

1 **WO**

2  
3  
4  
5  
6  
7  
8 **IN THE UNITED STATES DISTRICT COURT**  
9 **FOR THE DISTRICT OF ARIZONA**

10  
11 Russell B Toomey,  
12 Plaintiff,

13 v.

14 State of Arizona, et al.,  
15 Defendants.

No. CV-19-00035-TUC-RM (LAB)

**ORDER**

16  
17 Pending before the Court is Defendants State of Arizona, Andy Tobin, and Paul  
18 Shannons' ("State Defendants") Appeal (Doc. 223) of the Magistrate Judge's Order  
19 (Doc. 213) Granting Plaintiff's Second Motion to Compel Production of Documents  
20 (Doc. 195). Plaintiff responded to the Appeal. (Doc. 232.) For the following reasons, the  
21 Appeal will be denied and Magistrate Judge Leslie A. Bowman's Order granting the  
22 Motion to Compel will be affirmed.<sup>1</sup>

23 **I. Background**

24 Plaintiff Dr. Russell B. Toomey is a transgender male who is employed as an  
25 Associate Professor at the University of Arizona. (Doc. 86 at 3, 5.)<sup>2</sup> His health  
26

27 <sup>1</sup> The Court finds that the Appeal is suitable for decision without oral argument and  
28 accordingly denies the State Defendants' request for oral argument.

<sup>2</sup> All record citations herein refer to the document and page numbers generated by the  
Court's electronic filing system.

1 insurance—a self-funded plan (“the Plan”) controlled by the Arizona Department of  
2 Administration (“ADOA”)—categorically excludes “gender reassignment surgery” from  
3 coverage. (*Id.* at 5, 8-9.) Plaintiff brings this class action lawsuit alleging that the  
4 exclusion of gender reassignment surgery is sex discrimination under Title VII of the  
5 Civil Rights Act and a violation of the Fourteenth Amendment Equal Protection Clause.  
6 (*Id.* at 13-17.) One of the disputed factual questions in this case is “[w]hether the  
7 decision to exclude gender reassignment surgery in [the Plan] was actually motivated by  
8 a legitimate governmental interest.” (Doc. 128 at 11.)

9 Plaintiff served Defendants with his first set of Requests for Production on  
10 December 8, 2020. (Doc. 195 at 1; Doc. 195-3 at 8-27.) Requests for Production One,  
11 Three, and Nine sought documents and information concerning the Plan’s exclusion of  
12 gender reassignment surgery and the decision-making behind the exclusion. (Doc. 195 at  
13 4; Doc. 195-3 at 23-26.) The State Defendants withheld 85 documents as attorney-client  
14 privileged.

## 15 **II. Plaintiff’s Motion to Compel**

16 Plaintiff seeks to compel disclosure of the 85 documents that the State Defendants  
17 have withheld based on their assertion of the attorney-client privilege. (Doc. 195 at 2.)  
18 Plaintiff contends that the State Defendants waived the attorney-client privilege with  
19 respect to those documents: (1) “by asserting and relying on legal advice as a defense to  
20 the charge that discriminatory intent [motivated] [Defendants’] decision to maintain the  
21 Exclusion,” and (2) by voluntarily disclosing the substance of the legal advice. (*Id.* at 3-  
22 4.)

23 In support of his first argument, Plaintiff argues that the State Defendants placed  
24 the legal advice they received regarding the legality of the exclusion for gender  
25 reassignment surgery at issue by asserting it in their Responses to his First, Fourth, and  
26 Seventh Interrogatories, as well as during the depositions of former Director of ADOC  
27 Benefits Service Division Marie Isaacson and ADOA Plan Administration Manager Scott  
28 Bender. (*Id.* at 4-6.) Plaintiff’s First Interrogatory asked Defendants to identify the

1 reasons why the Plan excludes coverage for gender reassignment surgery. (Doc. 195-3 at  
2 30-31.) The State Defendants responded, in relevant part, that the Plan excludes gender  
3 reassignment surgery “because the State concluded, under the law, that it was not legally  
4 required” to provide such coverage. (Doc. 195-3 at 31.) Plaintiff’s Fourth Interrogatory  
5 asked Defendants to identify all persons involved in making decisions related to the  
6 exclusion of gender reassignment surgery. (Doc. 195-3 at 33.) The State Defendants’  
7 Response identified three attorneys for the State; Plaintiff thus argues that the attorneys  
8 were central to the decision-making regarding the exclusion. (Doc. 195 at 5; Doc. 195-3  
9 at 33). Plaintiff’s Seventh Interrogatory asked Defendants to produce any documents that  
10 Defendants relied on relating to the exclusion. (Doc. 195-3 at 35.) The State Defendants’  
11 Response listed two memoranda—one from Marie Isaacson to Mike Liburdi, dated  
12 August 3, 2016 regarding “Affordable Care Act § 1557,” and another from outside legal  
13 counsel Fennemore Craig, P.C. to Marie Isaacson dated July 20, 2016, regarding  
14 “Summary and Implications of § 1557 and Transgender Coverage Requirements”—both  
15 of which Defendants asserted were covered by the attorney-client privilege. (*Id.*) Marie  
16 Isaacson and Scott Bender testified during their depositions that the decision to exclude  
17 gender reassignment surgery from coverage under the Plan was based on what the Plan  
18 was legally required to cover. (Doc. 195-3 at 69, 79.) Plaintiff argues that these  
19 Interrogatory Responses and deposition testimony amount to an assertion of legal advice  
20 as a defense to his charge that the exclusion of coverage for gender reassignment surgery  
21 was motivated by discriminatory intent. (Doc. 195 at 5-6, 9-12.)

22 Next, Plaintiff argues that Defendants waived the attorney-client privilege by  
23 voluntarily disclosing the substance of the legal advice they received regarding the  
24 exclusion of gender reassignment surgery to the Governor’s Office in 2016 and during  
25 the deposition of Marie Isaacson. (Doc. 195 at 7, 12-14; *see also* Doc. 195-3 at 57-58,  
26 66.)

27 . . . .

28 . . . .

### 1           **III. Magistrate Judge Bowman’s Order**

2           In her Order granting Plaintiff’s Motion to Compel (“the Order”), Magistrate  
3 Judge Bowman finds that the State Defendants implicitly waived the attorney-client  
4 privilege with respect to the withheld documents by relying upon the legal advice they  
5 received regarding exclusion of coverage for gender reassignment surgery as “evidence  
6 that they harbored no discriminatory intent” in maintaining the exclusion. (Doc. 213 at 1-  
7 2, 4.) The Order rejects Defendants’ argument that they did not raise an “advice of  
8 counsel defense” as unsupported by the record, namely the Interrogatory Responses and  
9 deposition testimony discussed above. (*Id.* at 4-5.) The Order concludes that Plaintiff  
10 cannot realistically dispute Defendants’ claimed reason for maintaining the exclusion of  
11 coverage for gender reassignment surgery without access to the legal advice that  
12 Defendants relied upon in making that decision, and that “fairness” thus mandates that  
13 Plaintiff be able to review the substance of that advice. (*Id.* at 5-6.) Because the Order  
14 finds that Defendants waived the attorney-client privilege by relying on the advice of  
15 legal counsel as a defense to the charge of discriminatory intent, it does not reach the  
16 merits of Plaintiff’s alternate arguments involving witness deposition testimony or  
17 disclosure of the documents to the Governor’s Office. (*Id.* at 2.)

### 18           **IV. State Defendants’ Appeal of the Order**

19           On appeal, the State Defendants object to the Order on four grounds: (1) they did  
20 not assert or imply an “advice of counsel” defense through Interrogatory Responses or  
21 deposition testimony; (2) neither Marie Isaacson nor Scott Bender have authority to  
22 waive the attorney-client privilege; (3) compelling disclosure of the privileged documents  
23 violates public policy; and (4) the Order is unclear and ambiguous. (Doc. 223.)

24           First, the State Defendants argue that they never asserted—in their Answer,  
25 Interrogatory Responses, or deposition testimony—that they relied on the advice of  
26 counsel in deciding to maintain the Plan’s exclusion of coverage for gender reassignment  
27 surgery, and that the Order “reads too much into” their Interrogatory Responses. (*Id.* at 1-  
28 6.) The State Defendants further contend that their Interrogatory Responses indicate that

1 they relied on non-privileged documents from “insurers and other entities” regarding the  
2 coverage exclusion. (*Id.* at 4.) Defendants further contend that because they never stated  
3 the parameters of the legal advice received or the degree to which they relied upon it,  
4 they did not put that legal advice at issue. (*Id.* at 5.)

5 Second, Defendants argue that the deposition testimony of Marie Isaacson and  
6 Scott Bender could not waive the attorney-client privilege because neither witness had  
7 the authority to speak on behalf of the State Defendants. (*Id.* at 6-7.) Third, Defendants  
8 argue that compelling production of the documents would violate public policy because  
9 State officials should be encouraged to consult with counsel in developing policies and  
10 thus allowing the State to engage in privileged communications with legal counsel is  
11 “uniquely important.” (*Id.* at 7-8.)

12 Lastly, Defendants contend that the Order is “unclear and ambiguous” because it  
13 does not specify which documents it compelled Defendants to produce. (*Id.* at 8-10.)  
14 Defendants request that, if the Court affirms the Order, it compel production of only the  
15 attorney-client communications that relate to the legality of the exclusion and that were  
16 exchanged prior to the State’s final decision to maintain the exclusion. (*Id.* at 9-10.)

## 17 **V. Applicable Law**

18 Issues of privilege in federal question cases are determined by federal law. Fed. R.  
19 Evid. 501. “The party asserting an evidentiary privilege has the burden to demonstrate  
20 that the privilege applies to the information in question.” *Tornay v. United States*, 840  
21 F.2d 1424, 1426 (9th Cir. 1988); *see also United States v. Ruehle*, 583 F.3d 600, 608 (9th  
22 Cir. 2009).

23 “The attorney-client privilege protects confidential communications between  
24 attorneys and clients, which are made for the purpose of giving legal advice.” *United*  
25 *States v. Sanmina Corp.*, 968 F.3d 1107, 1116 (9th Cir. 2020). The Ninth Circuit employs  
26 an eight-part test to determine whether information is covered by the attorney-client  
27 privilege:

28

1 (1) Where legal advice of any kind is sought (2) from a  
2 professional legal adviser in his capacity as such, (3) the  
3 communications relating to that purpose, (4) made in  
4 confidence (5) by the client, (6) are at his instance  
5 permanently protected (7) from disclosure by himself or by  
6 the legal adviser, (8) unless the protection be waived.

7 *Id.* (internal citation omitted). Here, the parties dispute only element (8), whether the  
8 privilege was waived. (*See* Doc. 213 at 3.)

9 Express waiver “occurs when a party discloses privileged information to a third  
10 party who is not bound by the privilege, or otherwise shows disregard for the privilege by  
11 making the information public.” *Sanmina Corp.*, 968 F.3d at 1116-1117 (internal citation  
12 and quotation omitted). “In contrast, waiver by implication, or implied waiver, is based  
13 on the rule that a litigant waives the attorney-client privilege by putting the lawyer’s  
14 performance at issue during the course of litigation.” *Id.* at 1117. “Waivers by implication  
15 rest on the ‘fairness principle,’ which is often expressed in terms of preventing a party  
16 from using the privilege as both a shield and a sword.” *Id.* (citing *Bittaker v. Woodford*,  
17 331 F.3d 715, 719 (9th Cir. 2003)); *see also Chevron Corp. v. Pennzoil Co.*, 974 F.2d  
18 1156, 1162 (9th Cir. 1992) (“The privilege which protects attorney-client  
19 communications may not be used both as a sword and a shield.”). “In practical terms,  
20 this means that parties in litigation may not abuse the privilege by asserting claims the  
21 opposing party cannot adequately dispute unless it has access to the privileged materials.”  
22 *Sanmina Corp.*, 968 F.3d at 1117. Accordingly, “a holder of the attorney-client privilege  
23 or work-product immunity cannot claim that legal advice from his attorney justifies his  
24 actions while simultaneously shielding that advice from disclosure.” *Melendres v.*  
25 *Arpaio*, No. CV-07-2513-PHX-GMS, 2015 WL 12911719, at \*2 (D. Ariz. May 14,  
26 2015).

27 “An implied waiver of the attorney-client privilege occurs when (1) the party  
28 asserts the privilege as a result of some affirmative act, such as filing suit; (2) through  
this affirmative act, the asserting party puts the privileged information at issue; and (3)  
allowing the privilege would deny the opposing party access to information vital to its

1 defense.” *Home Indem. Co. v. Lane Powell Moss & Miller*, 43 F.3d 1322, 1326 (9th Cir.  
2 1995) (citing *Hearn v. Rhay*, 68 F.R.D. 547, 581 (E.D. Wash. 1975)). “[A]n overarching  
3 consideration is whether allowing the privilege to protect against disclosure of the  
4 information would be manifestly unfair to the opposing party.” *Id.* (internal quotation  
5 omitted).

6 **VI. Analysis**

7 The record supports affirming Magistrate Judge Bowman’s Order compelling  
8 production of the withheld documents. The Court’s review of the record reveals that,  
9 despite the State Defendants’ protestations to the contrary, the State Defendants’  
10 Interrogatory Responses indicate that they relied on the advice of legal counsel in  
11 deciding to maintain the exclusion of coverage for gender reassignment surgery. (*See*  
12 *Doc. 195-3 at 28-37.*) This constitutes an affirmative act placing the privileged materials  
13 at issue. Furthermore, as Judge Bowman concluded, Plaintiff is unable to adequately  
14 respond to this defense without viewing the withheld documents. Without disclosure of  
15 the withheld documents, Plaintiff cannot fully respond to Defendants’ argument that their  
16 reason for maintaining the exclusion was lawful and non-discriminatory because it was  
17 based on legal advice. As such, fairness mandates that the documents be disclosed. While  
18 the Court acknowledges that the public policy underlying the attorney-client privilege  
19 serves to protect the State’s ability to engage in privileged communications with its  
20 lawyers, that interest does not overcome Plaintiff’s right to fully litigate the merits of this  
21 action.

22 Accordingly,

23 **IT IS ORDERED** that Defendant’s Appeal of the Order (Doc. 223) is **denied**.

24 . . . .  
25 . . . .  
26 . . . .  
27 . . . .  
28 . . . .

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**IT IS FURTHER ORDERED** that Magistrate Judge Bowman’s Order (Doc. 213) granting Plaintiff’s Motion to Compel (Doc. 195) is **affirmed**. Within **fourteen (14) days** of the date of this Order, Defendants shall produce all documents related to Defendants’ decision-making regarding the exclusion of coverage for gender reassignment surgery as requested in Plaintiff’s Requests for Production One, Three, and Nine, including legal advice that may have informed that decision-making. Defendants need not produce documents that relate solely to their defense in the instant litigation.

Dated this 21st day of September, 2021.



---

Honorable Rosemary Márquez  
United States District Judge