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ENDORSED
FILED
ALAMEDA COUNTY

OCT 31 2019

CLERK OF THE SUPERIOR COURT
By ALICIA ESPINOZA Deputy

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 FOR THE COUNTY OF ALAMEDA

11 IRVIN MUCHNICK,

12 Petitioner,

13 vs.

14 UNIVERSITY OF CALIFORNIA, BOARD OF
15 REGENTS,

16 Respondent.

) Case No. RG17857115

) HAYWARD DIVISION

) PETITIONER'S MOTION AL
) PETITIONER'S MEMORANDUM OF
) POINTS AND AUTHORITIES IN SUPPORT
) OF MOTION RE PRIVILEGE

) RESERVATION NUMBER R-2126941

21 Hearing Date: December 5, 2019

22 Time: 9:00 a.m.

23 Judge: Hon. Jeffrey Brand

24 Dep't: 511

25 Petition Filed: April 18, 2017

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- Holmes v. Petrovich Develoment. Company, LLC* (2011) 191 Cal. App. 4th, 1047
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STATUTES

- California Code of Civil Procedure § 2018.
- California Evidence Code § 912
- California Evidence Code § 917
- California Evidence Code § 951
- California Evidence Code § 912
- California Evidence Code § 954

1 I. Statement of Relief Sought and Dominant Rationale for the Relief Sought

2 Petitioner Irvin Muchnick ("Petitioner") seeks an Order from this Court that Respondent The Regents
3 of the University of California ("Respondent") without justification invokes the attorney client
4 privilege to shield from public view a 17-page email message voluntarily transmitted by the then
5 University of California's Athletic Department's Deputy Director and Chief Operating Officer
6 Solomon Fulp ("Fulp") to Fulp's father, a non-lawyer unaffiliated with the University of California.
7 Respondent should be ordered to immediately produce to Petitioner an unredacted version of this 17-
8 page email message.

9 The attorney client privilege is of statutory creation in California and the necessary elements are
10 straightforward and unambiguous. (Evidence Code Section 954) As will be set out hereafter, the
11 entire subject email message cannot under the statutory definitions and criteria be a privileged
12 communication because it was sent by Respondent's executive to a non-lawyer with no purposeful
13 reason for informing this outside person of its contents.

12 II. Factual Background

13 The Court is well acquainted with the background of this case set forth in the original Petition with
14 its Exhibits. On February 7, 2014, student athlete Agu collapsed and died during a drill in the
15 offseason conditioning program of the football team. On April 14, 2016, Respondent agreed to a
16 \$4.75 million settlement in a wrongful death lawsuit brought by the Agu family in the Superior Court
17 for Alameda County, Case No. RG14735588. Petitioner has been investigating the circumstances
18 and aftermath of the student-athlete's death and the accompanying lack of accountability for a public
19 institution.

19 III. Respondent Has Gradually Disclosed Responsive Documents

20 After the filing of the Petition, the parties undertook to identify by dint of a search algorithm
21 documents in the possession of Respondent that are responsive to Petitioner's previous CPRA
22 requests. (Gordet Decl. ¶ 4) As part of this process, over a months long period, Respondent made
23 disclosures of approximately 730 pages of documents. Respondent asserted that some of the
24 documents were privileged; however, in lieu of a privilege log, Respondent unilaterally decided to
25 disclose documents in redacted format, thereby providing what Respondent considered was sufficient
26 information to satisfy Respondent's obligation under the applicable law and practice to justify its
27 privilege claims. (Gordet Decl. ¶ 5)

28 As part of this process, on September 6, 2018, Respondent produced approximately 387 pages of
documents, many of which were heavily redacted, presumably on grounds of attorney client

1 privilege. (Gordet Decl. ¶ 6)

2 IV. The Key Communication at the Heart of This Motion that Should Not Be Concealed Based on
3 Indefensible Attorney Client Privilege Claims

4 Among the documents produced by Respondent on that date are Bates numbered pages UC 0450 –
5 UC 0466 consisting of 17 heavily redacted pages of a unitary email communication from
6 Respondent's then Deputy Director of Athletics and Chief Operating Officer, Solomon Fulp, to the
7 recipient at the top of the email thread identified as "Dad". (Exhibit 1 and Muchnick Decl. ¶ 6) Based
8 on certain headings within the message, the email thread culminating in Fulp's message to "Dad"
9 dated April 23, 2014 ostensibly concerned public relations strategies in the aftermath of the Agu
10 death, although based on the heavy redactions of virtually all text in the body of the message, this
11 cannot be verified. (Muchnick Decl. ¶¶ 7-9) Some of the messages within the overall message
12 include as recipient or as sender Christopher Patti (Exhibit 1), who at the time was the General
13 Counsel of Respondent's Office of General Counsel. (Exhibit 3, Fulp 2015 Deposition, page 29)

14 At deposition, Fulp confirmed that the reference to "Dad" in Exhibit 1 was indeed his father,
15 who is a resident of Alaska, not an employee of the University of California, and not a lawyer.
16 (Exhibit 4, Fulp 2019 Deposition, pages 12-13) Fulp did not deny that he sent the message dated
17 April 23, 2014. (Exhibit 4, Fulp 2019 Deposition, page 13) The message instructs the recipient,
18 "Dad", to "See below". (Exhibit 1, page 1)

19 V. Salient Facts About Solomon Fulp

20 Submitted as Exhibit 2 is Fulp's resume publicly available on the Internet. (Gordet Decl. ¶ 8) At
21 deposition, Fulp affirmed that he wrote this resume himself. (Exhibit 4, Fulp 2019 Deposition, page
22 32 and Gordet Decl. ¶ 8) As noted from the job titles with dates appearing on Exhibit 2, at the time
23 he sent the message dated April 23, 2014 to "Dad", Fulp was "Deputy Athletic Director" and "Chief
24 Operating Officer" of the Cal Athletic Department. The extensive and high-level responsibilities and
25 accomplishments of Fulp at the University of California are set forth in detail in Exhibit 2.

26 Submitted as Exhibit 5 are discrete pages from Fulp's employment contract in effect at the time that
27 Fulp sent Exhibit 1 to Dad. Fulp confirmed at deposition that he executed this contract. (Exhibit 4,
28 2019 Fulp Deposition, page 40) Fulp's base salary at that time was \$227,879. (Exhibit 5) According
to provisions in the contract, Fulp was also in line for income supplements based on performance and
other factors that had the potential to increase his salary substantially beyond his base salary. (Exhibit
5) As further noted in Exhibit 5 at the bottom of page 2 of the contract, "The Chief Operating Officer
position.... is in the Managers and Senior Professional's group..." Fulp had so many employees

1 directly reporting to him that Fulp was unable to recall or even estimate how many persons reported
2 to him. Exhibit 4, 2019 Fulp Deposition, pages 33-34)

3 VI. Fulp's Direct Involvement in Managing the Aftermath of the Agu Death

4 It is obvious from Fulp's message to Dad (Exhibit 1), as would be expected based on his title and
5 responsibilities, Fulp was very involved in dealing with the strategies being discussed in Exhibit 1,
6 ostensibly concerning public relations strategies related to the Agu death and ostensibly having some
7 legal component, this because the General Counsel was one of the participants. Further, Fulp was
8 responsible for interfacing with Joey Mahalic, a student athlete who filed a whistleblower complaint
9 related to a coach's conduct around the time of the Agu death. (Exhibit 3, Fulp 2015 Deposition,
10 pages 27-29) Fulp admitted to having one on one conversations as part of his job responsibilities with
11 General Counsel Christopher Patti during his tenure, although he could not recall if any of these one
12 on one conversations with Patti related to the Agu incident. (Exhibit 4, Fulp 2019 Deposition, page
13 17) In any case, Fulp admitted that he met personally with Christopher Patti, Vice Chancellor John
14 Wilton, and Athletic Director Sandy Barbour concerning the Agu death and its aftermath. (Exhibit 3,
15 Fulp 2015 Deposition, pages 29 and 56)

16 Accordingly, Fulp was given significant responsibility and authority in managing the repercussions
17 for Respondent in managing the fallout from the Agu death. More generally, as expressly stated in
18 his resume (Exhibit 2), over the course of many years, Fulp acted for, and represented, the University
19 of California as a corporate officer and director in his multitudinous interactions with many different
20 entities and individuals outside and inside the University.

21 VII. Relevant Legal Concepts re Privilege

22 A. Attorney Client Privilege Is Statutory in California

23 "Our deference to the Legislature is particularly necessary when we are called upon
24 to interpret the attorney-client privilege, because the Legislature has determined that
25 evidentiary privileges shall be available only as defined by statute. (Evid.Code, § 911.)
26 Courts may not add to the statutory privileges except as required by state or federal
27 constitutional law [citations], nor may courts imply unwritten exceptions to existing
28 statutory privileges." [citation] "The area of privilege is 'one of the few instances where
the Evidence Code precludes the courts from elaborating upon the statutory scheme.'
" (citation)"

29 *Edwards Wildman Palmer v. Superior Court*, (2014) 231 Cal App 4th 1214, 1230-31

30 As stated in *McKesson HBOC v. Superior Court*, (2004), 115 Cal App 4th 1229, 1236: "In California,
31 the attorney-client privilege is a legislative creation. (See §§ 950-962.) The courts of this state have
32 no power to expand it or to recognize implied exceptions. *Wells Fargo Bank v. Superior Court* (2000)
33 22 Cal.4th 201, 206; see also § 911 [no privilege except as provided by statute].)"

1 Furthermore, it is well-established that "...evidentiary privileges should be narrowly construed
2 because they prevent the admission of relevant and otherwise admissible evidence. [citations]
3 *McKesson HBOC, Inc. v. Superior Court*, (2014) 115 Cal.App.4th 1214, 1236. Notwithstanding,
4 when the proper conditions are met for its application, the attorney client privilege serves the
5 important purpose of encouraging candid and open communication between a client and its
6 counsel. *Los Angeles County Board of Supervisors v. Superior Court*, (2016) 2 Cal. 5th 282, 292

7 B. The Text of Evidence Code Section 954 and Evidence Code Section 912

8 Accordingly, the discussion necessarily begins with the text of Evidence Code Section 954. titled
9 "Lawyer-client privilege", which states:

10 Subject to Section 912 and except as otherwise provided in this article, the client,
11 whether or not a party, has a privilege to refuse to disclose, and to prevent another
12 from disclosing, a confidential communication between client and lawyer if the
13 privilege is claimed by:

14 (a) The holder of the privilege;

15 (b) A person who is authorized to claim the privilege by the holder of the privilege;
16 or

17 (c) The person who was the lawyer at the time of the confidential communication,
18 but such person may not claim the privilege if there is no holder of the privilege in
19 existence or if he is otherwise instructed by a person authorized to permit disclosure.

20 ...The word "persons" as used in this subdivision includes partnerships, corporations,
21 limited liability companies, associations and other groups and entities.

22 In turn, Evidence Code § 912, subdivision (a) provides that a privilege "... is waived with respect to
23 a communication protected by the privilege if any holder of the privilege, without coercion, has
24 disclosed a significant part of the communication or has consented to disclosure made by
25 anyone...Consent to disclosure is manifested by any statement or other conduct of the holder of the
26 privilege indicating consent to the disclosure, including failure to claim the privilege in any
27 proceeding in which the holder has the legal standing and opportunity to claim the privilege."

28 C. Burden of Proof and Procedural Framework Under the Separate Evidence Code Sections for
Assessing Privilege Versus Assessing Waiver of the Privilege

1. Analysis of Section 954 Precedes a Section 912 Analysis

When a party asserts the attorney-client privilege it is incumbent upon that party to prove the
preliminary fact that a privilege exists. *State Farm Fire and Casualty v. Superior Court*, (1997) 54
Cal App 4th 625 As will be demonstrated, this is impossible for Respondent.

Stated differently, "The party claiming privilege has the burden of establishing the preliminary fact
that the communications were made during the course of an attorney-client relationship. (citations)"

Seahaus LaJolla Owners Association v. Superior Court. (2014) 224 Cal. App. 4th 754, 766

1 2. No Need to Reach the Section 912 Waiver Factors Because the Communication Did
2 Not Meet Section 954 Requirements

3 As explained in *Roman Catholic Archbishop of Los Angeles v. Superior Court*, (2005) 131 Cal. App.
4 4th 117, 442:

5 Thus, in this context, the privilege-claimant "has the initial burden of proving the
6 preliminary facts to show the privilege applies." (citation], italics added.) "Once the
7 claimant establishes the preliminary facts . . . , the burden of proof shifts to the
8 opponent of the privilege. To obtain disclosure, the opponent must rebut the statutory
 presumption of confidentiality set forth in [Evidence Code] section 917[, subdivision
 (a).] . . . Alternatively, the opponent of the privilege may show that the privilege has
 been waived under [Evidence Code] section 912. . ." (citation, italics added.)"

9 In other words, the trial court must first make the determination whether the communication meets
10 the criteria of Evidence Code Section 954 and Code of Civil Procedure Section 2018. *OXY*
11 *Resources California LLC v. Superior Court* (2004) 115 Cal.App.4th 874, 887–888

12 Where, as in this instant case, it is clear that the subject communication was non-confidential
13 because it was sent by a high ranking executive from within the University of California inner
14 circle of executive administrators to someone completely foreign to the circle and who was not an
15 attorney, there is no need to undertake an analysis under Evidence Code Section 912 concerning
16 "waiver". The communication is *ipso facto* not privileged.

17 However, if a privilege had attached to the communication, only then "The next step in the analysis
18 is to determine whether disclosing the information to a party outside the attorney-client relationship
19 waived any applicable privilege. *Id.*

19 3. Fulp's Message to Dad Fails to Meet the Requirements of Section 954

20 This procedural and substantive approach was expressly endorsed by *Seahaus LaJolla Owners*
21 *Association v. Superior Court*. (2014) 224 Cal. App 4th 754. Because it is self-evident that
22 Respondent's communication at issue from Fulp to Dad was not confidential and therefore not
23 privileged, the Court need not reach the potential second step involving a waiver analysis under
24 Evidence Code Section 912 and those cases interpreting it. Nonetheless, Petitioner will summarily
25 demonstrate that under Evidence Code Section 912 Respondent has waived any attorney client
26 privilege that Respondent may attempt to impute to the non-confidential communication between
27 Fulp and Dad. The rationale under both analyses overlaps and the conclusion is the same: the 17-
28 page document must see the light of the day because there is no privilege attached to it.

 The privilege does not attach to a communication not intended to be of a confidential nature. *City*
and County of San Francisco v. Superior Court, (1951) 37 Cal.2d 227, 234-235

1 In the instant case, there is no aspect of Fulp's message to "Dad" related to legal advice as between
2 Fulp and his father. As importantly, it cannot be overstated: the communication was from a person
3 with major authority and responsibility within the highest executive circle of the holder of the
4 purported privilege to a non-lawyer. Respondent should not be heard to claim that Fulp acted outside
5 his "official capacity" when he made the communication to his father from his email account from a
6 server belonging to Respondent. Respondent admitted as much when Respondent produced the
7 redacted email communication (Exhibit 1) pursuant to Petitioner's CPRA request, albeit at a date
8 after the filing of Petitioner's Petition. There is no policy reason for cloaking any part of this email
9 communication from Fulp to Dad with attorney client privilege, or any other type of privilege.
10 Moreover, any defense premised on a lack of intention by the holder is undermined by the cases
11 holding that potentially privileged communications are not considered privileged when the holder of
12 the privilege, or its agent, such as an attorney, made the subject communication in the presence of
13 third parties with no connection to the subject matter. *See for example, Behunin v. Superior Court*
14 *(Schwab)* (2017) 9 CA5th 833, 843-844 (where a third party is present for a communication between
15 attorney and client, the presumption of confidentiality does not apply and the proponent of the
16 privilege has the burden to establish that the communication's confidentiality was preserved.)

17 In another illustrative case, the attorney-client privilege did not protect emails sent by an employee
18 to her attorney via her employer's company computer regarding possible legal action against the
19 employer: "By using the company's computer to communicate with her lawyer, knowing the
20 communications violated company computer policy and could be discovered by her employer due to
21 company monitoring of e-mail usage, [employee] did not communicate 'in confidence ...'" *Holmes*
22 *v. Petrovich Develoment. Company, LLC* (2011) 191 Cal App 4th, 1047, 1067

23 The rationale for these holdings is that such communications made in the presence of uninvolved
24 third parties do not meet the important criterion of being "confidential" as defined by Evidence Code
25 Section 952 and as required by Evidence Code Sections 954. Fulp's communication to "Dad" cannot
26 meet the confidentiality requirement.

27 4. To Be Confidential and Privileged, a Communication Must Be for a Purpose Related to
28 the Legal Advice or Relationship

29 Accordingly, as stated in *Los Angeles County Board of Supervisors v. Superior Court*, (2016)2 Cal
30 App 5th 282, 297-298, "the attorney-client privilege only protects communications between attorney
31 and client "made for the purpose of seeking or delivering legal advice or representation".

32 Thus, the privilege does not apply to every communication confidentially transmitted between

1 attorney and client. "Rather, the heartland of the privilege protects those communications that bear
2 some relationship to the attorney's provision of legal consultation." *Los Angeles County Board of*
3 *Supervisors v. Superior Court* (2016) 2 Cal 5th 282, 294-295 (to be privileged, communication must
4 "be made for the purpose of the attorney's professional representation, and not for some unrelated
5 purpose")

6 It must be emphasized that even if the communication here was purportedly found to be
7 "confidential", this message to Dad has no purpose related to whatever legal advice, if any, may have
8 been provided by Respondent's general counsel to the executives, including Fulp, in the email thread
9 of Exhibit 1.

10 5. The Court Should Reject Any Attempt by Respondent to Argue that Fulp's Communication
11 to Dad Was Not a Communication by the "Client"

12 Thus, the communication from Fulp to Dad never was "confidential" when Fulp sent it to Dad without
13 restriction and without legitimate purpose. Neither Fulp nor Dad was an attorney so there can be any
14 serious claim of privilege. It would appear that based on the facts of this case, Respondent has only
15 the argument, unsupportable when juxtaposed against the four corners of Section 954, that Fulp is
16 not the "client" or does not stand in the shoes of Respondent for purposes of a Section 954 analysis.
17 Any such attempt must fail.

18 First of all, based on a review of the content of Exhibit 1 and as explained further in the Muchnick
19 Decl. ¶ 8, it is unquestioned that various persons with high levels of authority and responsibility
20 within the highest levels of the administrative establishment of UC Berkeley were participating in
21 whatever was being discussed in Exhibit 1. This list includes the General Counsel, Christopher Patti.
22 (Exhibit 1, page 1). Fulp himself was the Deputy Director of the Athletic Department and its Chief
23 Operating Officer. Dr. Batten was the football team physician, and so on. (Muchnick Decl. ¶ 8) Fulp
24 was fully participating with all of these executives concerning the ostensibly sensitive and high stakes
25 strategies being discussed. The very fact that these high-level administrators and the General Counsel
26 were spending their valuable time attests to the level of responsibility being shared by all of the
27 participants, including Fulp.

28 As set forth in Section V above and in this section, Fulp had major responsibilities within the
University, particularly concerning the operations of the athletic department. Fulp was the executive
to whom head football coach Sonny Dykes reported. (Exhibit 3, 2015 Fulp Deposition, page 10) In
addition, Fulp participated in the hiring of persons who were at the center of the investigation in the
aftermath of Agu's death and the policies of the athletic department. (Exhibit 3, 2015 Fulp Deposition,

1 page 56) Both Fulp individually and Respondent were the beneficiaries of the attorney client privilege
2 claims of various communications related to or involving Fulp. It defies logic to permit Respondent
3 to do a 180 degree turn around and contend that the voluntary decision of Fulp to send the message
4 identified as Exhibit 1 is somehow not binding on Respondent and therefore Fulp and Respondent
5 are entitled to assert attorney client privilege for a communication to a third party with no connection
6 to Respondent and no connection to the subject matter of the communication.

7 There is still stronger evidence of Fulp's status as client, or as someone standing as the equivalent of
8 the client as interpreted under Evidence Code Section 951. Fulp admitted that he had direct
9 communications with Christopher Patti, the General Counsel. (Exhibit 4, Fulp 2019 Deposition,
10 pages 17) This underscores Fulp's importance, authority and stature within Respondent's hierarchy
11 and as someone who has been entrusted to make significant decisions on behalf of Respondent on
12 both million dollar business projects as well as legally-infused matters. Fulp's communication cannot
13 be dismissed as somehow less than a client communication merely because Fulp unjustifiably
14 disclosed the communication to a third party.

15 The cases make clear that voluntary disclosure of communications to third parties, or permitting third
16 parties to participate in the attorney client meeting or communication, forces the communication out
17 of the bounds of a "confidential communication" warranting a claim of attorney client privilege. *See*
18 *for example, Behunin v. Superior Court* (2017) 9 Cal App 5th 833, 843-844: (where a third party is
19 present for a communication between attorney and client, the presumption of confidentiality does not
20 apply and the proponent of the privilege has the burden to establish that the communication's
21 confidentiality was preserved.)

22 According to Evidence Code Section 951, a "...client means a person who, directly or through an
23 authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal
24 service from him in his professional capacity."

25 It would be incongruous to claim that Fulp's sending of the communication to Dad lands within the
26 four corners of Section 954's statutory requirements or that Fulp does not come within the definition
27 of "client" under Section 951.

28 Petitioner concedes that corporations and public entities like Respondent are entitled to assert the
attorney client privileged based on communications involving employees, including even those who
are not executives.

"A corporation (or other organization), of course, cannot communicate as such with its lawyer; rather,
attorney-client communications necessarily must be through individuals acting for the organization.
Those communications often emanate from corporate directors or officers. But in many cases,

1 attorney communications with the organization's other employees will likewise be protected by the attorney-client privilege."

2 *D.I. Chadbourne, Inc. v. Superior Court* (1964) 60 Cal 2d 723, 736-738.

3 Again, Respondent should not be heard to request that this Court honor Fulp's status within
4 Respondent's executive hierarchy and an individual engaged with many communications presumably
5 legitimately entitled to attorney client privilege (such as those meetings in person with General
6 Counsel Patti (Exhibit 4, Fulp 2019 Deposition, page 17), and then attempt to disavow Fulp's status
7 or authorization when Fulp's voluntary and intentional communication to a third party falls far
8 outside the confidentiality requirement of Section 954. There is a disconnect.

9 Thus, this situation is easily distinguished from the situation in *Seahaus LaJolla* which addressed the
10 issue of whether individual homeowners participating in a group meeting with their attorneys
11 concerning a homeowner association's legal strategies should be deemed to have forfeited the
12 confidentiality of their communications with their attorney such that there the communications would
13 not fall within the requirements of Section 954. The Court in *Seahaus LaJolla, supra* at page 776
14 held that the communications to non-clients were reasonably necessary to pursue the lawsuit and
15 therefore were protected by the privilege. Fulp to Dad was not reasonably necessary, to say the least.

16 VIII. Overlapping But Distinguishable Principles Are Applied by Courts Assessing the Waiver of
17 Privilege Under Section 912, And Evidence Code Section 912 Does Not Assist Respondent Here

18 Evidence Code § 912, subdivision (a) provides that a privilege "... is waived with respect to a
19 communication protected by the privilege if any holder of the privilege, without coercion, has
20 disclosed a significant part of the communication or has consented to disclosure made by
21 anyone...Consent to disclosure is manifested by any statement or other conduct of the holder of the
22 privilege indicating consent to the disclosure, including failure to claim the privilege in any
23 proceeding in which the holder has the legal standing and opportunity to claim the privilege."

24 *Insurance Company of North America v. Superior Court* (1980) 108 Cal.App.3d 758, 767

25 There are many decisions where a disclosure by a client or by an attorney of a confidential
26 communication to a third party was not deemed a waiver of the privilege. *See for example State*
27 *Compensation Insurance. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644. But those decisions
28 invariably involved inadvertence on the part of the party sending the communication. Thus, in *State*
Compensation Insurance. Fund v. WPS, Inc. (1999) 70 Cal.App.4th 644 a discovery production
resulted in the inadvertent delivery of privileged documents mixed in with a box of non-privileged
documents. The court rejected the argument that the privilege had been waived and upheld the
privilege, despite the inadvertent disclosure. As stated plainly at the top of Exhibit 1, Fulp intended

1 to send this message to Dad, so it was not inadvertent.

2 As noted above, Section 912 addresses the issue where a communication is properly considered
3 privileged because it originally met the criteria of Section 954, but a party to the communication has
4 subsequently waived the privilege by its conduct incompatible with the assertion of the privilege.

5 As explained above, Fulp's voluntary communication to Dad was not confidential as defined by
6 statute and was not privileged. Assuming *arguendo* that Fulp's communication to Dad was inherently
7 imbued with a privilege, it is impossible for Respondent to demonstrate that there was any "common
8 purpose" or any "legitimate purpose" for Fulp to have voluntarily shared the 17-page email thread
(Exhibit 1) with an outsider.

9 Thus, as explained by the *Seahaus LaJolla* court at page 768:

10 ...section 952 provides that confidentiality is retained if such an attorney-client communication is
11 transmitted in confidence "*to no third persons other than those who are present to further the interest*
12 *of the client in the consultation*" (§ 952, italics added.) Together, sections 912 and 952 will "permit
13 sharing of privileged information *when it furthers the attorney-client relationship*; not simply when
two or more parties might have overlapping interests." (*McKesson HBOC, Inc. v. Superior Court*
(2004) 115 Cal.App.4th 1229, 1237, italics added....)

14 As noted above, Section 912(d) clarifies the limited circumstances in which disclosure of a privileged
15 communication to a third party will not constitute a waiver. *OXY Resources California LLC v.*
16 *Superior Court* (2004) 115 Cal.App.4th 874, 890 concluded that voluntary disclosure of a privileged
17 communication to a third party will constitute a waiver unless the disclosure is made "in confidence"
18 and is "reasonably necessary" for the accomplishment of the purpose for which the client consulted
19 the lawyer. *See also Insurance Company of North America v. Superior Court*, 108 Cal App. 3d 758,
20 765 (1980) (the "involvement of an unnecessary third person in attorney-client communications
destroys confidentiality")

21 In determining whether a disclosure was reasonably necessary to avoid a waiver, "the key concept"
22 is the third party's "need to know" the disclosed information. *Insurance Company of North America*,
23 108 Cal. App. 3d *supra* at 765. The client and third party receiving the information must share an
24 "identical legal interest with respect to the subject matter of a communication between an attorney
and a client concerning legal advice." *Id.* at 769 (citation omitted)

25 Thus, in the unlikely event that the Court finds that the original communication from Fulp to Dad
26 was "confidential", any confidentiality or privilege was waived under the express language of Section
27 912 and those cases interpreting it.

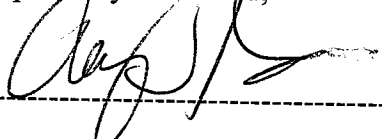
1 IX. Finding No Privilege Under These Facts Is Inherently Fair Under the Legal and the Policy Goals
2 Concerning Privilege and When Juxtaposed Against the Legal and Policy Goals of CPRA

3 One of the key practical purposes of attorney-client privilege is to protect a party, whether in a civil
4 or criminal context, from unwarranted exposure in the hurly-burly of litigation stemming from frank
5 or even indiscreet disclosures to counsel. The established principle is that clients (and counsel) will
6 refrain from frank discussion if they will be required in discovery to share these communications
7 with the opposing side. The equally compelling legal argument central to this Motion checks
8 overbearing claims of privilege when the purported privilege holder has not itself treated the
9 communication as a confidential communication. There is no untoward precedent for Respondent's
10 future dealings that is being set by requiring Respondent here to disclose to Petitioner the subject
11 communication to Fulp's father (Exhibit 1) – the facts and their application are specific. The
12 California Supreme Court has recently held that the fact that the production of ostensibly confidential
13 attorney client documents occurs at a later date, after the resolution of a lawsuit where the requested
14 documents were relevant, may tilt the balance in favor of disclosure. *Los Angeles County Board of*
15 *Supervisors v. Superior Court*, (2016) 2 Cal 5th 282, 298. Here, Respondent years ago settled the Agu
16 family's lawsuit and the settlement agreement included comprehensive Section 1542 waivers barring
17 any future legal action by either party against the other for any reason. (Exhibit 5 and Muchnick Decl.
18 ¶ 14) The absence of legal liability or exposure to Respondent from release of what Petitioner has
19 demonstrated is a non-confidential and therefore non-privileged communication points more strongly
20 towards the legislative aim and function intended by CPRA: to shine public light, after the fact, on
21 the circumstances that motivated Respondent to expend \$4.75 million of taxpayer- and tuition payer-
22 subsidized funds to reach a settlement with the Agu family.

23 X. Conclusion

24 Respondent cannot meet its statutory burdens to demonstrate that Exhibit 1 was communicated in
25 confidence, served a function related to legal advice, and that it should be cloaked with any justifiable
26 privilege. Respondent should be ordered to immediately transmit to Petitioner unredacted copies of
27 the message from Fulp to his father, Exhibit 1.

28 Respectfully submitted,



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