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8 UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
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11 OLEGS KOZACENKO,

12 Plaintiff,

13 v.

14 CALIFORNIA HIGHWAY PATROL
15 OFFICER ANDREW P. MURRILL, et al.,

16 Defendants.
17

No. 2:12-cv-2196 MCE DAD

ORDER

18 This matter came before the court on June 13, 2014, for hearing of plaintiff's motion to
19 compel production of a California Highway Patrol Form 268 ("Form 268") that was completed
20 with respect to the incident at issue in this action. Attorney Stewart Katz appeared on behalf of
21 the plaintiff. Deputy Attorney General Alberto L. Gonzalez and Deputy Attorney General Neli
22 N. Palma appeared on behalf of the defendants. At the conclusion of the hearing, the undersigned
23 took the motion under submission and received a copy of the Form 268 at issue for in camera
24 review.

25 On June 16, 2014, the undersigned issued an order ordering counsel for defendants to
26 advise the court of the date upon which the Office of the Attorney General first received the Form
27 268 which had been submitted to the court for in camera review. On June 23, 2014, counsel for
28 defendants filed a response to that order. (Dkt. No. 53.)

1 ANALYSIS

2 Defendants assert that the California Highway Patrol's ("CHP") procedures require an
3 officer to complete a Form 268 "to report incidents of potential civil litigation arising from the
4 activities of its personnel to its attorneys and risk managers and in order to receive legal direction
5" (Defs.' Opp'n (Dkt. No. 47) at 5.) In this regard, they note that "Chapter 8, of Highway
6 Patrol Manual 11.1, requires officers in the field to forward the completed 268 to the ORM
7 [Office of Risk Management] within 48 hours of a reportable incident." (Id.) According to
8 defendants, the ORM then forwards the Form 268 to the Office of the Attorney General. (Id.)
9 Defendants argue that Form 268 "serves as the attorney-client communication from CHP officers
10 to their attorneys," and, therefore, it is protected from disclosure by the attorney-client privilege.
11 (Id. at 2.)

12 "[A] party asserting the attorney-client privilege has the burden of establishing the
13 [existence of an attorney-client] relationship and the privileged nature of the communication."
14 United States v. Ruehle, 583 F.3d 600, 607 (9th Cir. 2009) (quoting United States v. Bauer, 132
15 F.3d 504, 507 (9th Cir. 1997)). See also United States v. Bergonzi, 216 F.R.D. 487, 493 (N.D.
16 Cal. 2003) ("The party asserting the privilege must make a prima facie showing the privilege
17 protects the information the party intends to withhold."). "Because it impedes full and free
18 discovery of the truth, the attorney-client privilege is strictly construed." Bauer, 132 F.3d at 507
19 (quoting United States v. Martin, 278 F.3d 988, 999 (9th Cir. 2002)).

20 An eight-part test determines whether information is covered by the attorney-client
21 privilege:

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

25 United States v. Graf, 610 F.3d 1148, 1156 (9th Cir. 2010) (quoting Ruehle, 583 F.3d at 607).
26 "The party asserting the privilege bears the burden of proving each essential element." Ruehle,
27 583 F.3d at 608.

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1 “The attorney-client privilege protects confidential communications between attorneys
2 and clients, which are made for the purpose of giving legal advice.” United States v. Richey, 632
3 F.3d 559, 566 (9th Cir. 2011) (internal citations omitted). “[T]here is general agreement that the
4 protection of the privilege applies only if the primary or predominate purpose of the attorney-
5 client consultations is to seek legal advice or assistance.” United States v. Salyer, 853 F.Supp.2d
6 1014, 1018 (E.D. Cal. 2012). See also In re County of Erie, 473 F.3d 413, 420-21 (2d Cir. 2007)
7 (“We consider whether the predominant purpose of the communication is to render or solicit legal
8 advice The predominant purpose of a communication cannot be ascertained by
9 quantification or classification of one passage or another; it should be assessed dynamically and
10 in light of the advice being sought or rendered, as well as the relationship between advice that can
11 be rendered only by consulting the legal authorities and advice that can be given by a non-
12 lawyer.”); North Pacifica, LLC v. City of Pacifica, 274 F.Supp.2d 1118, 1127 (N.D. Cal. 2003)
13 (“In general, legal advice is implicated if the nonlegal aspects of the consultation are integral to
14 the legal assistance given and the legal assistance is the primary purpose of the consultation.”).
15 “In the context of the attorney-client privilege, ‘legal advice involves the interpretation and
16 application of legal principles to guide future conduct or to assess past conduct.’” Koumoulis v.
17 Independent Financial Marketing Group, Inc., 295 F.R.D. 28, 37 (E.D. N.Y. 2013) (quoting Erie,
18 473 F.3d at 419)).

19 The history surrounding the preparation of the Form 268 at issue in this case is
20 significantly different than that described by CHP’s official policy as discussed above. In this
21 case, the use of force by law enforcement officers against plaintiff occurred on September 2,
22 2011. The first person to complete the Form 268 was not one of the CHP officers involved in the
23 use of force, but was instead Sergeant Kevin Pierce, also a named defendant in this action, who
24 completed the Supervisory Review section of the form on September 3, 2011. Thereafter, Officer
25 Andrew Murrill, also a named defendant in this action, completed the Incident Narrative section
26 of the form on September 7, 2011, five days after the incident and well past the 48-hour deadline
27 for the forwarding of the form to the CHP’s Office of Risk Management provided by the CHP
28 policy set out above.

1 Moreover, the information provided by Sergeant Pierce and Officer Murrill is simply their
2 version of the events that occurred involving other CHP officers and plaintiff. There is no request
3 for, or discussion of, legal advice in the sections of the form completed by them. Indeed, the
4 Form 268 provides a boxes allowing for an indication if “CHP COUNSEL [was] NOTIFIED.” In
5 the provided response area there is a box checked that reads “No.” The Form 268 in this case
6 also reflects that an internal investigation was not completed regarding the incident in question.

7 Four months later, on January 11, 2012, the Form 268 was signed by Lieutenant John
8 Arrabit, also a named defendant in this action. On January 23, 2012, Division Commander
9 Kenneth Hill, also a defendant in this action, signed the Form 268. The signatures of defendants
10 Arrabit and Hill appear in the section of the form designated for “Approvals.” Thereafter, the
11 Form 268 was finally received by the Office of Risk Management on February 3, 2012, as
12 evidenced by a stamp on the front of the form, some five months after the use of force incident at
13 issue in this action occurred.

14 According to counsel for the defendants, plaintiff’s file with the Office of the Attorney
15 General (“AGO”) contains two copies of the Form 268 at issue here and “[t]he first date of receipt
16 of the Form 268 is unknown.” (Dkt. No. 53 at 2.) Defense counsel asserts that one copy of the
17 Form 268 found in the AGO’s file bears the stamp of the Office of Risk Management dated
18 February 3, 2012, and that copy of the form was “sent to the AGO on December 12, 2012,” after
19 plaintiff filed the complaint in this action. (Id. at 2-3.)

20 The other copy of the Form 268 in the AGO’s file does not bear a stamp from the Office
21 of Risk Management which, defense counsel asserts, “indicates the AGO received a Form 268
22 independent of the CHP’s Office of Risk Management prior to the filing of the present action.”¹

23 (Id. at 2.) In this regard, defense counsel asserts that “[t]he AGO, through its Government Claims
24 Unit (GCU), during the time in question, routinely received the Form 268 by U.S. mail or

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26 ¹ Although it appears possible that the AGO received the unstamped copy of the Form 268 prior
27 to the filing of this civil rights action, because the AGO has no records for the receipt of that
28 copy, the most that can be said with certainty is that “[t]he first date of receipt of the Form 268 is
unknown.” (Dkt. No. 53 at 2.)

1 interagency mail from the California Highway Patrol.”² (Id.) In any event, because the form
2 itself was not completed by CHP until January 23, 2012, when Commander Hill signed his
3 approval, it is clear that the AGO could not have received the Form 268 prior to January 23, 2012,
4 over four month after the use of force incident at issue.³

5 Thus, the court has been presented with a document that, contrary to CHP’s official
6 policy, was not finally completed by the defendants until over four months after the use of force
7 incident involving plaintiff. The document explicitly states that CHP’s counsel, which also serves
8 as counsel for the defendants in this case, was not notified of the incident at the time and did not
9 even receive a copy of the form until sometime between January 23, 2012 and December 12,
10 2012. Within that time period, counsel for defendants is unable to determine when the AGO first
11 received the document, let alone when it was first reviewed. Moreover, the document itself does
12 not explicitly seek legal advice and there has been no assertion that any legal advice was rendered
13 in response to the AGO’s receipt of the form from CHP.

14 It should be noted that, according to counsel for defendants, plaintiff had already
15 submitted a claim to the Victims Compensation and Government Claims Board as of December
16 20, 2011, (Dkt. No. 23 at 2), and this civil rights action was commenced on August 23, 2012.
17 Thus, by the earliest date the AGO could have received this Form 268, January 23, 2012, plaintiff
18 had already filed a claim with the Victims Compensation and Government Claims Board. Of
19 course, it is also possible that the AGO did not receive this form until December 12, 2012, after
20 plaintiff had already commenced this civil rights action.

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22 ² To recap, after the court’s inquiry revealed that the Form 268 which traveled to the AGO
23 through the procedure outlined by defense counsel in opposing the motion to compel did not
24 reach the AGO until after this litigation had been commenced, it was for the first time reported
25 that a second copy of the form may have been delivered to the AGO through another route,
26 although there is apparently little ability to track that routing or receipt of that second copy by the
27 AGO. If it continues to be the AGO’s position that these forms are protected by the attorney-
28 client privilege, hopefully, the transmittal of the Form 268 will be more closely tracked and
catalogued in the future.

³ This is consistent with defense counsel’s assertion that “[a]s of January 6, 2012, the GCU found
that a Form 268 had not yet been received by the AGO.” (Dkt. No. 53 at 2.)

1 Under these circumstances, the court cannot find that defendants have met their burden of
2 establishing the essential elements of the attorney-client privilege.⁴ As another Magistrate Judge
3 of this court has observed under somewhat similar circumstances:

4 It is clear that these incident reports are routinely prepared by
5 employees after an accident in a Kohl's store in the ordinary course
6 of business and pursuant to corporate policy, and that they contain
7 essentially factual information. According to defendant's own
8 policies, the dominant purpose of these statements, independently
9 prepared by store employees, is to prevent recurrence and make the
workplace safer—not to communicate information to or seek advice
from defendant's attorneys. The mere fact that these statements
may ultimately be forwarded to defendant's in-house counsel (or
outside counsel), for example when litigation ensues, does not
transform them into privileged documents.

10 Fisher v. Kohl's Dept. Stores, Inc., No. 2:11-cv-3396 JAM GGH, 2012 WL 2377200, at *4 (E.D.
11 Cal. June 22, 2012). See also Fisher v. United States, 425 U.S. 391, 403-04 (1976) ("This Court
12 and the lower courts have thus uniformly held that pre-existing documents which could have been
13 obtained by court process from the client when he was in possession may also be obtained from
14 the attorney by similar process following transfer by the client in order to obtain more informed
15 legal advice."); Koumoulis, 295 F.R.D. at 37 ("[i]nvestigatory reports and materials are not
16 protected by the attorney-client privilege or the work-product doctrine merely because they are
17 provided to, or prepared by, counsel"); U.S. Postal Service v. Phelps Dodge Refining Corp., 852
18 F. Supp. 156, 164 (E.D. N.Y. 1994) ("A corporation cannot be permitted to insulate its files from
19 discovery simply by sending a "cc" to in-house counsel."); cf. Upjohn Co. v. United States, 449
20 U.S. 383, (1981) (questionnaires administered as part of a corporate counsel's internal
21 investigation into actions taken by the corporation's employees for purposes of providing legal
22 advice to the corporation were protected by the attorney-client privilege); Shaffer v. American
23 Medical Ass'n, 662 F.3d 439, 446 (7th Cir. 2011) ("The communication was made in confidence
24 and to an attorney. Lynch created the memorandum for the sole purpose of meeting with in-

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26 ⁴ Although the undersigned has doubts as to whether the attorney-client privilege would protect
27 the Form 268 from disclosure even if the form is generated and routed in conformity with CHP's
28 official policy, in light of the fact that the form at issue here was clearly not prepared and
submitted in compliance with the terms of that policy in significant respects, the undersigned's
ruling is limited to the document at issue in this action.

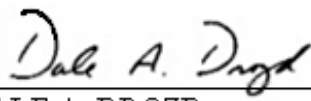
1 house counsel Lynch created the document alone, did not discuss it with anyone else, and
2 gave the memorandum only to [in house counsel] in a meeting where only the two were present.
3 Lynch therefore produced the memorandum in confidence to an attorney.”).

4 CONCLUSION

5 Upon consideration of the arguments on file and at the hearing, and for the reasons set
6 forth above and on the record at the hearing, IT IS HEREBY ORDERED that:

- 7 1. Plaintiff’s motion to compel production of Form 268 (Dkt. No. 45) is granted;
8 2. Within seven days of the date of this order defendants shall produce to plaintiff a copy
9 of the Form 268 submitted to the court for in camera review; and
10 3. Production of the Form 268 shall be subject to a stipulated protective order.

11 Dated: July 3, 2014

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14 DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

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