

1 **WO**

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

8
9 Cameron Lebbon, a married man; Peoria
10 Police Officer's Association Charities, a
11 non-profit charitable organization; Peoria
Police Officer's Association, a non-profit
corporation,

12 Plaintiffs,

13 v.

14 City of Peoria, a municipality,

15 Defendant.

No. CV-12-00921-PHX-GMS

ORDER

16
17 Pending before the Court is Plaintiffs' Motion to Compel Discovery. (Doc. 25.) At
18 issue is a document referred to by the parties as the 2010 Investigation. On October 19,
19 2012, Plaintiffs filed a Request for Production of Documents requesting Defendants to
20 produce the 2010 Investigation. (*Id.* at 2.) Defendants refused, asserting that the 2010
21 Investigation is protected by the attorney-client and work product privileges. (*Id.*)

22 "A party asserting the attorney-client privilege has the burden of establishing the
23 existence of an attorney-client relationship *and* the privileged nature of the
24 communication." *United States v. Graf*, 610 F.3d 1148, 1156 (9th Cir. 2010) (internal
25 quotations omitted) (emphasis in original). Similarly, a party asserting the work product
26 privilege bears the burden of proving that the material withheld meets the standards
27 established for material to be classified as work product. *Garcia v. City of El Centro*, 214
28 F.R.D. 587, 591 (S.D. Cal. 2003).

1 Here, Defendants have made no effort to meet their burden, instead merely
2 asserting that Plaintiffs conceded in a telephonic conference that the 2010 Investigation
3 was privileged. (Doc. 28 at 2.) Defendants have failed to show that the 2010 Investigation
4 is protected by either the attorney-client or the work product privilege.

5 Even if Plaintiffs had conceded that the 2010 Investigation was privileged (a fact
6 that they strongly dispute), Defendants waived that privilege when they disclosed the
7 contents of the 2010 Investigation to Plaintiff Cameron Lebbon in a Memo dated May 31,
8 2011. “Disclosing a privileged communication . . . results in waiver as to all other
9 communications on the same subject.” *Hernandez v. Tanninen*, 604 F.3d 1095, 1100 (9th
10 Cir. 2010). In the 2011 Memo to Lebbon, Defendants set forth a lengthy series of
11 conclusions that they reached as a result of the 2010 Investigation. (Doc. 25-1.) Thus,
12 Defendants disclosed the contents of the 2010 Investigation to Lebbon.

13 Defendants contend that the work product privilege can only be waived “when
14 voluntarily disclosed such that it may become readily accessible to an adversary.” (Doc.
15 25 at 2–3) (citing *Samuels v. Mitchell*, 155 F.R.D. 195, 200 (N.D. Cal. 1994)). In fact, the
16 case cited by Defendants stands for the narrower proposition that waiver by disclosure
17 occurs “if the disclosure substantially increases the opportunity for potential adversaries
18 to obtain the information.” *Samuels*, 155 F.R.D. at 200. Furthermore, the same court has
19 held that the work product privilege for written materials is waived as to any factual
20 information orally disclosed to the adverse party. *S.E.C. v. Roberts*, 254 F.R.D. 371, 377
21 (N.D. Cal. 2008).

22 Here, Defendants disclosed the contents of the 2010 Investigation by citing to
23 factual findings from the Investigation in their 2011 Memo to Lebbon. (Doc. 25-1 at 2–
24 4.) By setting out those findings in the Memo, Defendants “substantially increased the
25 opportunity” for Lebbon to obtain that information. Defendants have thus waived any
26 work product privilege they might have had regarding such information in the 2010
27 Investigation. *See Arizona ex rel. Goddard v. Frito-Lay, Inc.*, 273 F.R.D. 545, 555 (D.
28 Ariz. 2011).

1 Defendants have failed to establish that the 2010 Investigation is protected by
2 either the attorney-client or work product privileges. Even if they had made such a
3 showing, they waived any privilege they may have had by disclosing the contents of the
4 2010 Investigation in their 2011 Memo to Plaintiff Lebbon.

5 **IT IS THEREFORE ORDERED** that Plaintiffs' Motion to Compel (Doc. 25) is
6 **GRANTED**. Defendants are ordered to produce the 2010 Investigation.

7 Dated this 31st day of January, 2013.

8 

9 _____
10 G. Murray Snow
11 United States District Judge
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28