and untenable. In terms of the adequacy of the Logs, we agree with the Plaintiff's assessment.

A proponent of a privilege log must “expressly make the claim and describe the nature of the documents, communications, or tangible things not produced or disclosed and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.” Fed. R. Civ. P. 26(b)(5)(A)(i) & (ii).⁸ In this respect, and in order to evaluate and facilitate the determination of whether a privilege exists, courts generally require compliance with this statutory mandate that an adequately detailed privilege log be provided. *United States v. Constr. Prod. Research, Inc.*, 73 F.3d 464, 473 (2d Cir.1996) (citations omitted). Without an adequately detailed privilege log, the opposing party and even the courts are hamstrung in their attempt to decipher the presence and the extent of the claimed privilege. An acceptable privilege log, at a minimum, should provide facts that would establish each element of the claimed privilege as to each document, and “identify each document and the individuals who were parties to the communications, providing sufficient detail to permit a judgment as to whether the document is at least potentially protected from disclosure. Other required information, such as the relationship between individuals not normally within the privileged relationship, is then typically supplied by affidavit or deposition testimony.” *Trudeau v. New York State Consumer Prot. Bd.*, 237 F.R.D. 325, 334 (N.D.N.Y.2006) (quoting *United States v. Constr. Prod. Research, Inc.*, 73 F.3d at 473 & citing *Strougo v. BEA Assoc.*, 199 F.R.D. 515, 519 (S.D.N.Y.2001)). In determining the asserted privileges, courts have broad discretion as to how to proceed and can use an adequately detailed privilege log along with “evidentiary submissions to fill in any factual gaps.” *Bowne of New York City, Inc. v. AmBase Corp.*, 150 F.R.D. 465, 474 (S.D.N.Y.1993); see also *In re Grand Jury Subpoenas Duces Tecum*, 798 F.2d 32 (2d Cir.1986) (affidavit and documents submitted *in camera*); *In re John Doe Corp.*, 675 F.2d 482 (2d Cir.1982) (same).⁹ When a party fails to comply with the requirements of Rule 26(b)(5) by submitting a privilege log that is inadequate by virtue of not providing sufficient support of the privilege, the claim of privilege may be denied. *Johnson v. Bryco Arms*, 2005 WL 469612, at *3-4 (E.D.N.Y. Mar. 1, 2005) (citing *United States v. Constr. Prod. Research, Inc.*, 73 F.3d at 474).

*5 CFF challenges the sufficiency of the Log, claiming further that it is devoid of any factual indications to support

that a specifically referenced document's content is indeed privileged. Dkt. No. 113-2, Pl.'s Mem. of Law at pp. 6-7, & 9-10. Similarly, CFF notes that the State Defendants have failed to describe the nature of the documents in a manner such that a reasonable person could discern whether the privilege is properly asserted. Consequently, the paucity of information has caused CFF to make a blanket challenge to all of the documents listed. *Id.* at p. 7. In viewing the Log, we agree with CFF that the “subject matter” substance is not detailed enough to permit a reasonable judgment on the specific documents. Considering the deficiencies of the State Defendants' Log, it would, nonetheless, be too austere a remedy to deny the asserted privileges when the deficiencies have been readily rectified by a more comprehensive, sealed affidavit. *Export-Import Bank of United States v. Asia Pulp & Paper Co., Ltd.*, 232 F.R.D. 103, 111 (S.D.N.Y.2005) (directing the proponent of a privilege what other specificity is required). Although CFF remains at a disadvantage, the Court, relying upon the sealed affidavit, has ample information to fully appreciate the disputation on the privileges. *Trudeau v. New York State Consumer Prot. Bd.*, 237 F.R.D. at 335.

Conversely, it is unfair for the State Defendants to chastise CFF for making nonspecific blanket objections to the Log and it is also unreasonable for them to protest that CFF's objections are not sufficiently focused in order to compel disclosure. Dkt. No. 114-2, State Defs.' Mem. of Law at pp. 3-4. CFF cannot be held solely responsible for the brevity or lack of specificity with its objections because the Log is relatively sparse as to the nature of the documents and why one or more privileges may attach thereto, and, additionally, CFF was not privy to the documents in question. Considering the quantity and quality of the information provided in the Log, CFF was still able to discuss reasonably well a number of documents and why the privileges should not survive and further discuss the legal standard upon which the various privileges may rest. Dkt. No. 113-2 at pp. 9-16. The Court will set aside the State Defendants' complaints and weigh accordingly CFF's objections.

B. Deliberative Process Privilege

The State Defendants claim a mass of documents as protected by the deliberative process privilege.¹⁰ Dkt. No. 113. Many, if not all, of these documents are purportedly and additionally cloaked by either the attorney-client privilege or the work product doctrine. CFF complains that “Defendants engaged in and facilitated content-based and viewpoint-based

discrimination and the exercise of unbridled discretion during the course of their review and ultimate denial of the requested plate designs.” Dkt. No. 49, Am. Compl. at ¶ 112. CFF further charges that Defendants “rel[ie]d upon vague and overbroad policies ... [and] enforced [those] policies in an *ad hoc* and arbitrary manner.” *Id.* at ¶¶ 119 & 120. In making these incriminations, CFF complains that the Defendants' violated its First Amendment rights to be free of prior restraints on its speech, and its Fourteenth Amendment rights of due process and equal protection. In CFF's view, the deliberation process that led to the denial of its applications is one of the issues in this litigation and, hence, the deliberative process privilege cannot stand.

*6 The deliberative process privilege is a sub-species of the work product doctrine that covers documents reflecting advisory opinions, recommendations, draft documents, proposals, suggestions, and any other subjective documents that reflect the personal opinions of the writer rather than the agency and deliberations comprising part of a process by which governmental decisions and policies are formulated.¹¹ *Tigue v. United States Dep't. of Justice*, 312 F.3d 70, 76 & 80 (2d Cir.2002); *A. Michael's Piano, Inc. v. F.T.C.*, 18 F.3d 138, 147 (2d Cir.1994) (stating that the privilege “protects the decisionmaking processes of the executive branch in order to safeguard the quality and the integrity of governmental decisions” (citation omitted)). In order for a document to be protected by this privilege, it must be an inter-agency or intra-agency document which is both predecisional and deliberative. *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 482 (2d Cir.1999) (citing, *inter alia*, *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184-85 (1975)). Post decisional memoranda which sets forth the reason for the agency's decision are not protected under this doctrine. *A. Michael's Piano, Inc. v. F.T.C.*, 18 F.3d at 147. An inter-agency or intra-agency document may be withheld from the public purview if it is prepared in order to assist an agency in arriving at its decision and actually related to the process by which policies are formulated. *Nat'l Council of La Raza v. Dept. of Justice*, 411 F.3d 350, 356 (2d Cir.2005). Intra-agency documents are those that remain within a single agency's walls while inter-agency documents are those that pass from one governmental agency to another; but in terms of this privilege, they are treated the same. *Tigue v. United States Dep't. of Justice*, 312 F.3d at 77-78. Generally speaking, the efficiency of government would be clearly hamstrung if it was not for such protection. *Hopkins v. United States of Hous. & Urban Dev.*, 929 F.2d 81, 84 (2d Cir.1991).

The deliberative process privilege “does not operate indiscriminately to shield all decision-making by public officials.” *Schiller v. City of New York*, 2007 WL 136149, at *10 (S.D.N.Y. Jan. 19, 2007) (quoting *Grossman v. Schwartz*, 125 F.R.D. 376, 381 (S.D.N.Y.1989)). As a general rule, the privilege does not cover purely factual matters. *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d at 482 (quoting *Env't Prot. Agency v. Mink*, 410 U.S.73, 87-88 (1973) for the proposition that “memoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery”) & *Local 3, Int'l Bhd. of Elec. Workers, AFL-CIO v. N.L.R.B.*, 845 F.2d 1177, 1180 (2d Cir.1988) (“Purely factual material not reflecting the agency's deliberative process is not protected.”); *Cipolla v. County of Rensselaer*, 2001 WL 1223489, at *2 (N.D.N.Y. Oct. 10, 2001). Nor does it protect documents which are peripheral to the policy formulation. *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d at 482. Furthermore, if an agency has adopted or incorporated by reference a pre-decisional memorandum into the final decision, that memorandum must be disclosed. *Wood v. FBI*, 432 F.3d 78, 83 (2d Cir.2005) (citations omitted). And lastly, the privilege is not absolute but rather qualified. *Ebbert v. Nassau County*, 2007 WL 674725, at * 11 (E.D.N.Y. Mar. 5, 2007); *Schiller v. City of New York*, 2007 WL 136149, at *8 (“The privilege is a qualified one, requiring courts to balance the agency's interest in non-disclosure against the public interest in opening for scrutiny the government's decision-making process.” (internal quotations and citations omitted)).

*7 The deliberative process privilege is fashioned in such a way that it protects the government's deliberative process from inquiry if it is collateral to the litigation itself. However, if the party's cause of action is directed at the government's intent in rendering its policy decision and closely tied to the underlying litigation then the deliberative process privilege “evaporates.” *In re Subpoena Duces Tecum Served on the Office of the Comptroller*, 145 F.3d 1422, 1424 (D.C.Cir.1998)¹² (cited in *State of New York v. Oneida Indian Nation of New York (Oneida II)*, 2007 WL 2287878, at *14 (N.D.N.Y. Aug. 7, 2007)); *McPeck v. Ashcroft*, 202 F.R.D. 332, 335 (D.D.C.2001) (“It is certainly true that this privilege yields when the lawsuit is directed at the government's subjective motivation in taking a particular action.”). The historical and overwhelming consensus and body of law within the Second Circuit is that when the decision-making process itself is the subject of the litigation, the deliberative process privilege cannot be a bar to discovery. *Ebbert v. Nassau County*, 2007 WL 674725, at *11 (finding

that when the deliberations are “among the central issues in the case” or “when the subject of the lawsuit is the very nature of the decision making process, the privilege should not foreclose the production of critical information”) (internal quotations and citations omitted); *Mitchell v. Fishbein*, 227 F.R. D. 239, 250 (S.D.N.Y.2005 (surveying cases on the waiver)); *State of New York v. Oneida Indian Nation of New York (Oneida I)*, 2001 WL 1708804, at *6 (N.D.N.Y. Nov. 9, 2001) (finding that the privilege must give way when the decision making process is the subject of the litigation) (citing *Marisol A v. Giuliani*, 1, 1998 WL 132810, at *7-8 (S.D.N.Y. Mar. 23, 1998)); *Mr. and Mrs. B. v. Bd. of Educ. of Syosset Cent. Sch. Dist.*, 35 F.Supp.2d 224, 230 (E.D.N.Y.1998) (when the agency's position is “pivotal to the lawsuit”); *Dep't of Econ. Dev. v. Arthur Andersen & Co.*, 139 F.R.D. 295, 299 (S.D.N.Y.1991) (“Where the deliberations of government are genuinely at issue, privileges designed to shield the deliberative process from public scrutiny ‘may not be raised as a bar against disclosure.’”) (quoting *Burka v. New York City Trans. Auth.*, 110 F.R.D. 660, 667 (S.D.N.Y.1986) & citing *Grossman v. Schwarz*, 125 F.R.D. 376, 385 (S.D.N.Y.1989)). Even “when the factors shaping the decisions made by governmental officials are at issue,” the privileges may not be raised to prevent disclosure. *Natural Res. Defense Council v. Fox*, 1998 WL 158671, at *5 (S.D. N.Y. Apr. 6, 1998).

On all accounts, the crux of CFF's case is the deliberative process employed by the Defendants in rejecting CFF's applications for a custom license plate. CFF is challenging the process by which Defendants made their decision, claiming that it was viewpoint-based censorship. By claiming that Defendants acted in an arbitrary manner and exercised an unbridled discretion in rendering their policy decision, which allegedly denied CFF due process and equal protection of the law, has made the process the cornerstone of this litigation. Stated another way, in alleging that Defendants engaged in and facilitated content-based and viewpoint-based discrimination when rejecting its application and in charging Defendants acted upon a policy wrought with vagaries and overbreadness, CFF has identified the deliberative process as the fulcrum of this litigation. For all purposes, there is not doubt that the sum of CFF's causes of action is directed at Defendant's purported subjective motives and thus a subject matter of the litigation. In this regard, the deliberative process privilege that has shielded, in significant respects, the State Defendants documents from public scrutiny must now disappear.

*8 We disagree with the State Defendants' assessment that the documents CFF seeks are “utterly unrelated to plaintiff's claims.” Dkt. No. 114-2, Mem. of Law at p. 10. The equal protection and due process claims have everything to do with the deliberative process and those documents which were an integral part of the process may lend support to CFF's claims. And we further dismiss the State Defendants' overture that this is a “routine intrusion” of the deliberative process; it is nothing of the sort. Although the State Defendants cast CFF's interest in discovering these documents as “negligible,” the record before this Court proves otherwise.

Notwithstanding the consistent thread of precedents that have pierced the deliberative process privilege when the deliberative process is closely tied to the litigation, the State Defendants press this Court to subject its documents to a “balancing test, not a rule of *per se* waiver.” *Id.* at p. 9 (emphasis in original). Because the deliberative process privilege is a qualified privilege, courts have recognized a balancing test between the interest of the litigant and the public's need to know and the government's need to protect frank discussion and to prevent injury to the quality of the agency's decision. The factors supporting this balancing test are (i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the seriousness of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable. *In re Subpoena Duces Tecum Served on Office of Comptroller*, 145 F.3d at 1424; *Dep't of Econ. Dev. v. Arthur Anderson*, 139 F.R.D. at 298-299; *In re Franklin Nat'l. Bank Sec. Litig.*, 478 F.Supp. 577, 583 (E.D.N.Y., 1979). Of all of the cases cited above that waived the privilege when the deliberative process was the subject matter of the litigation, none of them engaged in the balancing test. *See e.g. In re Subpoena Duces Tecum*, 145 F.3d at 1425 (after finding that the process was a central issue in the litigation, the court further found “no need to engage in the balancing test”). And in those cases cited by The State Defendants where the balancing test occurred, the deliberative process was not pivotal to the litigation. *See In re Franklin Nat'l. Bank Sec. Litig.*, 478 F.Supp. 577 & *Resolution Trust Corp. v. Diamond*, 137 F.R.D. 634 (S.D.N.Y.1991). Accordingly, the Court stands by its ruling above and finds no need to engage in a balancing test.

Just because we have found that the deliberative process evaporates in this case, it does not necessarily follow that all of those documents identified as such (*see supra* note 10)

have lost all of their protections. It appears that some of these documents may have an additional, independent protection from disclosure. We note that all but four of the documents that have been identified as protected by the deliberative process privilege are also identified as protected by either the attorney-client privilege, the work product doctrine, or both. There is a caveat to presuming that these independent protections, whether attorney-client privilege or work product or both, generally and inextricably protect those documents that have lost their protection under the deliberation process privilege. Much like the deliberative process privilege, “the attorney-client privilege may not be invoked to protect a document adopted as, or incorporated by reference into, an agency policy.” *Nat’l Council of La Raza v. Dep’t. of Justice*, 411 F.3d 350, 360 (2d Cir.2005). However, where an agency does not adopt a legal memorandum’s conclusion and just merely relies on the document’s conclusion, the memorandum does not lose the insulation afforded it by other privileges. *Wood. v. F.B.I.*, 432 F.3d 78 (2d Cir.2005) (continued to be protected by the work product doctrine).

*9 This Court has examined all of the documents alleged to be privileged under the deliberative process privilege as well as either the attorney-client privilege or the work product doctrine and found none of them were adopted or incorporated into the DMV’s decision to reject CFF’s application for a custom license plate. Thus it is not readily apparent that any waiver has occurred under this scenario. See *Raba v. Suozzi*, 2007 WL 128817 (E.D.N.Y. Jan. 11, 2007) (discussing *In re County of Erie*, 473 F.3d 413 (2d Cir.2007)). Therefore, each of these documents will have to be scrutinized under the law applicable to those other privileges.

C. Attorney-Client Privilege and the Work Product Doctrine

1. Attorney-Client Privilege

The attorney-client privilege is a longstanding, common law privilege recognized in New York and by the federal courts under *Fed.R.Evid. 501*. This privilege encourages full engagement between a party and her attorney so that full and frank communication exists to impart all the information an attorney may need in order to give sage and cogent advice on the matter. *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998); *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir.1989) (“[The] communications between attorney and client endure as the oldest rule of privilege known to the common law.”). Accordingly, its essential purpose is to encourage clients to be fully forthcoming with their attorney

and to receive, in return, advice which will protect the clients’ legal rights. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *United States v. Const. Prod. Research, Inc.*, 73 F.3d 464, 473 (2d Cir.1996); *United States v. Blizerian*, 926 F.2d 1285, 1292 (2d Cir.1991); see also *NXIVM v. O’Hara*, 241 F.R.D. 109, 124-26 (N.D.N.Y.2007).

When determining if there is in fact an attorney-client privilege present to cloak both the client’s communication and the corresponding legal advice, a court needs to ascertain that this safety net attaches to only those communications (1) where legal advice of any kind is sought, (2) from a professional legal advisor in his or her capacity as such, (3) the communication relates to that purpose, (4) made in confidence, (5) by the client, and (6) is at his or her insistence permanently protected, (7) from disclosure by the client or the legal advisor, (8) except if the protection is waived. *In re County of Erie*, 473 F.3d 413, 419 (2d Cir.2007) (citing *United States v. Constr. Prod. Research, Inc.*, 73 F.3d at 473) (listing the elements that include that the communication is made “for the purpose of obtaining or providing legal advice”); *United States v. Int’l Bhd. of Teamsters*, 119 F.3d 210, 214 (2d Cir.1997) (citing *In Re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1036 (2d Cir.1984)); *In re Six Grand Jury Witnesses*, 979 F.2d 939, 943-44 (2d Cir.1992); *Madanes v. Madanes*, 199 F.R. D. 135, 143 (S.D.N.Y.2001) (citing, *inter alia*, *In re Richard Roe, Inc.*, 68 F.3d 38, 39-40 (2d Cir.1995) & quoting *United States v. Kovel*, 296 F.2d 918, 921 (2d Cir.1961)); see also 8 Wigmore, Evidence § 2292 (McNaughton rev. ed.1961). It is axiomatic that the burden of proving each element of the privilege rests on the party claiming the protection. *In re County of Erie*, 473 F.3d at 418 (citing *In re Grand Jury Proceedings*, 219 F.3d 175, 182 (2d Cir.2000) & *United States v. Int’l Broth. of Teamster Chauffeurs, Warehousemen and Helpers of Am. AFL-CIO*, 119 F.3d 210, 214 (2d Cir.1997)); *In re Horowitz*, 482 F.2d 72, 82 (2d Cir.1973).

*10 Contrary to modern yet ill-informed perceptions, the attorney-client privilege is often “[n]arrowly defined, riddled with exceptions, and subject to continuing criticism.” *United States v. Schwimmer*, 892 F.2d at 243. The attorney-client privilege is not given broad, unfettered latitude to every communication with a lawyer, but is to be narrowly construed to meet this narrowest of missions. *In re County of Erie*, 473 F.3d at 418 (quoting *Fisher v. United States*, 425 U.S. 391, 403 (1976) (The privilege “appl[ies] only where necessary to achieve its purpose”));¹³ see also *In re Horowitz*, 482 F.2d at 81 (privilege ought to be “strictly confined within

the narrowest possible limits consistent with the logic of its principle”) (quoting 8 Wigmore § 2292 at 70); *United States v. Int’l Bhd. of Teamsters*, 119 F.3d at 214.

In today’s world, an attorney’s acumen is sought at every turn, even average attorneys mix legal advice with business, economic, and political advice. *NXIVM v. O’Hara*, 241 F.R.D. at 126 (citing *In re County of Erie*, 473 F.3d at 419-20). Since government has an equal claim for the protection of attorney-client privilege communication as any other legal entity, the same situation applies to government attorneys who are obligated to provide legal advice to “officials responsible for formulating, implementing and monitoring governmental policy” even when they may or may not have policy duties. *In re County of Erie*, 473 F.3d at 419 (citing *Upjohn Co. v. United States*, 449 U.S. at 389).¹⁴ However, when a government lawyer may have a dual role encompassing both legal and policymaking, as possibly Dunn may have,¹⁵ “[s]o long as the **predominant purpose** of the communication is legal advice” the privilege prevails. *Id.* at 420 (emphasis added); *E.B. v. New York City Bd. of Educ.*, 2007 WL 2874862, at *2 (E.D.N.Y. Sept. 27, 2007) (noting that the “communication must be to render or solicit legal advice as opposed to business or policy advice”); *NXIVM Corp. v. O’Hara*, 241 F.R.D. at 126. To this extent, documents, such as memoranda and emails that were prepared and sent for the predominant purpose of soliciting or rendering legal advice, may be protected by the attorney-client privilege. *E.B. v. New York City Bd. of Educ.*, 2007 WL 2874862, at *3 (citing *In re County of Erie*, 473 F.3d at 422-23). This predominant purpose must be assessed “dynamically and in light of the advice being sought or rendered, as well as the relationship between the advice that can be rendered only by consulting with the legal authorities and advice that can be given by a non-lawyer[.]” *Raba v. Suozzi*, 2007 WL 128817, at *2 (quoting *In re County of Erie*, 473 F.3d at 420-21). “When a lawyer has been asked to assess compliance with a legal obligation, the lawyer’s recommendation of a policy that complies (or better complies) with the legal obligation—or that advocates and promotes compliance, or oversees implementation of compliance measure—is legal advice.” *In re County of Erie*, 473 F.3d at 422 (quoted in *MacNamara v. City of New York*, 2007 WL 755401, at *7 (S.D.N.Y. Mar. 14, 2007)).

2. Work Product Doctrine

*11 The State Defendants assert that CFF threatened to initiate litigation against them on at least two occasions during

their deliberative process. On March 22, 2002, DMV was notified that Attorney Raun was retained by CFF to represent its interest. On May 8, 2002, CFF’s attorney threatened to seek judicial intervention if he did not receive a satisfactory response on the application. Dkt. No. 114-2, at p. 22. Further, on February 19, 2004, Attorney Raun repeated his threat. Based upon CFF’s Counsel’s letters, the State Defendants rightfully believed that litigation over the denial of the custom license plate was imminent. *Id.* Assessing CFF’s threats and considering, *inter alia*, the prolific and ubiquitous litigation history surrounding “Choose Life” custom license plates, the State Defendants aver that they anticipated litigation with CFF over its application and thus began preparing their defense. Accordingly, the State Defendants declare work product doctrine covers a significant portion of the documents that they alleged to be privileged.

The work product privilege is more broad than the attorney-client privilege, *In re Grand Jury Proceedings*, 219 F.3d 175, 190 (2d Cir.2000), and it exists to protect attorneys’ mental impressions, opinions, and/or legal theories concerning litigation, *Horn & Hardart Co. v. Pillsbury Co.*, 888 F.2d 8, 12 (2d Cir.1989). Indeed, the work product privilege is designed to protect an adversarial system of justice and has been analyzed in that context by the Supreme Court in *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947). This doctrine establishes a “zone of privacy” in which a lawyer can prepare and develop theories and strategies with an eye towards litigation free from unnecessary intrusion by his or her adversaries. *United States v. Adlman (“Adlman I”)*, 68 F.3d 1495, 1500-01 (2d Cir.1995) (citing *United States v. Nobles*, 422 U.S. 225, 238 (1975) & *Hickman v. Taylor*, 329 U.S. at 516); *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1299-1300 (D.C.Cir.1980) (The purpose “is to protect a material from an opposing party in litigation.”). Of course the burden, albeit not a heavy one, of establishing that the work product doctrine applies rests with that party’s attorney who is claiming the protection. The work product doctrine, like the attorney-client privilege, “does not extend to every document generated by the attorney; it does not shield from disclosure everything a lawyer does.” *Rattner v. Netburn*, 1989 WL 223059, at *6 (S.D.N.Y. Dec. 7, 2005). Omnipresent is the concern that revelation of the attorney’s mental processes is real and not just speculative. *Gould Inc. v. Mitsui Mining & Smelting Co., Ltd.*, 825 F.2d 676, 680 (2d Cir.1987).

Fed. R. Civ. P. 26(b)(3)(A) and (B) provides a relevant rule on the discovery of work product material. It reads in part:

Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

*12 (i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.¹⁶

It is important to note that the work product doctrine classifies documents into two categories: "non-opinion" work product and "opinion" work product. The distinction between these two categories turns on the effort employed in obtaining disclosure pursuant to Rule 26(b)(3). For "non-opinion" work product, the party seeking this information must show a substantial need for the document and undue hardship to acquire the document or its substantial equivalent by other means. On the other hand, "opinion" work product requires a higher protection to the extent that the requesting party has to demonstrate extraordinary justification before the court will permit its release. *Strougo v. BEA Assocs.*, 199 F.R.D. 515, 521 (S.D.N.Y.2001) (citing *In re Sealed Case*, 676 F.2d 793, 809-10 (D.C.Cir.1982)); see also *Upjohn Co. v. United States*, 449 U.S. at 401. At a minimum, such "opinion" work product should remain protected until and unless a highly persuasive showing is made. *In re Grand Jury Proceedings*, 219 F.3d at 191; *United States v. Adlman* ("Adlman II"), 134 F.3d 1194, 1204 (2d Cir.1998). In a similar vein, in most instances, the work product doctrine extends to facts but those facts can be readily revealed, as stated above, upon a showing of substantial need and undue hardship. *In re Grand Jury Subpoena Dated Oct. 22, 2001*, 282 F.3d 156, 161 (2d Cir.2002) (citing Fed. R. Civ. P. 26(b)(3)). Nonetheless, non-privileged facts that are in the sole possession of an adversary, and not readily available to the party seeking the information, should be freely discoverable. *NXIVM Corp. v. O'Hara*, 214 F.R.D. at 127.

"[W]here a party faces the choice of whether to engage in a particular course of conduct virtually certain to result in litigation and prepares documents analyzing whether to engage in the conduct based on its assessment of the likely result of the anticipated litigation, [it should be] conclude[d] that the preparatory documents should receive protection under Rule 26(b)(3)." *Adlman II*, 134 F.3d at 1196. The crux being that a document which has been prepared because of the prospect of litigation will not lose its protection under the work product doctrine, even though it may assist in business or policy decisions. *E.B. v. New York City Bd. of Educ.*, 2007 WL 2874862, at *5; *Strougo v. BEA Assocs.*, 199 F.R.D. at 521 ("Where a document is created because of the prospect of litigation, analyzing the likely outcome of that litigation, it does not lose protection under this formulation merely because it is created to assist with a business decision." (citing *Adlman II*, 134 F.3d at 1202)); *Adlman I*, 68 F.3d at 1502. But this protection will not be extended, under any circumstances, to records that are prepared in the ordinary course of business. *Adlman II*, 134 F.3d at 1202; *Adlman I*, 68 F.3d 1502. Even though the work product doctrine protects the impressions, opinions, theories, and strategies of an attorney, Rule 26(b)(3) makes clear that the document at issue, either obtained or prepared by or for a party, or by or for his representative, may be cloaked by this doctrine as well. *Id.*; *E.B. v. New York City Bd. of Educ.*, 2007 WL 2874862, at *5 (citing, *inter alia*, *Lugosch v. Congel*, 2006 WL 931687, at *16 (N.D.N.Y. Mar. 7, 2006)). This maxim makes sound sense considering how complex litigation can be and the undeniable need for others to assist in developing all that is necessary to prosecute or defend a lawsuit. Obviously, impressions and strategies are not always created in a vacuum, but, rather are generated in cogent discourse with others, including the clients and agents. Further, the exchange of such documents and ideas with those whose expertise and knowledge of certain facts can help the attorney in the assessment of any aspect of the litigation does not invoke a waiver of the doctrine. *United States v. Nobles*, 422 U.S. at 239; *Adlman I*, 68 F.3d at 1502.

3. Common Interest Doctrine

*13 In this case, New York State's Executive Chamber, the seat of the executive branch, is implicated as indicated by the former Governor being sued individually and the current Governor in his official capacity. As to the matter before us, DMV's Deputy Counsel and Legal Department corresponded and communicated regularly with Governor's Counsel and staff about CFF's applications and the policy and legal ramifications thereof. And, in this context, The

State Defendants claim that all of these communications are protected under the common interest doctrine.

Often the common interest doctrine and the joint defense privilege are intertwined and deemed synonymous. *Lugosch v. Congel*, 219 F.R.D. 220, 236 n.10 (N.D.N.Y.2003) (noting that common interest doctrine and joint defense doctrine are synonymous while the common interest arrangement and pooled information doctrines, which may be broader, are distinguishable). They are nonetheless an extension of the attorney-client privilege and the work product doctrine. *Gulf Islands Leasing Inc. v. Bombardier Capital, Inc.*, 215 F.R.D. 466, 472 (S.D.N.Y.2003). The common interest doctrine and the joint defense privilege are best summarized in *United States v. Schwimmer*:

The joint defense privilege, more properly identified as the “common interest rule,” see generally Capra, *The Attorney-Client Privilege In Common Representations*, 20 Trial Lawyers Quarterly, Summer 1989, at 20, has been described as “an extension of the attorney client privilege,” *Waller v. Financial Corp. of Am.*, 828 F.2d 579, 583 n.7 (9th Cir.1987). It serves to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel. See *United States v. Bay State Ambulance and Hosp. Rental Serv.*, 874 F.2d 20, 28 (1st Cir.1989). Only those communications made in the course of an ongoing common enterprise and intended to further the enterprise are protected. *Eisenberg v. Gagnon*, 766 F.2d 770, 787 (3d Cir.1985), cert. denied, 474 U.S. 946, 106 S.Ct. 342, 88 L.Ed.2d 290 (1985); *Matter of Bevill, Bresler & Schulman Asset Management Corp.*, 805 F.2d 120 (3d Cir.1986). “The need to protect the free flow of information from client to attorney logically exists whenever multiple clients share a common interest about a legal matter,” Capra, 20 Trial Lawyers Quarterly, at 21 (citation omitted), and it is therefore unnecessary that there be actual litigation in progress for the common interest rule of the attorney-client privilege to apply, *United States v. Zolin*, 809 F.2d 1411, 1417 (9th Cir.1987), vacated in part on other grounds, 842 F.2d 1135 (9th Cir.1988) (en banc), *aff’d in part and vacated in part on other grounds*, 491 U.S. 554, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989). Neither is it necessary for the attorney representing the communicating party to be present when the communication is made to the other party's attorney. *Matter of Grand Jury Subpoena*, 406 F.Supp. 381 (S.D.N.Y.1975); cf. *Hunydee v. United States*, 355 F.2d 183 (9th Cir.1965).

*14 892 F.2d 237, 243-44 (2d Cir.1989).

In order then for documents and communications shared amongst those who may participate in a joint defense or common interest scheme to be considered confidential, there must exist an agreement, though not necessarily in writing, embodying a cooperative and common enterprise towards an identical legal strategy. *Shamis v. Ambassador Factors Corp.*, 34 F.Supp.2d 879, 893 (S.D.N.Y.1999) (citation omitted); *United States v. Weissman*, 1996 WL 737042, at *10 (S.D.N.Y. Dec. 26, 1996) (survey of cases). Paramount to the common interest doctrine, there must be a commonality of interest amongst the members to the agreement and each party must reasonably understand that the communications are provided in confidence. *United States v. Weissman*, 195 F.3d 96, 99 (2d Cir.1999); *Bank Brussels Lambert v. Credit Lyonnais Suisse S.A.*, 160 F.R.D. 437, 447 (S.D.N.Y.1995) (commonality of interest is more than concurrent interest). And “[o]nly those communications made in the course of ongoing common enterprise and intended to further the enterprise are protected.” *United States v. Weissman*, 195 F.3d at 99; see generally *Lugosch v. Congel*, 219 F.R.D. at 235-39.

To the extent that the communications were made in confidence amongst the agreement's allies, they ought to be deemed confidential pursuant to the attorney-client privilege. *In re Grand Jury Subpoena Duces Tecum dated November 16, 1974*, 406 F.Supp. 381, 392 (S.D.N.Y.1975) (“That a joint defense may be made by somewhat unsteady bedfellows does not in [and of] itself negate the existence or viability of the joint defense.”). But, and it is worth repeating, **only** those communications made in the course of an ongoing common litigation enterprise with the intent to further the enterprise are protected. *United States v. Schwimmer*, 892 F.2d at 243; *In re Bevill, Bresler & Schulman Asset Mgmt Corp.*, 805 F.2d 120, 126 (3d Cir.1986). The Court is persuaded, in light of *Schwimmer*, that if a joint defense agreement or common interest exists there is an implicit understanding that one attorney is permitted not only to confer with another attorney but with the other attorney's party. *United States v. Schwimmer*, 892 F.2d at 244 (citing *In re Grand Jury Subpoena*, 406 F.Supp. at 391-92 (permitting attorney interviews of others without the presence of their own attorney and in the presence of other co-defendants)); see also *United States v. McPartlin*, 595 F.2d 1321, 1336-37 (7th Cir.1979) (deeming confidential communications to an investigator for a co-defendant's attorney fell within the joint defense privilege); *United States v. Walker*, 910 F.Supp. 861, 865 (N.D.N.Y.1995) (investigator and other agents). It is clear

that the parties conferring amongst themselves, outside the confines of the group, and not for the purpose of collecting information in order to obtain legal advice, does not preserve the privilege because in that event they are not seeking legal advice or sharing information to receive legal advice. *Lugosch v. Congel*, 219 F.R.D. at 238.

*15 The Executive Chamber and state agencies are inextricably interlocked, with a few exceptions, *New York ex rel. Boardman v. Amtrak*, 233 F.R.D. 259, 263 (N.D.N.Y.2006), and the nexus, whether policy or legally driven, is utterly obvious. Under Article V, Section 2 of the New York State Constitution and New York's Executive Law § 30, all executive departments are subsumed within the executive branch.¹⁷ The Executive Chamber and the state agencies will generally fall within the common interest doctrine and, in this respect, communications between Governor's Counsel and staff and DMV's Counsel and legal staff are absolutely and unmistakably encompassed by this doctrine insofar as they have an inseparable and abiding common interest in ensuring that policies are both legal and constitutional. Thus, there is no waiver of any of the privileges when DMV shared correspondence, memoranda, documents, and opinions with Governor's staff. We are therefore obligated to review those communications between the Executive Chamber and DMV within the prism of the common interest doctrine.

C. Analysis of the Documents

Weighing all of the legal instruction cited above, we must now embark upon a review of the documents claimed to be privileged for sundry reasons. In doing so, we are also mindful that redaction is available for those documents that may contain legal advice incidental to other nonlegal advice that is the predominant purpose of the communication. *In re County of Erie*, 473 F.3d at 421, n.8; *Raba v. Suozzi*, 2007 WL 128817, at *4. We also must reiterate that we have pierced the deliberative process in this case, but those documents may also be cloaked by either the attorney-client privilege or work product doctrine and thus may yet be protected.¹⁸ We note generally that most of the documents were circulated among attorneys in both the Governor's Counsel's Office and DMV's Legal Department. In reviewing the documents, we find the following:

(1) *protected by the attorney-client privilege*-P 1, 9-11,¹⁹ 12-13, 61, 63, 70, 105-110, 126, 160-165, 285, 286-288, 305-306, 308-310, 346-349, 354, 363-364, 368-374.

(2) *not protected by the attorney-client privilege*-P 88, 190-192, 298, 353, 365.

(3) *attorney-client privileged communication redacted*-P 3 (redact the third sentence after "Jill"); 59 (redact second paragraph beginning with Kristie's); 60 (redact all but first and third paragraphs at the end); 62 (redact paragraph commencing with Bill); 89 (redact the top half of the page); 90 (redact the first sentence; the balance of the first paragraphs remains; redact the middle portion of the page); 92-96 (redact handwriting on pages); 366-367 (redact the first paragraph).

(4) *protected by either the attorney-client privilege or the work product doctrine, or both*-P 5, 6-8, 24-38, 43-44, 51-58, 61, 65-67, 71-74, 75-80, 81-84, 112-125, 127-144, 166-173, 174-184, 185-189, 193-202, 220-227, 259-284, 289-290, 291-297, 299-304, 311-345, 355-362.

*16 (5) *facts not protected by any privilege*-P 85-87, 145-159, 228-258.

(6) *P 215-219*: The State Defendants claim that these documents are protected by the deliberative process privilege, the attorney-client privilege, and the work product doctrine. The State Defendants maintain that this document was part of a more comprehensive exchange between governmental lawyers. That may be true, however, the document does not appear to fit neatly within an attorney-client privileged document nor has the earmarks of being prepared in anticipation of any litigation. Moreover, it appears to be a document that had already existed and contains facts. Without a broader appreciation of the nature of this document, notwithstanding the State Defendants' affidavit attempting to explain the broader cache of documents, this Court is prepared to disclose it; however, we will allow the State Defendants' to provide a more definitive characterization of the document to save its protections. The same task will hold true for P 350.

In terms of CFF's Motion to Compel, it would appear that we have just defined the scope of the privileges as to specific documents. There remains, however, a debate among the Defendants as to whether a Defendant, who served as counsel to a state agency and sued in

her individual capacity, may use for her defense several documents already determined to be protected by either the attorney-client privilege or the work product doctrine.

D. Piercing of Privilege Protections by Individual Defendant who served as an Attorney

As we have noted throughout, Defendant Dunn served as DMV's Counsel throughout the entire decision making process. *See supra* note 15. We further know that she has been sued in her individual capacity exposing her personally to a judgment and money damages for purportedly violating CFF's constitutional rights. In order to adequately defend herself, Dunn contends that she needs to pierce her former client's attorney-client privilege and work product doctrine protections. By piercing the privileges for seventeen selected documents,²⁰ Dunn postulates that she may be able to establish that DMV, and to the extent that her actions and/or decisions enfolded within DMV's decision to reject CFF's plate, always acted objectively reasonable thus making her qualified immunity defense viable. Dkt. No. 117, Mem. of Law at p. 2. Alternatively, Dunn argues that these documents will prove that she played no role in the ultimate decision not to grant CFF's plate application. *Id.* Her ability to pierce the privileges of these select documents rests upon two legal theorems: (1) her right to the self defense exception of DR 4-104(c)(1) and (4); and (2) an at issue waiver created by the State Defendants' assertion of the affirmative defense of qualified immunity on behalf of the individual Defendants. *Id.* at pp. 2-3.

The State Defendants dismiss, as lacking merit, Dunn's argument that these select documents are needed for her defense because the privileges that she wishes to invade belong solely to her client and, moreover, there is a volume of non-privileged materials Dunn could use in lieu of these chosen documents, although these documents are never identified. Dkt. No. 147, State Defs.' Reply Mem. of law at p. 1. By cherry picking certain documents and shielding others, the State Defendants argue that Dunn is essentially using the privileges as both a shield and a sword which is improper. *Id.* at p. 2.

1. DR 4-104(c)(1) and (4)

*17 It is axiomatic that an attorney is required to preserve a client's confidences and secrets. N.Y. Comp.Codes R. & Regs. tit. 22, § 1200.19 (DR 4-101(a) & (b)). But this same Discipline Rule carves out an exception to this axiom and permits a "lawyer to reveal [c]onfidences or secrets necessary to establish or collect the lawyer's fee or to defend

the lawyer or his or her employees or associates against accusation of wrongful conduct." *Id.* (DR 4-101(c)(4)). The State Defendants intimate that this self defense exception exist only when an attorney is being sued by her client. Dkt. No. 147, State Defs.' Mem of Law at p. 2. But the broad expanse of common law, at least within the Second Circuit, states otherwise.

The Second Circuit has embraced DR 4-101(c)(4) and confirmed that a lawyer, when sued, may reveal confidences or secrets necessary to defend herself against an accusation of wrongful conduct. *Meyerhofer v. Empire Fire & Marine Ins. Co.*, 497 F.2d 1190, 1194-95 (2d Cir.1974) (recognizing that an attorney sued by a party other than his client may be entitled to disclose his client's confidences, even though the case did not turn on this point); *In re Nat'l Mortgage Equity Corp. Pool Certificates Sec. Litig.*, 120 F.R.D. 687, 691 (C.D.Cal.1988) (identifying *Meyerhofer* as a seminal case on this issue and further finding its reasoning persuasive). Since *Meyerhofer* was issued, courts within the Second Circuit have fully adopted this Discipline Rule to support an attorney's "right to support his version of the facts with suitable evidence," *First Fed. Sav. & Loan Ass'n of Pittsburgh v. Owens*, 110 F.R.D. 557, 562 (S.D.N.Y.1986), which may mean revealing his client's confidential communications "in an effort to clear his or her name." *Stirum v. Whalen*, 811 F.Supp. 78, 83-84 (N.D.N.Y.1993) (noting that an attorney must be permitted to defend themselves when accused of wrongful conduct).²¹ It would be a "manifest injustice" to permit a client to withhold privileged communications to the attorney's disadvantage, especially when sued, *Louima v. City of New York*, 2004 WL 2359943, at *70 (E.D.N.Y. Oct. 5, 2004), and it would ill serve the "truth-finding function of the litigation process." *First Fed. Sav. & Loan Ass'n of Pittsburgh v. Owens*, 110 F.R.D. at 565 (noting that such disclosure would be "consistent with the general principle of narrowly construing evidentiary privileges"). The self defense exception is not restricted to fee disputes between the attorney and client nor available only when the client sues her attorney. The Discipline Rule encompasses all of those circumstances when an attorney has been accused of misconduct, even when sued by someone other than the client. *Id.* at 562; *Trepel v. Dippold*, 2005 WL 2206800, at *3 (S.D.N.Y. Sept. 12, 2005) (when discussing whether attorney party could reveal confidences, the court cited *Meyerhofer* for the proposition that an attorney has the right to defend himself even when the wrongdoing is made by someone other than the client); *Morin v. Turpin*, 728 F.Supp. 952, 956 (S.D.N.Y.1989) (finding that when an attorney along with

others was sued for securities fraud, that attorney had a right to disclose confidential communications with respect to his role in the matter); *Sec. Exch. Comm. v. Forma*, 117 F.R.D. 516, 524 (S.D.N.Y.1987) (stating that formal charges need not be issued in order for the self defense exception to apply and further noting that “it would be senseless to require the stigma of an indictment to attach before allowing the lawyer to invoke the self-defense doctrine”). Under this self defense exception, however, disclosure of confidences can only be made in “the narrow context of [the attorney’s] own defense.” *Housler v. First Nat’l Bank of East Islip*, 484 F.Supp. 1321, 1323 (E.D.N.Y.1980).

***18** We are persuaded by the precedents stated above that Dunn’s interest in defending herself is so compelling that it outweighs the State Defendants’ interest in maintaining confidentiality. *First Fed. Sav. & Loan Ass’n of Pittsburgh v. Owen*, 110 F.R.D. at 565. Dunn has been sued individually and subject to money damages; under these circumstances, she is entitled to present her version of the facts with suitable evidence of her choosing. The State Defendants attempts to circumnavigate the scope of the precedents cited above and their arguments are far adrift from these well reasoned and consistent decisions. They also bemoan Dunn’s intent to use seventeen privileged documents when she could alternatively utilize approximately 1300 pages of other documents that have already been released in discovery (some of them previously considered privileged document) and that these select privileged documents are irrelevant and unnecessary for her defense. Dkt. No. 147 at pp. 4-5. Essentially, the State Defendants’ complaint, if granted, would serve to dictate how another Defendant may quantitatively and qualitatively pursue her defense, notwithstanding their erstwhile professional relationship. Such dictates and control of another’s defense will not be honored, at least not under these circumstances. Further, we do not observe Dunn asking to use these documents beyond the narrowly crafted context of her defense and there is no wholesale waiver of the privileges as The State Defendants fear. Therefore, for these reasons and the applicability of self defense doctrine, the seventeen documents shall be disclosed.

2. Qualified Immunity Defense

The qualified immunity defense has been raised several times in this litigation. It was raised in the State Defendants’ First Motion to Dismiss, first Answer, Appeal to the Second Circuit, and Amended Answer. *See* Dkt. No. 51, Am. Ans. at ¶ 131 (“At all relevant times, defendants acted under the reasonable belief that their conduct was in accordance

with clearly established laws. They are, therefore, protected under the doctrine of qualified immunity.”). Defendants also pled that they were not personally involved in the alleged constitutional or statutory violations. *Id.* at ¶ 133. In this respect, Dunn wants to take advantage of these defenses to establish that her conduct was objectively reasonable in accordance with clearly established law and that she was not personally involved in the final decision. And in order to successfully raise these two defenses, she claims the need to use documents that are protected by the attorney-client privilege and the work product doctrine. Since the qualified immunity defense has been interjected into this case, an issue waiver may have occurred.

Qualified immunity shields “government officials from liability for civil damages when their conduct does not violate ‘clearly established statutory or constitutional rights of which a reasonable person would have known.’” *African Trade & Info. Ctr., Inc. v. Abromaitis*, 294 F.3d 355, 359 (2d Cir.2002) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)); *see also Mollica v. Volker*, 229 F.3d 366, 370 (2d Cir.2000). This also applies “insofar as it was objectively reasonable for [the government officials] to believe that their acts did not violate those rights.” *Mollica v. Volker*, 229 F.3d at 370 (internal quotation marks and citations omitted); *see also Anderson v. Creighton*, 483 U.S. 635, 641 (1987). The objectively reasonable test will be met “ ‘if [officials] of reasonable competence could disagree’ on the legality of the defendant’s actions.” *Lennon v. Miller*, 66 F.3d 416, 420 (2d Cir.1995) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (further citation omitted)). Public officials will further be entitled to qualified immunity if, “at the time the [official] was acting, the right in question was not clearly established[.]”²² *Pitsley v. Ricks*, 2000 WL 362023, at *1 n.1 (N.D.N.Y. Mar. 31, 2000) (citing *Connell v. Signoracci*, 153 F.3d 74, 80 (2d Cir.1988)).

***19** It is well settled law that in “certain circumstances a party’s assertion of factual claims can, out of consideration of fairness to the party’s adversary, result in the involuntary forfeiture of privileges for matters pertinent to the claims asserted.” *John Doe Co. v. United States*, 350 F.3d 299, 302 (2d Cir.2003) (citing, *inter alia*, *United States v. Bilzerian*, 926 F.2d 1285 (2d Cir.1991)). The application of an “at issue” waiver is primarily due to the fact that the party asserting the privilege has placed “a contention at issue.” *Id.* (citing, *inter alia*, *Worthington v. Endee*, 177 F.R.D. 113, 116-117 (N.D.N.Y.1998) and 6 James Wm. Moore et al, Moore’s Federal Practice § 26.70[6][c] (3d ed.1997)). Moreover, it is not the filing of the lawsuit that matters but the relevance of

the contention that controls. *Remington Arms Co. v. Liberty Mut. Ins. Co.*, 142 F.R.D. 408 (D.Del.1992). The test that the courts within the Second Circuit have resorted to in order to determine whether an at issue waiver has occurred is: (1) assertion of the privilege was a result of some affirmative act, such as filing suit, (2) through the affirmative act, the asserting party puts the protected information at issue by making it relevant to the case, and (3) the application of the privilege would have denied the opposing party access to information vital to the defense. *Bank Brussels Lambert v. Credit Lyonnais (Suisse)*, 1995 WL 598971, at *3 (S.D.N.Y. Oct. 11, 1995) (citing *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D.Wash.1975)).²³ The forfeiture of the privilege should be narrowly construed and tailored to remedy the unfairness or prejudice. *In re Grand Jury Proceedings*, 219 F.3d 175, 188 (2d Cir.2000). “It is further axiomatic, when a number of documents are claimed to be privileged, that there is no wholesale waiver but rather a specific inquiry as to each document.” *Lugosch v. Congel*, 2006 WL 931687, at *23 (N.D.N.Y. Mar. 7, 2006).

It is also an established principle of law that if the advice of counsel is placed in issue by either a claim, defense, or testimony, it is deemed waived. *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851 (3d Cir.1994); *United States v. Bilzerian*, 926 F.2d 1285. And when defendants raise the affirmative defense of qualified immunity, it places the privilege and relevant information at issue. *Mitzner v. Sobol*, 136 F.R.D. 359, 362 (S.D.N.Y.1991); *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D.Wash.1975) (finding that legal advice was germane to the affirmative defense of qualified immunity and the assertion of the privilege “deprive[d] plaintiff of the information necessary to defend” itself); see also *Pritchard v. County of Erie*, 2007 WL 3232096, at *4-5 (W.D.N.Y. Oct. 31, 2007) (citing *Hearn* for the proposition that asserting qualified immunity defense places protected information at issue).

It is obvious that qualified immunity inures to the individual defendants' benefit and not state agencies. Even though represented collectively by the Attorney General prior to 2007, clearly the State Defendants interjected qualified immunity in this case for the sole purpose of protecting those state employees who were sued in their individual capacity. Therefore, it is incumbent upon the individual defendants, such as Dunn, to demonstrate that she acted objectively reasonable or that the rights were not clearly established in order to establish her qualified immunity defense. *Connecticut v. Crotty*, 346 F.3d 84, 102-03 (2d

Cir.2003). In this context, qualified immunity is “both fact-intensive and fact-specific [defense] [.]” *Id.* at 102. Thus, the determination of objective reasonableness, an integral component of this affirmative defense, can only be made upon a factual record, which fact may include the rendering of and the legal advice given to DMV. Similar to the self defense exception, a waiver of the privileges, under the at issue waiver, can be narrowly tailored to minimize any prejudice, and it appears Dunn's request fits that charge. *Trudeau v. New York State Consumer Prot. Bd.*, 237 F.R.D. 325, 341 (N.D.N.Y.2006). And for this reason, as well, those seventeen documents will be disclosed. See *supra* note 20.

III. CONCLUSION

*20 Because privileges remain for the largest lot of documents, the Court intends on remaining under seal those original documents that comprised the State Defendants' Opposition to CFF's Motion to Compel. Those documents are the State Defendants' Memorandum of Law, Neal Schoen's Affidavit, and the Exhibits submitted for an *in camera* review. Dkt. No. 114. All other pleadings and documents, except Dunn's Exhibits (Dkt. No. 116), have already been provided to everyone in full or redacted form, striking any specific factual references or discussion that may bear upon the privileges of those documents. With respect to the documents required to be disclosed, consistent with the mandates of *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110 (2d Cir.2006), this Court will not require the disclosure for at least ten (10) days in the event a party files objections to this Memorandum-Decision and Order.

Accordingly, it is hereby

ORDERED, that CFF's Motion to Compel, Dkt. No. 113, is **granted in part and denied in part**, consistent with the decision above; and it is further

ORDERED, that Defendant Dunn's Motion to Compel, Dkt. Nos. 116 and 117, is **granted**; and it is further

ORDERED, that the Clerk of the Court shall file the State Defendants' original and unredacted version of its Opposition to CFF's Motion under seal; and it is further

ORDERED, that compliance with this Memorandum-Decision and Order shall be stayed for ten (10) days pending the filing of any objections; and it is further

IT IS SO ORDERED.

ORDERED, that the parties shall provide dates and times when they may be available for a telephone conference during the week ending December 21, 2007, to discuss amending the Uniform Pretrial Scheduling Order.

All Citations

Not Reported in F.Supp.2d, 2007 WL 4344915

Footnotes

- 1 The lineup of Defendants and their respective legal representation has changed since the inception of this case. At the moment the State Defendants served and filed their Opposition to the Motion to Compel, they were Commissioner David Swartz, Deputy Commissioner and Counsel Jill A. Dunn, and Governor Eliot Spitzer, all represented by the Attorney General's Office in their official capacities. Former Governor George E. Pataki, Jill A. Dunn, and former Commissioner Raymond P. Martinez were sued in their individual capacities as well and have their own independent counsel. Shortly after the State Defendants filed their Opposition, Jill A. Dunn was terminated from her employment and Neal Schoen replaced her as Deputy Commissioner and Counsel. Thus, Schoen appears in this action in his official capacity and Dunn solely in her individual capacity.
- 2 For a complete recitation of the facts, this Court refers the reader to the Memorandum-Decision and Order, dated August 3, 2007. Dkt. No. 128.
- 3 Originally, the Complaint was filed on August 4, 2004. Dkt. No. 1. The First Amended Complaint was filed on September 8, 2006, after the Second Circuit dismissed the the State Defendants' Appeal of their First Motion to Dismiss. See Dkt. No. 35, Second Circuit Mandate; *Children First Foundation, Inc., et. al. v. Martinez, et. al.*, 169 Fed. Appx. 637 (2d Cir.2006).
- 4 Immediately after the the State Defendants had filed their Motion for Reconsideration (Dkt. No. 18), the State Defendants filed an Answer and therein preserved the qualified immunity defense for Defendants Martinez, Dunn, and Pataki, who were sued in their individual capacities as well. Dkt. No. 21, Ans., dated Feb. 1, 2005, at ¶ 152.
- 5 Dunn has not filed an Amended Answer because there are Cross Appeals as to this Court's August 3rd Memorandum-Decision and Order. See Dkt. Nos. 130, Pl's. Appeal, dated Aug. 17, 2007, & 131, Dunn's Mot. to Vacate (Appeal), dated Aug. 17, 2007. Oral arguments were heard by Senior District Judge McCurn on September 25, 2007, and he has reserved decision. Dkt. No. 150, Min. Entry.
- 6 This Order is consistent with the Court's Ruling at the March 30th Discovery Hearing:
The Court: Because of the sensitive nature of the communication, Ms. Clark, on behalf of Ms. Dunn, [and] Mr. McCartin, on behalf of the the State Defendants, will be presenting to the Court the confidential documents in issue, they will be providing a sealed declaration of facts that would support their claim as to those privileges ... [and] there will be two memorandum of law coming from both of them. There would be one memorandum of law that will be discussing the law and possibly those facts that are revealed in the declaration.... Mr. Raum, Mr. Shafer ... Mr. Lipton [and] Miss Musella, ... will be receiving a redacted memorandum of law with only the discussion of the law. All other parties will have an opportunity to file a memorandum of law based upon what they receive....
Mr. Shafer: You're suggesting that we'll be able to participate in the briefing of the legal issues, but we not be permitted to know about the underlying facts, is that correct?
The Court: That's correct[.].
Hr'g Tr. at pp. 102-03.
To the extent there was any confusion as to what must be served and filed, that confusion was resolved at a recent conference. See Dkt. No. 156, Min. Entry, dated Nov. 20, 2007.
- 7 For various reasons, the briefing schedule was amended several times. See Dkt. No. 112, Order, dated May 15, 2007, Text Order, dated July 30, 2007, & Text Order, dated Aug. 24, 2007.
- 8 Since the State Defendants are asserting the privileges, it is their burden to provide the necessary information to support their assertions.
- 9 In our Order, dated March 30, 2007, we directed the the State Defendants to provide an affidavit by a person with particular knowledge setting forth those details identified as crucial for any analysis of the privilege in compliance with *United States v. Const Prod. Research, Inc.*, 73 F.3d 464 (2d Cir.1996). Defendant Neal Schoen who is DMV's Deputy Commissioner and Counsel provided such an affidavit, under seal.

10 Those documents are designated as P 5-8, 10-11, 24-38, 51-58, 61-62, 65, 67, 70-84, 89-96, 105, 112-113, 116-125, 127-151, 193-202, 215-263, 286-288, 289-293, 295-297, 299-318, 321-324, 331, 335-336, 339, 346-349, 351-352, 366, 367, 374.

11 The State Defendants exhort the Court to consider the “constitutional” dimension of the deliberative process privilege, which in their view derives from the separation of powers of the United States Constitution, particularly Article II, citing *United States v. Nixon*, 418 U.S. 683 (1974). Dkt. No. 114-2, Defs.’ Mem. of Law at pp. 5-7. We suppose that they have cast the privilege as constitutional in order to give the debate more gravitas. In support of this notion, they quote the Supreme Court as stating that “[c]ertain powers and privileges flow from the nature of the enumerated powers; the protection of the confidentiality of [executive branch] communications has similar constitutional underpinnings,” *id.* at p. 6 (quoting *United States v. Nixon*, 418 U.S. at 705), but we note that the alteration in quote, which is material, struck the specific reference to the “President.” The crucible of the Nixon case was the expectation of a *President*, as he exercises his Article II enumerated powers, to have confidentiality to his conversations and correspondences as may exist under Article II of the United States Constitution. The *Nixon* case seems to have narrowly tailored this exquisite privilege to those conversations between the President and his staff which are “fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.” *Id.* at 708. We do not agree that this Presidential Communication Privilege, as it is generally called, extends broadly to every executive agency that is not communicating directly with the President or his executive staff. *Nixon* recognizes that the Presidential Communication Privilege belongs exclusively and uniquely to the President of the United States and no other entity. *Hobley v. Chicago Police Commander Burge*, 445 F.Supp.2d 990, 998 (N.D.Ill.2006) (citing *Cheney v. United States Dist. Ct. of Dist. of Columbia*, 542 U.S. 367, 381-82 (2004)); *Bennett v. City of Boston*, 54 F.3d 18, 20 (1st Cir.1995) (surveying other circuits that have stated that *Nixon* was “not meant to extend ... to any other government official other than the President himself”). There is, however, a distinct federal deliberative process privilege for executive branch agencies which has a “different scope” from the President’s Communication Privilege that rests solely upon Article II and the separation of powers. *Hobley*, 445 F.Supp.2d at 997-98. And this leads to a more poignant observation: that the President’s separation of powers and related executive privileges as derived from the United States Constitution do not inure to the benefit of any state executive, such as those in New York. No where does Article II refer to state governance nor that state governor possess this unique communication privilege. Even under the most fantastical reading of Article II, it would be incredulous for someone to find any empowerment or protection for any state official or employee under this Article of the United States Constitution. It would be the individual state’s constitutional and legislative provisions that would define the parameters of its chief executive and/or its executive agencies’ confidentiality privileges. *Id.* at 998 (No federal court has “recognized the assertion of the presidential communication privilege by a state governor” or agency.). Under our current scheme, the deliberative process privilege, as we know it, was developed by virtue of both the federal’s and state’s Freedom of Information Acts.

Nonetheless, the Supreme Court in *Nixon* rejected the Presidential Executive Privilege as being absolute and unqualified and further determined that the privilege may have to be set aside when confronted by other constitutional rights such as due process. *Nixon*, 418 U.S. 713; see also *Cheney v. United States Dist. Court of Dist. of Columbia*, 542 U.S. 367.

12 Many cases cite to this District of Columbia Circuit Court ruling in establishing the principle upon which the deliberative process privilege may be waived. However, this same Circuit revisited the matter in the same case and modified its holding as follows: “And our holding that the deliberative process privilege is unavailable is limited to those circumstances in which the cause of action is directed at the agency’s subjective motivation.” *In re Subpoena Duces Tecum Served on the Office of the Comptroller*, 156 F.3d 1279-80 (D.C.Cir.1998).

13 There is the general maxim that the public, particularly within the judicial forum, is entitled to be exposed to “everyman’s evidence.” 8 Wigmore, Evidence § 2317 (McNaughton rev. ed.1961). The quest is for the truth of the matter to flow forward before the court, and “[t]he suppression of truth is a grievous necessity at best ... [only justified] when the opposed private interest is supreme.” *In re Megan-Racine Assocs., Inc.*, 189 B.R. 562, 570 (Bankr.N.D.N.Y.1995) (quoting *McMann v. Sec. and Exch. Comm’n*, 87 F.2d 377, 378 (2d Cir.1937)). But since the attorney-client privilege “stands in derogation of the public’s right to everyman’s evidence, ... it ought to be strictly confined within the narrowest possible limits consistent with the logic of the principle.” *In re Grand Jury Proceedings v. John Doe*, 219 F.3d 175, 182 (2d Cir.2000) (citing *United States v. Int’l Bhd. of Teamsters*, 119 F.3d at 214).

14 The Second Circuit recognized that a government “lawyer’s lack of formal authority to formulate, approve or enact policy does not actually prevent the rendering of policy advice to officials who do possess that authority.” *In re County of Erie*, 473 F.3d 413, 421 (2d Cir.2007). Moreover,

[i]t is to be hoped that legal considerations will play a role in governmental policymaking. When a lawyer has been asked to assess compliance with a legal obligation, the lawyer's recommendation of a policy that complies (or better complies) with the legal obligation-or that advocates and promotes compliance, or oversees implementation of compliance measures-is legal advice. Public officials who craft policies that may directly implicate the legal rights or responsibilities of the public should be "encouraged to seek out and receive fully informed legal advice" in the course of formulating such policies. *In re Grand Jury Investigation*, 399 F.3d 527, 534 (2d Cir.2005).

Id. at 422; see also *E.B. v. New York City Bd. of Educ.*, 2007 WL 2874862, at *7 (E.D.N.Y. Sept. 27, 2007) (noting that legal considerations play a role in governmental policymaking).

15 Dunn denies that she had any "policy-making authority or administrative responsibility for the sponsorship plate program at DMV." Dkt. No. 117, Dunn's Mem. of Law at p. 1.

16 This Federal Rule was amended becoming effective on December 1, 2007. Although this particular Rule's format has been modified and there has been slight alteration of the statutory text, the content and context have remained virtually unchanged. The Advisory Committee Notes for 2007 do not note any material change to this provision of the law. Thus, those court precedents as stated above remain applicable.

17 The [New York Executive Law section 30](#) states

[t]here shall continue to be in the state government an executive department. The head of the executive department shall be the governor. The governor may appoint such subordinates and employees as may be necessary for the exercise of his powers and the powers and the performance of his duties as head of the executive department, and may prescribe their duties[.]

see also [N.Y. Const. Art. 4, § 1](#) ("The executive power is vested in the governor[.]").

The Department of Motor Vehicles is an executive department with the Commissioner appointed by the governor. [N.Y. Veh. Traf. L. § 200](#).

18 As a component of this Motion, the State Defendants disclosed the following documents: P 2, 4, 14-23, 39-42, 45-50, 64, 68-69, 97-104, 203-214, 288, and 307. Furthermore, in terms of an analysis of those documents contended to be protected by the work product doctrine, CFF has not asserted a substantial need or undue hardship for those documents that may embrace facts gathered by the State Defendants and, therefore, will not be considered. See *supra* Part II.C.2 (work product doctrine discussion).

19 P 11 is a part of this series of documents, but if it was already sent to CFF's counsel, and it appears that it may have, the document is waived. Otherwise, if not forwarded to CFF, it remains privileged.

20 These seventeen documents comprise pages P 25-26, 27-38, 44-50, 60, 61, 66, 75-78, 79-80, 198-202, 289, 290, 299-300, 301, 302, 303-304, 305-308, and 356-362. See Dkt. No. 116, Ex. A, Dunn's Privilege List. Furthermore, Exhibit A also provides the specific reasons for the disclosure of each of the documents. We further note that P 45-50, and 307 have already been disclosed by the State Defendants.

21 The State Defendants argue that [Stirum v. Whalen](#), 811 F.Supp. 78 (N.D.N.Y.1993) is inapplicable because the case was decided on the basis of the crime-fraud exception to the attorney-client privilege. Dkt. No. 147 at p. 3, note 2. We agree that some of the privileged documents in that case were released because of the crime-fraud exception, but had the the State Defendants read further they would have noted that the attorneys, who were sued along with their client, requested to reveal confidential communications. Because there were numerous allegations of wrongdoing by the law firm, the *Stirum* court granted the defendant attorneys authority to disclose confidential documents and testify about their role in all aspects of the events. [Stirum v. Whalen](#), 811 F.Supp. at 83-84.

22 "In order for the constitutional right to be clearly established, three elements must be met: '1) ... [that] the right in question [be] defined with reasonable specificity; 2) [that] the decisional law of the Supreme Court and applicable circuit court support the existence of the right in question; and 3) [that] under preexisting law a reasonable defendant official would have understood that his or her acts were unlawful.' [Mollica v. Volker](#), 229 F.3d 366, 371 (2d Cir.2000) (internal quotation marks and citations omitted) (alterations in original); see also [Moore v. Vega](#), 371 F.3d 110, 114 (2d Cir.2004) (stating that in assessing whether defendants are entitled to qualified immunity, the Court must examine '[o]nly Supreme Court and Second Circuit precedent existing at the time of the alleged violation' to determine if a right is clearly established (citation omitted))."

[Luessenhop v. Clinton County, New York](#), 2007 WL 1063650, at *5 (N.D.N.Y. Apr. 6, 2007).

23 There are other criteria which a court may consider in ascertaining whether an "at issue" forfeiture is applicable: (1) the very subject of privileged communication [is] critically relevant to the issue litigated, (2) there is a good faith basis for believing such essential privileged information exists, and (3) there is no other source of direct proof. [Bank Brussels Lambert v. Credit Lyonnais \(Suisse\)](#), 1995 WL 598971, at *5.

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EXHIBIT 13-F

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Leslie A. Merritt, Jr.,
Plaintiff,
v.
State of Arizona, et al.,
Defendants.

No. CV17-4540 PHX DGC
ORDER

The Court has reviewed the filings of the parties and the Governor’s counsel on certain discovery issues addressed during a February 28, 2018 conference call. Docs. 56, 58, 59, 60. The Court enters the following orders.

1. The Court concludes that prescription and medical records for Defendant Kalkowski, from August 1, 2015 through October 31, 2015, are relevant to claims and defenses in this case and proportional to the needs of the case. Fed. R. Civ. P. 26(b)(1). Defendant Kalkowski’s work on September 17 and 18, 2015, is central to issues in this case, and he has testified about medical issues he was managing during that time. Plaintiffs are entitled to conduct discovery of information that bears on his ability during that time to perform his work accurately. Defendants shall produce prescription and medical records for Defendant Kalkowski, from August 1 through October 31, 2015, under the existing protective order, within two weeks of this order.

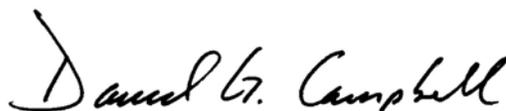
2. For reasons explained by the State Defendants (Doc. 58), the Court concludes that the issue of phone record production was pending before Judge Martin

1 when this case was removed. The Court therefore does not find that the State Defendants
2 are in violation of Judge Gass's earlier order.

3 a. Except for the position taken by the Governor (Doc. 59), the State
4 Defendants do not appear to argue that the Court should alter Judge Gass's order. The
5 State Defendants shall, therefore, produce the phone records of the Director and Deputy
6 Director, redacting home addresses and the middle three numbers of the non-government
7 phone numbers, within two weeks of this order.

8 b. Plaintiff has not shown that security and privilege concerns
9 expressed by counsel for the Governor are unfounded. The Governor shall produce the
10 phone records sought by Plaintiff, of contacts with the Governor or his office, but may
11 redact personal addresses and official or unofficial phone numbers, as well as information
12 protected by executive privilege. If information is withheld on privilege grounds (as
13 opposed to being partially redacted), counsel for the Governor shall produce a privilege
14 log. Documents produced under this paragraph will be subject to the protective order
15 (Doc. 54). Production under this paragraph shall occur within 30 days of this order.¹

16 Dated this 19th day of March, 2018.

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20 _____
21 David G. Campbell
22 United States District Judge
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¹ Plaintiff has not sought to depose the Governor. The arguments related to such a deposition are therefore not addressed in this order.

EXHIBIT 13-G

2014 WL 171923

Only the Westlaw citation is currently available.
United States District Court, D. Arizona.

ARIZONA DREAM ACT COALITION;
Jesus CastroMartinez; Christian Jacobo;
Alejandro Lopez; **Ariel Martinez**;
and Natalia PerezGallagos, Plaintiffs,

v.

Janice K BREWER, et al., Defendants.

No. CV-12-02546-PHX-DGC.

|
Jan. 15, 2014.

ORDER

DAVID G. CAMPBELL, District Judge.

*1 Following a discovery conference call with the Court on December 6, 2013, and at the Court's direction, the parties filed briefs regarding application of the deliberative process and attorney-client privileges. Plaintiffs seek to compel the production of documents and testimony concerning the policy of the Governor's Office and the Arizona Department of Transportation ("ADOT") to deny driver's licenses to individuals granted deferred action status under the 2012 Deferred Action for Childhood Arrivals ("DACA") program. Doc. 210. Plaintiffs have submitted Defendants' privilege log and portions of deposition transcripts in which Defendants assert that certain material is privileged. Defendants argue that both the documents in the log and testimony about those documents are protected by the attorney-client privilege, work product doctrine, and the deliberative process privilege. Doc. 209.

For ease of analysis, the contested documents are divided into two categories: (1) documents for which Defendants assert only the deliberative process privilege, and documents for which Defendants assert the attorney-client privilege. Plaintiffs do not challenge the assertion of the work product doctrine.

I. Deliberative process privilege.

Defendants' privilege log (Doc. 210-2) identifies 174 documents as protected only by the deliberative process privilege. For the reasons stated below, Plaintiffs' motion to compel production of these documents will be granted.

A. Legal Standard.

Federal common law recognizes a deliberative process privilege. *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001). The privilege rests on the fact that officials will not communicate candidly among themselves if each remark could be subject to discovery. The privilege seeks to enhance the quality of government by promoting open and frank exchanges among government decision-makers. For the privilege to apply, a document must meet two threshold requirements. "First, the document must be predecisional—it must have been generated before the adoption of an agency's policy or decision.... Second, the document must be deliberative in nature, containing opinions, recommendations, or advice about agency policies. Purely factual material that does not reflect deliberative processes is not protected." *F.T.C. v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir.1984).

Even if a party satisfies these requirements, the deliberative process privilege is qualified. "A litigant may obtain deliberative materials if his or her need for the materials and the need for accurate fact-finding override the governments' interest in nondisclosure." *Id.* Among the factors that the Court must consider are: (1) the relevance of the evidence, (2) the availability of other evidence, (3) the government's role in the litigation, and (4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions. *Id.* Thus, if the Court determines that the privilege applies, the Court must consider whether portions of the document are still subject to disclosure. *See Elec. Frontier Found. v. Office of the Dir. of Nat'l. Intelligence*, 639 F.3d 876 (9th Cir.2010) (citing *Vaughn v. Rosen*, 484 F.2d 820, 826-27 (D.C.Cir.1973)). "The party asserting an evidentiary privilege has the burden to demonstrate that the privilege applies to the information in question." *Tornay v. United States*, 840 F.2d 1424, 1426 (9th Cir.1988) (citing *United States v. Hirsch*, 803 F.2d 1493, 1496 (9th Cir.1986)).

B. Analysis.

*2 The driver's license policy at issue in this case was originally adopted in 2012. The Court issued an order denying a preliminary injunction of the 2012 policy in May of 2013.

The policy was subsequently changed, and that change was implemented on September 17, 2013.

To meet their threshold burden in asserting the privilege, Defendants must show that the contested communications are pre-decisional. *Warner*, 742 F.2d at 1161; *Tornay*, 840 F.2d at 1426. Defendants do not attempt to make this showing. They do not attach a copy of their privilege log to their brief, and do not discuss the timing of claimed deliberative documents or the relationship of those documents to the 2012 policy or the 2013 policy change. Plaintiffs provide a copy of Defendants' privilege log with their brief, and it does include dates of documents, but the log says nothing about whether documents claimed to be deliberative relate to the 2012 policy or the 2013 policy change. Although the Court could make assumptions on the basis of the document dates and the dates of the 2012 policy and the 2013 policy change, the Court should not have to proceed on the basis of assumptions. Moreover, the record suggests that the 2013 policy change was considered by Defendants for many months before it was adopted, and the Court cannot safely attempt to guess which allegedly deliberative documents relate solely to that policy change.¹

¹ All of the documents in Defendants' privilege log that assert only the deliberative process privilege pre-date the 2013 policy change. Doc. 210–2. But Defendants have not argued that all of the documents on the privilege log are predecisional to the 2013 policy change, and some of the documents from the summer and fall of 2012 appear to be pre-decisional as to the Governor's executive order, such as a series of emails described as “re: DHS Announcement” from August, 2012. Doc. 210–2 at 39.

Defendants must also make the threshold showing that the documents are deliberative in nature. *Warner*, 742 F.2d at 1161; *Tornay*, 840 F.2d at 1426. Defendants do not make this showing. In order to be deliberative, the documents must contain opinions, recommendations, or advice about agency policies. *Warner*, 742 F.2d at 1161. In analyzing this threshold requirement in *Warner*, the Ninth Circuit examined the contents of the documents to determine whether such opinions or recommendations existed. Defendants in this case provide no information about the content of the documents other than the privilege log's very short description of a few words and the names of the senders and recipients. The description in many cases is uninformative, such as the series of emails described as “re: DHS Announcement.” Doc. 210–2 at 39. A few documents have notes in the “comments” column, but none of those notes discuss the contents of the documents.

In sum, Defendants have not carried their burden of showing that the deliberative process privilege applies to the documents listed in the privilege log. Defendants have not addressed whether the documents are pre-decisional, and have made no showing that the documents are deliberative under *Warner*. But this is not the only reason for granting Plaintiff's motion. Even if Defendants had made this threshold showing, the Court would conclude, under the four factors articulated in *Warner*, that the qualified privilege should not be applied in this case. 742 F.2d at 1161.

*3 First, the communications at issue in this case are highly relevant. Under the Ninth Circuit's active level of rational basis review for Equal Protection claims, which the Court found applicable in its previous decision, the Court must consider the actual intent behind Arizona's driver's license policy when it considers the merits of this case. Doc. 114 at 24–27, discussing *Dep't. of Agriculture v. Moreno*, 413 U.S. 528 (1973); *City of Cleburn v. Cleburn Living Center, Inc.*, 473 U.S. 432 (1985); *Romer v. Evans*, 517 U.S. 620 (1996); *Diaz v. Brewer*, 656 F.3d 1008 (9th Cir.2011). Under such an analysis, documents concerning the government's intent and purpose in crafting this policy are relevant. This factor weighs in favor of disclosure.²

² The Court does not intend to foreclose Defendants from arguing that a different level of scrutiny should be applied in this case, but the Court's analysis so far has found that active rational basis review is warranted. *See* Doc. 114 at 24–27.

Second, there may be other evidence available that would negate the need for disclosure of these documents. Plaintiffs argue that the documents Defendants seek to withhold are “the best evidence of improper motive.” Doc. 210 at 10. The inquiry, however, is not whether this is the “best” evidence that can be found, and Defendants assert that other evidence as to the motive for the policy is available to Plaintiffs in the form of “the Executive Order, the Policy, publicly made statements, declarations, written discovery responses, and express testimony of several deponents.” Doc. 209 at 7. This factor weighs against disclosure.

Third, the government has a central role in the events at issue in this case, and the basis for its action is a central issue in the litigation. In *Warner*, the Court examined whether there was evidence of bad faith or misconduct on the part of the government in concluding that the reports at issue were protected under the privilege. 742 F.2d at 1162. While no

allegations of bad faith have been made here, this is not a situation in which the content of government deliberations regarding the policy is secondary to the issues at play, as was the case in *Warner*. The government is a party to this case and its intent in crafting the policy is a primary issue. Moreover, the bad faith inquiry in *Warner* arose from an alleged inconsistency in how the government disclosed or withheld information, and no similar inconsistency has been alleged here. This factor weighs in favor of disclosure.

Fourth, the Court cannot conclude that disclosure would be likely to hinder frank and independent discussion. Arizona has a policy in favor of full and open disclosure, as evidenced by Arizona's open meetings law. *Rigel Corp. v. State*, 225 Ariz. 65, 72–73, 234 P.3d 633, 640–41 (Ariz.Ct.App.2010) (“Arizona recognizes a legal presumption in favor of disclosing public records.”); see also *Cox Ariz. Publ'ns, Inc. v. Collins*, 175 Ariz. 11, 14, 852 P.2d 1194, 1198 (1993). Arizona courts have not recognized a deliberative process privilege under state law. See *Arizona Indep. Redistricting Comm'n v. Fields*, 206 Ariz. 130, 141, 75 P.3d 1088, 1099 (Ariz.Ct.App.2003); *Star Pub 'g Co. v. Pima County Attorney's Office*, 181 Ariz. 432, 434, 891 P.2d 899, 901 (App.1994). Arizona state government officials, therefore, should reasonably expect that their deliberations in crafting policy are open to public scrutiny. This factor weighs in favor of disclosure.

*4 Thus, even if the contested documents were privileged—which Defendants have not shown—the *Warner* factors would result in disclosure.

II. Attorney-client privilege.

For the remaining contested documents on the privilege log, Defendants have asserted the attorney-client privilege. This privilege is sometimes combined in the log with the deliberative process privilege or the work product doctrine, but the Court has already found that the deliberative process privilege does not permit withholding of the documents, and, as noted, Plaintiffs have not challenged assertions of the work product doctrine. Plaintiffs argue that Defendants have impliedly waived the attorney-client privilege by putting the 2013 Policy at issue in this litigation, impermissibly using the privilege as both a sword and a shield. Doc. 210, 12–16.

A. Legal Standard.

The attorney-client privilege is absolute. It is not qualified like the deliberative process privilege or the work product

doctrine. Thus, if a communication is privileged, it normally cannot be obtained in discovery no matter how relevant it might be to the claims or defenses at issue in the action.

The Ninth Circuit has held, however, that the privilege may be waived through a party's litigation actions. *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156 (1992) (citing *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir.1991)). The test for such waiver is three-pronged. First, a party must assert the privilege as an affirmative act in the litigation. Second, through the affirmative act, the party must put privileged information at issue. Third, the Court must find that allowing the privilege to stand would deny the opposing party access to information vital to its case. *United States v. Amlani*, 169 F.3d 1189, 1195 (1999).

B. Analysis.

Plaintiffs argue that Defendants have placed their attorney-client communications about the 2013 policy change at issue by asserting that the 2013 policy change cures the constitutional violations of the 2012 policy. Doc. 210 at 14. Plaintiffs cite Defendants' Motion to Supplement the Record on Appeal before the Ninth Circuit, where Defendants argue that the 2013 policy change passes constitutional muster and moots Plaintiffs' Equal Protection claim because the new policy denies drivers' licenses to *all* deferred action recipients, not just DACA recipients. See Reply in Support of Mot. To Supp. the Record on Appeal, No. 13–16248 (9th Cir.). Defendants respond that they do not contend that their decision to change the policy was at the direction of legal counsel, nor that the decision is constitutional because they sought or received legal advice. Doc. 209 at 11.

It is well-established that a holder of the privilege cannot claim that legal advice from his or her attorney justifies his or her action while simultaneously shielding that advice from disclosure. *Chevron*, 974 F.2d at 1156; *Amlani*, 169 F.3d at 1195; *In re Cnty. of Erie*, 546 F.3d 222, 228 (2d Cir.2008); *Sedco Int'l S.A. v. Cory*, 683 F.2d 1201, 1206 (8th Cir.1982). But if the privilege holder makes no claim that he or she relied on counsel's advice, the question of how privileged information is placed at issue—the second prong of the waiver test—is more difficult.

*5 The most analogous case in this circuit appears to be *Amlani*, in which the defendant argued on appeal that the prosecutor's disparaging comments about his lawyer caused him to fire his lawyer and settle for less effective counsel. 169 F.3d 1189. The government sought discovery of

the defendant's conversations with his lawyer to determine whether the alleged disparagement had in fact caused him to change counsel, and the defendant asserted the attorney-client privilege in response. The Ninth Circuit held that the defendant's claim—that his lawyer was fired only because of statements made by the prosecutor—sufficiently interjected his communications with the lawyer into the case to constitute waiver of the privilege. *Id.* at 1195.

Courts outside the Ninth Circuit have taken a variety of approaches to this issue. At one end of the spectrum, the Eastern District of Washington in *Hearn v. Rhay*, 68 F.R.D. 574 (1975), took a broad view of waiver. In *Hearn*, prison officials in a civil rights case asserted the defense of qualified immunity. *Id.* at 574. The defendants never claimed advice of counsel as a defense to their actions, but the district court noted that for qualified immunity to apply, the defendants must have acted in good faith. *Id.* The plaintiff sought disclosure of the legal advice rendered to the defendants by the state's attorney “insofar as such advice related to plaintiff's confinement and tends to prove defendants' bad faith.” *Id.* at 578. The district court held that the defendants' assertion of the immunity defense was an affirmative act and, because “the legal advice they received is germane to the qualified immunity defense they raised,” that the first two prongs of the waiver test were met. *Id.* at 581. The district court justified its holding by noting that “the content of defendants' communications with their attorney is inextricably merged with the elements of plaintiff's case and defendants' affirmative defense. These communications are not incidental to the case; they inhere in the controversy itself, and to deny access to them would preclude the court from a fair and just determination of the issues.” *Id.* at 582.

Other courts disagree with the broad scope of waiver articulated in *Hearn*. See, e.g., *In re Cnty. of Erie*, 546 F.3d 222, 229 (2d Cir.2008). The Third Circuit, for example, reviewed the holding in *Hearn* and similar cases and characterized them as extending “waiver of the privilege to cases in which the client's state of mind may be in issue in the litigation,” rather than limiting waiver to situations where a party affirmatively asserts that advice of counsel justified his or her actions. *Rhone–Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 864 (3d Cir.1994). The Third Circuit noted that cases such as *Hearn* “rest on a conclusion that the information sought is relevant and should in fairness be disclosed.” *Id.* But “[r]elevance is not the standard for determining whether or not evidence should be protected from disclosure as privileged.” *Id.*; see also *Erie*, 546 F.3d at

229. The Third Circuit held that even if a privilege holder's state of mind is at issue, the privilege still applies. Other courts have also held that “a party must *rely* on privileged advice from his counsel” in order to waive the privilege, rather than merely make the evidence relevant. *Erie*, 546 F.3d at 229 (emphasis in original).

*6 The Court concludes that the reasoning in *Rhone–Poulenc* and *Erie* is truer to the intent and nature of the attorney-client privilege than *Hearn*. Defendants do not claim that the 2013 policy change is constitutional because counsel so advised them. Doc. 209 at 11. Defendants instead argue that “[t]hrough this litigation” they learned that all deferred action recipients are without the right, under Arizona law, to drivers' licenses, and that the policy change reflecting this moots any basis for an Equal Protection claim. Reply in Support of Mot. To Supp. the Record on Appeal, No. 13–16248 (9th Cir.).

Plaintiffs' brief is telling on this distinction. Plaintiffs argue that “[b]y asserting that the 2013 Policy cures the constitutional violations of the 2012 Policy, Defendants are using the 2013 Policy as a sword and have placed the 2013 policy revision ‘at issue.’” Doc. 210 at 14. Plaintiffs do not assert, however, that Defendants have used *the advice of legal counsel* as a sword. Plaintiffs in essence ask the Court to grant them access to privileged communications because those communications are highly relevant and will allow Plaintiffs to test Defendants' assertions concerning the real reasons for the 2013 policy change. As already noted, however, relevancy—even high relevancy—does not waive the attorney-client privilege. *Erie*, 546 F.3d at 229. Most attorney-client communications related to a case would be highly relevant to that case, but the privilege applies even when attorney-client communications are “vital, highly probative, directly relevant or even go to the heart of [the] issue.” *Rhone–Poulenc*, 32 F.3d at 864. Waiver requires more than the mere fact that legal counsel were consulted before a defendant acted.

Nor is the Court persuaded that the privilege has been waived in this case on the basis of the Ninth Circuit's decision in *Amlani*. The circumstances in *Amlani* were unique, with a defendant seeking to overturn his criminal conviction by asserting that the prosecutor interfered with his attorney-client relationship and persuaded him to terminate his counsel. More was at work than the relevancy of the defendant's communications with his attorney. The very nature of the attorney-client relationship, and why it was terminated, were injected into the case by the defendant's claim. No similar

claim regarding their relationship with counsel has been made by Defendants in this case. Rather, Plaintiffs seek the privileged communications to test the credibility of Defendants' explanation for why they changed the 2012 policy. The fact that the communications might help Plaintiffs in making their argument, however, provides no basis for finding waiver.

A corollary point is nonetheless important. During his deposition, ADOT Director John Halikowski testified that he made the decision to implement the 2013 policy change. Although neither side has provided a complete copy of his deposition transcript, the portion provided by Defendants shows that the attorney-client privilege was invoked. Halikowski testified to the reasons for the 2013 policy change, but invoked the privilege rather than describing the legal advice he received from counsel in connection with the change. Doc. 209-1 at 59-64. Having thus invoked the privilege, Defendants will not be permitted at later stages of this litigation to describe that advice or to explain the reasons for the 2013 policy change by revealing information that was withheld on the basis of

the attorney-client privilege. Defendants cannot selectively disclose privileged communications for their own benefit. Nor will Defendants be permitted to argue that the 2013 policy change satisfies the Constitution because it was made on advice of counsel.

***7 IT IS ORDERED:**

1. Defendants shall disclose the documents withheld in their privilege log solely on the basis of the deliberative process privilege. These documents shall be disclosed within 14 days of this order. Defendants need not disclose the remaining documents in the privilege log.
2. The parties promptly shall confer concerning any additional deposition discovery that is warranted by this ruling, and shall place a conference call to the Court to discuss a brief modification of the discovery schedule.

All Citations

Not Reported in F.Supp.3d, 2014 WL 171923

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EXHIBIT 13-H

2012 WL 1648416

Only the Westlaw citation is currently available.
United States District Court, D. Arizona.

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, Plaintiff,

v.

SWISSPORT FUELING, INC., Defendant.

No. CV-10-2101-PHX-GMS.

|
May 10, 2012.

Attorneys and Law Firms

Andrea Gail Baran, Christopher Robert Houk, Mary Joleen O'Neill, Sally Clifford Shanley, Equal Employment Opportunity Commission Phoenix, AZ, James P. Driscoll-Maceachron, Nancy Eileen Griffiths, EEOC, Phoenix, AZ, for Plaintiff.

Richard Seth Cohen, Victoria R. Torrillon, Jackson Lewis LLP, Amy Jo Gittler, Phoenix, Az, for Defendant.

ORDER

G. MURRAY SNOW, District Judge.

*1 Pending before the Court is Plaintiff EEOC's Expedited Motion For Extension of Time to Identify Claimants and Memorandum in Support (Second Request) (Corrected), Doc. 184.¹ To the extent that the EEOC requests that the deadline be retroactively extended for all potential claimants that motion is denied. To the extent that the motion is one to modify the deadlines on behalf of those claimants for whom the EEOC has shown good cause to modify the deadlines, the motion is granted in part and denied in part as further explained in this order.²

Also pending before this Court is Plaintiff EEOC's Motion For Protective Order Regarding the Deposition of EEOC investigator Jae Richardson, Doc. 165, Defendant Swissport's Motion to Compel, Doc. 216, and Defendant Swissport's Second Motion to Compel, Doc. 217. For the reasons stated below Plaintiff EEOC's Motion for Protective Order is denied, and Investigator Richardson may be deposed by Defendant. Plaintiff will pay the court-reporter cost incurred in taking

the deposition. Further, Defendant Swissport's Motions To Compel, Docs. 216 and 217, are denied in part and granted in part as further explained in this Order. Pursuant to Fed.R.Civ.P.37 (5)(A), the EEOC will file with the Court within five days a memorandum, not to exceed five pages, indicating why Swissport should not be awarded its attorney's fees in connection with bringing Doc. 217.

The Court will confer with the parties concerning the necessary re-opening of discovery at the status conference scheduled for May 11, 2012.

A. Motion For Extension

In May 2007, two Swissport fuelers filed discrimination charges with the EEOC. At approximately the same time, the EEOC received a petition signed by approximately twenty current and former employees of Swissport complaining of discrimination. During the course of the EEOC's ensuing administrative investigation, and at its request, Defendant provided Plaintiff with a list of fueler employees who were potential claimants for the period back to 2005, along with the employees' contact information and dates of employment.

For the next three years the EEOC conducted its investigation and, Defendant provided, at Plaintiff's request, more than 3000 documents concerning Defendant's employment practices. On June 11, 2010 the EEOC issued 18 separate letters of determination finding reasonable cause against Swissport. Those determination letters lead to an unsuccessful conciliation process. When conciliation was unsuccessful, Plaintiff filed its complaint at the end of September 2010.

According to that complaint, since at least May 2005 Defendant Swissport has been unlawfully harassing "the charging parties"—unspecified African fuelers—because of their race, national origin and/or color and created a hostile working environment. The Complaint also alleges that since at least May 2007, Swissport has "retaliated against the Claimants for opposing the hostile work environment based on race, national origin and/or color." And, it alleges that since at least June 2008, the Defendant "constructively discharged claimants because the discriminatory treatment had made the workplace intolerable." The complaint requests injunctive relief, damages and equitable relief such as back pay, reinstatement and/or front pay as well as punitive damages.

*2 The scheduling conference was held in April seven months after Plaintiff filed its complaint. At the scheduling

conference, Plaintiff indicated that it had currently identified seventeen charging parties, apparently made up of the same persons whose rights it had asserted in the administrative conciliation process. It had not, however, provided a single document or any of the information as required by [Fed.R.Civ.P. 26](#) with respect to the damages and equitable relief it was claiming on behalf of these identified claimants. Plaintiff also asserted that in addition to the seventeen identified claimants, there were the 20 additional potential claimants that had signed and submitted the petition against the Defendant back in 2007. Plaintiff stated with respect to those twenty additional potential claimants that “We’ve looked for many of them. We’ve looked for all of them, and many of their addresses have changed. There’s a few that we’re—we’re still trying to track down.” Plaintiff thought it could reasonably locate and identify ten of them.³

At the scheduling conference Defendant asserted that one of two key witnesses in the defense case, Jim Vescio, had terminal cancer and Defendant needed to preserve his testimony with respect to the claims asserted by the Plaintiff. Defendant had provided the EEOC with notice of Mr. Vescio’s condition prior to the scheduling conference.

In light of the years that the EEOC had to identify claimants, and the limited time in which Mr. Vescio could be deposed regarding the claimants’ assertions, Defendant requested a cutoff for adding additional claimants. The Court granted an additional sixty days to amend the complaint or add additional claimants. It did not preclude the EEOC from adding additional claimants after that time if it could establish its own diligence in seeking to identify such claimants. The Court noted: “Well, I’m actually going to—I’m not going to allow amendment past 60 days. So to add class members, to me, is an amendment. You’ve got 60 days to find class members, unless you can tell my why, in light of the extensive period that you’ve already had to do that, I should give you more time.”

Apparently sometime after the scheduling conference, despite the Court’s order, the EEOC determined it would cast a much wider net in seeking to discover potential claimants. On May 24, 2011, approximately one month after the scheduling conference, the EEOC sent out letters with information packets to 188 Swissport employees for whom Swissport had provided contact information more than three years earlier. Further, on May 25, it sent an interrogatory to Swissport asking it to identify all of its employees who worked for the

company as early as January 1, 2001 and further requesting disclosure of their race and job title.

By the deadline for amending the pleadings and identifying claimants that was set by the Court, Plaintiff had not filed an amended complaint seeking to recover for discrimination or harassment prior to May 2005, nor had it specifically identified additional claimants on whose behalf it sought relief. On that date, Plaintiff served Defendant with additional disclosures in which it identified persons who were claimants, and persons who were “Potential Claimants.” Plaintiff had, by this time, identified nine additional claimants and an additional 75 potential claimants in their supplemental disclosure statements. Thus, the scope of the potential claimants that Plaintiff was seeking to identify now vastly exceeded those identified at the scheduling conference.

^{*3} On that same date Plaintiff also filed its Motion For Extension of Time. Doc. 32. The motion stated that since the setting of the schedule, the EEOC had decided to send out letters to the 188 fuelers for which Swissport had provided it with contact information, and 103 of those letters were returned as undeliverable. Plaintiff asserted that many of the addressees had changed addresses—not surprising if the Plaintiff had taken three years from receiving their contact information to actually attempt to contact them—and that many traveled for extensive periods out of the country. Plaintiff stated that it was continuing to use public databases to attempt to find current contact information.

In that motion Plaintiff also identified that it had expanded the scope of its discovery requests to the Defendant to identify additional potential charging parties. Plaintiff had not, however, sought to amend the complaint to assert a right to relief earlier than May 2005. Because of the expansion of its efforts to identify potential claimants, Plaintiff requested that the Court grant it until December 16, 2011 to continue to identify potential claimants.

When requesting a modification to a scheduling order, the requesting party must establish good cause for doing so. The existence of such good cause is, as the EEOC had been advised at the scheduling conference, dependent upon its diligence. Amendment to the scheduling order is allowed only if the good cause standard is satisfied. *See Johnson v. Mammoth Recreation Centers, Inc.*, 975 F.2d 604 (9th Cir.1992). “A court’s evaluation of good cause is not coextensive with an inquiry into the propriety of the amendment under ... Rule 15.” *Id.* at 609. “Unlike Rule

15(a)'s liberal amendment policy which focuses on the bad faith of the party seeking to interpose an amendment and the prejudice to the opposing party, Rule 16(b)'s 'good cause' standard primarily considers the diligence of the party seeking the amendment." *Id.* "[C]arelessness is not compatible with a finding of diligence and offers no reason for a grant of relief." *Id.*, citing *Engleson v. Burlington, Northern R.R. Co.*, 972 F.2d 1038, 1043 (9th Cir.1992). If the party seeking amendment "was not diligent, the inquiry should end." *Id.*

Not only does the EEOC offer no reason consistent with diligence why it did not earlier seek to identify such claimants since it had earlier received their contact information, it offers no reason, consistent with diligence, as to why it did not decide until after the scheduling conference that it was going to seek to identify 188 additional Claimants as opposed to the twenty that it disclosed at the scheduling conference.

In declining to rule on the motion to extend, the Court ordered:

To the extent that the identification of claimants would require the EEOC to seek to amend its pleadings, the Court will determine at the time of the proposed amendment whether such a modification in the Scheduling Order is both justified by "good cause," see *Fed.R.Civ.P. 16*, and by the moving party's diligence in the matter. See *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604 (9th Cir.1992). In the absence of any proposed motion to amend, the Court cannot determine whether the EEOC has been sufficiently diligent to justify the proposed extension. Therefore, the Court declines to rule on the EEOC's motion as unripe. To the extent that the EEOC takes the position that no amendment is necessary, the Scheduling order has a discovery deadline that will continue to govern this action. The parties are advised to cooperate to insure that all parties are timely aware of all potential claimants to ensure successful discovery within the parameters of that deadline.

*4 The EEOC treated this order as authorization to continue to seek to add class members throughout the course of the litigation on a rolling basis by so informing the Defendant in disclosure statements, and without seeking leave of the Court to do so.

Those notices resulted in the Defendant filing its motion to limit class on October 31, 2011. In its Response, Plaintiff again made no effort to demonstrate diligence with respect to its attempts to identify individual claimants. As a result, the Court granted Defendant's motion in part, while indicating it

would still allow the Plaintiff the opportunity to demonstrate such diligence and good cause:

The Court has never deviated from its view that after that date, June 28, 2011, it would require Plaintiff to establish good cause, and thus previous diligent efforts to identify members of the class, prior to permitting Plaintiff to seek individual relief on behalf of additional members of the charging class. Frankly, the Court acknowledges that the wording of its order refusing to act on the Plaintiff's motion to amend was not as clear as it should have been. In seeking to recognize that, as a technical matter, Plaintiff might not need to amend the complaint to seek to add members of the charging class on whose behalf the Plaintiff sought individual relief, the Court did not make it precisely clear that Plaintiff nevertheless would have to establish good cause before seeking to add additional persons on whose behalf it sought relief.

While recognizing that there still might be unidentified members of the class, the Court entered its previous scheduling order in light of the extensive time that Plaintiff has had to identify individuals on whose behalf it seeks relief, and the need for Defendant to adequate time to conduct adequate discovery from those persons. In any of the motions or responses filed, Plaintiff has yet to identify or establish to this Court, individuals on whose behalf it seeks to assert relief that it had not identified prior to June 28, 2011, and any reasons approaching good cause, why those persons were not previously identified. To the extent that Plaintiff has set forth generic reasons why it should still be able to seek to identify class members, those reasons are rejected in light of the years that the Plaintiff has had to identify such class members and the failure of Plaintiff to set forth any good faith reason why such steps were not earlier taken.

Therefore, absent demonstrating "good cause" why this Court should allow Plaintiff to seek individual relief for aggrieved employees who were identified to Defendant after June 28, 2011, Plaintiff is precluded from doing so.

By the status conference held on January 20, 2012, Plaintiff asserted that it had identified an additional seven of the remaining 75 class members on whose behalf it desired to seek relief. The Court directed the Plaintiff to file a pleading by early February establishing such good cause on an individual basis.

ANALYSIS

*5 Despite the Court's order, in its motion for extension the EEOC nevertheless sets forth generic arguments similar, if not identical, to those that the EEOC had earlier asserted unsuccessfully. The EEOC first seems to argue that because the Court only made an oral order setting a deadline for the EEOC to disclose the claimants on whose behalf it seeks relief, it was not obliged to comply with the order. This argument plainly lacks merit. In the Ninth Circuit “oral orders are entitled to the same force and effect as an order reduced to writing.” *Lorenz v. Beltio, Ltd.*, 76 F.3d 387 (9th Cir.1996) (citing *Noli v. CIR*, 860 F.2d 1521, 1525 (9th Cir.1988)). The EEOC did not overlook the order but was aware of at all times of the need to identify charging parties by the 28th of June as its first Motion for Extension demonstrates. See, e.g., Doc.32. (“The [case management] Order does not explicitly set forth a deadline for identification of Claimants ... but the Court advised the parties at the April 29, 2011 Case Management Conference that it expected all Claimants to be identified by the June 28 deadline.”) To the extent that Plaintiff EEOC suggests that this Court cannot set a deadline for the disclosure of claimants governed by *Fed.R.Civ.P. 16*, such a suggestion also lacks merit.

To the extent that the EEOC asserts that this Court abused its discretion in setting the disclosure deadline sixty days after the discovery conference it is also unpersuasive. At the scheduling conference the EEOC asserted that it knew of only approximately twenty additional potential claimants—those who had signed the 2007 employee petition—and that it had “looked for all of them,” and that “[t]here's a few that we're-we're still trying to track down.” Sixty days is not an unreasonable period to track down the remaining few claimants in such circumstances especially when a key defense witness as to such potential claims is suffering from a terminal illness and has testimony that must be preserved, and the EEOC had been given the contact information for virtually all such persons at the start of the investigation three years earlier. The EEOC could and should have determined by the point of the scheduling conference which of Swissport's previous employees it wished to solicit to be charging parties and been prepared to request that sufficient time be scheduled and balanced into the other exigencies raised by the parties. At that time, however, they only desired to identify the twenty employee signers of the petition for whom it represented it had already been looking.

The EEOC also asserts that it is routinely given significant time in discovery to ascertain the identity of potential class members. Yet, it fails to establish that it is awarded such lengthy discovery even in cases when it has, during the administrative proceedings, compelled the Defendant to disclose to it the identities and contact information of all such potential class members, and has otherwise done nothing to ascertain actual claimants since the time that it received that information or filed its complaint.

*6 The EEOC asserts that it need not identify all persons on whose behalf it seeks damages relief during its administrative investigation or conciliation procedures. *EEOC v. United Parcel Service*, 94 F.3d 314, 318 (7th Cir.1996), *EEOC v. United Parcel Service*, 860 F.2d 372, 376 (10th Cir.1988), *EEOC v. American National Bank*, 652 F.2d 1176, 1185 (4th Cir.1980). The Court assumes the accuracy of this legal assertion. Even so, it is hardly dispositive of whether, under *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604 (9th Cir.1992), the EEOC has demonstrated diligence in identifying charging parties on whose behalf it seeks actual and equitable damages and injunctive relief in a judicial proceeding.

In assessing a reasonable deadline for such disclosures, and whether the EEOC has been diligent in attempting to meet such a deadline, a court may take into account that Plaintiff EEOC twice mandated Defendant to provide the identities and contact information of all potential judicial claimants years earlier in its administrative processes. A court may further consider the nine months between the Plaintiff's filing of the complaint and the deadline set for the identification of claimants on whose behalf the EEOC seeks damages and injunctive relief. It may further consider the far more limited number of potential Claimants that the Plaintiff identified that it might add at the Scheduling Conference. None of the cases cited by Plaintiff suggest otherwise.

Prior to the deadline set by the Court for identifying claimants, the Plaintiff identified nine additional claimants on whose behalf it is seeking relief in this lawsuit. It may seek relief on behalf of such claimants. It now seeks to add twenty-two more. Pursuant to *Fed.R.Civ.P. 16(b)(4)*. It must demonstrate good cause as to each of these twenty-two.

The facts as to many of the twenty-two additional persons on whose behalf the EEOC seeks to assert claims bear certain similarities. It is undisputed that during the EEOC's administrative investigation of Swissport first in January and

then again in April 2008, Swissport provided the EEOC with the then current contact information for twenty-one of the twenty-two additional claimants, and that the contact information for the remaining potential claimant was given to the EEOC in 2007.

Approximately two weeks prior to the scheduling conference, on April 13, 2011, the EEOC supplied Swissport with a preliminary list of the twenty persons who signed the petition that it believed it would eventually identify as claimants in addition to the seventeen claimants it had already identified. That list includes five of the twenty-two additional names on whose behalf Plaintiff now desires to seek relief apparently including Amos Tarley, Angelo Ajawin, Kweku Essien, Wellington Pyne and Charles Talati. In that letter the EEOC also requested Swissport to voluntarily provide a list of names, addresses and phone numbers and dates of employment of fuelers employed from 2005 to 2007.

*7 Swissport did not voluntarily supply such a list to the Plaintiff. Compliance with such a request would have constituted the third time that Defendant would have done so. However, given the passage of time, such a list would have contained some updated contact information for eight of the twenty-two claimants on whose behalf the EEOC now seeks to assert claims.⁴ These include: Amos Tarley, Angelo Ajawin, Jacob Kual, Angelo Ring, Salah Ahmed, Abdurahman Mumin, Koami Kromega, and Charles R. Talati. Because Swissport desired to quickly identify the claimants so that Mr. Vescio's testimony could be preserved with respect to them, it would have been reasonable for Swissport to assist in identifying such potential claimants on request. Swissport was served by the EEOC with a formal request for the information in May. After it received a mutual extension from the EEOC it apparently disclosed this updated contact information in July 2011. While, under the circumstances, Swissport's determination not to voluntarily provide updated contact information does not demonstrate bad faith, the Court is unwilling to find that to the extent the EEOC was making diligent efforts to locate such persons without such direct and efficient assistance, it should not result in a windfall to Swissport. This reasoning has particular force when, as was the case here, Swissport sought an accelerated date for identifying claimants in part, due to the precarious health of a key witness.

The EEOC was ordered on April 29, 2011 to identify all parties on whose behalf it would seek relief by June, 28, 2011. The EEOC arrived at the decision sometime after the

scheduling conference to attempt to identify all of the past qualified employees identified by Swissport in the EEOC administrative proceedings as claimants in this lawsuit as opposed to merely the signers of the 2007 employee petition. Beginning approximately four weeks later, between May 24, and June 11, 2011, the EEOC mailed out a notice of litigation letter, questionnaire and participation agreements to 188 potential claimants. These letters were apparently sent to the last known address of the potential claimants that the EEOC had earlier received from Swissport in connection with its administrative investigation in 2008 and included twenty-one of the twenty-two people on whose behalf the EEOC now wishes to assert claims.⁵

There is no reason that the EEOC could not have earlier made the determination as to the number of potential claimants it sought to represent and proceeded to identify those claimants either during the administrative process or after it filed its complaint. This Court is aware as the EEOC points out, that to the extent that the EEOC was not diligent in pursuing the identity of the claimants, it is the claimants themselves and not the EEOC who lose their opportunity to assert their claims. Nevertheless, the EEOC's lack of diligence cannot always be excused just because it harms others who might have had a claim for relief, but did not independently assert it. Such deprivation must be balanced against the fairness and expediency that is due to the parties against whom the EEOC asserts such claims. The EEOC can reasonably be expected to consider the scope of its claims by the time of the scheduling conference. It is, after all, the diligence of the party, in this case the EEOC, that is at issue when deciding whether to adjust deadlines previously set under [Fed.R.Civ.P. 16](#), and not the diligence of those who rely on the party to assert their claims for relief.

*8 In balancing these two interests, the Court has determined that the most important facts to consider is whether the EEOC was diligent and consistent in seeking to identify charging parties once this Court set a deadline to identify charging parties. While it did not begin sending out information letters to such potential charging parties until May 24, the Court does not consider this alone sufficient to establish a lack of diligence and deny the extension of a deadline to all potential claimants. Nevertheless, to the extent the EEOC failed to demonstrate continued diligence in seeking to identify charging parties in this suit after the deadline had expired, given their past opportunity to identify the claimants over a three year period, the Court will not modify its schedule to permit the claim of the proposed charging party.

1. Amos Tarley

Mr. Tarley had been earlier disclosed on April 13, by the EEOC as a potential claimant, and, at the time, Mr. Tarley remained in the employ of Swissport. Thus, Swissport was aware of his whereabouts, but, apparently, did not disclose them to the EEOC. After sending the packet of materials to Amos Tarley on May 24 to the address previously provided by Swissport, the EEOC continued to search for him by using public databases and attempting to telephone him. The EEOC thus listed Mr. Tarley as a potential claimant in its June 28 disclosure statement. On June 30, 2011 the EEOC was able to contact Mr. Tarley by telephone and confirmed with him that he wished to be a claimant. They notified Swissport that he was a claimant on that same date. Plaintiff has established sufficient diligence to permit the modification of the scheduling order to allow it to assert the claims of Amos Tarley.

2. Angelo Ajawin

Mr. Ajawin had been earlier disclosed on April 13, 2011 by the EEOC as a potential claimant, and, had remained in the employ of Swissport until 2009. Swissport thus, presumably, had updated contact information concerning Mr. Ajawin that it did not provide to the EEOC until after the deadline. The EEOC first sent the packet of materials to Mr. Ajawin on June 17. Mr. Ajawin replied by mail. The EEOC conferred with Mr. Ajawin on or before July 5 and identified Mr. Ajawin to Swissport as a claimant on the next day. Plaintiff has established sufficient diligence to permit the modification of the scheduling order to permit it to assert the claims of Angelo Ajawin.

3. Wellington Pyne

After sending the packet of materials to Wellington Pyne on May 25, the EEOC listed him as a potential claimant in its June 28 disclosure statement and continued to search for him by using public databases. With information obtained on such databases it sent a follow-up letter on July 5 and was successful in contacting Mr. Pyne by phone on July 7. Mr. Pyne had been earlier disclosed on April 13, by the EEOC as a potential claimant. On July 8, the EEOC was able to confirm with him that he wished to be a claimant. They so notified Swissport on that same date. Plaintiff has established sufficient diligence to permit the modification of the scheduling order to permit the claims of Wellington Pyne.

4. Jacob Kual.

*9 Mr. Kual remained in the employ of Swissport, and thus Swissport had updated information about his whereabouts, but, apparently, did not disclose it to the EEOC, prior to the deadline. When Mr. Kual did not respond to the informational letter, the EEOC conducted a public records search to locate the address of Mr. Kual on July 5. On that date it sent him an information packet. The EEOC unsuccessfully attempted to reach Mr. Kual by phone on July 6. The EEOC reached Mr. Kual by phone on July 11 and he indicated he wished to have the EEOC assert claims on his behalf. The EEOC so notified Swissport on that same date. It has established sufficient diligence to permit the modification of the scheduling order to permit the claims of Jacob Kual.

5. David Mensah

After sending the packet of materials to David Mensah on May 24, the EEOC continued to conduct public record searches for him and sent two letters to potential addresses on June 17, 2011. The EEOC also attempted to reach Mr. Mensah by phone and was able to reach him on July 7. He thereafter came in and spoke with the EEOC in person. The EEOC notified Swissport on July 14 that Mensah would be a claimant. Plaintiff has established sufficient diligence to permit the modification of the scheduling order to permit the claims of David Mensah.

6. Kweku Essien

Mr. Essien had been earlier disclosed on April 13, 2011 by the EEOC as a potential claimant. After sending the packet of materials to Kweku Essien on May 24, to the address previously provided by Swissport, the EEOC continued to search for him by using public databases and sent him another letter on July 5. The EEOC received a written response from Mr. Essien on July 11, and spoke to him on July 14. The EEOC notified Swissport of Essien's claimant status on that same date. Plaintiff has established sufficient diligence to permit the modification of the scheduling order to permit the claims of Kweku Essien.

7. Sulaiman Kargbo

After sending the packet of materials to Sulaiman Kargbo on May 24, the EEOC continued to conduct public record searches for him and sent another letter to a potential address on July 5, 2011. The EEOC received Mr. Kargbo's response on July 11, 2011 indicating that he wished to be a claimant.

The EEOC notified Swissport on July 18 that Kargbo would be a claimant. Plaintiff has established sufficient diligence to permit the modification of the scheduling order to permit the claims of Sulaiman Kargbo.

8. Sumene Kaborloomene John Dan–Kane Friday Ikue Anthony Nwiyaara Muritala Yusuf

There appears to be no dispute that five of the claims are asserted for periods outside of the time parameters of the complaint. The EEOC makes no argument that it has ever amended its original complaint in this action pursuant to the deadline for amendments set forth by the Court. The complaint seeks relief as far back as May 2005. The EEOC asserts that because the complaint states “since at least May 2005” as its earliest date, the complaint covers an unlimited period prior to that date. This argument is unpersuasive and would not permit the parties to define claims or marshal defenses for such claims based on the limitations period set by the statute itself. 42 U.S.C. § 2000e–5(e)(1).

*10 The EEOC was able, had it wished to do so, to amend the complaint to specify for what earlier periods it was seeking relief. It was aware of its obligation to do so. It offers no explanation how its failure to do so was consistent with its diligence. Plaintiff’s failure to otherwise amend the complaint pursuant to the deadline demonstrates that it did not act with diligence sufficient to now seek relief on behalf of the five potential claimants above named. It will, therefore, not be able to seek relief on behalf of Friday Ikue, Anthony Nwiyaara, Sumene Kaborloomene, Muritala Yusuf and John Dan–Kane.

9. John Ruai

After sending the packet of materials to John Ruai on May 24, the EEOC continued to search for him and sent two letters to potential addresses on July 6, 2011. Using a phone number from a public records search, the EEOC successfully contacted Mr. Ruai on July 18, 2011 and confirmed that he wished to assert claims. The EEOC notified Swissport on July 20 that Ruai would be a claimant. Plaintiff has established sufficient diligence to permit the modification of the scheduling order to permit the claims of John Ruai.

10. Angelo Ring

Mr. Ring had been earlier disclosed on April 13, by the EEOC as a potential claimant, and, at the time, Mr. Ring remained in the employ of Swissport. Thus, Swissport was aware of his whereabouts, but, apparently, did not disclose them to the

EEOC. After sending the packet of materials to Mr. Ring on June 6 to the address previously provided by Swissport, which was apparently the correct address, the EEOC continued to search for him by using public databases and attempting to telephone him. The EEOC thus listed Mr. Ring as a potential claimant in its June 28 disclosure statement. On July 7, 2011, the EEOC called Mr. Ring at a telephone number found in a public records search and left a message. On July 14, 2011, Mr. Ring returned the call. On a return call from the EEOC on that date the EEOC confirmed with him that he wished to be a claimant. They notified Swissport of that status on July 20, 2011. Plaintiff has established sufficient diligence to permit the modification of the scheduling order to permit the claims of Angelo Ring.

11. Salah Ahmed

Mr. Ahmed had been earlier disclosed on April 13, by the EEOC as a potential claimant. After sending the packet of materials to Salah Ahmed on May 24, the EEOC continued to search for him and sent Mr. Ahmed a second letter to a potential address on June 28, 2011. Using a phone number from a public records search, the EEOC successfully contacted Mr. Ahmed on July 20, 2011. The EEOC notified Swissport on July 27 that Mr. Ahmed would be a claimant. Plaintiff has established sufficient diligence to permit the modification of the scheduling order to permit the claims of Salah Ahmed.

12. Peter Adje

After sending the packet of materials to Peter Adje on May 24, the EEOC continued to search for him and sent a second letter to him at a different address on June 28, 2011. Using a phone number from a public records search, the EEOC successfully contacted Mr. Adje on July 20, 2011. The EEOC notified Swissport on July 27 that Mr. Adje would be a claimant. Plaintiff has established sufficient diligence to permit the modification of the scheduling order to permit the claims of Peter Adje.

13. Abdirahman Mumin

*11 Mr. Mumin had been earlier disclosed on April 13, by the EEOC as a potential claimant. After sending the packet of materials to Abdirahman Mumin on May 24, the EEOC continued to search for him and sent a second letter to him at a different address on July 5, 2011. Mr. Mumin responded on July 25, 2011 and the EEOC interviewed him on July 27, 2011. The EEOC notified Swissport on July

28 that Mr. Muhmin would be a claimant. Plaintiff has established sufficient diligence to permit the modification of the scheduling order to permit the claims of Abdirahman Mumin.

14. Ebenezer Sitam

The EEOC provides no facts concerning its attempts to contact Mr. Sitam in the affidavit of Rosanne T. Wood. It merely repeats, through what appears to be a copy and paste error, the averments pertaining to Anthony Nwiyaara. The Court will grant five judicial days after the filing of this order to permit the EEOC to assert facts that it believes establish its diligence in trying to contact Mr. Sitam. In the absence of such a filing, the EEOC will have failed to establish its diligence in contacting Mr. Sitam and the EEOC will not be allowed to pursue relief on his behalf. Should the EEOC provide such information in a timely fashion, the Court will evaluate it to determine whether it constitutes good faith.

15. Koami Kromega

Mr. Kromega had been earlier disclosed on April 13, 2011 by the EEOC as a potential claimant. After the EEOC sent an information packet on May 24, 2011, it sent Mr. Kromega an addition letter on July 6, 2011 to a different address in Glendale. The next effort made by the EEOC with respect to Mr. Kromega was October 31 when it was able to contact him by telephone. The EEOC did not identify Mr. Kromega as a claimant to Swissport until November 23, 2011. The EEOC offers no evidence of any attempt to locate or contact Mr. Kromega from July 6, (already after the deadline), until October 31. This almost four months delay after the deadline had passed and while available discovery time was being exhausted does not, in the Court's assessment, constitute diligent effort to identify Mr. Kromega after the deadline had passed. Having failed to establish its diligence in attempting to contact Mr. Kromega after July 6, 2011, the EEOC will not be able to seek relief on his behalf.

16. Yasir Hamid

After the EEOC sent an information packet on May 24, 2011, it sent Mr. Hamid an addition letter on July 6, 2011 to a different address in Phoenix. The next effort made by the EEOC with respect to Mr. Hamid was October 31 when it was able to contact him by telephone after determining his number through a public database. The EEOC did not identify Mr. Hamid as a claimant until November 23, 2011. The EEOC offers no attempt to locate or contact Mr. Hamid

from July 6, (already after the deadline), until October 31. For the reasons set forth above, this almost four-month delay does not constitute diligent effort to identify Mr. Hamid. Having failed to establish its diligence in attempting to contact Mr. Hamid after July 6, 2011, the EEOC will not be able to seek relief on his behalf.

17. Doctor Clemente Joule Dado

*12 After the EEOC sent an information packet on May 24, 2011, it sent Mr. Dado an additional letter on July 5, 2011. The EEOC lists no additional efforts that it made to contact Mr. Dado. Although the EEOC offers hearsay testimony that Mr. Dado traveled between New York and Phoenix in this period and had communications barriers with the brother who received his mail, the relevant inquiry is not whether there is an excuse for Mr. Dado's tardiness, but rather whether the EEOC acted with diligence. The EEOC indicates no effort to locate or contact Mr. Dado from July 5, (already after the deadline) until it received his written correspondence on October 25. This almost four months delay after the deadline had passed does not constitute diligent effort by the EEOC to identify Mr. Dado after the deadline had passed. Having failed to establish its diligence in attempting to contact Mr. Dado after July 5, 2011, the EEOC will not be able to seek relief on his behalf.

18. Charles Talati

Mr. Talati had been earlier disclosed on April 13, by the EEOC as a potential claimant, and, at the time, Mr. Talati remained in the employ of Swissport. Thus, Swissport was aware of his whereabouts, but, apparently, did not disclose them to the EEOC until July 25 when it responded to the EEOC's interrogatory. After sending the packet of materials to Charles Talati on May 24, the EEOC indicates it sent him another letter on July 6 at an address in Phoenix. Thereafter, it states without indicating when, that "it attempted to reach Mr. Talati by telephone." The EEOC finally sent Mr. Talati a third letter on November 15, 2011 which was also returned as undeliverable. The EEOC then called Mr. Talati on January 11 and received a return call from Mr. Talati on January 12. The EEOC subsequently identified Mr. Talati as a claimant on February 2, 2012. The EEOC offers no specific attempts to locate or contact Mr. Hamid from July 6, (already after the deadline), until November 15. This delay after the EEOC would have presumably been made aware of Mr. Talati's contact information, followed by an additional two month delay between November and January while available discovery time was being exhausted does not, in the Court's

assessment, constitute diligent effort to identify Mr. Talati after the deadline had passed. Mr. Talati was not identified by the EEOC as a claimant until well after even the retroactive identification deadline that the EEOC would have this court impose. Having failed to establish its diligence in attempting to contact Mr. Talati after July 6, 2011, the EEOC will not be able to seek relief on his behalf.

B. Motion For Protective Order and For Sanctions

After Defendant took its 30(b)(6) deposition, on December 14, 2011 both parties simultaneously moved for relief. Defendant moved for sanctions, Doc. 164, and an order to compel Plaintiff to provide a knowledgeable and prepared deponent. To that end Defendant noticed the deposition of Jae Richardson, who was apparently the principal investigator with the EEOC on the administrative charges. Plaintiff immediately thereafter moved for a protective order to prevent the deposition. Doc. 165. The Court opted to treat Defendant's Motion for Sanctions as a Response to the Motion for Protective Order, and to allow Defendant's to supplement that Response. See Doc. 180. After review the Court now rules as follows:

*13 It is clear to the Court after a review of the 30(b)(6) notice and the deposition testimony provided that Berta Echeveste was not an adequately knowledgeable or prepared witness for the areas of testimony designated in the 30(b)(6) deposition notice. Although she was able to provide some answers, she did not have adequate knowledge, familiarity or preparation in many of the areas of inquiry to adequately respond. Therefore, contrary to the position taken by the Plaintiff, Ms. Richardson's deposition would be neither cumulative, nor has Swissport had a reasonable opportunity to otherwise obtain the evidence.

To assert that the adequacy of an EEOC investigation is not an appropriate subject on which testimony can be introduced at trial, the EEOC cites to cases from different circuits which, for the most part, do not allow consider relevant matters concerning the adequacy of an EEOC investigation. Nevertheless, the Ninth Circuit explicitly provides for inquiry into the adequacy of EEOC investigations. See, *Plummer v. Western Int'l Hotels, Co., Inc.*, 656 F.2d 502, 505 (9th Cir.1981) (observing that because the EEOC findings are admissible at trial the Defendant is "free to present evidence refuting the findings of the EEOC and may point out deficiencies in the EEOC determination"); See also, *Ex Rel. Goddard v. Frito Lay, Inc.*, 273 F.R.D. 545, 552 (D.Ariz.2011)

(same). Thus, the EEOC's argument that the law is otherwise lacks merit in this circuit at least.

The Court is further unpersuaded by the EEOC's argument that it would be unduly burdensome to permit the investigation of Jae Richardson. Therefore, the EEOC's Motion for Protective Order is denied, and the Defendant's Motion for Sanctions is granted to the extent that Ms. Richardson may be deposed and the EEOC will be obliged to pay the court reporting expenses incurred in the deposition of Ms. Richardson.

C. Defendant's First Motion To Compel, Doc. 216

Defendant also moves to compel:

1. All May 24, 2011 "Notice of Class Litigation" letters that the EEOC sent to non-claimants, and a list of individuals to whom these letters were sent.
2. All Participation Agreements that were returned to the EEOC from any individuals who are not current claimants in this litigation.
3. All Questionnaires that were returned to the EEOC from any individuals who are not current claimants in this litigation.
4. Tax returns for any claimants for whom the EEOC seeks lost wage recovery, or, if unavailable, documentation showing all efforts to seek such tax returns from the IRS
5. Information regarding claimants' travel out of the country from January 1, 2003 to present.

1. Identities of Potential Claimants Provided With Notice

At the time the May 24, 2011 letters were sent, this matter had been in litigation for nine months. And, as related above, the EEOC counsel apparently decided to pursue a broader class of claimants than it had earlier identified in the scheduling conference. The notice letter was signed by EEOC counsel and was sent with a packet containing a Questionnaire and a Participation Agreement. Although the contents of the Notice, Participation Agreement and Questionnaire as drafted by the Plaintiff's attorneys are not subject to the attorney-client privilege to the extent that the material was sent to those who were not clients and did not qualify as clients, any privilege or immunity in the text of the document has

been waived to the extent that the documents has already been disclosed by the EEOC. However, Plaintiff is entitled to work-product immunity to the extent that Defendant requests that it identify to whom its attorneys sent the information. *EEOC v. Collegeville/Imagineering Ent.*, no. CV-05-3033-PHX-DGC, 2007 WL 1089712, at *1 (D.Ariz. Apr.10, 2007) (holding that “where a party ... seeks to learn who has been contacted by opposing counsel, work product concerns arise. Such discovery requests seek to track the steps of opposing counsel ... [and thus focuses] on the actions of lawyers rather than the knowledge of witnesses.”); see also *Commonwealth of Mass. v. First Nat'l Supermarkets, Inc.*, 112 F.R.D. 149, 152 (D.Mass.1986). The decision to contact additional possible claimants, and the further decision of who among the possible candidates to contact, involves, at this stage of the litigation, the mental impression of Plaintiff's attorneys. To the extent that Defendants attempt to trace the work of Plaintiff's counsel in impeaching the claims asserted by Plaintiff as a result of the number of people contacted by Plaintiff's counsel who did not become claimants, Defendant is attempting to profit from work undertaken by Plaintiff's counsel. Such information is subject to the work-product immunity. As a result, Plaintiff need not identify the persons to whom it sent class notification letters.

2. Participation Agreements and Questionnaires

*14 Further, those who signed the Participation Agreement and returned it to the Plaintiff, had, by the terms of the Participation Agreement itself, an expectation of privacy in a communication with an attorney representing their interests and evaluating their potential claims. Such communications are thus subject to the attorney-client privilege. *Yurick ex rel. Yurick v. Liberty Mut. Ins. Co.*, 201 F.R.D. 465, 468 (D.Ariz.2001). Those who returned the questionnaire along with the Participation Agreement sufficiently indicated that they wished to have their interests represented by the EEOC and thus would have had an objectively reasonable belief that they were speaking to counsel. In such cases, the communication is protected by the attorney-client privilege.

EEOC v. ABM Industries, 261 F.R.D. 503 (E.D.Ca.2009) is distinguishable because in that case, the Court noted “the EEOC has not demonstrated that the persons who filled out and returned the questionnaires were seeking to become EEOC clients at the time they completed the document ...” While this observation also remains true in this case for those who returned the questionnaire without returning a signed Participation Agreement, for those who did fill out and return the Participation Agreement with the questionnaire, the

EEOC has adequately demonstrated that such persons were seeking to become EEOC clients.

In sum, then, the EEOC must disclose the contents of the questionnaires that were returned without Participation Agreements or that were returned with Participation Agreements if the respondent indicated that he/she did not wish to assert a claim. It need not return Participation Agreements or questionnaires returned with Participation Agreements, when the respondent indicated that he or she wished the EEOC to assert a claim on his or her behalf. Further, the EEOC need not disclose the persons to whom it sent out the notice, participation agreement and/or questionnaire.

3. Tax returns and Other Documents

The EEOC shall provide tax returns, and W-2s for years in which tax returns have not yet been filed, for all claimants on whose behalf the EEOC seeks back wage recovery. To the extent that the Court has permitted the EEOC to assert additional claims on behalf of new claimants in this order, or previous claimants had not yet received complete tax returns from the IRS, discovery shall be reopened to allow the Defendants to obtain such tax returns. To the extent that the EEOC has such tax returns for claimants in its possession, it shall immediately provide them to the Defendants.

4. Out-of-Country Travel Information

The EEOC shall provide the requested information regarding claimants' travel out of the country from January 1, 2003 to present. To the extent that the Court has permitted the EEOC to assert additional claims on behalf of new claimants in this order, discovery shall be reopened to allow the Defendants to obtain such tax information concerning the claimants. To the extent that the EEOC has such information for claimants in its possession, it shall immediately provide such information to the Defendants.

D. Defendant's Second Motion to Compel, Doc. No. 217

*15 Defendant's second motion to compel relates to documents withheld by the EEOC pursuant to the deliberative process privilege. Swissport's motion lays out a detailed history as to its concern that the EEOC has over-asserted the privilege. The motion further sets out the extent of the deliberative process privilege, and requests that the Court review EEOC's privilege log to determine compliance.

It is the agency's "burden to submit specific information identifying each document and its contents, so that the court, in looking at the list of documents, can understand the basis on which the privilege is asserted. The [agency] will not be allowed to shift its burden onto the court by submitting all the documents for inspection *in camera* without more. Such a procedure would 'force[] courts to become mindreaders—to discern without guidance what privilege claims an agency is asserting, the reasons for those claims, and then using those assumption to determine whether the documents may be justifiably withheld.'" *Resolution Trust Corp. v. Diamond*, 137 F.R.D. 634, 642 (S.D.N.Y.1991) quoting *Mobil Oil Corp. V. Department of Energy*, 102 F.R.D. 1, 6 (N.D.N.Y.1983).

Further, the claim of deliberative due process privilege must be raised by a formal claim made by the head of the agency after she has personally considered the material in question prior to the invocation of the privilege. "[S]he does so by submitting a declaration stating the precise reasons for reserving the confidentiality of the investigative report and identifying and describing the documents to which the privilege is asserted." *EEOC v. Peoplemark, Inc.*, 2010 U.S. Dist. LEXIS 17526 at *3 (W.D.Mich. Feb 26, 2010). In this case, the proffered declaration is deficient. It is, as Defendant notes, conclusory. Further, it fails to assert with precision the reason why each document is subject to the asserted privilege. As a result, in evaluating the applicability of the privilege the Court is left without the benefit of context necessary with respect to many documents, to determine whether they are in fact, deliberative.

In this case the EEOC does, however, divide the withheld documents into five general categories that it asserts demonstrate the existence of the privilege. The first of these categories is investigator notes and communications reflecting mental impressions, analysis and/ or investigative method.

1. Investigation Notes, Mental Impressions and Analysis

The EEOC broadly asserts that, as a general matter, notes of meetings are subject to the deliberative process privilege. *Nulankeyutmonen Nkihtaqmikon v. Bureau of Indian Affairs*, 493 F.Supp.2d 91, 107 (D.Maine 2007), quoting *Baker & Hostetler LLP v. U.S. Dep't of Commerce*, 473 F.3d 312, 321 (D.C.Cir.2006). Nevertheless, merely because an investigator's notes are at issue does not justify the assertion of privilege, unless there is a sufficient connection between the notes and the agency's deliberative process. The privilege

is not categorically applicable to all investigative notes in this Circuit.

*16 To qualify for the privilege, "a document must be *both* (1) 'predecisional' or antecedent to the adoption of agency policy, and (2) 'deliberative,' meaning 'it must actually be related to the process by which policies are formulated.'" *Nat'l Wildlife Fed'n v. United States Forest Serv.*, 861 F.2d 1114, 1117 (9th Cir.1988) quoting *Jordan v. United States Department of Justice*, 591 F.2d 753, 774 (D.C.Cir.1978). "Factual material that does not reveal the deliberative process is not protected by this exemption." *Nat'l Wildlife* at 1117, quoting *Paisley v. CIA*, 712 F.2d 686, 698 (D.C.Cir.1983). However, "even if the content of a document is factual, if disclosure of the document would expose 'the decision-making process itself' to public scrutiny by revealing the agency's "evaluation and analysis of the multitudinous facts," the document would nonetheless be exempt from disclosure." *Id.*

"Under such a 'process-oriented' inquiry, 'a report does not become part of the deliberative process simply because it contains only those facts which the person making the report thinks material.'" *Id.* quoting *Playboy Enterprises, Inc. v. Department of Justice*, 677 F.2d 931, 935 (D.C.Cir.1982). Nevertheless, "[w]here either the disclosure of the manner of selecting or presenting facts would expose the deliberative process, or where facts are 'inextricably intertwined' with 'policy making processes,' the material is [subject to the privilege]." *Id.* quoting *Ryan*, 617 F.2d at 790.

The EEOC asserts a privilege in all notes of investigators because they either reflect the investigators' mental impressions, analysis or investigative method. Many of the authors of such notes are unknown as are the dates on which the notes are written, and the topic, otherwise unclear, is unidentified. Where the EEOC fails to specify the note's author, the date on which it was written, its subject, and the date and identity of the "decision" or policy that it preceded and pursuant to which it was prepared, the EEOC has not met its burden of establishing that the communication was either pre-decisional or deliberative. Thus with respect to such documents the EEOC has failed to establish the applicability of the privilege and the documents must be disclosed.

Further, as the Ninth Circuit set forth in *National Wildlife*, 'a report does not become part of the deliberative process simply because it contains only those facts which the person making the report thinks material.'" *Id.* quoting *Playboy Enterprises*,

677 F.2d at 935. To the extent that the investigator notes, whether otherwise identified or not, only set forth facts which the person making the note thinks material, and they do not expose the deliberative process by which policy or decisions are made, or are not otherwise “inextricably-intertwined” with it, the privilege is not appropriately invoked.

“The exercise of judgment in the formulation of a factual statement is not sufficient to lift it to the level of deliberation.” *Resolution Trust*, 137 F.R.D. at 641, quoting *Playboy Enterprises*, 677 F.2d at 935. Thus, while an investigator may have mental impressions about which facts are important to discern, or about how to approach a particular witness, or what questions to ask a particular witness, such concerns are more related to the discovery of facts than they are to the deliberative process leading to a policy or ultimate agency decision. While hopefully administrative policies or decisions ultimately rely on factual determinations, factual investigations, without more, are not as a generic matter “inextricably-intertwined” with the deliberative process that results in an agency decision or policy in a way that protects factual investigations in general pursuant to the privilege. Apart from generally noting that the document relates to an investigator’s mental process, analysis or methods, Plaintiff does not specify how any particular document meets the necessary requirements to be sufficiently related to the deliberative process that ultimately results in the agency decision. This Court declines to parse the documents on its own to determine, based on its limited scope of knowledge of the facts of this case, which documents might have some text that arguably qualifies and which do not. To construe the privilege as broadly as Plaintiff does here would be to permit the limited privilege to swallow the general objection to produce the evidence.

*17 Upon its review of the documents, however, the Court concludes that with respect to the investigation notes that the EEOC has identified as “analyzing information that had been obtained,” (Exhibit 1 to EEOC’s Response, Privilege Log Exhibit A Lines 374–79, 381, 382–88, 405), it has appropriately invoked the deliberative process privilege. Those documents to a greater or lesser degree do actually expose agency deliberations that lead to a charging decision. Therefore, of those documents designated by the EEOC as privileged because they were Investigator Notes and Communications, the documents at line numbers 374–79, 381–88 and 405 are protected by the privilege. All other documents must be disclosed.

2. Draft Documents

Plaintiff identifies seven privilege log line number documents that it asserts are “draft documents” that fall under the protection of the privilege. The Ninth Circuit has noted that “the deliberative process privilege has been held to cover all ‘recommendations, draft documents, proposals, suggestions and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency’ as well as documents which would ‘inaccurately reflect or prematurely disclose the views of the agency.’” *Nat’l Wildlife*, 861 F.2d at 1119, quoting *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C.Cir.1980). Nevertheless, merely because the document is a draft does not make it one that is actually sufficiently “related to the process by which policies are formulated” to be subject to the privilege. *Nat’l Wildlife*, 861 F.2d at 1117, quoting *Jordan v. United States Department of Justice*, 591 F.2d 753, 774 (D.C.Cir.1978).

Upon its review the Court finds that the EEOC has appropriately invoked the privilege with respect to three of the documents—those listed at line numbers 290, 293, 294. Those documents are draft conciliation proposal letters by the Commission. The text of a conciliation proposal letter sufficiently constitutes an agency decision so that a draft of the letter is subject to the protection of the privilege.

However, the EEOC also seeks to withhold four other documents that are not, subject to the privilege. Two of the documents, lines 366 and 373, though also draft letters, are draft requests to Swissport’s counsel for additional information. Mere requests for information from the party under investigation do not constitute documents that are sufficiently related to a deliberative process resulting in a “decision or policy” of the agency. They are, as is discussed above, informational requests.

Documents 279 and 283 are also drafts. Nevertheless, they are drafts of charges of discrimination for persons who may or may not have filed such charges with the EEOC. While the EEOC or its investigators may have drafted such documents for the consideration of the putative charging party, the decision regarding whether to revise, file, accept or reject the draft belongs to the charging party and not the agency. Thus the draft document is not protected by the deliberative process privilege belonging to the agency because it is not the draft of a document that represents a decision or policy that the agency has the authority to make.

*18 Therefore with respect to those documents designated by the EEOC as privileged because they were drafts, the documents at line numbers 290, 293 and 294 are protected by the privilege. All other documents must be disclosed.

3. Data Searches

Plaintiff identifies four privilege log line number documents, documents 174, 228, 229 and 230, that it asserts are “data searches” that, fall under the protection of the privilege. The Court has reviewed these documents. While they are the documents that Plaintiff describes, the data searches themselves are not sufficiently related to a deliberative process or decision to be made by the EEOC to merit protection under the privilege. Privilege Log Line Number Documents 174, 228, 229 and 230 will, therefore be disclosed by Plaintiff.

4. Internal Instructional Document

Plaintiff identifies one privilege log line number, document 298, that it asserts is “an internal instructional document” used by the EEOC to determine what type of relief to seek in conciliation, and thus subject to the protection of the privilege. To the extent that the document is a tool used by the EEOC to guide its conciliation offers it relates to the explanation, interpretation or application of an existing policy within the EEOC. Such materials are not protected by the deliberative process privilege. See *Resolution Trust*, 137 F.R.D. at 641, *Mobil Oil*, 102 F.R.D. at 5. Document line number 298 will, therefore, be disclosed.

5. Internal Charge Inventory Document

Plaintiff identifies one privilege log line number, document 348, that it asserts is “an internal charge inventory document” kept by individual investigators and their superiors to ‘evaluate and categorize their charge inventory in order to efficiently and effectively process their charges.’ Although it has withheld this document on the basis of the deliberative process privilege, the EEOC offers no explanation as to how this document relates to a deliberative process used by it. Its argument, essentially, is that this particular list also has information relating to other charges and claimants that are

not at issue in this case. While that may be true, such an argument does not justify the invocation of the deliberative process privilege. The EEOC, therefore, has not met its burden of establishing the applicability of the deliberative process privilege. The document will, therefore, be disclosed.

6. The Benjamin Documents

Defendant asserts that Plaintiff is out of compliance with the Court's Order in which the EEOC agreed to, and was ordered to provide, certain access to the Benjamin documents. Nevertheless, after the parties comply with the above orders of the Court regarding the scope of the privilege, all Benjamin documents contained in the in camera submission will have been disclosed to the Defendants.

IT IS THEREFORE ORDERED THAT:

1. Plaintiff's Motion for Protective Order (Doc. 165) is denied.
- *19 2. Plaintiff's Expedited Motion for Extension of Time to Identify Claimants (Doc. 184) is granted in part and denied in part.
3. Defendant's Motion to Strike or, in the Alternative, Motion for Leave to File Sur-Reply (Doc. 198) is denied.
4. Defendant's Motion to Compel Production (Doc. 216) is granted in part and denied in part.
5. Defendant's Motion to Compel in Camera Inspection (Doc. 217) is granted in part and denied in part.
6. Plaintiff's Motion for Extension of Time to File Response to Motion to Compel (Doc. 224) is denied as moot.
7. Plaintiff's Motion for Leave to File Document Under Seal (Doc. 227) is granted. The Clerk of Court is directed to file Exhibit 1 to EEOC's Response (Doc. 228) under seal.

All Citations

Not Reported in F.Supp.2d, 2012 WL 1648416

Footnotes

1 Doc. 184 supercedes and corrects Doc. 160 which was EEOC's earlier motion to extend. The Court considered Defendant's Response to Doc. 160 as its Response to Doc. 184.

- 2 Defendant's Motion to Strike Reply, or in the alternative Motion for Leave to File Sure-Reply, Doc. 198, is denied to the extent it seeks to have the EEOC's Reply stricken. It is granted to the extent that the Court permits the filing and consideration of Swissport's Sur-reply.
- 3 To the extent that the EEOC seeks to assert that it stated that there would be up to thirty additional potential Claimants at the pretrial conference it either misapprehends or misstates the record.
- 4 Fourteen of the twenty-two additional charging parties left Swissport's employ prior to their previous disclosure of the list to the EEOC in April 2008. These employees include Wellington Pyne, David Mensah, Kweku Essien, Sualiman Kargbo, Sumene Daborloomene, John Dan-Kane, John Ruai, Friday Ikue, Peter Adjei, Anthony Nwiyaara, Ebenezer Sitam, Muritala Usuf, Yasir Hamid, Doctor Clemente Joule Dador.
- 5 No such packet of materials was sent to Angelo Ajawin during this period although a packet was later sent to him.

End of Document

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EXHIBIT 13-I



LEGISLATURE

Arizona bills would ban coverage for gender-reassignment surgeries already denied by state

Transgender advocates are calling the bills 'discriminatory and misguided.'

Maria Polletta, The Republic | azcentral.com

Published 1:28 p.m. MT Jan. 24, 2017 | Updated 2:04 p.m. MT Jan. 24, 2017

Story Highlights

The bills would ban gender-reassignment surgeries for Medicaid recipients and prison inmates

Taxpayers don't currently fund gender-reassignment surgeries for them

Rep. Anthony Kern says the bills are a necessary pre-emptive strike, given recent shifts in transgender rights

An Arizona lawmaker has introduced a pair of bills that would prohibit gender-reassignment surgeries for Medicaid recipients and prison inmates, saying he is "always in favor of personal freedoms ... but never at the expense of the taxpayer."

Arizona taxpayers don't currently fund gender-reassignment surgeries for such individuals. Nonetheless, Rep. Anthony Kern sees House bills 2293 and 2294 as a crucial pre-emptive strike given recent shifts in transgender rights and protections.

"The fact of the matter is, taxpayers in California had to foot the bill for (an inmate's) gender-reassignment surgery," the Glendale Republican said in a statement issued in response to interview requests. "Now, the precedent has been set to attempt to push other states into supporting this."

RELATED: Phoenix 1st Arizona city to offer transgender-inclusive benefits to city workers

California is the first state to allow transgender inmates to apply for state-financed reassignment surgeries, with one completed so far.

'Discriminatory and misguided'

Ashton Skinner, transgender-outreach coordinator for diversity-and-inclusion coalition ONE Community, called Kern's bills "discriminatory and misguided."

"Seeking pre-emptive exclusions on services that currently do not exist is playing politics with people's lives," Skinner said.

"Transgender Americans already face disproportionate hardships and discrimination seeking and gaining access to health care that can be life-saving," he said. "We shouldn't create additional and unnecessary obstacles."

Transgender activist Juli Myers agreed, decrying the effort to restrict gender-reassignment surgeries for those who rely on the Arizona Health Care Cost Containment System as "doubly shameful."

STUDY: Arizona has more transgender adults than U.S. average

Transgender residents are more likely to be poor and rely on Medicaid than the population at large.

"For those trans people who feel their (gender) dysphoria very intensely, hormone treatment and gender affirmation surgery are medically necessary treatments," Myers said. "Living in-between — transitioned but without the surgery — leaves a trans person open to being in a sort of legal limbo ... and it puts their physical safety at risk."

Bills come after new federal regulations

Kern's legislation comes less than a year after the federal Department of Health and Human Services issued new regulations forbidding discrimination based on gender identity in health care.

Those rules — directed at health-care providers and programs using federal funding, as well as health-insurance companies — didn't explicitly require coverage of gender-reassignment surgeries. Instead, they mandated equal access to covered services. For instance, if an insurer would cover hormone therapy for a patient with menopause or an endocrine disorder, it also had to cover hormone therapy for a transitioning person.

PREVIOUSLY: Highlights from our Diversity Dialogue with Arizona's transgender communities

Human-rights organizations applauded the expanded protections, saying transgender patients routinely faced discrepancies in health-care coverage, treatment and pricing.

But a handful of states and religious medical organizations filed a lawsuit to block enforcement of the new rules, arguing doctors might have to provide services to transgender patients that contradicted their religious beliefs and medical judgment. A judge sided with opponents in late December, issuing a preliminary injunction that remains in effect.

EXHIBIT 13-J

98 C.J.S. Witnesses § 423

Corpus Juris Secundum | June 2021 Update

Witnesses

John Bourdeau, J.D.; James Buchwalter, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Stephen Lease, J.D.; William Lindsley, J.D.; Karl Oakes, J.D.; Jeanne M. Reiser, J.D.; Eric C. Surette, J.D.; and Timothy E. Travers J.D.

III. Competency

D. Confidential Relations and Privileged Communications

8. Governmental or Law Enforcement Confidential Relations and Privileged Communications

§ 423. Executive privilege

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Privileged Communications and Confidentiality](#) 354 to 356

An executive privilege protects from disclosure the source and substance of certain communications to and from the executive.

An executive privilege exists as to the source and substance of certain communications to and from the executive of the government,¹ generally meaning the President of the United States² or the Governor of a state.³ The privilege is not absolute,⁴ but is qualified,⁵ and is an extraordinary assertion of power not to be lightly invoked.⁶

A state Governor's executive privilege, where recognized as a qualified privilege derived from the state constitution's separation of powers among the branches of government,⁷ required communications related to the state executive's constitutionally mandated duties and concerning the executive's decision-making in the realm of core duties and communications to or from individuals in very close organizational and functional proximity to the executive.⁸ Only the state Governor may assert the state executive privilege.⁹

Whenever a formal claim of executive privilege is made in litigation, its applicability is for the court to decide,¹⁰ requiring a balancing of competing interests.¹¹ An executive privilege is for the benefit of the public and not the government officials who claim the privilege.¹²

In dealing with executive privilege, civil discovery interests may be less weighty than criminal discovery interests.¹³

An executive privilege may be waived only by an incumbent of the executive office.¹⁴

CUMULATIVE SUPPLEMENT

Cases:

Recipients of congressional subpoenas retain common law and constitutional privileges with respect to certain materials, such as attorney-client communications and governmental communications protected by executive privilege. [Trump v. Mazars USA, LLP](#), 140 S. Ct. 2019 (2020).

Executive privilege safeguards the public interest in candid, confidential deliberations within the Executive Branch, and it is fundamental to the operation of Government. [Trump v. Mazars USA, LLP](#), 140 S. Ct. 2019 (2020).

The presidential communications privilege extends beyond direct communications by the President to communications solicited and received by senior presidential advisors, as well as communications authored by such advisors themselves and, additionally, protects records memorializing or reflecting such communications. [Seife v. United States Department of State](#), 298 F. Supp. 3d 592 (S.D. N.Y. 2018).

Separation of powers doctrine resulted in an executive communications privilege to the Public Records Act (PRA); privilege played a critical part in preserving the integrity of the executive branch, and refusal to recognize the gubernatorial communications privilege would have subverted the integrity of the governor's decision making process, damaging the functionality of the executive branch, and transgressing the boundaries set by the separation of powers doctrine. [West's RCWA Const. Art. 3, § 2](#); [West's RCWA 42.56.001 et seq. Freedom Foundation v. Gregoire](#), 310 P.3d 1252 (Wash. 2013).

If the governor provides the privilege log in support of gubernatorial communications privilege, the courts must treat the communications as presumptively privileged. [Freedom Foundation v. Gregoire](#), 310 P.3d 1252 (Wash. 2013).

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—[Cheney v. U.S. Dist. Court for Dist. of Columbia](#), 542 U.S. 367, 124 S. Ct. 2576, 159 L. Ed. 2d 459 (2004).
N.J.—[Wilson v. Brown](#), 404 N.J. Super. 557, 962 A.2d 1122 (App. Div. 2009).
Pa.—[Van Hine v. Department of State of Com.](#), 856 A.2d 204 (Pa. Commw. Ct. 2004).
Vt.—[Herald Ass'n, Inc. v. Dean](#), 174 Vt. 350, 816 A.2d 469 (2002).
Limited privilege for communications
N.M.—[Republican Party of New Mexico v. New Mexico Taxation and Revenue Dept.](#), 2012-NMSC-026, 283 P.3d 853 (N.M. 2012).
Not created as common law
Mass.—[Babets v. Secretary of Executive Office of Human Services](#), 403 Mass. 230, 526 N.E.2d 1261 (1988).
- 2 U.S.—[U.S. v. Nixon](#), 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974).
A.L.R. Library
[Executive privilege with respect to presidential papers and recordings](#), 19 A.L.R. Fed. 472.
- 3 Ind.—[State v. International Business Machines Corp.](#), 964 N.E.2d 206 (Ind. 2012).
N.J.—[Wilson v. Brown](#), 404 N.J. Super. 557, 962 A.2d 1122 (App. Div. 2009).

N.M.—*Republican Party of New Mexico v. New Mexico Taxation and Revenue Dept.*, 2012-NMSC-026, 283 P.3d 853 (N.M. 2012).

Ohio—*State ex rel. Dann v. Taft*, 110 Ohio St. 3d 252, 2006-Ohio-3677, 853 N.E.2d 263 (2006).

Vt.—*Herald Ass'n, Inc. v. Dean*, 174 Vt. 350, 816 A.2d 469 (2002).

Not recognized by federal law

Federal law does not recognize an executive communications privilege for state Governors.

U.S.—*Hobley v. Chicago Police Commander Burge*, 445 F. Supp. 2d 990 (N.D. Ill. 2006).

4 U.S.—*U.S. v. Nixon*, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974); *S.E.C. v. Rajaratnam*, 622 F.3d 159 (2d Cir. 2010).

N.J.—*Piniero v. New Jersey Div. of State Police*, 404 N.J. Super. 194, 961 A.2d 1 (App. Div. 2008).

Pa.—*Van Hine v. Department of State of Com.*, 856 A.2d 204 (Pa. Commw. Ct. 2004).

5 N.M.—*Republican Party of New Mexico v. New Mexico Taxation and Revenue Dept.*, 2012-NMSC-026, 283 P.3d 853 (N.M. 2012).

Ohio—*State ex rel. Dann v. Taft*, 110 Ohio St. 3d 252, 2006-Ohio-3677, 853 N.E.2d 263 (2006).

6 *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 124 S. Ct. 2576, 159 L. Ed. 2d 459 (2004).

7 N.M.—*Republican Party of New Mexico v. New Mexico Taxation and Revenue Dept.*, 2012-NMSC-026, 283 P.3d 853 (N.M. 2012).

Ohio—*State ex rel. Dann v. Taft*, 110 Ohio St. 3d 252, 2006-Ohio-3677, 853 N.E.2d 263 (2006).

8 N.M.—*Republican Party of New Mexico v. New Mexico Taxation and Revenue Dept.*, 2012-NMSC-026, 283 P.3d 853 (N.M. 2012).

9 N.M.—*Republican Party of New Mexico v. New Mexico Taxation and Revenue Dept.*, 2012-NMSC-026, 283 P.3d 853 (N.M. 2012).

Ohio—*State ex rel. Dann v. Taft*, 110 Ohio St. 3d 252, 2006-Ohio-3677, 853 N.E.2d 263 (2006).

10 N.J.—*Wilson v. Brown*, 404 N.J. Super. 557, 962 A.2d 1122 (App. Div. 2009).

Pa.—*Van Hine v. Department of State of Com.*, 856 A.2d 204 (Pa. Commw. Ct. 2004).

Judiciary decides, not executive

N.M.—*Republican Party of New Mexico v. New Mexico Taxation and Revenue Dept.*, 2012-NMSC-026, 283 P.3d 853 (N.M. 2012).

11 N.J.—*Wilson v. Brown*, 404 N.J. Super. 557, 962 A.2d 1122 (App. Div. 2009).

N.M.—*Republican Party of New Mexico v. New Mexico Taxation and Revenue Dept.*, 2012-NMSC-026, 283 P.3d 853 (N.M. 2012).

Pa.—*Van Hine v. Department of State of Com.*, 856 A.2d 204 (Pa. Commw. Ct. 2004).

Vt.—*Herald Ass'n, Inc. v. Dean*, 174 Vt. 350, 816 A.2d 469 (2002).

12 Md.—*Hamilton v. Verdow*, 287 Md. 544, 414 A.2d 914, 10 A.L.R.4th 333 (1980).

13 U.S.—*S.E.C. v. Rajaratnam*, 622 F.3d 159 (2d Cir. 2010).

N.J.—*Piniero v. New Jersey Div. of State Police*, 404 N.J. Super. 194, 961 A.2d 1 (App. Div. 2008).

14 Del.—*Guy v. Judicial Nominating Com'n*, 659 A.2d 777 (Del. Super. Ct. 1995).

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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Russell B. Toomey,
Plaintiff,

v.
**State of Arizona; Arizona Board of Regents,
D/B/A University of Arizona,** a governmental
body of the State of Arizona; et al.,

Defendants.

Case No.19-cv-00035-TUC-RM (LAB)

[PROPOSED] ORDER

The Court having reviewed Plaintiff Russell B. Toomey’s Motion Compelling Production of Documents (Doc. _____) and finding good cause,

IT IS ORDERED:

1. Plaintiff’s Motion is GRANTED.

2. The Office of the Governor of the State of Arizona (Governor’s Office) is hereby ordered to produce all the documents withheld on the basis of “executive communications privilege.”

3. The Governor’s Office shall produce the documents above within 14 days of the date of this Order.

Dated this _____ day of _____, 2021.

Leslie A. Bowman
United States Magistrate Judge