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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 MARILYN MORTON, et al.

12 Plaintiffs,

13 v.

14 COUNTY OF SAN DIEGO, et al.,

15 Defendants.  
16

Case No.: 21-cv-1428-MMA-DDL

**ORDER GRANTING IN PART AND  
DENYING IN PART AS MOOT  
PLAINTIFFS' MOTION TO  
COMPEL PRODUCTION OF  
DOCUMENTS**

**[Dkt. No. 114]**  
17

18 **I.**

19 **INTRODUCTION**

20 Joseph Morton committed suicide in May 2020 while in custody at the Vista  
21 Detention Facility. Plaintiffs seek to compel the County of San Diego ("County") to  
22 produce 19 reports generated by the San Diego Sheriff's Department's Critical Incident  
23 Review Board ("CIRB") pertaining to other in-custody suicides from January 2015 to May  
24 2020. Plaintiffs also seek to compel production of Sheriff's Department Internal Affairs  
25 reports pertaining to three of those suicides and Citizens Law Enforcement Review Board  
26 ("CLERB") reports in the County's possession.

27 The primary issue is whether the CIRB Reports are subject to the attorney-client  
28 privilege and thus are protected from disclosure to Plaintiffs. On June 28, 2023, the Court

1 issued an Amended Order (“June 28 Order”) granting in part Plaintiffs’ motion to compel  
2 production of the CIRB Report pertaining to Morton’s death because the County had not  
3 met its burden to establish that the privilege applied to the Report in its entirety. Dkt. No.  
4 97 at 11-12. However, the Court relied on the testimony of Chief Legal Advisor Michael  
5 Baranic to conclude that the Report’s description of specific communications between the  
6 former Chief Legal Advisor and Sheriff’s Department personnel should be redacted. *Id.* at  
7 12.

8 The Court’s analysis of the attorney-client privilege issue in the June 28 Order  
9 applies with equal force to the instant motion, and the Court again concludes the County  
10 has not met its burden to establish that the 19 CIRB Reports are subject to the attorney-  
11 client privilege in their entirety. Further, the 19 CIRB Reports must be produced in  
12 unredacted form given that the County has failed to identify specific portions of the Reports  
13 that it contends should be redacted. Finally, the Court concludes that the Internal Affairs  
14 reports are not exempt from disclosure under the official information privilege and that the  
15 operative Protective Order adequately addresses third-party privacy concerns with respect  
16 to the CIRB Reports and the Internal Affairs reports.

17 As set forth below, the Court **GRANTS** Plaintiffs’ motion to compel production of  
18 the 19 CIRB Reports and the three Internal Affairs reports. The Court **DENIES AS**  
19 **MOOT** Plaintiffs’ motion to compel production of the CLERB reports given the County’s  
20 representation that will produce all such reports in its possession, custody or control.

## 21 **II.**

### 22 **FACTUAL BACKGROUND**

#### 23 **A. Morton’s Suicide**

24 Plaintiffs’ Third Amended Complaint alleges that Morton was arrested for an  
25 attempted robbery on May 11, 2020. Dkt. No. 28 at ¶ 5. He made suicidal statements to  
26 the arresting deputies and expressed suicidal thoughts to County intake staff at the Vista  
27 Detention Facility (“VDF”). *Id.* at ¶¶ 6-7. A Liberty Healthcare psychologist performed  
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1 a suicide assessment and deemed Morton to be a “low” risk for suicide. *Id.* at ¶ 9. Morton  
2 was placed in Enhanced Observation Housing. *Id.*

3 On May 12, 2020, a Liberty Healthcare mental health clinician performed a follow-  
4 up suicide assessment. *Id.* at ¶ 10. The clinician determined that Morton was a low risk  
5 for suicide and cleared him for mainline housing, which meant he would be placed in an  
6 isolation cell for ten days. *Id.* at ¶¶ 11-12. Later that day, another Liberty Healthcare  
7 psychologist performed a suicide assessment and concluded that Morton was faking his  
8 suicidal ideations. *Id.* at ¶ 13. Following the assessment, Morton was returned to his  
9 isolation cell. *Id.* at ¶ 14.

10 Morton remained in the isolation cell for five days. *Id.* at ¶ 15. On May 17, 2020,  
11 Morton committed suicide by hanging himself with a bedsheet in his cell. *Id.* at ¶ 16.

12 The Third Amended Complaint states causes of action against the County of San  
13 Diego; Samantha Macanlalay, an intake nurse at the VDF; Liberty Healthcare, the  
14 contracted psychiatric provider for the jails in San Diego County; and Liberty Healthcare  
15 employees Bijan Rahmani, Hosanna Alto and Matthew Berlin. *Id.* at ¶¶ 25-30. Plaintiffs  
16 assert causes of action under 42 U.S.C. § 1983 for “objective indifference” (*id.* at ¶¶ 34-  
17 75), inadequate suicide prevention/self-harm policy and training program (*id.* at ¶¶ 76-  
18 112), and failure to summon medical care (*id.* at ¶¶ 113-125). Plaintiffs further allege  
19 claims under California law for a survival action, wrongful death and professional  
20 negligence. *Id.* at ¶¶ 126-151.

## 21 **B. Critical Incident Review Board**

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

24 The purpose of [the CIRB] is to consult with department legal  
25 counsel when an incident occurs which may give rise to  
26 litigation. The focus of the CIRB will be to assess the  
27 department’s civil exposure as a result of a given incident. The  
28 CIRB will carefully review those incidents from multiple  
perspectives, including training, tactics, policies, and procedures  
with the ultimate goal of identifying problem areas and

1 recommending actions so that potential liability can be avoided  
2 in the future.

3 Dkt. No. 58-1 at 15.<sup>1</sup> Section 4.23 requires the CIRB to review all “critical incidents,”  
4 which, at the time of Morton’s death, was defined to include “[i]n custody deaths, other  
5 than natural causes.” *Id.* at 16.

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

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

15 The CIRB review consists of both a “presentation session” and a “closed session.”  
16 Dkt. No. 58-1 at 4; Baranic Trans. at 16:19-17:4. At the presentation session, “the  
17 investigators involved in the investigation of the critical incident will present facts and  
18 circumstances to the members of the CIRB.” Dkt. No. 58-1 at 16. CIRB members may  
19 question the investigators “regarding the specific facts and circumstances surrounding the  
20 critical incident.” *Id.* Baranic testified the presentation session “is where the information  
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24 <sup>1</sup> The Court draws the facts regarding the CIRB process from the declarations of  
25 Sheriff’s Department Director of Legal Affairs and Chief Legal Advisor Michael Baranic,  
26 dated March 13, 2023 (Dkt. No. 58-1) and August 7, 2023 (Dkt. No. 119-1). This Order  
27 cites to the version of Section 4.23 that was in effect in 2020 and 2021 and is attached to  
28 Baranic’s March 13 declaration. *See* Dkt. No. 58-1 at 13-21. The Court also draws from  
Baranic’s testimony on April 24, 2023, regarding the CIRB process and functions. Dkt.  
No. 79 (“Baranic Trans.”).

1 is presented to the board members, and we have the opportunity to ask questions of either  
2 the affected command or subject matter experts.” Baranic Trans. at 16:25-17:3.<sup>2</sup>

3 Following the presentation session, the CIRB meets in closed session. Only the five  
4 CIRB members and a Division of Inspectional Services Lieutenant acting as the “scribe”  
5 are present at the closed session. *Id.* at 78:14. As stated in Section 4.23, “[a]fter hearing  
6 from all necessary parties, the three Commanders will vote to make a determination as to  
7 whether or not a policy violation may exist.” Dkt. No. 58-1 at 16. If a majority of the three  
8 voting Commanders determine a policy violation may have occurred, the case is referred  
9 to Internal Affairs for further investigation. *Id.* If the majority does not find a potential  
10 policy violation, “the CIRB case will be forwarded to the Standards and Compliance  
11 Manager of the Division of Inspectional Services for the generation of a report, consistent  
12 with the Board’s findings, at the conclusion of the CIRB.” *Id.* at 17.

13 Section 4.23 identifies two post-CIRB meeting requirements. First, for critical  
14 incidents involving a Sheriff’s Department employee, the employee’s Facility or Unit  
15 Commander must brief the employee “as to the results of the CIRB” review within seven  
16 days of the CIRB meeting. *Id.* Second, within 45 days of the CIRB review, the Department  
17 of Inspectional Services must “prepare a report summarizing the actions and conclusions  
18 of the board.” *Id.* The report “shall contain specific findings with regard to whether the  
19 review board found any policy violations, and training or policy issues, as well as what  
20 actions were taken by the department.” *Id.* The Lieutenant who served as the “scribe”  
21 prepares the CIRB Report. Baranic Trans. at 78:14. Baranic testified the CIRB Report  
22 may contain action items. *Id.* at 112:4-13. Under Section 4.23, the CIRB may also make  
23 “recommendations for training based on the analysis of critical incidents” as well as  
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26 <sup>2</sup> *Greer v. Cnty. of San Diego*, 634 F. Supp. 3d 911 (S.D. Cal. 2022), describes the  
27 CIRB meeting as occurring in three stages, with a second stage involving a discussion  
28 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 “proposed policy recommendations” if it identifies “policy issues of concern while  
2 reviewing a critical incident.” Dkt. No. 58-1 at 17. In addition to these requirements,  
3 Baranic testified that, in the days following the CIRB review, he “tend[s] to have a standing  
4 meeting with the Sheriff and Undersheriff, and I will brief them on the CIRBs.” Baranic  
5 Trans. at 112:1-3.

6 In February 2022, the California State Auditor issued a report regarding inmate  
7 deaths in San Diego County Jails. See [https://www.auditor.ca.gov/pdfs/reports/2021-](https://www.auditor.ca.gov/pdfs/reports/2021-109.pdf)  
8 [109.pdf](https://www.auditor.ca.gov/pdfs/reports/2021-109.pdf) (last accessed September 18, 2023). The report included a response from the San  
9 Diego County Sheriff’s Department that includes the following regarding the CIRB:

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

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

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

### 23 III.

### 24 DISCUSSION

#### 25 A. CIRB Reports

26 Plaintiffs seek disclosure of 19 CIRB Reports pertaining to in-custody suicides at  
27 San Diego County jails from January 2015 to May 2020. The County’s privilege log  
28 asserts the attorney-client privilege, work product doctrine, official information privilege  
and law enforcement investigatory privilege with respect to the CIRB Reports. Dkt. No.  
114 at 14-51. However, the County’s opposition brief focuses almost entirely on the

1 attorney-client privilege and addresses the other privileges in a single sentence. *See* Dkt.  
2 No, 119 at 6 (“The CIRB reports are protected work product, deliberative process privilege,  
3 official information privilege, and law enforcement investigatory privilege.”). This  
4 assertion is insufficient because “a party asserting an evidentiary privilege has the burden  
5 to demonstrate that the privilege applies to the information in question.” *Lambright v.*  
6 *Ryan*, 698 F.3d 808, 822 (9th Cir. 2012).<sup>3</sup> Nevertheless, the Court will address each  
7 privilege notwithstanding the absence of analysis in the County’s brief and notwithstanding  
8 that the County’s privilege log does not assert the deliberative process privilege.

9 The County further asserts the CIRB Reports are neither relevant nor proportional  
10 to the needs of the case irrespective of any privilege. The Court addresses each contention  
11 in turn.

12 **1. Attorney-Client Privilege**

13 **a. General principles**

14 Federal law applies to assertions of privilege in this federal civil rights action. *See*  
15 *United States v. Zolin*, 491 U.S. 554, 562 (1989). “The attorney-client privilege is the  
16 oldest of the privileges for confidential communications known to the common law.”  
17 *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). “Its purpose is to encourage full  
18 and frank communication between attorneys and their clients and thereby promote broader  
19 public interests in the observance of law and administration of justice.” *Id.* “However,  
20 since the privilege has the effect of withholding relevant information from the fact-finder,  
21 it applies only where necessary to achieve its purpose” and “protects only those disclosures  
22 necessary 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 full  
24 and free discovery of the truth, the attorney-client privilege is strictly construed.” *United*  
25 *States v. Martin*, 278 F.3d 988, 999 (9th Cir. 2002).

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28 <sup>3</sup> All citations are omitted unless otherwise noted.

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

4 (1) When legal advice of any kind is sought (2) from a professional legal  
5 adviser in his or her capacity as such, (3) the communications relating to that  
6 purpose, (4) made in confidence (5) by the client, (6) are, at the client’s  
7 instance, permanently protected (7) from disclosure by the client or by the  
8 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 establish all  
9 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 meet the  
13 foregoing elements for privileged communications. *See In re Cnty. of Erie*, 473 F.3d 413,  
14 418 (2d Cir. 2007) (“In civil suits between private litigants and government agencies, the  
15 attorney-client privilege protects most confidential communications between government  
16 counsel and their clients that are made for the purpose of obtaining or providing legal  
17 assistance.”). This is because “[a]ccess to legal advice by officials responsible for  
18 formulating, implementing and monitoring governmental policy is fundamental to  
19 promot[ing] broader public interests in the observance of law and administration of  
20 justice.” *Id.* at 419.

21 **b. Prior rulings**

22 Multiple judges in this District (including the undersigned) have considered  
23 attorney-client privilege assertions as to CIRB Reports. In *Bush v. Cnty. of San Diego*, No.  
24 15-cv-686-L-JMA, Dkt. No. 22 (S.D. Cal. Nov. 24, 2015), the court declined to compel  
25 production of a CIRB Report based on a declaration from then-Sheriff’s Department Chief  
26 Legal Advisor Robert Faigin stating the Report “is a confidential communication involving  
27 the County’s employees and Faigin, in his capacity as a legal advisor, and was prepared  
28 for the purpose of obtaining legal advice related to the subject incident.” *Id.* at 8. Similarly,



1 in *Estate of Ruben Nunez v. Cnty. of San Diego*, No. 16-cv-1412-BEN-MDD, Dkt. No. 186  
2 (S.D. Cal. Sept. 11, 2017), the court declined to compel production of a CIRB Report based  
3 on a declaration from Faigin stating that “the purpose of the [CIRB] meeting was to obtain  
4 legal advice in advance of potential litigation.” *Id.* at 3.

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

20 As noted above, this Court’s June 28 Order granted Plaintiffs’ motion to compel  
21 production of the CIRB Report pertaining to Morton’s death. Dkt. No. 97. On September  
22 6, 2023, the District Judge overruled the County’s objection to the June 28 Order. Dkt.  
23 No. 131.

24 Finally, on August 30, 2023, in *Estate of Elisa Serna, et al. v. Cnty of San Diego, et*  
25 *al.*, 20-cv-2096-LAB-DDL, Dkt. No. 220, the Court granted the plaintiffs’ motion to  
26 compel production of 33 CIRB Reports for in-custody deaths from 2015 to 2019. The  
27 County’s objection to that order is pending before the District Judge.

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1                   c.     Application to the Present Dispute

2             Against this backdrop, the Court turns to the CIRB Reports at issue in this case. To  
3 justify its assertion of the attorney-client privilege as to the entirety of all 19 CIRB Reports,  
4 the County bears the burden to establish that each Report memorializes confidential  
5 communications between attorney and client that were “made for the purpose of giving  
6 legal advice.” *In re Grand Jury*, 23 F.4th at 1091; *see also Chrimar Sys. Inc. v. Cisco Sys.*  
7 *Inc.*, No. 13-CV-01300-JSW(MEJ), 2016 WL 1595785, at \*3 (N.D. Cal. Apr. 21, 2016)  
8 (attorney-client privilege extends to document that “memorializes and reflects legal advice  
9 rendered in a privileged conversation”). Given that the County asserts the privilege as to  
10 the entirety of each Report, the County must show that the communications memorialized  
11 in that Report were “made for the purpose of giving [or seeking] legal advice.” *In re Grand*  
12 *Jury*, 23 F.4th at 1091. The County has not met its burden.

13             The County points out the stated purpose of the CIRB is to “consult with department  
14 legal counsel when an incident occurs which may give rise to litigation” and “assess the  
15 department’s civil exposure as a result of a given incident.” Dkt. No. 58-1 at 15. Baranic  
16 declares the CIRB’s “primary purpose is to protect the Department from legal liability and  
17 exposure by providing legal advice to the Department, assessing the Department’s civil  
18 liability and risk exposure, and in anticipation of potential litigation as a result of a given  
19 incident.” *Id.* at 4. At the evidentiary hearing, Baranic similarly testified the “sole  
20 purpose” of the CIRB is to examine critical incidents “from a liability standpoint.” Baranic  
21 Trans. at 83:24-25. He further testified the CIRB Report is generated “to memorialize the  
22 discussions and [] any legal advice that was given during the CIRB process.” *Id.* at 90:8-  
23 9.

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  
26 opposed to business . . . advice.’” *Greer*, 634 F. Supp. 3d at 917-18 (citing *In re Grand*  
27 *Jury*, 23 F.4th at 1091). In determining whether the CIRB Reports memorialize  
28 communications “made for the purpose of giving legal advice,” *In re Grand Jury*, 23 F.4th

1 at 1091, the Court begins with the provisions of Section 4.23 that govern the CIRB process.  
2 As noted above, at the presentation session, “the investigators involved in the investigation  
3 of the critical incident will present facts and circumstances to the members of the CIRB.”  
4 Dkt. No. 58-1 at 16. Thereafter, the five CIRB members meet in closed session where “the  
5 three Commanders will vote to make a determination as to whether or not a policy violation  
6 may exist.” *Id.* In addition, the CIRB may make training recommendations and “proposed  
7 policy recommendations.” *Id.* at 17. Finally, Section 4.23 requires the preparation of a  
8 CIRB Report that “shall contain specific findings with regard to whether the review board  
9 found any policy violations, and training or policy issues, as well as what actions were  
10 taken by the department.” *Id.*

11 The requirements established by Section 4.23 – that the CIRB vote on the existence  
12 of policy violations, make findings as to any policy violations and “training or policy  
13 issues” and describe actions taken – exist independent of any legal advice that may be  
14 provided by the Chief Legal Advisor, who serves as a non-voting CIRB member. Stated  
15 another way, the CIRB could fulfill its duties under Section 4.23 to vote on policy  
16 violations and address training or policy issues absent any legal advice from the Chief  
17 Legal Advisor. *See Fisher*, 425 U.S. at 403 (privilege “protects only those disclosures  
18 necessary to obtain informed legal advice which might not have been made absent the  
19 privilege”); *Wisk Aero LLC v. Archer Aviation, Inc.*, No. 21-cv-2450-WHO (DMR), 2023  
20 WL 2699971, at \*4 (N.D. Cal. March 29, 2023) (“no privilege can attach to any  
21 communication as to which a business purpose would have served as a sufficient cause,  
22 *i.e.*, any communication that would have been made because of a business purpose, even  
23 if there had been no perceived additional interest in securing legal advice”). That legal  
24 advice from the Chief Legal Advisor is not necessary for the CIRB to fulfill these duties  
25 significantly undermines the County’s position that the Reports *in toto* are privileged, and  
26 weighs against a finding that the primary purpose of the CIRB meetings is to “give or  
27 receive legal advice.” *In re Grand Jury*, 23 F.4th at 1091.

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1 The Court’s *in camera* review of the 19 CIRB Reports further supports the  
2 conclusion that the primary purpose of the communications at the CIRB meetings was not  
3 to seek or receive legal advice such that the attorney-client privilege protects the entirety  
4 of each Report from disclosure. *See United States v. Chevron Corp.*, No. C 94-1885 SBA,  
5 1996 WL 444597, at \*2 (N.D. Cal. May 30, 1996) (“The court may conduct an *in camera*  
6 review of withheld documents to allow the client to demonstrate to the court that the  
7 attorney-client privilege applies to segregable portions of the withheld documents.”).  
8 Certain of the CIRB Reports contain questions and statements by then-Chief Legal Advisor  
9 Robert Faigin.<sup>4</sup> *See, e.g.*, UIN Doc. No. 4 at 2-7; UIN Doc. No. 9 at 3-12. However, it is  
10 not apparent from the CIRB Reports themselves that these questions or statements  
11 constitute legal advice, and the County has not asserted that specific portions of the CIRB  
12 Reports contain legal advice.<sup>5</sup> To be sure, the privilege applies to confidential  
13 “communications relating to” the seeking of legal advice, *Martin*, 278 F.3d at 999, which  
14 may include communications made by the client and communications made by the attorney  
15 that do not constitute legal advice *per se*. But the absence of readily identifiable legal  
16 advice contained in the CIRB Reports is nevertheless relevant to the Court’s assessment of  
17 whether the primary purpose of the communications was to give or receive legal advice.

18 The Court credits Baranic’s testimony that, from his perspective as the Chief Legal  
19 Advisor, his role in the CIRB is to provide legal advice. But the issue presented is whether  
20 the *primary* purpose of the communications at the CIRB meetings was to provide legal  
21 advice such that the 19 CIRB Reports are protected in their entirety by the attorney-client  
22 privilege. *In re Grand Jury*, 23 F.4th at 1091. As the Second Circuit explained, “[t]he  
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25 <sup>4</sup> Faigin was the Chief Legal Advisor and attended the CIRB meetings in that capacity  
26 prior to Baranic’s appointment in 2022. Dkt. No. 119-1 at 9, ¶ 22.

27 <sup>5</sup> Baranic asserts Faigin “would have participated in the Closed session of the CIRB  
28 review” and “would have provided legal advice,” but he does not reference portions of the  
CIRB Reports that contain legal advice. Dkt. No. 119-1 at 10, ¶ 25.

1 predominant purpose of a communication cannot be ascertained by quantification or  
2 classification of one passage or another,” but “should be assessed dynamically and in light  
3 of the advice being sought or rendered, as well as the relationship between advice that can  
4 be rendered only by consulting the legal authorities and advice that can be given by a non-  
5 lawyer.” *In re Cnty. of Erie*, 473 F.3d at 420-21. Here, the rendering of legal advice is not  
6 necessary for the CIRB to fulfill the requirements of Section 4.23, and the CIRB Reports  
7 do not, on their face, contain legal advice provided by the Chief Legal Advisor. On this  
8 record, the County has not carried its burden to establish that the primary purpose of the  
9 communications at the CIRB meetings was to seek or provide legal advice. As such, the  
10 Court concludes the attorney-client privilege does not apply to the entirety of each CIRB  
11 Report at issue.

12 Although the attorney-client privilege does not apply to the CIRB Reports in their  
13 entirety, “redaction is available for documents which contain legal advice that is incidental  
14 to the nonlegal advice that is the predominant purpose of the communication.” *Id.* at 421;  
15 *see also Chevron Corp.*, 1996 WL 444597, at \*2 (“[D]espite the overall nature of the  
16 document, the client may assert the attorney-client privilege over isolated sentences or  
17 paragraphs within a document.”). On August 7, 2023, the County timely submitted the 19  
18 CIRB Reports for the Court’s *in camera* review. Dkt. No. 125. In response to the Court’s  
19 request that the County indicate the portion of each report that the County would seek to  
20 redact if the Court concluded that the attorney-client privilege does not apply to the entirety  
21 of each CIRB Report, the County’s filing includes proposed redactions to one or more  
22 entire pages of each Report. *Id.* at 5-6. The County’s identification of its redactions by  
23 page numbers is imprecise, but it appears the County proposes to redact the entirety of  
24 every CIRB Report with the exception of a background section summarizing the in-custody  
25 death at issue. Those proposed redactions include the vast majority of each Report.

26 The County bears the burden to establish the information it seeks to redact is limited  
27 to “confidential communications between attorneys and clients, which are made for the  
28 purpose of giving legal advice.” *In re Grand Jury*, 23 F.4th 1088, 1091 (9th Cir. 2021).

1 The County has failed to meet its burden, and the Court will not parse the 19 CIRB Reports  
2 to identify specific communications as to which the County might have (but did not)  
3 propose targeted redactions.

4 The County’s argument that Plaintiffs have waived their right to seek unredacted  
5 CIRB Reports is without merit. First, the County’s waiver argument ignores that it bears  
6 the burden as the party asserting the attorney-client privilege to show that any redactions  
7 are appropriate. Moreover, the County cites no authority for the proposition that Plaintiffs’  
8 failure to file an objection under Fed. R. Civ. P. 72 to the June 28 Order prospectively  
9 waived Plaintiffs’ ability to seek unredacted CIRB Reports in this subsequent motion.

## 10 **2. Work Product Doctrine**

### 11 **a. General Principles**

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

24 “In circumstances where a document serves a dual purpose, that is, where it was not  
25 prepared exclusively for litigation, then the ‘because of’ test is used.” *United States v.*  
26 *Richey*, 632 F.3d 559, 567–68 (9th Cir. 2011). “In applying the ‘because of’ standard,  
27 courts must consider the totality of the circumstances and determine whether the document  
28 was created because of anticipated litigation, and would not have been created in

1 substantially similar form but for the prospect of litigation.” *Id.* “The party asserting work  
2 product protection has the burden to demonstrate it applies to the information in question.”  
3 *Greer*, 634 F. Supp. 3d at 918.

4 **b. Application to the Present Dispute**

5 The work product doctrine applies if the County establishes that each of the 19 CIRB  
6 Reports “would not have been created in substantially similar form but for the prospect of  
7 litigation.” *Richey*, 632 F.3d at 568. Section 4.23 requires the CIRB to review all “critical  
8 incidents,” which included “[i]n custody deaths, other than natural causes.” Dkt. No. 58-1  
9 at 16. Section 4.23 applies to all “critical incidents” regardless of whether the County has  
10 received notice of litigation arising from the incident at issue. Baranic Trans. at 22:25-  
11 23:15. The Court therefore concludes the County has not met this burden because Section  
12 4.23 mandates the CIRB review process for all critical incidents whether or not litigation  
13 is anticipated. *See Kelly v. City of San Jose*, 114 F.R.D. 653, 659 (N.D. Cal. 1987) (“Since  
14 police departments are under an affirmative duty, in the normal course of serving their  
15 public function, to generate the kind of information at issue here, the policies that inspire  
16 the work product doctrine are wholly inapplicable.”); *Martin v. Evans*, No. C 08-4067 JW  
17 MEJ, 2012 WL 1894219, at \*5 (N.D. Cal. May 23, 2012) (overruling work-product  
18 objection to production of prison internal affairs reports where prison “fails to demonstrate  
19 how the reports were generated primarily for use in litigation or collected outside the  
20 regular course of business”); *Greer*, 634 F. Supp. 3d at 921-22 (finding County did not  
21 establish work product doctrine applied to CIRB reports).

22 **3. Official Information Privilege**

23 “Federal common law recognizes a qualified privilege for official information.”  
24 *Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1033 (9th Cir.1990). “In determining what  
25 level of protection should be afforded by this privilege, courts conduct a case by case  
26 balancing analysis, in which the interests of the party seeking discovery are weighed  
27 against the interests of the governmental entity asserting the privilege.” *Soto v. City of*  
28 *Concord*, 162 F.R.D. 603, 613 (N.D. Cal. 1995). This balancing approach is “moderately

1 pre-weighted in favor of disclosure.” *Id.* The County bears the burden of establishing the  
2 official information privilege applies. *Shiflett by and through Davenport v. City of San*  
3 *Leandro*, No. 21-cv-7802-LB, 2023 WL 4551077, at \*2 (N. D. Cal. July 13, 2023).

4 The party asserting the privilege must make a “substantial threshold showing.” *Soto*,  
5 162 F.R.D. at 613. “[T]o fulfill the threshold requirement, the party asserting the privilege  
6 must submit a declaration or affidavit from a responsible official with personal knowledge  
7 of the matters to be attested to in the affidavit.” *Id.* The affidavit must include:

8 (1) an affirmation that the agency generated or collected the material in issue  
9 and has maintained its confidentiality; (2) a statement that the official has  
10 personally reviewed the material in question; (3) a specific identification of  
11 the governmental or privacy interests that would be threatened by disclosure  
12 of the material to plaintiff and/or his lawyer; (4) a description of how  
13 disclosure subject to a carefully crafted protective order would create a  
14 substantial risk of harm to significant governmental or privacy interests, and  
15 (5) a projection of how much harm would be done to the threatened interests  
16 if disclosure were made.

17 *Id.* “If the nondisclosing party does not meet this initial burden, the court will order  
18 disclosure of the documents; if the party meets this burden, the court generally conducts an  
19 *in camera* review of the material and balances each party’s interests.” *Rogers v. Giurbino*,  
20 288 F.R.D. 469, 481 (S.D. Cal. 2012) (overruling privilege claim where defendant did not  
21 submit appropriate declaration).

22 Because the County’s brief does not address the official information privilege (Dkt.  
23 No. 119 at 6), the Court will assume that the County relies on Baranic’s declaration to make  
24 the requisite “substantial threshold showing.” Baranic states he has reviewed all the CIRB  
25 Reports at issue and that the Reports are maintained in confidence. Dkt. No. 119-1 at ¶¶ 6,  
26 16, 27. However, Baranic does not sufficiently address the third, fourth or fifth factors.  
27 Baranic focuses on the County’s position that the CIRB Reports are subject to the attorney-  
28 client privilege, but that is a separate inquiry from “the governmental or privacy interests  
that would be threatened by disclosure of the material to plaintiff and/or his lawyer.” *Soto*,  
162 F.R.D. at 613. Nor does Baranic address how disclosure of the CIRB Reports subject



1 to the existing Protective Order “would create a substantial risk of harm to significant  
2 governmental or privacy interests” or “how much harm would be done to the threatened  
3 interests if disclosure were made.” *Id.* This is insufficient to satisfy the County’s burden  
4 to make a substantial threshold showing that the official information privilege applies.

5 Even assuming the requisite showing were made, the County does not address the  
6 non-exhaustive factors used in balancing the parties’ respective interests.<sup>6</sup> *See Shiflett*,  
7 2023 WL 4551077, at \*\*2-3 (citing *Frankenhauser v. Rizzo*, 59 F.R.D. 339, 344 (E.D. Pa.  
8 1973)). The Court has reviewed the 19 CIRB Reports *in camera* and concludes these  
9 factors weigh in favor of disclosure under the Protective Order. There is no showing that  
10 disclosure will discourage citizens from giving the government information, the party  
11 seeking the information is not an actual or potential defendant in a criminal proceeding,  
12 there is no indication that the 19 CIRB Reports entail ongoing disciplinary proceedings,  
13 Plaintiffs’ suit is non-frivolous, there is no showing that this information is available to  
14 Plaintiffs from other sources and the information regarding other deaths is relevant to  
15 Plaintiffs’ *Monell* claims. Other factors arguably weigh against disclosure, including the  
16 potential for disclosure of identities of individuals who died in the jails and the potential  
17 that “government self-evaluation and consequent program improvement will be chilled by  
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21 <sup>6</sup> Those factors include: “(1) The extent to which disclosure will thwart governmental  
22 processes by discouraging citizens from giving the government information; (2) The  
23 impact upon persons who have given information of having their identities disclosed; (3)  
24 The degree to which government self-evaluation and consequent program improvement  
25 will be chilled by disclosure; (4) Whether the information sought is factual data or  
26 evaluative summary; (5) Whether the party seeking the discovery is an actual or potential  
27 defendant in any criminal proceeding either pending or reasonably likely to follow from  
28 the incident in question; (6) Whether the police investigation has been completed; (7)  
Whether any 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 disclosure.” *Kelly*, 114 F.R.D. at 663. However, the absence of evidence from the County  
2 precludes a finding of any chilling effect beyond the generalized assertions that courts have  
3 found insufficient to deny disclosure under the official information privilege. *Shiflett*, 2023  
4 WL 4551077, at \*3 (collecting cases). And the operative Protective Order assuages any  
5 concern that information about nonparties would be disclosed outside of the litigation. The  
6 Court concludes the balancing analysis weighs in favor of disclosure of the CIRB Reports  
7 to Plaintiffs under the Protective Order.

#### 8 **4. Deliberative process privilege**

9 Federal law “shields from public disclosure confidential interagency memoranda on  
10 matters of law or policy.” *Nat’l Wildlife Fed’n v. U.S. Forest Serv.*, 861 F.2d 1114, 1116  
11 (9th Cir. 1988). This deliberative process privilege applies to documents that “reflect  
12 advisory opinions recommendations and deliberations comprising part of a process by  
13 which government decisions and policies are formulated.” *F.T.C. v. Warner Commc’ns*  
14 *Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984) (hereafter “*Warner*”). The document “must be  
15 predecisional – i.e., it must have been generated before the adoption of a policy or  
16 decision,” and it “must be deliberative in nature, containing opinions, recommendation, or  
17 advice about . . . policies [or decisions].” *Id.* In assessing whether the document is  
18 deliberative in nature, the inquiry is “whether the requested information independently  
19 reflects the deliberative process itself” because “purely factual material that does not reflect  
20 deliberative processes is not protected,” and “[o]nly those portions of a predecisional  
21 document that reflect the give and take of the deliberative process may be withheld.”  
22 *Shiflett*, 2023 WL 4551077, at \*4.

23 “The deliberative process privilege is a qualified one,” and “[a] litigant may obtain  
24 deliberative materials if his or her need for the materials and the need for accurate fact-  
25 finding override the government’s interest in non-disclosure.” *Warner*, 742 F.2d at 1161.  
26 “Among the factors to be considered in making this determination are: 1) the relevance of  
27 the evidence; 2) the availability of other evidence; 3) the government’s role in the litigation;  
28 and 4) the extent to which disclosure would hinder frank and independent discussion

1 regarding contemplated policies and decisions.” *Id.* The Court may also consider “(5) the  
2 interest of the litigant, and ultimately society, in accurate judicial fact finding, (6) the  
3 seriousness of the litigation and the issues involved, (7) the presence of issues concerning  
4 alleged governmental misconduct, and (8) the federal interest in the enforcement of federal  
5 law.” *N. Pacifica, LLC v. City of Pacifica*, 274 F. Supp. 2d 1118, 1122 (N.D. Cal. 2003).  
6 The County bears the burden of establishing the deliberative process privilege applies to  
7 the 19 CIRB Reports. *Shiflett*, 2023 WL 4551077, at \*2.

8 The County has not met its burden for multiple reasons.<sup>7</sup> First, the County’s brief  
9 fails to explain how the privilege applies to the 19 CIRB Reports. Dkt. No. 119 at 6.  
10 Second, even overlooking this failure, the County’s apparent position that the deliberative  
11 process privilege applies to the entirety of every CIRB Report is not well-taken. “Only  
12 those portions of a predecisional document that reflect the give and take of the deliberative  
13 process may be withheld.” *Shiflett*, 2023 WL 4551077, at \*4. It is true that factual  
14 materials may be exempt from disclosure under certain circumstances. *Nat’l Wildlife*  
15 *Fed’n*, 861 F.2d at 1119 (“whenever the unveiling of factual materials would be tantamount  
16 to the publication of the evaluation and analysis of the multitudinous facts conducted by  
17 the agency, the deliberative process privilege applies”). However, the County’s brief does  
18 not explain how the factual materials contained in the CIRB Reports are “tantamount to  
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21 <sup>7</sup> There is authority for the proposition that “the deliberative process privilege  
22 generally does not apply in civil rights lawsuits to protect from disclosure internal affairs  
23 documents, investigations, and records of witness/police officer statements, as these  
24 routinely generated communications are not designed to contribute to the formulation of  
25 important public policy.” *Shiflett*, 2023 WL 4551077, at \*5. However, in the absence of  
26 controlling Ninth Circuit authority addressing this issue, the Court assumes the privilege  
27 applies. *See Llera v. Las Vegas Metro. Police Dep’t*, 564 F. Supp. 3d 914, 918–19 (D.  
28 Nev. 2021) (“Because the deliberative process privilege is a privilege that the government  
can utilize to protect some deliberative material and the Court has not located any  
controlling authority stating that the privilege cannot be used in civil rights cases, the Court  
does not agree that it is inapplicable here.”).

1 the publication of the evaluation and analysis of the multitudinous facts conducted by the  
2 agency.” *Id.*<sup>8</sup>

3 Third, even looking beyond the County’s failure to justify its assertion the wholesale  
4 application of the privilege to the 19 CIRB Reports, and even assuming the privilege  
5 applies to all these documents, the County does not offer any argument or analysis as to  
6 whether Plaintiffs’ “need for the materials and the need for accurate fact-finding override  
7 the government’s interest in non-disclosure.” *Warner*, 742 F.2d at 1161.

8 Fourth, although the County’s failure to meet its burden is dispositive, the Court has  
9 independently considered the *Warner* factors and concludes they support disclosure of the  
10 CIRB Reports. The CIRB Reports are relevant to Plaintiffs’ *Monell* claim, as explained  
11 further below, and there is no indication that Plaintiffs can obtain information regarding  
12 other incidents relevant to the existence (or not) of a municipal policy that Plaintiffs must  
13 establish to prevail on that claim. As a party to this action, the County “is not an uninvolved  
14 entity that is being asked to disclose a typically confidential document for little reason.”  
15 *Llera*, 564 F. Supp. 3d at 920. And although disclosure of the CIRB Reports could  
16 potentially affect the willingness of CIRB participants to speak freely, there is no evidence  
17 in the record that disclosure of CIRB Reports pursuant to the Protective Order in this case  
18 would have such a chilling effect. *See id.* (holding deliberative process privilege did not  
19 prevent disclosure of Critical Incident Review Team report in federal civil rights case and  
20 concluding that fourth *Warner* factor did not support application of privilege, and noting  
21 “it is also entirely possible that if officers knew their reports would be public, they might  
22 be more thorough, accurate, deliberative, and candid . . .”). As such, Plaintiffs’ need for  
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25 <sup>8</sup> Baranic testified that “policy changes don’t come out of CIRB,” and “[t]here’s a  
26 procedure to change department policy, which accounts for 99 percent of the changes that  
27 occur.” Baranic Trans. at 83:11-17. This arguably weighs finding the deliberative process  
28 privilege applies to the CIRB Reports, but the parties did not address this portion of  
Baranic’s testimony in their briefing, and the Court will not consider it in determining  
whether the County has met its burden to establish the privilege applies here.

1 the CIRB Reports “override[s] the [County’s] interest in non-disclosure,” *Warner*, 742  
2 F.2d at 1161, and production pursuant to the Protective Order “will sufficiently protect [the  
3 County’s] interests.” *Al Otro Lado, Inc. v. Wolf*, No. 3:17-CV-2366-BAS-KSC, 2020 WL  
4 6449152, at \*5 (S.D. Cal. Nov. 2, 2020) (overruling deliberative process privilege  
5 objection to production of documents).

6 **5. Law enforcement investigatory privilege**

7 “Although the Ninth Circuit has not expressly recognized the law enforcement  
8 privilege, several courts within this Circuit have acknowledged and applied it.” *Lien v.*  
9 *City of San Diego*, No. 21-cv-224-MMA-WVG, 2022 WL 134896, at \*2 (S.D. Cal. Jan.  
10 14, 2022). The privilege “is based on the harm to law enforcement efforts that might arise  
11 from public disclosure of investigatory files.” *Id.*

12 A party asserting the privilege must meet the following requirements:

13 (1) there must be a formal claim of privilege by the head of the department  
14 having control over the requested information, (2) assertion of the privilege  
15 must be based on actual personal consideration by that official, and (3) the  
16 information for which the privilege is claimed must be specified, with an  
explanation why it properly falls within the scope of the privilege.

17 *Roman v. Wolf*, No. EDCV20-768-TJH(PVC), 2020 WL 6588399, at \*2 (C.D. Cal. July  
18 16, 2020). Thus, in *Lien*, the District Court found the privilege applied to internal  
19 documents maintained by the San Diego Police Department relating to “an ongoing,  
20 pending criminal prosecution” and “ongoing active criminal investigations” and affirmed  
21 the production of those documents to the civil action plaintiffs with redactions to  
22 information identifying those individuals. *Lien*, 2022 WL 134896, at \*\*3-4.

23 Assuming the County is relying on Baranic’s declaration to make the required  
24 showing, Baranic does not explain how disclosure of the CIRB Reports subject to the  
25 existing Protective Order could cause “harm to law enforcement efforts” such as pending  
26 investigations or prosecutions. *Lien*, 2022 WL 134896, at \*2. Nor does Baranic explain  
27 how redactions to specific portions of the CIRB Reports would be insufficient to protect  
28 the integrity of any unspecified investigations or prosecutions. *See id.* at \*\*4-5 (upholding

1 redactions to names of individuals subject to ongoing investigation and prosecution). For  
2 all these reasons, the County has not met its burden to establish the law enforcement  
3 investigatory privilege applies to the CIRB Reports.

4 **6. Privacy considerations**

5 The CIRB Reports contain information regarding Sheriff’s Department employees  
6 as well as confidential medical information regarding the individuals who died in Sheriff’s  
7 Department custody. The County asserts privacy rights on behalf of both groups.

8 “Federal courts recognize a constitutionally-based right of privacy that can be raised  
9 in response to discovery requests.” *Carr v. Cnty. of San Diego*, No. 19-cv-1139-JLS-MDD,  
10 2020 WL 7074881, at \*4 (S.D. Cal. Dec. 3, 2020). “Resolution of a privacy objection . . .  
11 requires a balancing of the need for the information sought against the privacy right  
12 asserted.” *Soto*, 162 F.R.D. at 616. “However, these privacy interests must be balanced  
13 against the great weight afforded to federal law in civil rights cases against police  
14 departments.” *Id.* “[P]rivacy objections can be appropriately addressed by: (1) redacting  
15 any personal identifying information from the documents produced; and (2) producing  
16 documents under a protective order to minimize any invasion into the individual’s privacy  
17 rights.” *Stuart v. Cnty. of Riverside*, No. 522CV701SPGMAR, 2023 WL 4826231, at \*2  
18 (C.D. Cal. June 15, 2023).

19 As explained below, the CIRB Reports contain information that is relevant to  
20 Plaintiffs’ municipal liability claim, and there is no showing this information is available  
21 to Plaintiffs through other means. Production of the CIRB Reports subject to the existing  
22 Protective Order will adequately protect the privacy interests of inmates and Sheriff’s  
23 Department employees. To the extent the CIRB Reports contain personal identifiable  
24 information regarding Sheriff’s Department employees (other than their names and titles)  
25 such as marital status, spouse names, children’s names, driver’s license numbers, Social  
26 Security numbers and home addresses, the County may redact that information. *Stuart*,  
27 2023 WL 4826231, at \*\*3-4.

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1 As to the privacy rights of individuals who died in Sheriff’s Department custody, the  
2 County correctly points out the Health Insurance Portability and Accountability Act  
3 (“HIPAA”) protects personal health information for 50 years after death. 45 C.F.R.  
4 § 160.103. HIPAA also provides that protected health information may be disclosed “[i]n  
5 response to an order of a court or administrative tribunal, provided that the covered entity  
6 discloses only the protected health information expressly authorized by such order.” 45  
7 C.F.R. § 164.512(e)(1)(i). The existing Protective Order adequately protects these privacy  
8 concerns and any similar concerns falling under the California Confidentiality of Medical  
9 Information Act. *See A.H. v. Cnty. of Los Angeles*, No. CV 22-03671-SB (ASX), 2023  
10 WL 3035349, at \*4 (C.D. Cal. Jan. 19, 2023) (“Given the protective order in place, Court  
11 is likewise unpersuaded by Plaintiffs’ assertion that HIPAA bars disclosure of these  
12 records.”); *Marsh v. Cnty. of San Diego*, No. CIV. 05CV1568 JLS AJB, 2007 WL  
13 3023478, at \*3 (S.D. Cal. Oct. 15, 2007).

#### 14 **7. Relevance and proportionality**

15 The Federal Rules of Civil Procedure permit a broad scope of discovery: “Parties  
16 may obtain discovery regarding any nonprivileged matter that is relevant to any party’s  
17 claim or defense and proportional to the needs of the case . . . .” Fed. R. Civ. P. 26(b)(1).  
18 “Information within this scope of discovery need not be admissible in evidence to be  
19 discoverable.” *Id.* “Evidence is relevant if: (a) it has any tendency to make a fact more or  
20 less probable than it would be without the evidence; and (b) the fact is of consequence in  
21 determining the action.” Fed. R. Evid. 401. “The party seeking to compel discovery has  
22 the burden of establishing that its request satisfies the relevance requirement of Rule 26.”  
23 *FlowRider Surf, Ltd. v. Pacific Surf Designs, Inc.*, No. 15-cv-1879-BEN-BLM, 2016 WL  
24 6522807, at \*2 (S.D. Cal. Nov. 3, 2016).

25 Plaintiffs assert the CIRB Reports are relevant to their claim against the County  
26 under *Monell v. Dep’t of Soc. Serv. of the City of N.Y.*, 436 U.S. 658 (1978). To  
27 successfully establish *Monell* liability, a plaintiff must show: “(1) [the plaintiff] was  
28 deprived of a constitutional right; (2) the municipality had a policy; (3) the policy amounted

1 to deliberate indifference to [the plaintiff’s] constitutional right; and (4) the policy was the  
2 moving force behind the constitutional violation.” *Lockett v. Cnty. of Los Angeles*, 977  
3 F.3d 737, 741 (9th Cir. 2020). A municipal policy may be established by showing: (1) “a  
4 city employee committed the alleged constitutional violation pursuant to a formal  
5 governmental policy or a longstanding practice or custom which constitutes the standard  
6 operating procedure of the local governmental entity”; (2) “the individual who committed  
7 the constitutional tort was an official with final policy-making authority and that the  
8 challenged action itself thus constituted an act of official government policy”; or (3) “an  
9 official with final policy-making authority ratified a subordinate’s unconstitutional  
10 decision or action and the basis for it.” *Gillette v. Delmore*, 979 F.2d 1342, 1346–47 (9th  
11 Cir. 1992) (internal quotations omitted).

12 Plaintiffs allege the County had an inadequate suicide prevention and training  
13 program (Dkt. No. 28 at ¶¶ 77-103) and was “deliberately indifferent by failing to  
14 adequately train its medical staff how to identify inmates that are a high-risk for suicide  
15 and how to properly treat and house those inmates on a continued basis.” *Id.* at ¶ 104. On  
16 the present record, Plaintiffs have adequately shown that information regarding other in-  
17 custody suicides contained in the CIRB Reports is “relevant to a claim or defense” for  
18 purposes of the Fed. R. Civ. P. 26(b) analysis. *See* Fed. R. Evid. 401 (evidence is relevant  
19 if “it has any tendency to make a fact more or less probable than it would be without the  
20 evidence” and “the fact is of consequence in determining the action”). Having reviewed  
21 the 19 CIRB Reports *in camera*, the Court finds the Reports contain information pertaining  
22 to other inmate suicides that is relevant and proportional to the needs of the case under  
23 Rule 26(b).

#### 24 **B. Internal Affairs Reports**

25 Plaintiffs move to compel production of three Sheriff’s Department’s Internal  
26 Affairs reports pertaining to other inmates who committed suicide. The County contends  
27 the reports are subject to the official information privilege and submits the declaration of  
28 Lieutenant Ruben Medina in support of its privilege assertion. Dkt. No. 119-2.



1 As noted above, the party asserting the official information privilege must properly  
2 invoke the privilege by making a “substantial threshold showing.” *Kelly*, 114 F.R.D. at  
3 669. Medina’s declaration fulfills the first two requirements in that he avers Internal  
4 Affairs reports are confidential and that he has personally reviewed the Internal Affairs  
5 reports at issue. Dkt. No. 119-2 at 3, ¶¶ 3-4.

6 The remainder of Medina’s declaration, however, proffers only generalized concerns  
7 regarding disclosure of information in Internal Affairs reports. He states, “[d]isclosure of  
8 certain information about law enforcement personnel can jeopardize their safety and the  
9 safety of their families, and subject them to harassment or intimidation.” *Id.* at ¶ 5. Medina  
10 further declares “constructive or negative criticism is sometimes necessary in evaluating  
11 the performance of one’s subordinates,” and “[c]onsistency and confidence in the Internal  
12 Affairs process enhances critical and candid assessments and is vital to deputies, their  
13 superiors, and the public.” *Id.* at 4, ¶ 6. Further, he asserts general concerns regarding  
14 dissemination of Internal Affairs reports, such as “discourag[ing] individuals from  
15 providing complete and candid information in the investigation process” and “disrupt[ing]  
16 the critical, day to day operations of the Department.” *Id.* at ¶ 7.

17 These generalized concerns, untethered to the facts of this case, do not make the  
18 requisite substantial threshold showing to satisfy the third, fourth or fifth factors. As to the  
19 third factor – identification of the specific privacy interests that would be threatened with  
20 disclosure in this case – Medina provides broad statements about the risks of disclosure  
21 generally. But to satisfy this factor, the County “must specifically describe how disclosure  
22 of the requested documents in that particular case . . . would be harmful.” *Soto*, 162 F.R.D.  
23 at 614. Medina does not address the fourth factor in that he does not attempt to explain  
24 how disclosure pursuant to the Protective Order would create a substantial risk of harm to  
25 significant governmental or privacy interests. *See Simon v. City of Los Angeles*, No.  
26 222CV01775SSSGJSX, 2023 WL 3402628, at \*7 (C.D. Cal. Apr. 21, 2023) (granting  
27 motion to compel production of LAPD Internal Affairs records where declaration offered  
28 in support of official information privilege invocation “only generally asserts speculative

1 harm that may result if officers’ private information is disclosed and has failed to explain  
2 why disclosure of responsive documents in this case would be detrimental if done pursuant  
3 to a carefully crafted protective order, such as the one already issued in this action”).  
4 Finally, Medina does not project the degree of harm that would be caused by disclosure to  
5 Plaintiffs of the three Internal Affairs reports relating to other in-custody suicides.

6 Even if Medina’s declaration were sufficient to make the requisite substantial  
7 threshold showing to assert the privilege, the County does not address the Court’s  
8 obligation to balance the parties’ respective interests in determining whether the privilege  
9 should bar disclosure under the facts of this case. *Shiflett*, 2023 WL 4551077, at \*\*2-3.  
10 The Court has reviewed the Internal Affairs reports and concludes the same factors  
11 applicable to the CIRB Reports weigh in favor of disclosure under the Protective Order.  
12 *Kelly*, 114 F.R.D. at 663.

13 Investigations into in-custody suicides are relevant to Plaintiffs’ *Monell* claim,  
14 *Simon*, 2023 WL 3402628, at \*7, and the County’s contention that the Internal Affairs  
15 reports will be inadmissible at trial is unpersuasive because “[i]nformation within th[e]  
16 scope of discovery need not be admissible to be discoverable.” Fed. R. Civ. P. 26(b)(1).  
17 The Internal Affairs reports are relevant to Plaintiffs’ claims, and their production is  
18 proportional to the needs of the case. Fed. R. Civ. P. 26(b)(1).

19 **C. CLERB Reports**

20 The County asserts it will produce all responsive CLERB Reports in its possession,  
21 custody or control. Dkt. No 119-3. Based on this representation, the Court agrees with the  
22 County that this issue is moot.

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**IV.**

**CONCLUSION**

For all the foregoing reasons, Plaintiffs' motion to compel is **GRANTED IN PART** and **DENIED IN PART AS MOOT** as follows:

1. By not later than **October 4, 2023**, the County must produce to Plaintiffs the 19 CIRB Reports identified in its privilege log. The County must produce the CIRB Reports without redactions except as described below.

2. By not later than **October 4, 2023**, the County must produce to Plaintiffs the three Internal Affairs reports identified in its privilege log.

3. As to both the CIRB Reports and the Internal Affairs reports, the County may redact personal identifiable information regarding Sheriff's Department employees (other than their names and titles).

**IT IS SO ORDERED.**

Dated: September 20, 2023



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Hon. David D. Leshner  
United States Magistrate Judge