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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DARRYL DUNSMORE, et al.,
Plaintiffs,
v.
SAN DIEGO COUNTY SHERIFF'S
DEPARTMENT, et al.,
Defendants.

Case No.: 20-cv-406-AJB-DDL
**ORDER GRANTING
PLAINTIFFS' MOTION TO
COMPEL PRODUCTION OF
CIRB REPORTS**
[Dkt. No. 412]

I.
INTRODUCTION

Plaintiffs move to compel production of 25 reports of the San Diego Sheriff's Department's Critical Incident Review Board (the "CIRB") pertaining to inmates who died in Sheriff's Department custody between January 1, 2021 and the present. The County of San Diego ("County") argues the CIRB Reports are protected from disclosure by the attorney-client privilege, the work product doctrine and the official information privilege.

Having considered the parties arguments and conducted an *in camera* review of the CIRB Reports, the Court finds the County has not met its burden to establish the privileges it invokes apply to the CIRB Reports in their entirety.

1 However, the Court will allow the County to submit proposed redactions to the
2 portions of the CIRB Reports that reflect communications with the County’s Chief
3 Legal Advisor consistent with the Court’s prior rulings on this issue in other cases.

4 **II.**

5 **FACTUAL BACKGROUND**

6 **A. Plaintiffs’ Allegations**

7 Plaintiffs are a certified class of individuals “who are now, or will be in the
8 future, incarcerated in any of the San Diego County Jail facilities.” Dkt. No. 435 at
9 10. Their Third Amended Complaint asserts multiple causes of action under 42
10 U.S.C. § 1983 against the County of San Diego and other defendants seeking
11 declaratory and injunctive relief to “remedy the dangerous, discriminatory, and
12 unconstitutional conditions in the Jail.” Dkt. No. 231, ¶ 4.

13 **B. Critical Incident Review Board**

14 San Diego Sheriff’s Department Policy and Procedure Manual Section 4.23
15 (“Section 4.23”) describes the CIRB’s purpose and procedures:

16 The purpose of [the CIRB] is to consult with department legal counsel
17 when an incident occurs which may give rise to litigation. The focus of
18 the CIRB will be to assess the department’s civil exposure because of
19 a given incident. The CIRB will carefully review those incidents from
20 multiple perspectives, including training, tactics, policies, and
21 procedures with the goal of identifying problem areas and
22 recommending remedial actions so that potential liability can be
23 avoided in the future.

24 Dkt. No. 420-1 at 15.¹ Section 4.23 requires the CIRB to review all “critical

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26 ¹ The Court draws the facts regarding the CIRB process from the declaration
27 of Sheriff’s Department Director of Legal Affairs and Chief Legal Advisor Michael
28 Baranic, which includes Section 4.23. Dkt No. 420-1. The Court also draws from
Baranic’s testimony on April 24, 2023, in *Morton v. Cnty. of San Diego, et al.*, 21-

1 incidents,” which include “[i]n custody death[s].” *Id.* at 16.

2 The CIRB consists of three voting members and two non-voting members.
3 *Id.* at 15. The three voting members include Sheriff’s Department Commanders
4 from the Law Enforcement, Court Services, and Detention Services Divisions. *Id.*
5 The two non-voting members are the Sheriff’s Department Chief Legal Advisor and
6 a Commander from Human Resources. *Id.*

7 Following an in-custody death, the Sheriff’s Department’s Homicide Unit
8 conducts an investigation. Baranic Trans. at 28:7-9. In preparation for the CIRB
9 meeting, Sheriff’s Department personnel prepare a PowerPoint presentation
10 summarizing the incident and the investigation. Baranic Trans. at 26:23-27:2;
11 108:20-23.

12 The CIRB’s review consists of both a “presentation session” and a “closed
13 session.” Dkt. No. 420-1 at 6-7; Baranic Trans. at 16:19-17:4. At the presentation
14 session, “the investigators involved in the investigation of the critical incident will
15 present facts and circumstances to the members of the CIRB.” Dkt. No. 420-1 at
16 16. CIRB members may question the investigators “regarding the specific facts
17 and circumstances surrounding the critical incident.” *Id.* Baranic testified the
18 presentation session “is where the information is presented to the board members,
19 and we have the opportunity to ask questions of either the affected command or
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21 cv-1428-MMA-DDL, Dkt. No. 79 (“Baranic Trans.”), regarding the CIRB process
22 and functions. Baranic states the version of Section 4.23 attached to his
23 declaration in this case “was in effect in 2020 and 2021.” Dkt. No. 420-1 at 4. In
24 *Morton*, Baranic submitted a different version of Section 4.23 as the policy in effect
25 in 2020 and 2021. *Morton*, Dkt. No. 58-1 at 3 and 13-24. The two versions are
26 similar in structure and substance but are not identical. *Compare* Dkt. No. 420-1
27 at 16 (CIRB reviews each “[i]n custody death”) *with Morton*, Dkt. No. 58-1 at 15
28 (CIRB reviews each “[i]n custody death, other than natural causes”). It appears
the version of Section 4.23 submitted in this case is the version currently in effect
and accessible on the Sheriff’s Department website. Regardless, the differences
between these two versions of Section 4.23 do not affect the Court’s analysis.

1 subject matter experts.” Baranic Trans. at 16:25-17:3.²

2 Following the presentation session, the CIRB meets in closed session. Only
3 the five CIRB members and a Division of Inspectional Services Lieutenant acting
4 as the “scribe” are present at the closed session. *Id.* at 78:14. As stated in Section
5 4.23, “[a]fter hearing from all necessary parties, the three voting Commanders will
6 vote to make a determination as to whether or not a policy violation may exist.”
7 Dkt. No. 420-1 at 17. If a majority of the three voting Commanders determine a
8 policy violation may have occurred, the case is referred to Internal Affairs for further
9 investigation. *Id.* If the majority does not find a potential policy violation, “the CIRB
10 case will be forwarded to the DIS Lieutenant for the generation of a report,
11 consistent with the Board’s findings, at the conclusion of the CIRB.” *Id.*

12 Section 4.23 identifies two post-CIRB meeting requirements. First, for critical
13 incidents involving a Sheriff’s Department employee, the employee’s Facility or
14 Unit Commander must “meet with the employee and provide them with any
15 feedback generated as a result of the CIRB presentation” review within seven days
16 of the CIRB meeting. *Id.* Second, within 45 days of the CIRB review, the
17 Department of Inspectional Services must “prepare a report summarizing the
18 actions and conclusions of the board.” *Id.* The report “shall contain specific
19 findings regarding whether the review board found any policy violations, and
20 training or policy issues, as well as what actions were taken by the department.”
21 *Id.* The Lieutenant who served as the “scribe” prepares the CIRB Report. Baranic
22 Trans. at 78:14. Baranic testified the CIRB Report may contain action items. *Id.*
23 at 112:4-13. Under Section 4.23, the CIRB may also make “recommendations for
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26 ² *Greer v. Cnty. of San Diego*, 634 F. Supp. 3d 911 (S.D. Cal. 2022), describes
27 the CIRB meeting as occurring in three stages, with a second stage involving a
28 discussion between the CIRB members and Sheriff’s Department subject matter
experts. *Id.* at 915. The record in this case does not include information about
that second stage, but that does not affect the Court’s analysis.

1 training based on the analysis of critical incidents” as well as “proposed policy
2 recommendations” if it identifies “policy issues of concern while reviewing a critical
3 incident.” Dkt. No. 420-1 at 17. In addition to these requirements, Baranic testified
4 that, in the days following the CIRB review, he “tend[s] to have a standing meeting
5 with the Sheriff and Undersheriff, and I will brief them on the CIRBs.” Baranic
6 Trans. at 112:1-3.

7 In February 2022, the California State Auditor issued a report regarding
8 inmate deaths in San Diego County Jails. See
9 <https://www.auditor.ca.gov/pdfs/reports/2021-109.pdf> (last accessed December
10 10, 2023). The report included a response from the San Diego County Sheriff’s
11 Department that includes the following regarding the CIRB:

12 As items of concern are identified during a critical incident,
13 such as an in-custody death, the CIRB reviews focus with
14 an eye toward what changes have already been
15 implemented by the chain of command to remedy any
16 deficiencies before the matter admitted to the CIRB for
17 review, as well as any changes the chain of command may
18 not have already identified and/or implemented to minimize
19 the risk of a reoccurrence.

18 If the CIRB identifies any best practices or changes not
19 previously identified and implemented by the change [sic]
20 of command prior to this review, the CIRB is empowered
21 to make such recommendations.

22 *Id.* at 103. Baranic testified this is “a purpose of CIRB but not the primary purpose
23 of CIRB.” Baranic Trans. at 76:1-2.

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1 III.

2 **DISCUSSION**

3 Plaintiffs seek disclosure of 25 CIRB Reports pertaining to in-custody deaths
4 at San Diego County jails from January 1, 2021 to the present in response to their
5 Request for Production No. 81. Federal Rule of Civil Procedure 26(b)(1) permits
6 discovery of “any nonprivileged matter that is relevant to any party’s claim or
7 defense and proportional to the needs of the case.” The County does not contest
8 that the CIRB Reports are relevant but contends they are protected from discovery
9 by the attorney-client privilege, the work product doctrine and the official
10 information privilege. The Court addresses each contention in turn.

11 **A. Attorney-Client Privilege**

12 **1. General Principles**

13 Federal law applies to assertions of privilege in this federal civil rights action.
14 See *United States v. Zolin*, 491 U.S. 554, 562 (1989). “The attorney-client privilege
15 is the oldest of the privileges for confidential communications known to the
16 common law.” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). “Its purpose
17 is to encourage full and frank communication between attorneys and their clients
18 and thereby promote broader public interests in the observance of law and
19 administration of justice.” *Id.* “However, since the privilege has the effect of
20 withholding relevant information from the fact-finder, it applies only where
21 necessary to achieve its purpose” and “protects only those disclosures necessary
22 to obtain informed legal advice which might not have been made absent the
23 privilege.” *Fisher v. United States*, 425 U.S. 391, 403 (1976). “Because it impedes
24 full and free discovery of the truth, the attorney-client privilege is strictly construed.”
25 *United States v. Martin*, 278 F.3d 988, 999 (9th Cir. 2002).³

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28 ³ All citations are omitted unless otherwise noted.

1 The privilege “protects confidential communications between attorneys and
2 clients, which are made for the purpose of giving legal advice.” *In re Grand Jury*,
3 23 F.4th 1088, 1091 (9th Cir. 2021). The elements of the privilege are:

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

8 *Martin*, 278 F.3d at 999. “The burden is on the party asserting the privilege to
9 establish all the elements of the privilege.” *Id.* at 999-1000.

10 There is no dispute the County may invoke the attorney-client privilege for
11 confidential communications between Sheriff’s Department counsel and Sheriff’s
12 Department personnel so long as the County establishes that the communications
13 meet the foregoing elements for privileged communications. *See In re Cnty. of*
14 *Erie*, 473 F.3d 413, 418 (2d Cir. 2007) (“In civil suits between private litigants and
15 government agencies, the attorney-client privilege protects most confidential
16 communications between government counsel and their clients that are made for
17 the purpose of obtaining or providing legal assistance.”). This is because “[a]ccess
18 to legal advice by officials responsible for formulating, implementing and
19 monitoring governmental policy is fundamental to promot[ing] broader public
20 interests in the observance of law and administration of justice.” *Id.* at 419.⁴

21 **2. Prior Rulings**

22 At the outset, the Court acknowledges that multiple judges in this District
23 (including the undersigned) have considered the application of the attorney-client
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26 ⁴ Having reviewed the parties’ supplemental briefing on the application of
27 Senate Bill 519 (Dkt. Nos. 428, 431), the Court concludes this new law does not
28 affect the County’s ability to assert the attorney-client privilege with respect to the
CIRB Reports.

1 to CIRB Reports. In *Bush v. Cnty. of San Diego*, No. 15-cv-686-L-JMA, Dkt. No.
2 22 (S.D. Cal. Nov. 24, 2015), the court declined to compel production of a CIRB
3 Report based on a declaration from then-Sheriff’s Department Chief Legal Advisor
4 Robert Faigin stating the Report “is a confidential communication involving the
5 County’s employees and Faigin, in his capacity as a legal advisor, and was
6 prepared for the purpose of obtaining legal advice related to the subject incident.”
7 *Id.* at 8. Similarly, in *Estate of Ruben Nunez v. Cnty. of San Diego*, No. 16-cv-
8 1412-BEN-MDD, Dkt. No. 186 (S.D. Cal. Sept. 11, 2017), the court declined to
9 compel production of a CIRB Report based on a declaration from Faigin stating
10 that “the purpose of the [CIRB] meeting was to obtain legal advice in advance of
11 potential litigation.” *Id.* at 3.

12 More recently, the *Greer* court applied the “primary purpose” test adopted by
13 the Ninth Circuit in *In re Grand Jury* to CIRB investigations. See *Greer*, 634 F.
14 Supp. 3d. at 919-21. The *Greer* court conducted a detailed analysis of Section
15 4.23 and concluded “the objective evidence before the Court establishes the
16 CIRB’s primary purpose is investigative and remedial (activities generally not
17 protected by the attorney-client privilege), and the County has not carried its
18 burden of establishing the primary purpose of the twelve CIRB investigations at
19 issue was obtaining legal advice.” *Id.* at 921. The District Judge affirmed that
20 ruling and thereafter conducted an *in camera* review of the CIRB Reports at issue.
21 Following the *in camera* review, the District Judge affirmed the prior ruling that the
22 CIRB Reports were not privileged. See Dkt. No. 61-1 at 59 (transcript of February
23 8, 2023 hearing in *Greer* in which the District Judge concluded “the CIRB
24 memoranda reports and documents are not privileged because their primary
25 purpose is to determine training issues and recommend remedial measures in
26 response to serious incidents that occur within the County jails, as opposed to
27 giving or seeking legal advice from or by the chief legal officer”).

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1 In *Morton*, this Court concluded that the County had not carried its burden to
2 establish that the primary purpose of all the communications at the CIRB meeting
3 pertaining to the decedent was to seek or provide legal advice so as to render the
4 entire CIRB Report privileged but that limited portions of the CIRB Report were
5 properly redacted prior to the Report's disclosure to the plaintiffs. *Morton v. Cnty.*
6 *of San Diego*, 21-cv-1428-MMA-DDL, 2023 WL 4243239, at *6 (S.D. Cal. June 27,
7 2023). Thereafter, the Court ordered the County to produce 19 CIRB Reports
8 pertaining to in-custody suicides. *Id.*, Dkt. No. 144. The District Judge overruled
9 the County's objections to both orders. *Id.*, Dkt. Nos. 131, 169.

10 Finally, in *Estate of Serna v. Cnty. of San Diego*, No. 20-cv-2096-LAB-DDL,
11 2023 WL 7477321 (S.D. Cal. Aug. 30, 2023), the Court granted the plaintiffs'
12 motion to compel production of 33 CIRB Reports for in-custody deaths from 2015
13 to 2019. The District Judge denied the County's application to stay this Court's
14 order, and the County's objection to that order is pending.

15 **3. Application to the Present Dispute**

16 Against this backdrop, the Court turns to the CIRB Reports at issue in this
17 case. To justify its assertion of the attorney-client privilege as to the entirety of all
18 25 CIRB Reports, the County bears the burden to establish that each Report
19 memorializes confidential communications between attorney and client that were
20 "made for the purpose of giving legal advice." *In re Grand Jury*, 23 F.4th at 1091;
21 *see also Chrimar Sys. Inc. v. Cisco Sys. Inc.*, No. 13-CV-01300-JSW(MEJ), 2016
22 WL 1595785, at *3 (N.D. Cal. Apr. 21, 2016) (attorney-client privilege extends to
23 document that "memorializes and reflects legal advice rendered in a privileged
24 conversation"). Given that the County asserts the privilege as to the entirety of
25 each Report, the County must show that the primary purpose of the
26 communications in each Report was to seek or give legal advice. *In re Grand Jury*,
27 23 F.4th at 1094. The County has not met its burden.

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1 The County points out the stated purpose of the CIRB is to “consult with
2 department legal counsel when an incident occurs which may give rise to litigation”
3 and “assess the department’s civil exposure because of a given incident.” Dkt. No.
4 420-1 at 15. At the evidentiary hearing, Baranic testified the “sole purpose” of the
5 CIRB is to examine critical incidents “from a liability standpoint.” Baranic Trans. at
6 83:24-25. He further testified that the CIRB Report is generated “to memorialize
7 the discussions and [] any legal advice that was given during the CIRB process.”
8 *Id.* at 90:8-9.

9 “Where the communication was made for dual-purposes, courts must
10 determine ‘whether the primary purpose of the communication is to give or receive
11 legal advice, as opposed to business . . . advice.’” *Greer*, 634 F. Supp. 3d at 917-
12 18 (citing *In re Grand Jury*, 23 F.4th at 1091). In determining whether the CIRB
13 Reports memorialize communications “made for the purpose of giving legal
14 advice,” *In re Grand Jury*, 23 F.4th at 1091, the Court begins with the provisions of
15 Section 4.23 that govern the CIRB process. As noted above, at the presentation
16 session, “the investigators involved in the investigation of the critical incident will
17 present facts and circumstances to the members of the CIRB.” Dkt. No. 420-1 at
18 16. Thereafter, the five CIRB members meet in closed session where “the three
19 voting Commanders will vote to make a determination as to whether or not a policy
20 violation may exist.” *Id.* at 17. In addition, the CIRB may make training
21 recommendations and “proposed policy recommendations.” *Id.* Finally, Section
22 4.23 requires the preparation of a CIRB Report that “shall contain specific findings
23 regarding whether the review board found any policy violations, and training or
24 policy issues, as well as what actions were taken by the department.” *Id.*

25 The requirements established by Section 4.23 – that the CIRB vote on the
26 existence of policy violations, make findings as to any policy violations and “training
27 or policy issues” and describe actions taken – exist independent of any legal advice
28 that may be provided by the Chief Legal Advisor, who serves as a non-voting CIRB

1 member. Stated another way, the CIRB could fulfill its duties under Section 4.23
2 to vote on policy violations and address training or policy issues absent any legal
3 advice from the Chief Legal Advisor. See *Fisher*, 425 U.S. at 403 (privilege
4 “protects only those disclosures necessary to obtain informed legal advice which
5 might not have been made absent the privilege”); *Wisk Aero LLC v. Archer*
6 *Aviation, Inc.*, No. 21-cv-2450-WHO (DMR), 2023 WL 2699971, at *4 (N.D. Cal.
7 March 29, 2023) (“no privilege can attach to any communication as to which a
8 business purpose would have served as a sufficient cause, *i.e.*, any
9 communication that would have been made because of a business purpose, even
10 if there had been no perceived additional interest in securing legal advice”). That
11 legal advice from the Chief Legal Advisor is not necessary for the CIRB to fulfill
12 these duties significantly undermines the County’s position that the Reports *in toto*
13 are privileged, and weighs against a finding that the primary purpose of the CIRB
14 meetings is to “give or receive legal advice.” *In re Grand Jury*, 23 F.4th at 1091.⁵

15 The Court’s *in camera* review of the 25 CIRB Reports further supports the
16 conclusion that the primary purpose of the communications at the CIRB meetings
17 was not to seek or receive legal advice such that the attorney-client privilege
18 protects the entirety of each Report from disclosure. See *United States v. Chevron*
19 *Corp.*, No. C 94-1885 SBA, 1996 WL 444597, at *2 (N.D. Cal. May 30, 1996) (“The
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22 ⁵ The County, relying on D.C. Circuit authority, asserts the Court should
23 consider whether giving or receiving legal advice was “a primary purpose” of the
24 CIRB meetings, rather than “*the* primary purpose.” See Dkt. No. 420 at 8 (citing *In*
25 *re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014)) (emphasis added).
26 As the County acknowledges, the Ninth Circuit considered the *Kellogg* standard,
27 but has thus far declined to adopt it. See *In re Grand Jury*, 23 F.4th at 1094 (finding
28 the adoption of *Kellogg’s* reasoning “unnecessary” on the facts of the case and
noting that no other circuit “ha[s] openly embraced” it). Regardless, even if “a
primary purpose” were the applicable standard here, the Court’s conclusion that
the CIRB Reports are not exempt from disclosure in their entirety and must be
produced with targeted redactions would remain unchanged.

1 court may conduct an *in camera* review of withheld documents to allow the client
2 to demonstrate to the court that the attorney-client privilege applies to segregable
3 portions of the withheld documents.”). Certain of the CIRB Reports contain
4 questions and statements by then-Chief Legal Advisor Robert Faigin. However, it
5 is not apparent from the CIRB Reports themselves that these questions or
6 statements constitute legal advice, and the County has not asserted that specific
7 portions of the CIRB Reports contain legal advice. To be sure, the privilege applies
8 to confidential “communications relating to” the seeking of legal advice, *Martin*, 278
9 F.3d at 999, which may include communications made by the client and
10 communications made by the attorney that do not constitute legal advice *per se*.
11 But the absence of readily identifiable legal advice contained in the CIRB Reports
12 is nevertheless relevant to the Court’s assessment of whether the primary purpose
13 of the communications was to give or receive legal advice.

14 The Court credits Baranic’s testimony that, from his perspective as the Chief
15 Legal Advisor, his role in the CIRB is to provide legal advice. But the issue
16 presented is whether the *primary* purpose of the communications at the CIRB
17 meetings was to provide legal advice such that the 25 CIRB Reports are protected
18 in their entirety by the attorney-client privilege. *In re Grand Jury*, 23 F.4th at 1091.
19 As the Second Circuit explained, “[t]he predominant purpose of a communication
20 cannot be ascertained by quantification or classification of one passage or
21 another,” but “should be assessed dynamically and in light of the advice being
22 sought or rendered, as well as the relationship between advice that can be
23 rendered only by consulting the legal authorities and advice that can be given by
24 a non-lawyer.” *In re Cnty. of Erie*, 473 F.3d at 420-21. Here, the rendering of legal
25 advice is not necessary for the CIRB to fulfill the requirements of Section 4.23, and
26 the CIRB Reports do not, on their face, contain legal advice provided by the Chief
27 Legal Advisor. On this record, the County has not carried its burden to establish
28 that the primary purpose of the communications at the CIRB meetings was to seek

1 or provide legal advice. As such, the Court concludes the attorney-client privilege
2 does not apply to the entirety of each CIRB Report at issue.

3 “[R]edaction is available for documents which contain legal advice that is
4 incidental to the nonlegal advice that is the predominant purpose of the
5 communication.” *Id.* at 421; see also *Chevron Corp.*, 1996 WL 444597, at *2
6 (“[D]espite the overall nature of the document, the client may assert the attorney-
7 client privilege over isolated sentences or paragraphs within a document.”). The
8 County asserts that redactions to the CIRB Report are appropriate if the Court
9 were to conclude the attorney-client privilege does not apply to the Reports in their
10 entirety. Dkt. No. 420 at 11. As set forth below, the Court will provide the County
11 with an opportunity to propose redactions to the CIRB Reports consistent with this
12 Order.

13 **B. Work Product Doctrine**

14 **1. General Principles**

15 “The work-product doctrine is a qualified privilege that protects from
16 discovery documents and tangible things prepared by a party or his representative
17 in anticipation of litigation.” *United States v. Sanmina Corp.*, 968 F.3d 1107, 1119
18 (9th Cir. 2020). “At its core, the work-product doctrine shelters the mental
19 processes of the attorney, providing a privileged area within which he can analyze
20 and prepare his client’s case, and protects both material prepared by agents for
21 the attorney as well as those prepared by the attorney himself.” *Id.* The doctrine
22 “upholds the fairness of the adversarial process by allowing litigators to creatively
23 develop legal theories and strategies – without their adversaries invoking the
24 discovery process to pry into the litigators’ minds and free-ride off them.” *In re*
25 *Grand Jury*, 23 F.4th at 1093; see also Fed. R. Civ. P. 26(b)(3)(A) (“Ordinarily, a
26 party may not discover documents and tangible things that are prepared in
27 anticipation of litigation or for trial by or for another party or its representative . . .”).

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1 “In circumstances where a document serves a dual purpose, that is, where
2 it was not prepared exclusively for litigation, then the ‘because of’ test is used.”
3 *United States v. Richey*, 632 F.3d 559, 567–68 (9th Cir. 2011). “In applying the
4 ‘because of’ standard, courts must consider the totality of the circumstances and
5 determine whether the document was created because of anticipated litigation,
6 and would not have been created in substantially similar form but for the prospect
7 of litigation.” *Id.* “The party asserting work product protection has the burden to
8 demonstrate it applies to the information in question.” *Greer*, 634 F. Supp. 3d at
9 918.

10 **2. Application to the Present Dispute**

11 The work product doctrine applies if the County establishes that each of the
12 25 CIRB Reports “would not have been created in substantially similar form but for
13 the prospect of litigation.” *Richey*, 632 F.3d at 568. Here, however, Section 4.23
14 requires the CIRB to review all “critical incidents,” which include “[i]n custody
15 deaths.” Dkt. No. 420-1 at 16. Section 4.23 applies to all “critical incidents”
16 regardless of whether the County has received notice of litigation arising from the
17 incident at issue. *Baranic Trans.* at 22:25-23:15. The Court therefore concludes
18 the County has not met this burden because Section 4.23 mandates the CIRB
19 review process for all critical incidents whether or not litigation is anticipated. See
20 *Kelly v. City of San Jose*, 114 F.R.D. 653, 659 (N.D. Cal. 1987) (“Since police
21 departments are under an affirmative duty, in the normal course of serving their
22 public function, to generate the kind of information at issue here, the policies that
23 inspire the work product doctrine are wholly inapplicable.”); *Martin v. Evans*, No. C
24 08-4067 JW MEJ, 2012 WL 1894219, at *5 (N.D. Cal. May 23, 2012) (overruling
25 work-product objection to production of prison internal affairs reports where prison
26 “fails to demonstrate how the reports were generated primarily for use in litigation
27 or collected outside the regular course of business”); *Greer*, 634 F. Supp. 3d at
28 ///

1 921-22 (finding County did not establish work product doctrine applied to CIRB
2 reports).

3 **C. Official Information Privilege**

4 “Federal common law recognizes a qualified privilege for official information.”
5 *Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1033 (9th Cir.1990). “In determining
6 what level of protection should be afforded by this privilege, courts conduct a case
7 by case balancing analysis, in which the interests of the party seeking discovery
8 are weighed against the interests of the governmental entity asserting the
9 privilege.” *Soto v. City of Concord*, 162 F.R.D. 603, 613 (N.D. Cal. 1995). This
10 balancing approach is “moderately pre-weighted in favor of disclosure.” *Id.* The
11 County bears the burden of establishing the official information privilege applies.
12 *Shiflett by and through Davenport v. City of San Leandro*, No. 21-cv-7802-LB, 2023
13 WL 4551077, at *2 (N. D. Cal. July 13, 2023).

14 The party asserting the privilege must make a “substantial threshold
15 showing.” *Soto*, 162 F.R.D. at 613. “[T]o fulfill the threshold requirement, the party
16 asserting the privilege must submit a declaration or affidavit from a responsible
17 official with personal knowledge of the matters to be attested to in the affidavit.”

18 *Id.* The affidavit must include:

- 19
20 (1) an affirmation that the agency generated or collected the material
21 in issue and has maintained its confidentiality; (2) a statement that the
22 official has personally reviewed the material in question; (3) a specific
23 identification of the governmental or privacy interests that would be
24 threatened by disclosure of the material to plaintiff and/or his lawyer;
25 (4) a description of how disclosure subject to a carefully crafted
26 protective order would create a substantial risk of harm to significant
27 governmental or privacy interests, and (5) a projection of how much
28 harm would be done to the threatened interests if disclosure were
made.

27 *Id.* “If the nondisclosing party does not meet this initial burden, the court will order
28 disclosure of the documents; if the party meets this burden, the court generally

1 conducts an *in camera* review of the material and balances each party’s interests.”
2 *Rogers v. Giurbino*, 288 F.R.D. 469, 481 (S.D. Cal. 2012) (overruling privilege
3 claim where defendant did not submit appropriate declaration).

4 The County asserts that Baranic’s declaration makes the requisite
5 “substantial threshold showing.” Dkt. No. 420 at 11. Baranic states he has
6 reviewed all the CIRB Reports at issue and that the Reports are maintained in
7 confidence. Dkt. No. 420-1 at ¶¶ 7, 24. However, Baranic does not sufficiently
8 address the third, fourth or fifth factors. Baranic focuses on the County’s position
9 that the CIRB Reports are subject to the attorney-client privilege, but that is a
10 separate inquiry from “the governmental or privacy interests that would be
11 threatened by disclosure of the material to plaintiff and/or his lawyer.” *Soto*, 162
12 F.R.D. at 613. Baranic asserts “[t]he release of CIRB reports, without any privilege
13 protection or order limiting admissibility, could chill the frank deliberations that
14 occur to render advice and formulate a strategy as part of the CIRB process to
15 address concerns related to potential or anticipated civil litigation regarding an
16 incident.” Dkt. No. 420-1 at ¶ 27. This generalized statement is insufficient to
17 satisfy the County’s burden to make a substantial threshold showing the official
18 information privilege applies. See *Soto*, 162 F.R.D. at 614 (“[A] general assertion
19 that a police department’s internal investigatory system would be harmed by
20 disclosure of the documents is insufficient to meet the threshold test for invoking
21 the official information privilege.”)

22 Even assuming the requisite showing were made, the County does not
23 address the non-exhaustive factors used in balancing the parties’ respective
24 interests.⁶ See *Shiflett*, 2023 WL 4551077, at **2-3 (citing *Frankenhauser v. Rizzo*,

27 ⁶ Those factors include: “(1) The extent to which disclosure will thwart
28 governmental processes by discouraging citizens from giving the government

1 59 F.R.D. 339, 344 (E.D. Pa. 1973)). The Court has reviewed the 25 CIRB Reports
2 *in camera* and concludes these factors weigh in favor of disclosure under the
3 Protective Order. There is no showing that disclosure will discourage citizens from
4 giving the government information, the party seeking the information is not an
5 actual or potential defendant in a criminal proceeding, there is no indication that
6 the CIRB Reports entail ongoing disciplinary proceedings, Plaintiffs' suit is non-
7 frivolous, there is no showing that this information is available to Plaintiffs from
8 other sources and the information regarding other deaths is relevant to Plaintiffs'
9 claims. Other factors arguably weigh against disclosure, including the potential for
10 disclosure of identities of individuals who died in the jails and the potential that
11 "government self-evaluation and consequent program improvement will be chilled
12 by disclosure." *Kelly*, 114 F.R.D. at 663. However, the absence of evidence from
13 the County precludes a finding of any chilling effect beyond the generalized
14 assertions that courts have found insufficient to deny disclosure under the official
15 information privilege. *Shiflett*, 2023 WL 4551077, at *3 (collecting cases). And the
16 operative Protective Order assuages any concern that information about
17 nonparties would be disclosed outside of the litigation. The Court concludes the
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21 information; (2) The impact upon persons who have given information of having
22 their identities disclosed; (3) The degree to which government self-evaluation and
23 consequent program improvement will be chilled by disclosure; (4) Whether the
24 information sought is factual data or evaluative summary; (5) Whether the party
25 seeking the discovery is an actual or potential defendant in any criminal proceeding
26 either pending or reasonably likely to follow from the incident in question; (6)
27 Whether the police investigation has been completed; (7) Whether any
28 intradepartmental disciplinary proceedings have arisen or may arise from the
investigation; (8) Whether the plaintiff's suit is non-frivolous and brought in good
faith; (9) Whether the information sought is available through other discovery or
from other sources; [and] (10) The importance of the information sought to the
plaintiff's case." *Kelly*, 114 F.R.D. at 663.

1 balancing analysis weighs in favor of disclosure of the CIRB Reports to Plaintiffs
2 under the Protective Order.

3 V.

4 **CONCLUSION**

5 For all the foregoing reasons, Plaintiffs' motion to compel is **GRANTED**. The
6 Court further orders as follows:

7 1. By not later than **December 20, 2023**, the County must submit for *in*
8 *camera* review any proposed redactions to the CIRB Reports. The County must
9 highlight the proposed redacted text for each Report.

10 2. Also by not later than **December 20, 2023**, the County must publicly
11 file a notice of its *in camera* submission and state whether all of its proposed
12 redactions to the CIRB Reports are consistent with the redactions authorized by
13 the Court in *Morton* and *Serna*.

14 **IT IS SO ORDERED.**

15 Dated: December 13, 2023

16 

17 Hon. David D. Leshner
18 United States Magistrate Judge