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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Russell B. Toomey,

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Plaintiff,

CV 19-0035-TUC-RM (LAB)

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v.

**ORDER**

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State of Arizona; Arizona Board of Regents,  
d/b/a University of Arizona, a governmental  
body of the State of Arizona; et al.,

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Defendants.

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Pending before the court is the plaintiff’s motion, filed on May 20, 2021, to compel production of documents. (Doc. 195) The defendants State of Arizona, Andy Tobin, and Paul Shannon (“the State Defendants”) filed a response on June 4, 2021. (Doc. 202) The plaintiff, Russell B. Toomey, filed a reply on June 10, 2021. (Doc. 205)

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Toomey served on the State Defendants his First Request for Production on December 8, 2020. (Doc. 195) “Request Nos. 1, 3, and 9 specifically sought documents and information concerning the [State’s health insurance plan] Exclusion [for gender reassignment surgery] and the decision-making behind it.” (Doc. 195, p. 4) The State Defendants withheld 85 documents on the basis of attorney-client privilege. *Id.* In the pending motion, Toomey seeks an order from this court compelling production of those documents.

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The motion will be granted. The State Defendants maintain that the Exclusion is not the product of intentional discrimination. It exists, they say, because they were advised by counsel that it is legal and nothing in the law requires the State’s health insurance plan to cover gender reassignment surgery. By allegedly relying on this legal advice as evidence that they harbored

1 no discriminatory intent, the State Defendants have waived by implication the attorney-client  
2 privilege as to that advice. The court does not reach Toomey’s alternate arguments.

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4 Discussion

5 The plaintiff in this action, Russell B. Toomey, is an associate professor employed at the  
6 University of Arizona. (Doc. 86, p. 5) (Amended Complaint) He receives health insurance  
7 from a self-funded health plan (“the Plan”) provided by the State of Arizona. (Doc. 86, pp. 3,  
8 8) The Plan generally provides coverage for medically necessary care. (Doc. 86, p. 8) There  
9 are coverage exclusions, however, one of which is for “gender reassignment surgery” (“the  
10 Exclusion”). (Doc. 86, p. 9)

11 Toomey is a transgendered man. (Doc. 86, p. 9) “[H]e has a male gender identity, but  
12 the sex assigned to him at birth was female.” (Doc. 86, p. 9) Toomey has been living as a male  
13 since 2003. (Doc. 86, p. 9) His treating physicians have recommended that he receive a  
14 hysterectomy as a medically necessary treatment for his gender dysphoria. (Doc. 86, p. 9)  
15 Toomey sought medical preauthorization for a total hysterectomy, but he was denied under the  
16 Plan’s exclusion for gender reassignment surgery. (Doc. 86, p. 10)

17 On January 23, 2019, Toomey brought the pending class action in which he argues the  
18 Plan’s Exclusion is sex discrimination under Title VII of the Civil Rights Act of 1964 and a  
19 violation of the Equal Protection Clause of the Fourteenth Amendment. (Doc. 1); (Doc. 86)

20 This action is currently in the discovery stage. On December 8, 2020, Toomey served  
21 his First Request for Production on the State Defendants seeking documents calculated to reveal  
22 the reason why the Plan contains an exclusion for gender reassignment surgery. (Doc. 195, p.  
23 4) The State Defendants produced a privilege log identifying 85 documents withheld “on the  
24 basis of attorney-client privilege.” (Doc. 195, p. 4)

25 In the pending motion, Toomey moves to compel the production of these documents  
26 pursuant to Fed.R.Civ.P.37(a)(3)(B). (Doc. 195, p. 2); *see also* LRCiv 37.1 He asserts that the  
27 State Defendants implicitly waived the attorney-client privilege “by asserting and relying on  
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1 legal advice as a defense to the charge that discriminatory intent . . . motivat[ed] their decision  
2 to maintain the Exclusion, effectively placing this legal advice at issue.” (Doc. 195, p. 3) He  
3 further argues that the State Defendants waived the privilege by sharing that legal advice with  
4 the Governor’s office and himself. (Doc. 195, pp. 3-4)

5 In general, “[p]arties may obtain discovery regarding any nonprivileged matter that is  
6 relevant to any party’s claim or defense and proportional to the needs of the case, considering  
7 the importance of the issues at stake in the action, the amount in controversy, the parties’  
8 relative access to relevant information, the parties’ resources, the importance of the discovery  
9 in resolving the issues, and whether the burden or expense of the proposed discovery outweighs  
10 its likely benefit.” Fed. R. Civ. P. 26(b)(1).

11 Pursuant to Fed. R. Civ. P. 37(a)(3)(B)(iv), “A party seeking discovery may move for  
12 an order compelling . . . production . . . if . . . a party fails to produce documents.” In this case,  
13 the State Defendants resist production of 85 documents based on the attorney-client privilege.  
14 “The party asserting an evidentiary privilege has the burden to demonstrate that the privilege  
15 applies to the information in question.” *Tornay v. United States*, 840 F.2d 1424, 1426 (9<sup>th</sup>  
16 Cir.1988) (construing the attorney-client privilege). Where, as here, federal law provides the  
17 rule of decision, the contours of an evidentiary privilege are governed by federal common law.  
18 Fed. R. Evid. 501.

19 “The attorney-client privilege protects confidential communications between attorneys  
20 and clients, which are made for the purpose of giving legal advice.” *United States v. Sanmina*  
21 *Corp.*, 968 F.3d 1107, 1116 (9<sup>th</sup> Cir. 2020). “Whether information is covered by the  
22 attorney-client privilege is determined by an eight-part test: (1) Where legal advice of any kind  
23 is sought (2) from a professional legal adviser in his capacity as such, (3) the communications  
24 relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance  
25 permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the  
26 protection be waived.” *Id.* In this case, the parties dispute only element (8) – the issue of  
27 waiver.

1 Waiver may be express or implied. An express waiver “occurs when a party discloses  
2 privileged information to a third party who is not bound by the privilege, or otherwise shows  
3 disregard for the privilege by making the information public.” *Id.* at 1117. “In contrast, waiver  
4 by implication, or implied waiver, is based on the rule that a litigant waives the attorney-client  
5 privilege by putting the lawyer’s performance at issue during the course of litigation.” *Id.*  
6 “Waivers by implication rest on the ‘fairness principle,’ which is often expressed in terms of  
7 preventing a party from using the privilege as both a shield and a sword.” *Id.* “In practical  
8 terms, this means that parties in litigation may not abuse the privilege by asserting claims the  
9 opposing party cannot adequately dispute unless it has access to the privileged materials.” *Id.*

10 In this case, the State Defendants maintain that the Exclusion is not the product of  
11 intentional discrimination. It exists in large part, they say, because the State Defendants were  
12 advised that it is legal and nothing in the law requires the Plan to cover gender reassignment  
13 surgery. By allegedly relying on this legal advice to explain their actions, the State Defendants  
14 have waived by implication their attorney-client privilege as to that advice. The State  
15 Defendants argue generally that they never raised an “advice of counsel defense.” The record,  
16 however, indicates otherwise.

17 In their answer to Toomey’s interrogatories, the State Defendants stated that that the Plan  
18 contains the Exclusion, in part, “because the State concluded, under the law, that it was not  
19 legally required to change its health plan to provide such coverage under either Title VII of the  
20 Civil Rights Act or under the Equal Protection clause of the Fourteenth Amendment to the  
21 United States Constitution.” (Doc. 195, p. 5); (Doc. 195-3, p. 53) The State Defendants  
22 explicitly asserted that, “The legal advice that the State received regarding this issue is covered  
23 by the attorney-client privilege.” (Doc. 195-3, p. 53) The State Defendants specifically  
24 identified two memoranda, one from Marie Isaacson, dated August 3, 2016, and one from  
25 outside legal counsel Fennimore Craig, P.C., dated July 20, 2016, as documents covered by  
26 attorney-client privilege that were “considered, reviewed, or relied on by Defendants relating  
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1 to the Exclusion.” (Doc. 195, pp. 5-6) In their respective depositions<sup>1</sup>, Marie Isaacson, Director  
2 of the Benefits Service Division of the Arizona Department of Administration (ADOA) from  
3 2015-2018, and Scott Bender, Plan Administration Manager of the ADOA from 2015-present,  
4 testified that “the deciding factor” or the “primary reason” for the continuing existence of the  
5 Exclusion was that the law did not require gender reassignment surgery to be covered. (Doc.  
6 195, p. 6) Isaacson stated that “We sought legal counsel and that – with the legal counsel’s  
7 recommendation and meeting with the governor’s office there was a decision made – a  
8 conclusion made to cover some services . . . . The counseling and hormone therapy were  
9 covered. And surgery was not covered.” (Doc. 195-3, p. 65, depo. p. 19, lns.8-15)

10 Toomey cannot adequately dispute this proffered reason for the actions of the State  
11 Defendants, that it was legal, without access to the legal advice that the State Defendants  
12 received. “Fairness” dictates that they disclose that legal advice to him. *See, e.g., Chevron*  
13 *Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162–63 (9<sup>th</sup> Cir. 1992) (“[T]o the extent that Pennzoil  
14 claims that its tax position is reasonable because it was based on advice of counsel, Pennzoil  
15 puts at issue the tax advice it received.”).

16 In their response, the State Defendants argue that they never asserted an “advice of  
17 counsel defense.” (Doc. 201, p. 5) They did say that the Plan contains the Exclusion “because  
18 the State concluded, under the law, that it was not legally required to change its health plan . .  
19 . .” But this was simply their understanding of “what the law was at the time of the decision to  
20 expand transgender benefits while continuing to exclude surgeries.” (Doc 201, p. 6) Their  
21 understanding, they assert, was not necessarily based on the advice of counsel. The court is not  
22 convinced.

23 If the State Defendants’ understanding of the law was based, say, on a newspaper article,  
24 then they would not have affirmatively stated that “[t]he legal advice that the State received

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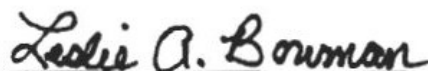
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26 <sup>1</sup> The State Defendants identified Isaacson and Bender as “persons with knowledge of  
27 the genesis, formulation, adoption, maintenance, or continuation of” the Exclusion. (Doc. 195-  
28 3, p. 32)

1 regarding this issue is covered by the attorney-client privilege.” (Doc. 195-3, p. 53) The  
2 attorney-client privilege does not cover newspaper articles. Moreover, the State Defendants  
3 specifically identified two memoranda, one from Marie Isaacson, dated August 3, 2016, and one  
4 from outside legal counsel Fennimore Craig, P.C., dated July 20, 2016, as documents covered  
5 by attorney-client privilege that were “considered, reviewed, or relied on by Defendants relating  
6 to the Exclusion.” (Doc. 195, pp. 5-6) The court concludes that the State Defendants’  
7 understanding of the law was based in large part on advice from counsel.

8 With regard to the memoranda, the State Defendants insist that they “did not disclose any  
9 legal advice contained therein, did not indicate there was a recommendation from legal counsel,  
10 and did not state that the State Defendants relied on any advice of legal counsel.” (Doc. 201,  
11 p. 10) The court is not persuaded. The State Defendants implied that they received legal advice  
12 on the propriety of the Exclusion from counsel and relied on that legal advice when they decided  
13 to establish or maintain the Exclusion even if they did not say so explicitly. “Fairness” dictates  
14 that Toomey is entitled to discover what that advice was. That advice is not shielded from  
15 discovery by the attorney-client privilege.

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17 IT IS ORDERED that the plaintiff’s motion, filed on May 20, 2021, to compel  
18 production of documents is GRANTED. (Doc. 195) The State of Arizona, Andy Tobin, and  
19 Paul Shannon (The State Defendants) shall “produce all the documents currently withheld on  
20 the basis of attorney-client privilege they received on the legality of the Exclusion . . . .” The  
21 State Defendants shall comply with this order within 14 days of service.

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23 DATED this 28<sup>th</sup> day of June, 2021.

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27 Leslie A. Bowman  
28 United States Magistrate Judge