Denisse O. Gastélum
GASTÉLUM LAW, APC

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
June 2025

Securing discovery in jail-death cases

NAVIGATING DISCOVERY DISPUTES OF IN-CUSTODY-DEATH CASES; CASE LAW YOU'LL NEED TO RELY ON

In my experience – both as a former public-entity defense attorney and a civil rights attorney – securing documents from correctional facilities is one of the most arduous tasks during in-custody-death litigation. These documents include custody records, medical and mental health records, internal investigations, death reviews, coroner's review, psychological autopsies and communications (e.g., emails between policymakers).

Aside from the boilerplate objections we commonly come across, there are also go-to defense objections that law enforcement agencies rely on to withhold documents.

Boilerplate objections

The following is a generic objection you will encounter in defendants' objections and responses to request for production of documents:

> OBJECTION: This request potentially calls for information that is protected from disclosure under the federal law enforcement investigative privilege, the federal and California constitutional right to privacy, and/or – in light of its broad phrasing so as to potentially include Defendants' *attorneys* – potentially including the attorney-client privilege (including but not limited to its investigative aspect) and/or the attorney work product protection. *See Hickman v. Taylor*, 329 U.S. 495, 511 (1947) [which provides that work product doctrine protects trial preparation materials or revealed attorney strategy, intended lines of proof, evaluation of strengths and weaknesses and inferences drawn from interim interviews]. Work product protection is designed to preserve the privacy of an attorney's thought processes and to prevent the parties from "borrowing the wits of their adversaries." *Hickman v. Taylor*, Supra; *Holmgren v. State Farm Mutual Auto Insurance Company* (Ninth Circuit, 1992) 976 F. 2d 573, 576. When the work product reflects the attorney's mental impressions, conclusions, opinions or legal theories, the protection is much greater than for the work product and may be affected by a showing of good cause. *Chaudhry v. Gallerizzo* (1999) 170 F. 3d 394, 403.
>
> Courts will overrule such objections on grounds that they are boilerplate. (*Josephs v. Harris Corp.* (3d Cir. 1982) 677 F.2d 985, 992 ["The party resisting discovery must show specifically how . . . each question is overly broad, burdensome or oppressive."] (citation omitted); *Holt v. Nicholas*, 2014 WL 250340, at *3 (E.D. Cal. Jan. 22, 2014) ["[g]eneric, boilerplate objections to discovery are not sufficient"] (citations omitted).)

Privilege log

Entering into a stipulated protective order is inevitable in in-custody-death cases. Because of this, I always make sure to include the following privilege-log parameters:

> Privilege logs. If a party withholds information that is responsive to a discovery request by claiming that it is privileged or otherwise protected from discovery, that party shall promptly prepare and provide a privilege log that is sufficiently detailed and informative for the opposing party to assess whether a document's designation as privileged is justified. (See Fed. Rules Civ. Proc., rule 26(b)(5).) The privilege log shall set forth the privilege relied upon and specify separately for each document or for each category of similarly situated documents:
>
> (a) the title and description of the document, including number of pages or Bates-number range;
> (b) the subject matter addressed in the document;
> (c) the identity and position of its author(s);
> (d) the identity and position of all addressees and recipients;
> (e) the date the document was prepared and, if different, the date(s) on which it was sent to or shared with persons other than its author(s); and
> (f) the specific basis for the claim that the document is privileged and protected.
>
> Communications involving counsel that post-date the filing of the complaint need not be placed on a privilege log.

Ultimately, while the Federal Rules of Civil Procedure are now silent as to what specifically is required in a privilege log, parties withholding documents as privileged should identify and describe the documents in sufficient detail to enable the demanding party "to assess the claim" of privilege or protection. (See Fed. Rules Civ. Proc., rule 26(b)(5)(A)(ii).) Indeed, it is common practice in federal cases, and particularly civil-rights actions, for a privilege log to include parameters pertaining to (1) date of document; (2) identity and position of recipients; (3) identity and position of author; (4) document description; (5) privilege claimed; and (6) present location. (See Rutter Group Prac. Guide Fed. Civ. Pro. Before Trial (Calif. and 9th Cir. Edition), Form 11:A.)

Defendants will typically produce privilege logs with boilerplate objections. As discussed above, "boilerplate objections . . . are insufficient to assert a privilege." (*Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Ct.* (9th Cir. 2005) 408 F.3d 1142, 1149; *Hoot Winc, LLC v. RSM McGladrey Fin. Process Outsourcing, LLC* (S.D. Cal. Nov. 16, 2009) 2009 WL 3857425, at *4 ["boilerplate assertions in a privilege log are insufficient to invoke an evidentiary privilege"]; *Miller v. Pancucci* (C.D. Cal. 1992) 141 F.R.D. 292, 302 [boilerplate objections "are improper and therefore no claim of privilege at all"] (citation and quotation marks omitted).)

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
June 2025

Attorney-client and work product privilege

Defendants will include objections as to nearly every request for production of documents that the documents are protected by attorney-client or work-product privilege; however, they must meet their burden of establishing that the privileges apply.

"The attorney-client privilege protects confidential disclosures made by a client to an attorney in order to obtain legal advice, . . . as well as an attorney's advice in response to such disclosures." (*U.S. v. Ruehle* (9th Cir. 2009) 583 F.3d 600, 607 (citation omitted).) The purpose of the privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." (*Upjohn Co. v. U.S.* (1981) 449 U.S. 383, 389, 101 S. Ct. 677, 66 L. Ed. 2d 584.

"'[A] party asserting the attorney-client privilege has the burden of establishing the [existence of an attorney-client] relationship *and* the privileged nature of the communication.'" (*U.S. v. Graf* (9th Cir. 2010) 610 F.3d 1148, 1156 (quoting *Ruehle*, 583 F.3d at 607).) Confidential communications between a client and an attorney are protected from disclosure: (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection be waived. (*Id.* (quoting *In re Grand Jury Investigation* (9th Cir. 1992) 974 F.2d 1068, 1071 n.2.)

"Because it impedes the full and free discovery of the truth, the attorney-client privilege is strictly construed." (*id.*), and "applies only where necessary to achieve its purpose." (*U.S. v. Talao* (9th Cir. 2000) 222 F.3d 1133, 1140.) Communications are not privileged unless they included legal advice or were made for the purpose of assisting counsel in rendering legal advice. (See *In re Copper Market Antitrust Litig.* (S.D.N.Y. 2001) 200 F.R.D. 213, 219 [finding privilege applied where communications "were made for the purpose of facilitating the rendition of legal services"].)

The work-product doctrine is a qualified privilege that protects documents prepared by a party or its representative in anticipation of litigation. (*U.S. v. Sanmina Corp.*, (9th Cir. 2020) 968 F.3d 1107, 1119.) At its core, the doctrine protects an attorney's mental processes and prevents "'exploitation of a party's efforts in preparing for litigation.'" (*Ibid.* (citation omitted); see *Miller*, 141 F.R.D. at 303 [documents prepared by a police department's internal affairs section in the regular course of business are not considered protected work product].)

Courts will overrule a law enforcement agency's attorney-client and work-product privilege if the log fails to identify all of the recipients, their positions, and the author's position, at a minimum, renders it impossible to determine whether either the attorney-client or work product privileges may apply. Notably, the mere fact an attorney is included on a communication does not render it privileged. (See *U.S. v. Chen* (9th Cir. 1996) 99 F.3d 1495, 1501 ["That a person is a lawyer does not, *ipso facto*, make all communications with that person privileged"].)

Official-information privilege

The only objection that holds weight is the official-information privilege. "Federal common law recognizes a qualified privilege for official information." (*Sanchez v. City of Santa Ana* (9th Cir. 1990) 936 F.2d 1027, 1033.) "Government personnel files are considered official information." (*Ibid.*) To determine whether the official-information privilege applies, courts apply a balancing test, weighing the potential benefits of disclosure against the potential disadvantages. (*Id.* at 1033-34.) Some district courts have applied "a balancing approach that is moderately pre-weighted in favor of disclosure" in civil rights cases against law enforcement agencies. (*Kelly v. City of San Jose* (N.D. Cal. 1987) 114 F.R.D. 653, 661.)

The party invoking the official-information privilege must at the outset make a "substantial threshold showing" by way of a declaration or affidavit from a responsible official with personal knowledge of the matters attested. (*Soto v. City of Concord* (N.D. Cal. 1995) 162 F.R.D. 603, 613.)

The declaration must include "(1) an affirmation that the agency generated or collected the material in issue and has in fact maintained its confidentiality (if the agency has shared some or all of the material with other governmental agencies it must disclose their identity and describe the circumstances surrounding the disclosure, including steps taken to assure preservation of the confidentiality of the material), (2) a statement that the official has personally reviewed the material in question, (3) a specific identification of the governmental or privacy interests that would be threatened by disclosure of the material to plaintiff and/or his lawyer, (4) a description of how disclosure subject to a carefully crafted protective order would create a substantial risk of harm to significant governmental or privacy interests, (5) and a projection of how much harm would be done to the threatened interests if the disclosure were made." (*Kelly*, 114 F.R.D. at 670; see *Kerr v. U.S. Dist. Ct. for N. Dist. of California* (9th Cir. 1975) 511 F.2d 192, 198.)

The official-information privilege must be supported by an affidavit. An affidavit will not hold any weight if the affiant does not identify with specificity all documents reviewed and if the affiant in a conclusory and general sense declares that the disclosure of the documents in the privilege log would

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
June 2025

harm defendants' interest because: (1) it would chill future candor in analysis or evaluation; (2) it would inhibit the ability to frankly engage in self-critical analysis; (3) many of the documents are unrelated to the underlying incident; (4) it could reveal investigative methods and endanger the ability of future investigations to identify wrongdoing; and (5) "internal correspondence and investigative records often involve ongoing investigations which may invoke the Law Enforcement Investigative Privilege."

Ultimately, such an affidavit is insufficient to make a threshold showing of official-information privilege.

First, a "general assertion that a police department's internal investigatory system would be harmed by disclosure of the documents is insufficient to meet the threshold test for invoking the official information privilege. A general claim of harm to the public interest is insufficient to overcome the burden placed on the party seeking to shield material from disclosure. The party resisting discovery must specifically describe how disclosure of the requested documents in that particular case would be harmful." (*Soto*, 162 F.R.D. at 614 (cleaned up and citations omitted); see, e.g., *Centeno v. City of Fresno* (E.D. Cal. Dec. 29, 2016) 2016 WL 7491634, at *14 [declaration that disclosure would likely chill future candor in analysis or evaluation "does not overcome the moderately weighed presumption in favor of disclosure"].)

Second, that the declarant determined the documents were irrelevant is not a factor to consider.

Finally, general statements that these types of documents may invoke the law enforcement investigatory privilege (discussed below) fail to establish how a specific document indeed implicates that privilege.

Deliberative-process privilege

Another common objection will be based upon deliberative-process privilege. The deliberative-process privilege protects the "decision making processes of government agencies" and covers documents "reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." (*NLRB v. Sears, Roebuck & Co.* (1975) 421 U.S. 132 (citations omitted).) The purpose of the privilege is to "promote frank and independent discussion among those responsible for making governmental decisions, and also to protect against premature disclosure of proposed agency policies or decisions." (*F.T.C. v. Warner Commc'ns, Inc.* (9th Cir. 1984) 742 F.2d 1156, 1161 (internal citation omitted).)

For the deliberative-process privilege to apply to a document, the document must have been generated before the adoption of the policy or decision and must be deliberative in nature (i.e., containing opinions, recommendations or advice about agency policies). (*Ibid.*) It is not an absolute privilege, and the documents may be discovered if the need for the documents outweighs the governmental interest in keeping them confidential. (*Scalia v. Int'l Longshore & Warehouse Union* (N.D. Cal. 2020) 336 F.R.D. 603, 610.)

The deliberative-process privilege is "inappropriate for use in civil rights cases against police departments." (*Soto*, 162 F.R.D. at 612.) It offers no protection to most of the kinds of information police departments routinely generate, including internal affairs investigations. (*Ibid.*) Thus, unless defendants demonstrate, through a declaration at a minimum, that withheld communications "directly contribute[d] to the formulation of important public policy," the deliberative process privilege is inapplicable. (*Ibid.*; see *Taylor v. Cnty. of San Bernardino* (C.D. Cal. May 7, 2024) 2024 WL 3915194, at *8 [agencies seeking to invoke the deliberative-process privilege can do so through a declaration explaining what the documents are and how they relate to the decisions].)

Law-enforcement investigative and critical self-analysis privileges

The law-enforcement investigative privilege (also known as the law-enforcement privilege and law-enforcement investigatory privilege) is "based on the harm to law enforcement efforts that might arise from public disclosure of investigatory files." (*Lien v. City of San Diego* (S.D. Cal. Jan. 14, 2022) 2022 WL 134896, *2; see *Scalia*, 336 F.R.D. at 617.) It is a qualified privilege protecting the confidentiality of investigative files to prevent harm to law-enforcement efforts that might arise from their public disclosure. (See *U.S. v. City of Los Angeles* (C.D. Cal. Aug. 28, 2023) 2023 WL 6370887, at *8.) The critical self-analysis privilege (also known as the self-critical analysis privilege) "has been used in some federal courts to shield from discovery internal safety reviews in which companies evaluate the causes of accidents in which they are involved." (*Soto*, 162 F.R.D. at 611.)

Both the Supreme Court and the Ninth Circuit "have yet to recognize or reject a 'law enforcement privilege.'" (*Shah v. Dep't of Justice* (9th Cir. 2017) 714 F. App'x 657, 658 n.1.) Nevertheless, "several courts within this circuit have acknowledged and applied it." (*Lien*, 2022 WL 134896, at *2.) These courts have found that the party asserting the law-enforcement investigative privilege must lodge a formal claim of privilege by the head of the department with control over the requested information, the assertion of the privilege must be based on personal consideration by that official, and the information for which the privilege is claimed must be specified with an explanation as to why it falls within the scope of the privilege. (*U.S. ex rel. Burroughs v. DeNardi Corp.* (S.D. Cal. 1996) 167 F.R.D. 680, 687; see also *Hereford v. City of Hemet* (C.D. Cal. Sept. 14, 2023) 2023 WL 6813740, at *11.)

Neither the Supreme Court nor the Ninth Circuit have recognized the self-critical-analysis privilege. (*Union Pac. R.*

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
June 2025

Co. v. Mower (9th Cir. 2000) 219 F.3d 1069, 1076 n.7; *Soto*, 162 F.R.D. at 611.) And district courts recognizing it have held the privilege "should not be applied to police personnel files and records of internal affairs investigations in civil suits against police officers." (*Soto*, 162 F.R.D. at 611-12 (citing *Kelly*, 114 F.R.D. at 664-66); see also *Branch v. Umphenour* (E.D. Cal. Aug. 7. 2014) 2014 WL 3891813, at *7 [declining to apply the privilege because it is not recognized in the Ninth Circuit]; *Quiroz v. Horel* (N.D. Cal. Feb. 11, 2014) 2014 WL 572381, at *4 [same].)

Privacy

"Privacy and privilege are distinct concepts. Information may be private but not necessarily privileged." (*Gutierrez v. Mora* (C.D. Cal. Dec. 14, 2019) 2019 WL 8953125, at *4.) There is no common-law privacy privilege, but "[f]ederal courts ordinarily recognize a constitutionally-based right of privacy that can be raised in response to discovery requests." (*Soto*, 162 F.R.D. at 616 (citation omitted); *Keith H. v. Long Beach Unified Sch. Dist.* (C.D. Cal. 2005) 228 F.R.D. 652, 657.) When objections to discovery are raised on privacy grounds, courts must weigh the privacy interests against the need for the information. (See *Altamirano-Santiago v. Better Produce, Inc.* (C.D. Cal. Feb. 20, 2020) 2020 WL 2303086, at *1; *Soto*, 162 F.R.D. at 617.)

Regarding personnel files, "'[c]urrent case law suggests the privacy interests police officers have in their personnel files do not outweigh plaintiff's interests in civil rights cases.'" (*Lua v. McNett* (S.D. Cal. Mar. 29, 2024) 2024 WL 1349649, at *5 (quoting *Dowell v. Griffin* (S.D. Cal. 2011) 275 F.R.D. 613, 617.) Moreover, any privacy concerns may be eliminated or dramatically reduced by a protective order. (*Hipschman v. Cnty. of San Diego*, ___ F.Supp. 3d _____, 2024 WL 3206909, at *7 (S.D. Cal. Jun. 26, 2024); *Dowell*, 275 F.R.D. at 617.)

Request for sanctions

Should you have to file a motion to compel when a law-enforcement agency is withholding documents on the aforementioned objections, you should, of course, attempt to resolve the issues through a meet and confer, then proceed with filing the motion and seeking sanctions.

Federal Rules of Civil Procedure, rule 37 (a)(5) provides that the moving party on a discovery motion is entitled to an award of its reasonable expenses incurred in bringing or opposing the motion, including attorney's fees, if it prevails or if the disclosure or requested discovery is provided after the motion was filed, except no payment should be ordered if: (1) the motion was filed before the moving party made a good faith effort to resolve the dispute; (2) the losing party's position was substantially justified; or (3) other circumstances make award of expenses unjust. (Fed. Rules Civ. Proc., rule 37(a)(5)(A).)

Rule 37(a)(5) also provides the court may apportion the reasonable expenses for the motion where a discovery motion is granted in part and denied in part. (Rule 37(a)(5)(C).)

Denisse O. Gastélum is the founder and lead trial attorney at Gastélum Law, APC, *where her practice focuses primarily on civil rights/police misconduct, sexual abuse and wrongful death. She is the current president of California La Raza Lawyers Association, and currently serves on the board of directors of the ACLU of Southern California, the National Police Accountability Project, the Los Angeles County Bar Association, the Consumers Attorneys Association of Los Angeles, and the Consumer Attorneys of California. She received her B.A. at UCLA and her J.D. from Loyola Law School.*