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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Blake Smalley,

10 Plaintiff,

11 v.

12 C Contino, et al.,

13 Defendants.

No. CV-12-02524-PHX-DGC

**ORDER**

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15 On November 20, 2013, the Court held a discovery conference call with the  
16 parties. At the Court's direction, the parties submitted memoranda on the application of  
17 the deliberative process privilege in this case. Docs. 89, 90. For the reasons set forth  
18 below, the Court concludes that Defendants must turn over the requested executive  
19 session minutes.

20 This case arises under 42 U.S.C. § 1983. Plaintiff seeks discovery of documents  
21 relating to Defendants' policing practices, and the request covers minutes from executive  
22 sessions of the County Board of Supervisors. Defendants argue that the minutes are  
23 privileged under A.R.S. § 38-431.03 and the deliberative process privilege. Doc. 89 at 2.

24 Defendants correctly observe that, under Federal Rules of Evidence 501, "state  
25 law governs privilege regarding a claim or defense for which state law supplies the rule  
26 of decision." Doc. 89 at 4. Defendants argue that because "Smalley's request for e-  
27 session minutes goes directly against Arizona state law," Arizona privilege law – which  
28 Defendant believes is embodied in A.R.S. § 38-431.03 – applies. Doc. 89 at 4. But the

1 “rule of decision” mentioned in Rule 501 is not the rule of decision on the privilege issue;  
2 it is the rule of decision on the claim or defense asserted in the case. This case arises  
3 under § 1983. Federal law, not Arizona law, supplies the rule of decision in such a case,  
4 and issues of privilege therefore are not resolved under Arizona law. *See Crowe v. Cnty.*  
5 *of San Diego*, 242 F. Supp. 2d 740, 746 (S.D. Cal. 2003); *American Civil Liberties Union*  
6 *of Mississippi, Inc. v. Finch*, 638 F.2d 1336, 1342 (5th Cir. 1981). Thus, even assuming  
7 A.R.S. § 38-413.03 establishes a privilege, it does not apply in this case.

8 Issues of privilege in this case must be resolved under federal common law. Fed.  
9 R. Evid. 501. That law recognizes a deliberative process privilege. *Dep’t of Interior v.*  
10 *Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8 (2001). The privilege rests on the  
11 realization that officials will not communicate candidly among themselves if each remark  
12 is potentially subject to discovery. The privilege seeks to enhance the quality of  
13 government by promoting open and frank exchanges among government decision  
14 makers. For the privilege to apply, a document must meet two requirements. “First, the  
15 document must be predecisional – it must have been generated before the adoption of an  
16 agency’s policy or decision . . . . Second, the document must be deliberative in nature,  
17 containing opinions, recommendations, or advice about agency policies. Purely factual  
18 material that does not reflect deliberative processes is not protected.” *F.T.C. v. Warner*  
19 *Comm’ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984).

20 Even if a party satisfies these requirements, the deliberative process privilege is  
21 qualified. “A litigant may obtain deliberative materials if his or her need for the materials  
22 and the need for accurate fact-finding override the government’s interest in non-  
23 disclosure.” *Id.* Among the factors that the Court must consider are: (1) the relevance of  
24 the evidence; (2) the availability of other evidence; (3) the government’s role in the  
25 litigation; and (4) the extent to which disclosure would hinder frank and independent  
26 discussion regarding contemplated policies and decisions. *Id.* Thus, if the Court  
27 determines that the privilege applies, the Court must consider whether portions of the  
28 document are still subject to disclosure. *See Electronic Frontier Found. v. Office of the*

1 *Dir. of Nat. Intelligence*, 639 F.3d 876 (9th Cir. 2010) (endorsing application of *Vaughn*  
2 *v. Rosen*, 484 F.2d 820, 826-27 (D.C. Cir. 1973), to deliberative process privilege).

3 “The party asserting an evidentiary privilege has the burden to demonstrate that  
4 the privilege applies to the information in question.” *Tornay v. United States*, 840 F.2d  
5 1424, 1426 (9th Cir. 1988) (citing *United States v. Hirsch*, 803 F.2d 1493, 1496 (9th Cir.  
6 1986)). Defendants have not met this burden. Defendants make only general allegations  
7 regarding the applicability of the privilege. Defendants argue in their brief that *EPA v.*  
8 *Mink*, 410 U.S. 73, 87 (1973), provides the acknowledged test for determining whether  
9 the deliberative process privilege applies. Although *Mink* is an important case on the  
10 content of the deliberative process privilege, subsequent the Supreme Court and Ninth  
11 Circuit cases cited above have expounded on the privilege and established inquiries to  
12 determine how and when it applies. Defendants have not addressed the threshold  
13 requirements of *Klamath Water Users*. They do not identify documents they seek to  
14 withhold under the privilege, address whether they are deliberative in nature, or address  
15 whether they contain purely factual material. Nor do they address the four factors to be  
16 considered under *Warner* in deciding whether the qualified privilege must give way.  
17 Because Defendants have not carried their burden of showing that the privilege applies in  
18 this case, the Court concludes that the Board of Supervisor’s executive session minutes  
19 must be produced.

20 **IT IS ORDERED** that Defendants produce the Board of Supervisors e-session  
21 minutes.

22 Dated this 12th day of December, 2013.

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David G. Campbell  
United States District Judge