

1 THE HONORABLE JOHN C. COUGHENOUR

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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 JAHMEZ A. AMILI II and CHARLES A.
10 CHAPPELLE II,

CASE NO. C13-1299-JCC

11 Plaintiffs,

ORDER

12 v.

13 CITY OF TUKWILA, et al.,

14 Defendants.

15 This matter comes before the Court on the parties' joint submission for a ruling regarding
16 testimony (Dkt. No. 29). Having thoroughly considered the parties' briefing and the relevant
17 record, the Court finds oral argument unnecessary and hereby GRANTS Plaintiffs' motion to
18 compel testimony (Dkt. No. 29) for the reasons explained herein.

19 **I. BACKGROUND**

20 This case arises from Plaintiffs' arrest on May 12, 2012. The prosecutor for the City of
21 Tukwila ultimately dismissed all charges against them. (Dkt. No. 29 at 1.) Tukwila police
22 Commander Rick Mitchell requested an explanation for why the prosecutor's office dismissed
23 the charges. (Dkt. No. 29 at 2, 4.) After that conversation, the police department issued a press
24 release stating that "all allegations of police misconduct were determined to be unfounded."
25 (Dkt. No. 30, Ex. 5.) Plaintiffs contend that the substance of the conversation is relevant to
26 Plaintiffs' claims that the City ratified the officers' actions. (Dkt. No. 1 ¶ 5.7.) They plan to

1 depose the prosecutor and the police commander and seek to prevent Defendants from
2 interposing privilege objections during those depositions. (Dkt. No. 29 at 4.) At issue here is
3 whether the work-product doctrine or attorney-client privilege protects the statements made by
4 the prosecutor to the commander explaining the reason for dismissing the charges. (Dkt. No. 29
5 at 2–3.)

6 **II. DISCUSSION**

7 The work-product doctrine protects “certain materials prepared by an attorney acting for
8 his client in anticipation of litigation.” *United States v. Nobles*, 422 U.S. 225, 237–38 (1975)
9 (internal quotation marks omitted) (citing *Hickman v. Taylor*, 329 U.S. 495, 508 (1947)).

10 Plaintiffs here seek the prosecutor’s rationale for dismissing a case, which is afforded greater
11 protection because it constitutes opinion work product. *See Upjohn Co. v. United States*, 449
12 U.S. 383, 401–02 (1983) (work product revealing attorney’s mental processes subject to greater
13 protection). However, even the “nearly absolute protection” afforded opinion work product may
14 be waived. *See Bagley v. TRW, Inc.*, 212 F.R.D. 554, 559 (C.D. Cal. 2003); *Burns v. Family*
15 *Practice*, 162 F.R.D. 624, 627 (S.D. Cal. 1995) (by virtue of finding waiver, court did not
16 address distinction between opinion and non-opinion work product). The attorney-client
17 privilege is a distinct privilege that protects “communications with a person’s legal counsel . . . if
18 they were made ‘in order to obtain legal advice.’” *United States v. Alexander*, 287 F.3d 811, 816
19 (9th Cir. 2002) (citing *United States v. Bauer*, 132 F.3d 504, 507 (9th Cir. 1997)). The work-
20 product privilege is broader than the attorney-client privilege, *Nobles*, 422 U.S. at 238 n.11,
21 although both serve to encourage “frank attorney-client communications and vigorous
22 investigation,” *see Bittaker v. Woodford*, 331 F.3d 715, 722 n.6 (9th Cir. 2003). Either privilege
23 may be waived if “a party discloses privileged information to a third party who is not bound by
24 the privilege. . . .” *Id.* at 719.

25 Regardless of whether or how the work-product doctrine would otherwise apply here, *see*
26 *Abdell v. City of New York*, No. 05-8453-KMK, 2006 WL 2664313 at *3, *7 (S.D.N.Y. 2006)

1 (citing many cases rejecting protection for a district attorney’s work product in subsequent civil
2 litigation, but recognizing that mental impressions “may be shielded from discovery even in
3 subsequent, unrelated litigation”), the prosecutor’s conversation with the police commander
4 constituted a waiver of any privilege with regard to the specific information communicated.
5 There was no attorney-client relationship between these two individuals because a district
6 attorney is a public officer who represents the people—not “the police officers.” *See Tennison v.*
7 *City & Cnty. Of San Francisco*, 226 F.R.D. 615, 620 (N.D. Cal. 2005) (distinguishing the roles
8 of district attorney and defense attorney for purposes of applying privilege); *Klein v. Jefferson*
9 *Parish Sch. Bd.*, No. 00-3401, 2003 WL 1873909 (E.D. La. 2003) (the “client” of the Jefferson
10 Parish District Attorney was the Parish of Jefferson Louisiana, which was not a party to the civil
11 case); *Doubleday v. Ruh*, 149 F.R.D. 601, 606 (E.D. Cal. 1993) (relying on California court’s
12 conclusion that district attorney is a public officer, not “an attorney who represents a ‘client’ as
13 such”).

14 Moreover, there is no suggestion that the conversation was made to develop the criminal
15 case. Indeed, contrary to Defendants’ suggestion, the conversation was outside the scope of
16 “official business related to prosecutions” because the prosecution, such as it was, had
17 concluded. (Dkt. No. 29 at 10.) As Defendants themselves highlight, the work-product doctrine
18 is intended to provide an attorney “a privileged area within which he can analyze and prepare his
19 case.” (Dkt. No. 29 at 10 (citing *Nobles*, 422 U.S. at 238).) This rationale does not apply when an
20 attorney chooses to discuss his or her reasoning in a closed case with a non-client.

21 In arguing otherwise, Defendants rely on the unsupported assertion that the prosecutor
22 serves the chief of police in the same way that a corporation’s attorney serves corporate officials.
23 (Dkt. No. 29 at 10.) As Defendants argue: “[T]he prosecutor and police investigator were
24 members of the City’s ‘legal team’ invested with responsibility to carry out their respective
25 duties, which in this case clearly involved ‘controversy,’ and possible future litigation.” (Dkt.
26 No. 29 at 11.) They cite no case law for this proposition, nor is this argument consistent with the

1 weight of case law discussed above concluding that no attorney-client relationship exists
2 between the prosecutor in a criminal case and a police officer in a related civil suit.

3 **III. CONCLUSION**

4 For the foregoing reasons, Plaintiffs' request to compel testimony is GRANTED. (Dkt.
5 No. 29.)

6 DATED this 10th day of July 2014.

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John C. Coughenour
UNITED STATES DISTRICT JUDGE