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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

THE ESTATE OF RUBEN NUNEZ,
by and through its successor-in-
interest LYDIA NUNEZ, ALBERT
NUNEZ, and LYDIA NUNEZ,
Plaintiffs,
v.
COUNTY OF SAN DIEGO, et al.,
Defendants, Third-Party Plaintiffs,
v.
CORRECTIONAL PHYSICIANS
MEDICAL GROUP, INC., et al.,
Third-Party Defendants.

Case No.: 16cv1412-BEN-MDD

**ORDER ON JOINT MOTION FOR
DETERMINATION OF
DISCOVERY DISPUTE
REGARDING REPORT OF
CRITICAL INCIDENT REVIEW
BOARD**

[ECF NO. 176]

Before the Court is the Joint Motion of the parties to determine a discovery dispute filed on September 1, 2017. (ECF NO. 176). The dispute involves Plaintiffs’ Request for Production (Set Two) No. 37 which, among other things, calls for Defendant County of San Diego to produce “critical

1 incident reports” relating to the death of Ruben Nunez. (ECF No. 176 at 2).
2 Defendant County identified a Critical Incident Review Board (“CIRB”)
3 report regarding the death of Ruben Nunez but has withheld the report from
4 disclosure on the basis of attorney-client privilege. As provided below,
5 Defendant County’s objection to disclosure is **SUSTAINED**.

6 LEGAL STANDARD

7 The Ninth Circuit consistently has described the attorney-client
8 privilege as protecting communications: (a) where legal advice of any kind is
9 sought; (b) from a professional legal advisor in his capacity as such; (c)
10 relating to that purpose; (d) made in confidence; (e) by the client; (f) that are
11 at the client’s insistence permanently protected; (g) from disclosure by
12 himself or the legal advisor; (h) unless the protection be waived. *United*
13 *States v. Ruehle*, 583 F.3d 600, 607 (9th Cir. 2009); *United States v. Martin*,
14 278 F.3d 988, 999 (9th Cir. 2002). The party asserting the privilege has the
15 burden of establishing all of its elements and, even if established, the
16 privilege is strictly construed. *Id.* at 999-1000.

17 DISCUSSION

18 In support of its assertion of attorney-client privilege to protect against
19 disclosure of the CIRB report regarding the death of Ruben Nunez,
20 Defendant County submitted the Declaration of Robert P. Faigin. (ECF No.
21 176-6). Mr. Faigin is the Chief Legal Advisor for the San Diego County
22 Sheriff’s Department. (*Id.* at ¶ 1). Mr. Faigin asserts that the purpose of the
23 CIRB is to consult with department legal counsel when an incident occurs
24 which may give rise to litigation. (*Id.* at ¶ 5, also see *Exh. A to Faigin*
25 *Declaration, San Diego County Sheriff’s Department Procedure § 4.23* (*Id.* at
26 176-6 at 4)). According to Mr. Faigin, the report is kept confidential and is

1 maintained in his office. (*Id.* at ¶ 6).

2 Plaintiff challenges the assertion of privilege because Procedure § 4.23
3 allows for the CIRB to refer matters to the Internal Affairs section of the
4 Sheriff's Office. (*See* ECF No. 176-6 at 7-8). In that regard, Plaintiff suggests
5 that the CIRB report is akin to an internal investigative report found not to
6 be protected in *Anderson v. Marsh*, 312 F.R.D. 584, 591-92 (E.D. Cal. 2015).
7 The Court disagrees. The investigative report at issue in *Anderson* was
8 created by a non-attorney and was not created for the purpose of obtaining
9 legal advice. Only after the report was created, was it disseminated to
10 general counsel for review. *Id.*

11 Such is not the case here. Mr. Faigin attended the meeting
12 memorialized in the report and both the procedural manual and Mr. Faigin
13 assert that the purpose of the meeting was to obtain legal advice in advance
14 of potential litigation. The Court is satisfied that attorney-client privilege
15 properly is asserted to protect the CIRB report.

16 CONCLUSION

17 Defendant County's assertion of attorney-client privilege to protect from
18 disclosure the CIRB report regarding the death of Ruben Nunez is
19 **SUSTAINED.**

20 **SO ORDERED.**

21 Dated: September 11, 2017

22 

23 Hon. Mitchell D. Dembin
24 United States Magistrate Judge
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