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Maricopa County Sheriff's Office**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

Manuel de Jesus Ortega Melendres, et al.	)	NO. CV07-02513-PHX-GMS
	)	
Plaintiffs,	)	<b>DEFENDANT JOSEPH</b>
	)	<b>ARPAIO'S RESPONSE TO</b>
vs.	)	<b>PLAINTIFFS' MOTION FOR</b>
	)	<b>DISCOVERY OF ATTORNEY-</b>
Joseph M. Arpaio, et al.,	)	<b>CLIENT AND WORK PRODUCT</b>
	)	<b>INFORMATION BASED ON</b>
Defendants.	)	<b>WAIVER</b>

Pursuant to Local Rule 7.2(c), Defendant Joseph Arpaio ("Defendant Arpaio") responds to Plaintiffs' Motion for Discovery of Attorney-Client and Work Product Information based on Waiver. Defendant Arpaio supports his Response with the following Memorandum of Points and Authorities.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. LAW AND ARGUMENT**

Plaintiffs seek privileged communications protected by the attorney-client privilege. The attorney-client privilege "is the oldest of the privileges for confidential communications known to the common-law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). "The purpose of the privilege is to encourage clients to make

1 disclosure to their attorneys.” *Fisher v. United States*, 876 F.2d 1411, 1415 (9<sup>th</sup> Cir.  
2 1989). The systemic benefits of the privilege are commonly understood to outweigh  
3 the harm caused by excluding critical evidence. *Id.* Defendant Arpaio did not waive  
4 his attorney-client privilege and Plaintiffs should not be allowed access to privileged  
5 communications.

6 **A. Defendant Did Not Invoke the Advice of Counsel Defense.**

7 Sheriff Arpaio’s testimony referenced general discussions with his attorney  
8 and did not place the advice of counsel at issue. A party does not waive the  
9 attorney-client privilege by publicly noting: (a) the existence of a communication  
10 between an attorney and his client; (b) the parties to the communication; and (c) its  
11 general subject matter; that same information is routinely included in privilege logs  
12 without causing waiver. *In Re Grand Jury*, 974 F.2d 1068, 1071 (9<sup>th</sup> Cir. 1992).  
13 Plaintiffs argue that Defendant Arpaio invoked the advice of counsel defense during  
14 his testimony; however, Plaintiffs point only to general comments. A party only  
15 waives the attorney-client privilege by injecting the advice of counsel into a case and  
16 placing its attorney-client communications at issue. *Rock River Commc’ns, Inc. v.*  
17 *Universal Music Grp., Inc.*, 745 F.3d 343, 353 (9<sup>th</sup> Cir. 2013). In *Sharper Image*, the  
18 court found the advice of counsel was put at issue when the defendant testified to a  
19 letter revealing his attorney’s opinions. *Sharper Image Corp. v. Honeywell Int’l, Inc.*,  
20 222 F.R.D. 621, 627 (N.D. Cal. 2004). Here, there has been no such use,  
21 Defendant Arpaio did not interject the opinions of counsel in the proceeding.  
22 Plaintiffs point to multiple areas of testimony where Defendant Arpaio testified to  
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1 communications with counsel. (Doc. 1045, pp. 2-3). Defendant Arapio testified that  
2 “counsel looked into it” and counsel “reviewed the order”. (Tr. 483:22-484:12).  
3 Defendant Arpaio also testified he “may have talked to counsel”. (Tr. 489:19-22).  
4 Even where Defendant Arpaio testified “[p]ursuant to advice of my attorney.” (Tr.  
5 489:19-22), Defendant Arpaio did not invoke the defense. Defendant Arpaio did not  
6 testify to the substantive content of any of the communications or opinions with  
7 counsel but only to the existence and general subject matter of the communications.  
8

9 Here, Defendant Arpaio testified to the existence of communications with his  
10 attorney. These statements do not reveal privileged communications but only its  
11 general subject matter. Moreover, what Plaintiffs seek to elicit are exactly what the  
12 attorney-client privilege protects. The content of the communications between an  
13 attorney and client is the oldest of the privileges and should be strictly construed.  
14 *Weil v. Inv./Indicators, Research & Mgmt. Inc.*, 647 F.2d 18, 24-25 (9<sup>th</sup> Cir. 1981).  
15 The Ninth Circuit determined that the attorney-client privilege covers “the motive of  
16 the client seeking representation, litigation strategy, or the nature of the services  
17 performed.” *Clarke v. American Commerce Nat’l Bank*, 974 F.2d 127, 129 (9th Cir.  
18 1992). It also includes “self-initiated attorney communications intended to keep a  
19 client posted on legal developments and implications. See *Jack Winter, Inc. v.*  
20 *Koratron Co.*, 54 F.R.D. 44, 46 (N.D. Cal. 1971). Plaintiffs want to know what  
21 attorney Tim Casey told his clients after the Court issued its December 23, 2011  
22 Order and following the events of May 14, 2014. These communications were  
23 intended to advise Defendant Arpaio of the legal developments and implications of  
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1 the orders and should be protected. Defendant Arpaio did not testify to the content  
2 of any of the communications with counsel but only to the existence and general  
3 subject matter of communications. This is not sufficient to waive privilege and the  
4 Court should deny Plaintiffs' Motion.

5 Plaintiffs argue that Defendant Arpaio's employees Lieutenant Sousa,  
6 Sergeant Palmer, and Chief Sheridan waived attorney client privilege during their  
7 testimony at the Evidentiary Hearing. Only Defendant Arpaio has the authority to  
8 waive privileged communications.

9  
10 The attorney-client privilege can only be waived by Defendant Arpaio. A  
11 public or private entity holds the attorney-client privilege to privileged  
12 communications between its employees and its counsel. *Ross v. City of Memphis*,  
13 423 F.3d 596, 605 (6<sup>th</sup> Cir. 2005) ("[I]t is the City that holds the privilege to these  
14 communications."); *cf. In re Grand Jury Subpoena*, 274 F.3d 563, 571 (1st Cir.  
15 2001) ("The default assumption is that the attorney only represents the corporate  
16 entity, not the individuals within the corporate sphere" because "an employee has a  
17 duty to assist his employer's counsel in the investigation and defense of matters  
18 pertaining to the employer's business." (citation omitted)). "The privilege for  
19 governmental entities may be asserted or waived by the responsible public official or  
20 body. The identity of that responsible person or body is a question of local  
21 governmental law." Under Arizona law, the sheriff is an elected county officer, with  
22 the statutory duty to provide law enforcement services, A.R.S. § 11-441(A), and the  
23 power to organize an office by "appoint[ing] deputies . . . and assistants necessary  
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1 to conduct [his] affairs,” A.R.S. § 11-409; *Hounshell v. White*, 220 Ariz. 1, 4, ¶¶ 12-  
2 13, 202 P.3d 466, 469 (Ariz. Ct. App. 2008). Thus, under Arizona law the Sheriff is  
3 the public official responsible for managing the Sheriff’s office and exercising the  
4 office’s attorney-client privilege. Defendant Arpaio alone holds the attorney-client  
5 privilege for communications between Mr. Casey and Defendant Arpaio.

6 Here, Plaintiffs argue testimony regarding Lieutenant Sousa’s interpretation of  
7 the preliminary injunction and that counsel did not tell him to change his  
8 interpretation put the content of the attorney-client communications at issue.

9 Therefore privilege is waived. (Doc. 1045, p. 5). First, Lieutenant Sousa did not  
10 reveal any of the content of the attorney communication. Lieutenant Sousa only  
11 referred to the existence of a communication and the general subject matter.  
12

13 Lieutenant Sousa testified that he talked to counsel regarding his opinion on the  
14 interpretation of the injunction but no one told him to change anything. (Doc. 1045,  
15 pp. 5-6). Moreover, Lieutenant Sousa cannot waive the privilege. Although  
16 deputies may exercise managerial responsibilities in the Sheriff’s Office, they are not  
17 constitutionally elected or statutorily empowered to manage the Office or waive its  
18 privilege. The Sheriff is “the head of MCSO, its chief policy maker, and [the public  
19 officer who] has final authority over *all* of the agency’s decisions.” Doc. 880 at 12  
20 (internal quotation marks omitted) (emphasis added). Chief Sheridan and other  
21 deputies cannot assert and affirmatively demonstrate a personal privilege over some  
22 of the confidential communications between Mr. Casey and the Sheriff’s Office. As  
23 a result, the power to waive the privilege held by the Sheriff’s Office necessarily  
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1 rests with the Sheriff alone, and any attempts by an employee or former employee  
2 to waive the privilege do not provide Plaintiffs an avenue for discovery of these  
3 confidential communications through document production or testimony by Mr.  
4 Casey or any other attorney.

5 **B. Defendants Did Not Voluntarily Disclose Privileged Documents.**

6 Plaintiffs argue that Defendant Arpaio voluntarily disclosed privileged emails  
7 regarding the preliminary injunction, especially emails that included Deputy Chief  
8 John MacIntyre and a work product email between attorneys. Defendant Arpaio did  
9 not voluntarily disclose privileged communications but rather was court ordered to  
10 produce the documents over objection. (Doc. 986). A party does not waive the  
11 attorney-client privilege for documents which he is *compelled* to produce.  
12 *Transamerica Computer v. International Business Machines*, 573 F.2d 646, 651 (9th  
13 Cir.1978). This Court previously found that Deputy Chief MacIntyre was a third  
14 party, and Defendant Arpaio failed to meet his burden that the attorney-client  
15 privilege attached. Defendant Arpaio were then ordered to disclose all documents,  
16 including privileged communications from counsel if Chief MacIntyre was copied on  
17 the e-mail. This Court ordered disclosure does not constitute a voluntary waiver of  
18 attorney-client privileged communications. Plaintiffs are not entitled to all  
19 communications on the subject of the preliminary injunction and events of May 14,  
20 2014.  
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23 Plaintiffs argue that during the deposition of Lieutenant Sousa, he reviewed  
24 privileged documents to refresh his recollection. Plaintiffs argue that Federal Rule of

1 Evidence 612 constitutes a subject matter waiver of the privileged documents and  
2 requires disclosure. As discussed *supra*, only Defendant Arpaio has the authority to  
3 waive the attorney-client privilege. Any actions by an employee to waive privilege  
4 do not provide Plaintiffs access to confidential communications.

5 **C. The Scope of Discovery Should Be Limited.**

6 If this Court finds, Defendant Arpaio waived his attorney-client privilege, the  
7 scope of the waiver should be limited. The scope of the waiver is governed by a  
8 rule of fairness. *SNK Corp. of Am. v. Atlus Dream Entm't Co.*, 188 F.R.D. 566, 571-  
9 72 (N.D. Cal. 1999). A court ultimately must be guided by the subject matter of the  
10 documents disclosed, balanced by the need to protect the frankness of the client  
11 disclosure and to preclude unfair partial disclosures. *Starsight Telecast, Inc. v.*  
12 *Gemstar Development Corp.*, 158 F.R.D. 650 (N.D.Cal.1994). Here, Plaintiffs seek  
13 disclosure of all communications and work product documents related to the  
14 preliminary injunction from December 23, 2011 and events of May 14, 2014.  
15 Specifically, Plaintiffs argue they should be able to obtain all documents in  
16 Defendant Arpaio's possession and should be allowed to depose Mr. Casey, Mr.  
17 Tom Liddy, and Ms. Christine Stutz. Plaintiffs point to no testimony that Defendant  
18 Arpaio waived privileged communications with Mr. Liddy or Ms. Stutz. Testimony by  
19 Chief Sheridan to his conversations with Ms. Stutz during the meeting following the  
20 May 14, 2014 hearing does not constitute a waiver by Defendant Arpaio. Therefore,  
21 the scope of privileged communications should be limited to only the  
22 communications testified to by Defendant Arpaio, mainly as to communications by  
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Mr. Casey relating to the interpretation of the injunction. Providing no limit to the information sought unfairly prejudices Defendant Arpaio and ignores the importance of protecting attorney-client communications.

**II. CONCLUSION**

Defendant Arpaio did not waive attorney-client privilege. Accordingly, the Court should deny Plaintiffs' Motion for Discovery of attorney-client information, and the depositions of Mr. Casey, Mr. Liddy, and Ms. Stutz.

**DATED** this 7th day of May, 2015

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