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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

FRANKIE GREER,

Plaintiff,

v.

COUNTY OF SAN DIEGO, et al.,

Defendants.

Case No.: 19-cv-378-JO-DEB

**ORDER GRANTING PLAINTIFF’S
MOTION TO COMPEL
INFORMATION AND MATERIAL
REGARDING THE SAN DIEGO
COUNTY SHERIFF’S
DEPARTMENT’S CRITICAL
INCIDENT REVIEW BOARD**

[DKT. NO. 148]

I. INTRODUCTION

Before the Court is Plaintiff Frankie Greer’s (“Plaintiff”) Motion to Compel further responses to Plaintiff’s Requests for Production (“RFP”) 52–54 for twelve Sheriff’s Department’s Critical Incident Review Board reports and related documents. Dkt. No. 148. Plaintiff’s Motion challenges Defendant the County of San Diego’s (“the County”) assertion of attorney-client privilege, work product protection, and other privileges for these documents. *Id.* The County opposes the Motion and Plaintiff has filed a Reply. Dkt. Nos. 152, 153.

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1 Because the County’s privilege log lacked sufficient detail to determine the
2 applicability of attorney-client privilege and work product protection, the Court ordered
3 supplemental briefing and for the County to file an amended privilege log. Dkt. No. 166.
4 The County then filed its supplemental brief and amended privilege log and Plaintiff filed
5 a sur-reply. Dkt. Nos. 168, 169.

6 For the reasons discussed below, the Court GRANTS Plaintiff’s Motion.

7 II. BACKGROUND

8 A. Plaintiff’s Claims

9 Plaintiff’s Second Amended Complaint (“SAC”) alleges when Plaintiff was booked
10 into the San Diego Central Jail, he gave medical staff his prescribed seizure disorder
11 medication and informed them he would suffer chronic seizures without it. Dkt. No. 59
12 ¶¶ 29–31. Medical staff did not administer Plaintiff’s medication, enter a seizure disorder
13 alert, enter lower bunk assignment order in the Jail Information Management System
14 (“JIMS”), or otherwise communicate Plaintiff’s medical condition and needs to jail staff.
15 *Id.* ¶¶ 36, 38, 41, 43.

16 Despite Plaintiff missing two doses of seizure medication and requesting a bottom
17 bunk due to his medical condition, jail staff assigned him to a top bunk. *Id.* ¶¶ 42, 44, 45–
18 53. Shortly thereafter, Plaintiff had a seizure and fell from his top bunk onto the concrete
19 cell floor, which rendered him unconscious. *Id.* ¶¶ 55–57. Jail staff did not respond to
20 Plaintiff’s cellmates’ intercom calls and shouts for help, which delayed medical treatment.
21 *Id.* ¶¶ 57–66, 69–71, 73. Plaintiff suffered “numerous clinical seizures” without receiving
22 immediate emergency medical care, which exacerbated his injuries. *Id.* ¶¶ 72–73. Plaintiff
23 sustained facial fractures, a brain bleed, and respiratory failure. *Id.* ¶ 74. Plaintiff remained
24 unconscious for weeks and has a significant brain injury, which continues to impair his
25 cognitive functioning, memory, and speech. *Id.* ¶¶ 78–79, 81.

26 Plaintiff alleges the County and supervisory officials are liable for his injuries
27 because they failed to train, monitor, supervise, and discipline Sheriff’s Department
28 personnel despite a known history of failures to: (1) communicate, share critical medical

1 information, and coordinate the care of seriously ill inmates; (2) provide seriously ill
2 inmates emergency medical care; and (3) properly monitor seriously ill inmates. *Id.* ¶¶ 119,
3 120, 129–32, 264–68, 278–85.¹ Plaintiff also asserts individual claims against the
4 supervisory officials, alleging they failed to adequately train and supervise jail staff to
5 properly: (1) administer medication; (2) input medical information in JIMS;
6 (3) communicate serious medical needs to other jail personnel; and (4) monitor seriously
7 ill inmates, including timely responding to emergency calls for aid. *Id.* ¶¶ 218–44.

8 B. The Critical Incident Review Board

9 The Critical Incident Review Board (“CIRB”) consists of three “voting” members
10 (one commander each from Law Enforcement, Court Services, and Detention Services
11 divisions), and two “non-voting” members (the Chief Legal Advisor and Human Resources
12 division commander). Dkt. No. 148-4 at 6.² In addition to CIRB members, meeting
13 attendees include the assigned investigator and representatives from the subject employee’s
14 chain of command, the Division of Inspectional Services (“DIS”), Internal Affairs, and
15 Training. *Id.* The CIRB can request additional personnel attend the meeting. *Id.*

16 [A] CIRB meeting occurs in three stages. First, Department personnel present
17 factual information regarding the underlying incident, including, in some
18 instances, PowerPoints, to the CIRB members, including the Department’s
19 legal counsel. Department employees whose attendance was requested
20 because of their relevant subject-matter expertise (e.g., weapons training unit,
21 in-service training, K-9 unit, etc.) also attend. Next, the Department
22 employees who present the factual information are dismissed from the room
and CIRB members, including legal counsel, discuss and address issues with
the Department’s subject-matter experts. Lastly, the subject-matter experts are

23 ¹ Municipalities are liable for monetary, declaratory, or injunctive relief where official
24 policy or custom violates a Constitutional right, including an unwritten practice or policy
25 that reflects “persistent and widespread discriminatory practices of state officials” that are
26 “so permanent and well-settled as to constitute a ‘custom or usage’ with the force of law.”
Monell v. Dep’t of Soc. Servs., 436 U.S. 658, 691 (1978).

27 ² When referencing page numbers for documents filed with the Court, the Court’s citation
28 refers to the page numbers assigned by the Court’s CM-ECF system.

1 dismissed from the room and the CIRB members, including legal counsel,
2 engage in further discussions. The DIS Lieutenant is also present to facilitate
3 these communications and to document key issues, comments, and matters for
inclusion in the CIRB confidential report.

4 Dkt. No. 152-1 ¶ 8.

5 At the conclusion of the CIRB's review, the voting members determine whether a
6 policy violation may exist. Dkt. No. 148-4 at 7. If so, the matter is forwarded to Internal
7 Affairs for further investigation. *Id.* The CIRB is also authorized to recommend policy
8 changes and training. *Id.* at 8.

9 Following the CIRB meeting, the DIS Lieutenant writes a report that must "contain
10 specific findings with regard to whether the review board found any policy violations, and
11 training or policy issues, as well as what actions were taken by the department." *Id.* The
12 employee under review is "debriefed" regarding the CIRB's findings. *Id.*

13 The Sheriff's Department requires the CIRB to review all "critical incidents." *Id.* at
14 6.³ The CIRB is the only mandatory internal review of deputy conduct related to in-custody
15 deaths to determine, for example, whether the deputy's tactics were proper and consistent
16 with training. *Id.* at 46–47.

17 The Sheriff's Department Policy and Procedures Manual describes the CIRB's
18 multiple purposes: (1) "assess the department's civil exposure as a result of a given
19 incident" (described as the "focus of the CIRB"); (2) "determine as to whether or not a
20 policy violation may exist"; (3) make "recommendations for training based upon the
21 analysis of critical incidents"; (4) identify any "policy issues of concern"; and (5) "debrief
22 [the employee] as to the results of the CIRB." *Id.* at 6–8.

23 Consistent with the CIRB's multiple purposes unrelated to obtaining legal advice,
24 the Sheriff's Department holds the CIRB out to the public as an internal body dedicated to
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26 ³ Critical incidents include in-custody deaths; uses of deadly force; events where death or
27 serious injury result; and incidences involving discharge of a firearm, major property
28 damage, or major vehicle damage. Dkt. No. 148-4 at 7.

1 police accountability and oversight. *Id.* at 9. For example, the Sheriff’s Department
2 describes the CIRB as an internal oversight board that supports the Sheriff’s Department’s
3 “dedicat[i]on to building a culture of trust with our communities ; [efforts to be]
4 proactive in the identification of possible opportunities for change in our policies,
5 procedure, and training to affect consistent positive outcomes ; [and] commit[ment] to
6 [the] impartial and compassionate enforcement of the law.” *Id.* And on June 9, 2020,
7 shortly after the eruption of nationwide protests in response to the death of George Floyd,
8 the Sheriff’s Department identified the CIRB as an internal oversight board that represents
9 the Department’s “commit[ment] to impartial and compassionate enforcement of the law”
10 and efforts to be “proactive in the identification of possible opportunities for change in our
11 policies, procedure, and training to affect consistent positive outcomes.” *Id.* at 11. The
12 Sheriff’s Department also said that, to honor this commitment, its “leadership team reviews
13 all critical incidents to ensure proper and just responses were administered [and its]
14 CIRB carefully reviews the incidents from multiple perspectives – including training,
15 tactics, policies, and procedures – with the goal of identifying problem areas and
16 recommending remedial actions.” *Id.* at 11, 12.

17 In June 2011, Robert Faigin, the Sheriff’s Department Chief Legal Adviser and
18 “primary architect of the CIRB policy and procedure” (Dkt. No. 148-3 at 49) authored an
19 article entitled, “Critical Incident Review Board: Creation and Refinement” (Dkt. No. 148-
20 4 at 14–20). He described the CIRB as a means by which “a law enforcement agency can
21 meet the public’s expectation of effective self-policing” Dkt. No. 148-4 at 15. Mr.
22 Faigin recommended including legal counsel as a CIRB member because it “potentially
23 provides the ability to protect the confidentiality of the discussion under the cloak of the
24 attorney-client privilege.” *Id.* at 16.

25 C. Plaintiff’s Requests For Production of Critical Incident Review Board
26 Reports and Related Information

27 Plaintiff’s RFPs 52–54 seek CIRB “reports or memoranda,” CIRB meeting
28 attendees, and “records, materials, and tangible things” provided to the CIRB during its

1 investigation of twelve County jail deaths that preceded Plaintiff's seizure and fall. Dkt.
2 No. 148-3 at 20–25. Plaintiff seeks these documents in connection with his *Monell* claim
3 (i.e., the County had notice of a pattern of jail personnel failing to properly address inmates'
4 serious medical needs and failed to take remedial action). Dkt. No. 113 at 14–23. The Court
5 previously ruled these document requests are relevant and proportionate to Plaintiff's
6 *Monell* claim. Dkt. No. 117. On July 27, 2022, District Judge Jinsook Ohta overruled the
7 County's objections to that Order. Dkt. No. 173.

8 The County refused to produce all CIRB-related documents sought by Plaintiff,
9 asserting they are protected from disclosure by the attorney-client privilege, work product
10 doctrine, and other protections. Dkt. No. 148-3 at 28–51. This Motion followed.

11 D. Plaintiff's Motion to Compel and the Court's Order Requiring the County
12 to Produce an Amended Privilege Log

13 Plaintiff's Motion asserts, among other arguments, the County forfeited any
14 attorney-client privilege and work product protection by failing to make a particularized
15 showing of their application to the CIRB documents at issue. Dkt. No. 148-1 at 21–26.

16 Although the County served a privilege log with its response to Plaintiff's RFPs, the
17 privilege log was incomplete because it lacked sufficient detail to determine the
18 applicability of attorney-client privilege and work product protection. Dkt. No. 166. The
19 Court issued the following Order upon completion of the briefing:

20 The County's privilege log lacks sufficient detail to determine the
21 applicability of attorney-client privilege and work product protection. Dkt.
22 No. 148-3. Necessary but missing information includes: (1) the date the
23 document was prepared; (2) the identity of all individuals listed as receiving
24 a copy of the document and their relationship to the County; (3) the identity
25 of any other individuals to whom the document was disseminated and their
26 relationship to the County; and (4) whether the document includes any
27 attachments and, if so, a description of the attachments. The Court, therefore,
28 directs the County to file and serve an amended privilege log

Dkt. No. 166 at 1–2.

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1 The County produced an amended privilege log in response to the Court’s Order.
2 Dkt. No. 168-2. The amended privilege log, however, also does not supply the requested
3 information. Specifically, the amended privilege log lacks information regarding “all
4 individuals listed as receiving a copy of the document and their relationship to the County”
5 and “other individuals to whom the document was disseminated and their relationship to
6 the County.”

7 III. LEGAL STANDARDS

8 A. Attorney-Client Privilege

9 The attorney-client privilege exists: “(1) where legal advice of any kind is sought
10 (2) from a professional legal adviser in his capacity as such, (3) the communications
11 relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance
12 permanently protected, (7) from disclosure by himself or by the legal adviser, (8) unless
13 the protection be waived.” *United States v. Graf*, 610 F.3d 1148, 1156 (9th Cir. 2010).

14 “The privilege extends to agencies . . . to the extent the agency is consulting its
15 attorney as would any private party seeking advice to protect personal interest.” *Our*
16 *Children's Earth Found. v. Nat'l Marine Fisheries Serv.*, 85 F. Supp. 3d 1074, 1086 (N.D.
17 Cal. 2015) (quotation omitted).

18 “Because it impedes full and free discovery of the truth, the attorney-client privilege
19 is strictly construed.” *United States v. Martin*, 278 F.3d 988, 999 (9th Cir. 2002) (quotation
20 omitted). The privilege “protects only those disclosures necessary to obtain informed legal
21 advice which might not have been made absent the privilege,” and “applies only when
22 necessary to achieve its purpose” of encouraging complete disclosure by the client. *Fisher*
23 *v. United States*, 425 U.S. 391, 403 (1976).

24 Where the communication was made for dual-purposes, courts must determine
25 “whether the primary purpose of the communication is to give or receive legal advice, as
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1 opposed to business . . . advice.” *In re Grand Jury*, 23 F.4th 1088, 1091 (9th Cir. 2021),
2 *cert. granted*, No. 21-1397, 2022 WL 4651237 (U.S. Oct. 3, 2022).⁴

3 “Voluntary disclosure of a privileged communication to a third person destroys
4 confidentiality and constitutes a waiver of the privilege.” *Griffith v. Davis*, 161 F.R.D. 687,
5 698 (C.D. Cal. 1995).

6 “The party asserting an evidentiary privilege has the burden to demonstrate that the
7 privilege applies to the information in question.” *Tornay v. United States*, 840 F.2d 1424,
8 1426 (9th Cir. 1988). This burden includes demonstrating the lack of a waiver. *Martin*, 278
9 F.3d at 999–1000; *Louen v. Twedt*, 236 F.R.D. 502, 506 (E.D. Cal. 2006) (“A person
10 asserting attorney-client privilege has the burden of persuasion as to all elements of the
11 privilege, including an affirmative showing of non-waiver . . .”).

12 B. Work Product Doctrine

13 “[A] party may not discover documents and tangible things that are prepared in
14 anticipation of litigation or for trial by or for another party or its representative (including
15 the other party’s attorney, consultant, surety, indemnitor, insurer, or agent).” Fed. R. Civ.
16 P. 26(b)(3)(A).

17 “The work product doctrine does not protect materials assembled in the ordinary
18 course of business. Rather, the *primary* motivating purpose behind the creation of the
19 materials must be as an aid in possible future litigation.” *Griffith*, 161 F.R.D. at 698
20 (emphasis in original). Thus, work product protection applies only to material “that would
21 not have been generated but for the pendency or imminence of litigation.” *Kelly v. City of*
22 *San Jose*, 114 F.R.D. 653, 659 (N.D. Cal. 1987).

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26 ⁴ *In re Grand Jury* remains binding Ninth Circuit precedent despite the Supreme Court’s
27 grant of certiorari. *Durham v. Prudential Ins. Co. of Am.*, 236 F. Supp. 3d 1140, 1147
28 (C.D. Cal. 2017) (“[A] stay of proceedings pending Supreme Court review does not
normally affect the precedential value of the circuit court's opinion.”)

1 The party asserting work product protection has the burden to demonstrate it applies
2 to the information in question. *Garcia v. City of El Centro*, 214 F.R.D. 587, 591 (S.D. Cal.
3 2003). Unlike the attorney-client privilege, “the party asserting waiver of work-product
4 protection bears the burden of demonstrating that a waiver of that protection has occurred.”
5 *McKenzie L. Firm, P.A. v. Ruby Receptionists, Inc.*, 333 F.R.D. 638, 642 (D. Or. 2019).

6 IV. DISCUSSION

7 Plaintiff challenges the County’s withholding of CIRB-related documents based on
8 the attorney-client privilege, work product doctrine, and other protection claims. Dkt.
9 No. 148. The County contends the discovery “at issue involves attorney-client privileged
10 reports written to legal counsel summarizing legal assessments presented during . . .
11 [CIRB] meetings and documents provided to CIRB for analysis by legal counsel.” Dkt.
12 No. 152 at 5. In addition to its initial and amended privilege logs, Dkt. Nos. 148-3 at 28-
13 47, 168-2, the County proffers declarations by Lt. Edward Greenawald (Dkt. No. 152-1)
14 and Mr. Faigin (Dkt. Nos. 148-3 at 48-51, 168-1) in support of its protection claims.

15 Having reviewed the County’s privilege logs, briefs, and supporting declarations,
16 the Court finds the County has failed to carry its burden of demonstrating the CIRB
17 documents Plaintiff seeks are protected from disclosure.

18 A. Attorney-Client Privilege

19 “The [attorney-client] privilege typically does not apply to internal police
20 investigations, such as . . . critical incident review proceedings . . .” *Medina*, 2014 WL
21 4793026, at *16; *see also Griffith*, 161 F.R.D. at 696 (an officer’s statements made during
22 an administrative investigation to determine whether police misconduct occurred were not
23 attorney-client privileged because the interview was not conducted primarily to obtain legal
24 advice). With this general principle as a starting point, the Court analyzes whether the
25 County has carried its burden of demonstrating that the specific CIRB materials at issue
26 here are nonetheless privileged. The Court rules the County has not carried this burden.

27 The County’s blanket assertion that “[a]ll CIRB reports . . . are confidential
28 communications with . . . the department’s Chief Legal Advisor and have been prepared at

1 [his] request and review” (Dkt. No. 148-3 at 51) falls short, as does the County’s general
2 contention that the CIRB’s “focus . . . will be to assess the department’s civil exposure as
3 a result of a given incident” (Dkt. No. 148-4 at 6). *See Martin*, 278 F.3d at 1000 (“A party
4 claiming the privilege must identify specific communications and the grounds supporting
5 the privilege as to each piece of evidence over which privilege is asserted. . . . Blanket
6 assertions are ‘extremely disfavored.’ . . . Further, the communication must be between
7 the client and lawyer for the purpose of obtaining legal advice.”) (citations omitted); *Our*
8 *Children's Earth Found.*, 85 F. Supp. 3d at 1086-87 (A party asserting attorney-client
9 privilege “fails to meet its burden if it uses to boilerplate language and makes no effort . . .
10 to tailor the explanation to the specific document withheld”); *Myles v. County of San*
11 *Diego*, No. 15-cv-1985-BEN-BLM, 2016 WL 2343914 *8 (S.D. Cal. May 4, 2016)
12 (rejecting the County’s attorney-client privilege claim for CIRB reports based on similar
13 generalized representations; “Such general assertions are insufficient to establish that the
14 communications were made in confidence and for the purpose of seeking legal advice.”).

15 The County’s only claim about the specific CIRB investigations at issue is “the
16 purpose of . . . consult[ing] with the Department’s legal counsel when a critical incident
17 occurs that may give rise to litigation” was “carried out for each CIRB matter identified in
18 the County’s privilege log” Dkt. No. 152-1 at 2. This representation, however, is
19 insufficient to carry the County’s burden of demonstrating “the primary purpose” of the
20 CIRB meetings at issue was “to give or receive legal advice” *In re Grand Jury*, 23
21 F.4th at 1091.

22 The CIRB serves multiple purposes unrelated to obtaining legal advice from counsel.
23 For example, the Sheriff’s Department relies on the CIRB to:

- 24 • “make a determination as to whether or not a policy violation may exist”;
- 25 • identify any “policy issues of concern”;
- 26 • identify “possible opportunities for change in . . . policies, procedure, and
27 training to affect consistent positive outcomes”;
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- 1 • further the Sheriff Department’s “impartial and compassionate enforcement
2 of the law”;
- 3 • make “recommendations for training based upon the analysis of critical
4 incidents”;
- 5 • “debrief [the employee] as to the results of the CIRB”; and
- 6 • “recommend remedial action when necessary and ensure that recommended
7 action is actually completed.”

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9 Dkt. No. 148-4 at 7–8, 11, 16.⁵

10 Indeed, statements by Sheriff Gore and Mr. Faigin support the conclusion that
11 obtaining legal advice typically is not the CIRB’s primary purpose. Sheriff Gore described
12 the CIRB as an investigative and remedial body: “the CIRB review is focused with an eye
13 towards what changes have already been implemented by the chain of command to remedy
14 any deficiencies before the matter made it to the CIRB for review, as well as any changes
15 the chain of command may not have already identified and/or implemented to minimize
16 the risk of recurrence.” *San Diego County Sheriff’s Department: It Has Failed to*
17 *Adequately Prevent and Respond to the Deaths of Individuals in Its Custody*, California
18 State Auditor, 103 (Feb. 2022), <http://auditor.ca.gov/pdfs/reports/2021-109.pdf>
19 (hereinafter *State Auditor’s Report*).

20 Mr. Faigin, the “primary architect of the CIRB policy and procedure” (Dkt. No. 148-
21 3 at 49), has also stated that the CIRB is designed to investigate critical incidents and
22 recommend remedial measures: “A CIRB is designed to help an agency review a critical
23 incident, assessing both the positive and negative aspects of that incident A
24 _____

25 ⁵ Consistent with these purposes, the first stage of a CIRB meeting generally involves the
26 development and investigation of facts from witnesses. Dkt. No. 152-1 ¶ 8. However, “[t]he
27 [attorney-client] privilege only protects disclosure of communications; it does not protect
28 disclosure of the underlying facts by those who communicated with the attorney.” *Upjohn*
Co. v. U.S., 449 U.S. 383 at 395 (1981).

1 department’s lack of knowledge of issues resulting from a critical incident will certainly
2 cause the department to be slow in taking remedial measures to address the incident or the
3 conduct that caused the incident.” Dkt. No. 148-4 at 15. Mr. Faigin has also described the
4 CIRB as a means by which “a law enforcement agency can meet the public’s expectation
5 of effective self-policing.” *Id.* at 14.⁶

6 Pertinent to this Motion, Mr. Faigin recommends installing legal counsel as a CIRB
7 member to cloak the CIRB’s investigation, findings, and recommendations in privilege:
8 “The department’s legal advisor also should be a member of the CIRB board. A legal
9 advisor brings risk/liability perspective to the discussion and **potentially provides the**
10 **ability to protect the confidentiality of the discussion under the cloak of the attorney-**
11 **client privilege.”** *Id.* at 16 (emphasis added). Courts, however, have rejected attempts to
12 immunize documents from disclosure by simply involving an attorney in the investigation.
13 *See, e.g., United States v. ISS Marine Servs., Inc.*, 905 F. Supp.2d 121, 129–30 (D.D.C.
14 2012) (“At bottom, the respondent’s claim to privilege appears to be premised on a
15 gimmick: exclude counsel from conducting the internal investigation but retain them in a
16 watered-down capacity to ‘consult’ on the investigation in order to cloak the investigation
17 with privilege. Unfortunately for the respondent, this sort of ‘consultation lite’ does not
18 qualify the Audit Report for the protections of attorney-client privilege.”); *Guo Wengui v.*
19 *Clark Hill, PLC*, 338 F.R.D. 7, 13 (D.D.C. 2021) (“Although Clark Hill papered the
20 arrangement using its attorneys, that approach appears to have been designed to help shield
21 material from disclosure and is not sufficient in itself to provide work-product protection.”)
22 (quotation and internal edits omitted).

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25 ⁶ The Auditor of the State of California – an outside body familiar with the County’s CIRB
26 – also has acknowledged the CIRB’s primary purpose is investigative and remedial: the
27 CIRB’s “ultimate goal is identifying problem areas and recommending remedial actions –
28 such as posting a training bulletin or changing a policy – so that potential liability can be
avoided in the future.” *State Auditor’s Report* at 36.

1 The County’s privilege log and supporting declarations also fail to establish the
2 existence of an attorney-client relationship between Mr. Faigin, who “serve[s] as the Chief
3 Legal Advisor for the elected Sheriff and his command staff,” and the individuals who
4 attended the CIRB meetings at issue. Dkt. No. 148-3 ¶ 2. In addition to command staff,
5 CIRB meetings are attended by personnel from a range of Sheriff Department’s non-legal
6 divisions, many of whom are there to present factual information or subject matter
7 expertise. Dkt. Nos. 148-4 at 6, 152-1 ¶ 8. The County, however, offers no information
8 regarding the identity of the individuals who attended the specific CIRB meetings at issue.
9 Nor does it offer any evidence these individuals’ communications are protected by Mr.
10 Faigin’s attorney-client relationship with the Sheriff and command staff. *See Coastal States*
11 *Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980) (attorney-client privilege
12 not established where defendant did not show attorney-client relationship between agency
13 lawyer and agency employee). The County, therefore, has not shown the communications
14 during the CIRB meetings at issue involved Mr. Faigin’s clients and, consequently, has
15 also not shown these communications were made in confidence. *Griffith*, 161 F.R.D. at
16 698.

17 Finally, the County has not carried its burden of demonstrating it has not waived any
18 privilege for the CIRB documents at issue by disclosing them to a third party. *Martin*, 278
19 F.3d at 999–1000. After finding the County’s original privilege log lacked “sufficient detail
20 to determine the applicability of the attorney-client privilege and work product protection,”
21 the Court gave the County another opportunity to make this showing. Dkt. No. 166.
22 Specifically, the Court ordered the County to provide an amended privilege log identifying
23 “all individuals listed as receiving a copy of the document and their relationship to the
24 County” and “any other individuals to whom the document was disseminated and their
25 relationship to the County.” *Id.* at 1-2. The Court explained this information was necessary
26 “to determine the applicability of [the] attorney-client privilege and work product
27 protection.” *Id.* The County’s amended privilege log, however, does not contain the
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1 requested information. Dkt. No. 168-2.⁷ The County, therefore, has failed to carry its
2 burden to establish it has not waived the asserted attorney-client privilege through
3 disclosure to a third party. *Miller v. Pancucci*, 141 F.R.D. 292, 302 (C.D. Cal. 1992) (a
4 party may sustain its burden of asserting attorney-client privilege by producing an index or
5 list identifying privileged documents that includes, among other things, each document’s
6 “primary addressee . . . [and] secondary addressee(s); persons copied and recipient (and
7 the relationship of that person(s) to the client and/or author of the document”); *U.S. v.*
8 *ChevronTexaco Corp.*, 241 F. Supp. 2d 1065, 1074-75 (N.D. Cal. 2002) (finding defendant
9 improperly claimed attorney-client privilege for e-mail correspondence where it failed to
10 identify a third-party recipient on its privilege log.).

11 In sum, the objective evidence before the Court establishes the CIRB’s primary
12 purpose is investigative and remedial (activities generally not protected by the attorney-
13 client privilege), and the County has not carried its burden of establishing the primary
14 purpose of the twelve CIRB investigations at issue was obtaining legal advice.

15 B. Work-Product Protection

16 The County has also not carried its burden of establishing the CIRB materials at
17 issue are protected attorney work product.

18 Sheriff’s Department policy mandates the CIRB review certain types of incidents
19 involving use of force, regardless of whether litigation is pending or imminent. Dkt.
20 No. 148-4 at 7 (types of incidents that “shall be reviewed by CIRB,” include all in-custody
21 deaths; uses of deadly force; events where death or serious injury result; and incidences
22 involving discharge of a firearm, major property damage, or major vehicle damage). If the
23 CIRB investigations at issue here were conducted for a purpose other than preparing for
24 pending or anticipated litigation, then work product protection does not apply. *See Miller*,
25 141 F.R.D. at 303 (finding police department’s internal affairs investigations are not work-
26

27 ⁷ This omission is noteworthy because Plaintiff has submitted evidence that the County
28 has disclosed other CIRB materials to third parties. Dkt. No. 169 at 4-5.

1 product protected because they are performed in the regular course of business); *Kelly*, 114
2 F.R.D. at 659 (“[S]ince police departments are under an affirmative **duty**, in the normal
3 course of serving their public function,” to generate documents such as internal
4 investigation reports, “the policies that inspire the work product doctrine are wholly
5 inapplicable.”) (emphasis in original); *Griffith*, 161 F.R.D. at 698-99 (“The work product
6 doctrine does not protect materials assembled in the ordinary course of business. Rather,
7 the **primary** motivating purpose behind the creation of the materials must be as an aid in
8 possible future litigation.”) (emphasis in original).

9 The County offers no evidence establishing the specific CIRB investigations at issue
10 here were conducted primarily to aid in pending or anticipated litigation. The County,
11 therefore, has not carried its burden of demonstrating the CIRB documents Plaintiff seeks
12 are protected work product. *Griffith*, 161 F.R.D. at 698-99 (“memorandum [that] would
13 have been generated whether or not litigation was pending, . . . does not qualify as attorney
14 work product.”); *Kelly*, 114 F.R.D. at 659 (holding “[s]ince police departments are under
15 an affirmative **duty**, in the normal course of serving their public function,” to generate
16 documents such as internal investigation reports, “the policies that inspire the work product
17 doctrine are wholly inapplicable.”) (emphasis in original); *Miller*, 141 F.R.D. at 303
18 (finding police department’s internal affairs investigations are not work-product protected
19 because they are performed in the regular course of business).

20 C. Other Objections and Protection Claims

21 Although the County’s privilege logs list other bases for refusing to produce the
22 requested documents (i.e., official information privilege, deliberative process, law
23 enforcement purposes, and confidentiality), the County’s Opposition makes no argument
24 supporting any of these grounds. These objections, therefore, are moot and/or waived. *See*
25 *Sherwin-Williams Co. v. Earl Scheib of Cal. Inc.*, No. 12-cv-2646-JAH-JMA, 2013 WL
26 12073836, at *2 n.1 (S.D. Cal. Mar. 4, 2013) (limiting review to arguments in the parties’
27 briefs and finding other objections not addressed in the discovery motion are moot or
28 waived).

1 V. CONCLUSION

2 Based on the foregoing, Plaintiff's Motion is GRANTED. The County must produce
3 documents responsive to RFPs 52-54 on or before October 21, 2022.

4 **IT IS SO ORDERED.**

5 Dated: October 7, 2022



6
7 Honorable Daniel E. Butcher
8 United States Magistrate Judge
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