

**FILED**  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SAN BERNARDINO  
SAN BERNARDINO DISTRICT

FEB 28 2018

BY JESSICA JOANIS, DEPUTY

Superior Court of California  
County of San Bernardino  
247 W. Third Street, Dept. S23  
San Bernardino, CA 92415-0210

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SAN BERNARDINO, SAN BERNARDINO DISTRICT

TOWN OF APPLE VALLEY,

Plaintiffs,

Case No.: CIVDS1600180

v

APPLE VALLEY RANCHOS WATER  
COMPANY, et al,

Defendants.

**RULING ON MOTION TO COMPEL  
PRODUCTION OF TOWN'S  
TRANSITION PLAN**

This matter came before the court for a hearing on a Motion to Compel production of Town's Transition Plan by Defendant Liberty Utilities (Apple Valley Ranchos Water Corp.) The court has reviewed and considered the briefs of the parties as well as the arguments of counsel and issues its ruling as follows:

**FACTUAL AND/OR PROCEDURAL CONTEXT**

On January 7, 2016, plaintiff Town of Apple Valley filed this eminent domain action against Liberty Utilities (formally Apple Valley Ranchos Water Corp.) to obtain the water company's water supply and distribution system within the boundaries of the Town and County. At issue in the eminent domain action is the same Resolution of Necessity at issue in the related CEQA action, Case No. CIVDS1517935.

1 On January 24, 2018, Liberty's motion to compel the production of the Town's  
2 transition plan came before the court for hearing. The Town opposed. Liberty replied.  
3 After considering the parties' arguments, the court rules as follows.

4 **DISCUSSION**

5 In support of its motion, Liberty does not cite to any specific discovery statute in  
6 support of the motion. Given this motion is related to documents specified in the  
7 deposition notice and requested at a deposition, the court considered the motion under  
8 Code of Civil Procedure, section 2025.480.

9 **Legal Standard**

10  
11 Code of Civil Procedure section 2025.480 provides:

12 (a) If a deponent fails to answer any question or to produce any document,  
13 electronically stored information, or tangible thing under the deponent's  
14 control that is specified in the deposition notice or a deposition subpoena, the  
15 party seeking discovery may move the court for an order compelling that  
16 answer or production.

17 (b) This motion shall be made no later than 60 days after the completion of  
18 the record of the deposition, and shall be accompanied by a meet and confer  
19 declaration under Section 2016.040.

20 With respect to the meet and confer the Town argues that Liberty failed to  
21 sufficiently meet and confer before filing the motion. At the hearing, when the court  
22 asked whether the Town thought it would be worthwhile to meet and confer, the Town  
23 responded that it was prepared to submit on the ruling. While the Town made  
24 reference to believing there was an agreement that was broken, it conceded the court  
25 could proceed with considering the motion.

26 The Town also objects to Liberty using an unsigned and uncertified transcript of  
27 the deposition. It argues that the parties did not reach an agreement for the use of  
28 anything other than a signed certified copy. (MacVey Decl. ¶ 7 and Ex. C (Depo  
Transcript) at p. 203:3-16.) However, at the hearing the Town did not raise this as an  
issue and stated it was prepared to submit on the ruling.

1 **Liberty's Motion**

2 At the December 5, 2017 deposition of Greg Snyder, Public Works Director, when  
3 asked about whether there are documents that explain the Town's plan for operation of  
4 the system, he testified that they have been working on a draft transition plan. When  
5 asked about production of that document, the Town's counsel objected that the  
6 document is still under legal review and internal analysis, so the Town was objecting on  
7 attorney-client privilege. (Moran Decl. Ex. A – Synder Depo p. 35:3-13.)

8 Liberty' counsel asked if the draft transition plan was created to be a  
9 communication to counsel to give to the lawyers and Snyder answered no. (Moran  
10 Decl. Ex. A at p. 36:16-19.) Later, the Town's counsel asked Snyder whether it was his  
11 understanding that the plan is being prepared and directed to legal counsel and Snyder  
12 answered yes, and when Liberty's counsel asked Snyder if he prepared this to be a  
13 communication to his lawyers, Snyder answered yes. (Moran Decl. Ex. A at p. 37:6-16.)  
14 Snyder also answered yes, when asked if the transition plan is a plan for operation of  
15 the water system. (Moran Decl. Ex. A at p. 38:19-21.)

16 Liberty asserts that the Town's counsel recognized the transition plan is not a  
17 confidential document and will need to be disclosed to the public. Cited is testimony in  
18 which Synder testified that the draft plan will be revealed to the public after it is  
19 reviewed by its lawyers. (Moran Decl. Ex. A at p. 40:20-23.) When asked when this  
20 draft plan would be available, the Town's counsel responded that the Town was  
21 awaiting this court's CEQA decision. (Moran Decl. Ex. A at p. 41:1-9.)

22 Liberty argues that there is no basis for the Town to assert the attorney-client  
23 privilege and the Town is seeking to hide relevant information from defendant. Liberty  
24 asserts that this information is relevant because in the eminent domain action it is  
25 necessary to consider whether the Town satisfied the following requirements: (1) the  
26 "public interest and necessity require" the Town's proposed takeover; (2) the proposed  
27 takeover is "planned or located in the manner that will be most compatible with the  
28 greatest public good and the least private injury;" (3) the property the Town seeks to  
acquire is "necessary" for the proposed takeover; and (4) the Town's proposed

1 takeover is for a "more necessary public use" than the use of which the property is  
2 presently being put by Liberty, citing Code of Civil Procedure sections 1240.030(a)-(c),  
3 1240.610, and 1240.650.

4 Liberty argues that the CEQA action is irrelevant because the Town only began  
5 developing the "Transition Plan" in May or June 2016. (Moran Decl. Ex. A at p. 121:5-  
6 16.) This was after Liberty filed its writ petition and after the Town filed this eminent  
7 domain action. Liberty argues documents do not become privileged by handing them  
8 over to counsel, citing cases in support. It also asserts that the plan was created by  
9 non-lawyers independent of counsel and under *Wellpoint Health Networks, Inc. v.*  
10 *Superior Court* (1997) 59 Cal. App. 4th 115, 119, it does not become privileged by  
11 turning it over to counsel for review.

12 The separate statement of Liberty sets forth other objections, stating the Town  
13 also objected to the request on the bases of confidential and/or proprietary information,  
14 third party privacy, work product, deliberative or legislative process privilege, official  
15 information privilege, or "any other applicable privilege or protection." A copy of the  
16 Town's objections to the deposition notice was not provided with the motion. From the  
17 opposition it is learned that in response to Liberty's deposition notice, the Town served  
18 written objections that included additional objections such as work product doctrine,  
19 common interest doctrine, legislative and/or deliberative process privilege, and official  
20 information privilege. (MacVey Decl. Ex .B.)

21 In opposition, the Town argues that this transition plan is protected by the  
22 attorney-client privilege and the official information privilege. It submits the declaration  
23 of Thomas Rice, Assistant Town Attorney, who asserts that at the direction of the Town  
24 Attorney's Office, Town staff prepared a draft Transitional Operations Plan for review by  
25 the Town Attorney's Office and its consultants. He asserts that such request was made  
26 in anticipation that Liberty would argue, in the course of litigation, that the Town was  
27 not prepared to operate a water system and it did not have a plan for the operation of  
28 the system. He also states it is anticipated that counsel will perform a review of the  
draft to ensure it complies with legal requirements. (Rice Decl. ¶¶ 2-3.)

1 The Town also argues that the draft transition plan also is subject to protection  
2 under the official information privilege that protects public agencies from disclosing  
3 official information acquired in confidence provided there is a necessity for preserving  
4 confidential information that outweighs the necessity for public disclosure. The Town  
5 argues that the draft transition plan has little relevance to this case and is of no benefit  
6 to the public at large. Once it is brought to the Town Council for approval, it will be a  
7 public record and disclosed.

8 In reply, Liberty asserts that it is not seeking privileged communications, it only  
9 is seeking the production of the transition plan. It again argues the transition plan is  
10 not subject to the attorney-client privilege. It asserts the Town was very clear that this  
11 plan only was being withheld because the Town was waiting for a ruling in the CEQA  
12 action.

13 **Analysis**

14 Liberty is correct that Town's counsel made statement at the deposition that the  
15 draft plan would be produced after the CEQA decision was issued. The following was  
16 stated at the deposition:

17  
18 Q When will the transition plan be released?

19 A. Once it's been reviewed by legal, internally, and they've given the  
20 authorization to release that information.

21 Q. When is that going to happen? Do you know?

22 Mr. MacVey: It's not gonna happen before the ruling of the CEQA case.  
23 It may – it'll happen sometime after that.

24 (Moran Decl. Ex. A – p. 35:23-36:5.)

25 Mr. Soneff: Counsel, can I – when will we have this draft plan?

26 Mr. MacVey: I already explained to you, Counsel, that we're awaiting  
27 the CEQA decision. It will be sometime after that. I can't be any more  
28 specific than that.

(Moran Decl. Ex. A – p. 41:1-6.)

1 In addition, as part of its opposition, the Town asserts that Liberty's counsel  
2 proposed a stipulation for the completion of the deposition and asserts this motion is  
3 contrary to such agreement. At the end of the deposition the following was stated:

4  
5 MR. SONEFF: Okay. I don't have anything further today, except I want  
6 to put a stipulation on the record that I hope accurately reflects our  
7 conversation.

8 So we've asked that the draft transition report be produced to us as  
9 soon as the Town's willing to do that. I understand that they're potentially  
10 willing to do that after there's a ruling on the CEQA case.

11 And because our view is that the transition report, apparently, will  
12 reflect the Town's plan for operations, at least to some degree, so we've  
13 asked that Mr. MacVey agree that we are entitled to further depose the PMK  
14 from the Town and who, I guess, will be Mr. Snyder again, about its plan for  
15 operations after and if the Town produces the transition plan.

16 MR. MacVEY: That's correct.

17 (MacVey Decl. Ex. D at p. 201:16-202:5.)

18 While the Town argues in its opposition and at the hearing that there was an  
19 agreement between the parties regarding production, it also argues that the attorney-  
20 client privilege and the official information privilege apply.

21 **Official Information Privilege**

22 Evidence Code section 1040 establishes a privilege for "official information," and  
23 protects: (1) disclosure forbidden by statute, or (2) disclosure against the public interest  
24 because there is a necessity for preserving the confidentiality of the information that  
25 outweighs the necessity for disclosure in the interest of justice.

26 "Official information" is defined as "information acquired in confidence by a  
27 public employee in the course of his or her duty and not open, or officially disclosed, to  
28 the public prior to the time the claim of privilege is made." (Evid. Code, § 1040, subd.  
(a).) The Town does not demonstrate that a draft transition plan for the operation of  
the water system is a document involving "information acquired in confidence by a  
public employee." There is no showing that a transition plan created by Town staff and  
intended to describe how the Town intends to operate the water system and intended

1 to be released to the public when finalized, involves information acquired by Town staff  
2 in confidence.

3 Even if this threshold issue could have been demonstrated, which it was not, the  
4 Town does not cite to a statute that supports finding this privilege applies. It also failed  
5 to demonstrate the necessity for preserving the confidentiality of the information  
6 outweighs disclosure. Instead, it asserts the information is not relevant and is of little  
7 relevance in this case, because the Town's acquisition of the water system is presumed  
8 to be a more necessary public use. It also contends that that for purposes of eminent  
9 domain, the wisdom of the acquisition or likelihood of success is not an element to  
10 establishing a more necessary use or public interest and necessity.

11 However, in determining whether disclosure is against the public interest, "the  
12 interest of the public entity as a party in the outcome of the proceeding may not be  
13 considered." (Evid. Code, § 1040, subd. (b)(2).) The Town does not offer any  
14 argument to demonstrate there is a necessity for preserving the confidentiality of the  
15 information. It admits the transition plan was created by staff to describe how the  
16 Town intends to operate the water system should it acquire it by eminent domain. That  
17 the document at issue is a draft, and not the final plan, is not demonstrated to have  
18 any bearing on the issue. No legal authority is provided that a document's status as a  
19 draft is relevant to considering whether the official information privilege applies.

20 **Attorney-Client Privilege**

21 The Town asserts that the draft plan is protected by the attorney-client privilege.  
22 The party claiming the privilege has the burden of establishing the preliminary facts  
23 necessary to support its exercise. (*Costco Wholesale Corp v. Superior Court* (2009) 47  
24 Cal.4th 725, 733.)

25 The Assistant Town Attorney asserts that the draft transitional operations plan is  
26 being worked on at the direction of the Town Attorney's Office. (Rice Decl. ¶ 2.) He  
27 states in late 2016, the Town Attorney's Office instructed Town staff to prepare a draft  
28 Transitional Operations Plan for review by the Town Attorney's Office and its  
consultants. (Rice Decl. ¶ 3.) This is a plan for the operation of the water system. He



1 states the Town Attorney's Office would perform a review to ensure it complied with  
2 various legal requirements. (Rice Decl. ¶ 3.) He also states that Town staff, at some  
3 point, intends to recommend to Town Council adoption of the Transitional Operations  
4 Plan. (Rice Dec. ¶ 2.)

5 Liberty is correct that when a communication between a client and lawyer serves  
6 two purposes, one legal and one non-legal, "the question presented to the trial court is  
7 as to which purpose predominates." (*Hohm v. Superior Court* (1954) 42 Cal.2d 500,  
8 507, disapproved on other grounds as stated in *Suezaki v. Sup. Crt.* (1962) 58 Cal.2d  
9 166.) It is only when the legal purpose predominates, will the communication be  
10 considered privileged. (*D.I. Chadbourne, Inc. v. Superior Court* (1964) 60 Cal.2d 723,  
11 733.) A client cannot protect unprivileged information from discovery by transmitting it  
12 to an attorney. (*Id.* at p. 732-733, 734.)

13 At issue is a draft of a transition plan that ultimately will be approved by the  
14 Town council. The Town's PMK testified that the draft plan will be revealed to the  
15 public after its review by lawyers. (Moran Decl. Ex. A, p. 40:20-23.) The Assistant  
16 Town Counsel states the request for a transition plan was made for two purposes, that  
17 Liberty would argue in litigation that the Town did not have a plan and for operation of  
18 a water system. It is not demonstrated that the plan itself is subject to the attorney-  
19 client privilege where the ultimate purpose of the plan is to guide the Town's operation  
20 of the water system it seeks to acquire by eminent domain and it is intended to be a  
21 public document approved by the Town council.

22 In addition, even if it was privileged the Assistant Town Attorney states that the  
23 plan was prepared for and is currently under review by the Town Attorney's Office and  
24 its consultants. (Rice Decl. ¶¶ 2, 3.) Evidence Code section 912, subdivision (d)  
25 addresses that disclosure of an attorney-client privilege communication to a third  
26 person waives the privilege unless the disclosure was reasonably necessary to  
27 accomplish the client's purpose of consulting counsel. It is the proponent of the  
28 privilege who bears the burden on such issue. The Town does not provide any  
information on these consultants such that the court can conclude transmission of the



1 information to these consultants was reasonably necessary to accomplish the purpose  
2 for which the Town's counsel is consulted.

3 Finally, the Town repeatedly asserted that there already existed an agreement  
4 regarding the disclosure of the draft transition plan. After the court inquired about a  
5 further meet and confer, the Town asserted it would submit. However, the Town also  
6 stated there was nothing to meet and confer on "other than the fact that [it] thought  
7 [it] had an understanding already that's reflected in the deposition transcript, which  
8 [Liberty] has broken." Statements in the deposition transcript discussed earlier  
9 demonstrate a purported agreement. Given such agreement the motion could be  
10 considered premature when filed. However, in light of the court issuing a ruling in the  
11 CEQA matter, the Town should produce the draft transitional plan pursuant to its  
12 agreement.

13 **RULING**

14 For the reasons stated above, the court grants the motion to compel and orders  
15 the Town to produce the "transition plan" identified by the Town's PMK at the  
16 December 5, 2017 deposition.

17  
18 Dated this 28 day of February, 2018

19  
20  
21   
22 DONALD ALVAREZ  
23 Judge of the Superior Court  
24  
25  
26  
27  
28

<b>SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN BERNARDINO</b>  SAN BERNARDINO SUPERIOR COURT JUSTICE CENTER 247 W. Third Street San Bernardino, CA 92415	<b>CASE NUMBER</b>  <b>CIVDS1600180</b>
TOWN OF APPLE VALLEY,   <div style="text-align: right;">Plaintiff,</div> <div style="text-align: center;">vs.</div> APPLE VALLEY RANCHOS WATER COMPANY, et al,  <div style="text-align: right;">Defendants.</div>	Donald Alvarez, Judge  Department S23

I, Nicci Martinez, certify that: I am not a party to the above-entitled case; that on the date shown below, I served the following document(s):

**RULING ON MOTION TO COMPEL PRODUCTION OF TOWN'S TRANSITION PLAN**

on the parties shown below by placing a true copy in a separate envelope, addressed as shown below; each envelope was then sealed and, with postage thereon fully prepaid, deposited in the United States Postal Service at San Bernardino, California.

MANATT PHELPS & PHILLIPS, LLP 11355 West Olympic Boulevard Los Angeles, CA 90064-1614	BEST BEST & KRIEGER, LLP 3390 University Ave., 5 <sup>th</sup> Floor P.O. Box 1028 Riverside, CA 92502	
HILL, FARRER & BURRILL LLP One California Plaza, 37 <sup>th</sup> Floor 300 South Grand Avenue Los Angeles, CA 90071-3147	GUTIERREZ, PRECIADO & HOUSE LLP 3020 East Colorado Blvd. Pasadena, CA 91107	

**NANCY EBERHARDT**  
Court Executive Officer

Dated: 3-1-18

By: \_\_\_\_\_

NICCI MARTINEZ

CLERK'S CERTIFICATE OF SERVICE BY MAIL