STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

NEA ALAMEDA COMMUNITY LEARNING CENTER UNITED, Charging Party, v. COMMUNITY LEARNING CENTER SCHOOLS, INC., Respondent.	Case No. SF-CE-3105-E PERB Order No. Ad-448 June 29, 2017

Appearances: California Teachers Association by Laurie Burgess, Attorney, for NEA Alameda Community Learning Center United; Law Offices of Young, Minney & Corr by Maryisa S. Okreglak and Chastin Pierman, Attorneys, for Community Learning Center Schools, Inc.

Before Gregersen, Chair; Winslow and Banks, Members.

DECISION

GREGERSEN, Chair: This case is before the Public Employment Relations Board (PERB or Board) on a request pursuant to PERB Regulation 32150, subdivision (f),[1] by a PERB Administrative Law Judge (ALJ) to the Office of the General Counsel to seek enforcement of a subpoena duces tecum (Subpoena). The NEA Alameda Community Learning Center United's (NEA) Subpoena seeks disclosure of documents from the Community Learning Center Schools, Inc.'s (CLCS) legal counsel Young, Minney & Corr, LLP (YMC). Based on the facts and relevant legal authority, the Board denies the request for enforcement of

[1] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

the Subpoena, and remands the matter to the ALJ for clarification as to each request prior to the Board seeking court enforcement of the Subpoena consistent with the analysis below.

Background

CLCS is a public school employer. NEA is the exclusive representative of two bargaining units: one of certificated employees and one of classified employees at CLCS. On behalf of the certificated bargaining unit, on December 22, 2014, NEA filed an unfair practice charge alleging that CLCS both retaliated against and interfered with employee rights to be represented, and NEA's rights to represent the employees by removing teachers from the CLCS governing board (CLCS Board) because of NEA's unionization efforts in violation of EERA section 3543.5, subdivision (a).[2] On August 19, 2015, NEA filed a first amended charge. On October 20, 2015, the Office of the General Counsel issued a complaint solely on the interference allegation.[3] After the parties met for an informal conference and failed to reach an agreement, the matter was scheduled for formal hearing. The formal hearing in this matter was heard on February 26, May 31, June 1 and August 15, 2016.

At the formal hearing, CLCS presented evidence showing that it had sought a legal opinion from YMC (YMC Opinion) regarding the legality of teachers serving on the CLCS

[2] EERA is codified at Government Code section 3540 et seq. Unless otherwise specified, all statutory references herein are to the Government Code.

[3] Though unclear, it appears as though the retaliation allegation was never addressed by the Office of the General Counsel. The charging party is entitled to a warning letter identifying any deficiencies before the charge is dismissed. (PERB Regulation 32620, subd. (d); *Hartnell Community College District* (2015) PERB Decision No. 2452, p. 31; *County of San Joaquin* (2003) PERB Decision No. 1570-M, p. 8.) While charge allegations that are not investigated before dismissal must be remanded either for further investigation or for issuance of a complaint (*Trustees of the California State University* (2014) PERB Decision No. 2384-H *(Trustees of CSU),* pp. 4-5; *County of Alameda* (2006) PERB Decision No. 1824-M, pp. 4-5), this matter has not come before us on either an appeal of a dismissal or on exceptions to a proposed decision. Therefore, we do not, at this stage opine as to whether this allegation should be remanded back to the Office of the General Counsel for further investigation.

Board following recognition of NEA as the exclusive representative. The YMC Opinion was then admitted into evidence by CLCS and a partner of the firm testified regarding the YMC Opinion. The YMC Opinion discusses issues relating to conflict of interest provisions under the Political Reform Act, Corporations Code, and Government Code section 1090. In addition, CLCS witnesses testified that the principal factor in their decision to remove teachers from the CLCS Board was the YMC Opinion, and was not based on anti-union animus.

On or about July 29, 2016, after three days of formal hearing, NEA served YMC with a Subpoena seeking the disclosure of various documents relating to the YMC opinion, as well as documents that may demonstrate that YMC—in preparing the legal opinion—harbored anti-union animus. The documents requested in NEA's Subpoena included advice, counsel and opinion documents provided by, sought from, or received by YMC regarding conflict of interest issues, teachers serving on charter school boards, and union avoidance strategies.

Thereafter, YMC filed objections and a motion to revoke and/or quash the Subpoena, and NEA filed briefs in support of enforcing the Subpoena. The parties also filed supplemental briefing regarding enforcement of the subpoena following a hearing before the ALJ.

On September 30, 2016, the ALJ issued an order denying YMC's motion to quash in part as further explained below. The ALJ ruled that PERB had jurisdiction to issue the requested Subpoena, finding only those documents generated or received after June 2014 to be materially irrelevant. On September 28, 2016, YMC filed a response to the ALJ order. Because it claims the Subpoena requires disclosure of privileged materials, YMC refuses to comply with the ALJ order. On September 30, 2016, the ALJ transmitted a request to the

Office of the General Counsel recommending enforcement of the Subpoena, pursuant to PERB Regulation 32150, subdivision (f).[4]

The ALJ's Order

The ALJ summarized NEA's requests as follows, noting that all the requests were for the time period of January 1, 2009 to the present:[5]

> Request No. 1: advice, counsel, and opinion documents provided by, sought from, or received by YMC regarding conflict of interest issues (i.e., law firms, government agencies, California Charter School Association, etc.). For example, NEA seeks a YMC letter to the law firm of Best, Best and Krieger that prompted an opinion letter from the latter firm on the conflict of interest issue, which letter was offered into evidence. It also seeks other "non-privileged" communications between YMC and other third parties regarding the subject.

[4] PERB Regulation 32150, subdivision (f) provides:

> Upon the failure of any person to comply with a subpoena, the Board may apply to an appropriate superior court for an order requiring such person to appear and produce evidence and give testimony regarding the matter under investigation or in question. Requests for compliance with a subpoena shall be made to the Board agent assigned the case. If the Board agent deems it appropriate, he or she shall promptly recommend to the General Counsel that the Board seek enforcement of the subpoena. A request that the Board apply for an order may be made by the General Counsel at any stage of the proceedings. The Board shall seek enforcement on recommendation of the General Counsel unless in the judgment of the Board the enforcement of such subpoena or notice would be inconsistent with law or the policies of the applicable Act. If the request is granted, the record will remain open in the matter until the Board determines that the court order will not be forthcoming, or that further delay would frustrate the policies of the applicable Act, or until the testimony sought is included in the record.

[5] The original subpoena identified six categories of documents. The ALJ consolidated those six requests into five. For purposes of providing clarity and consistency, we discuss the requests as renumbered by the ALJ.

> Request No. 2: determination and opinion documents regarding teachers serving on charter school governing boards (i.e., YMC internal memoranda, email communications, letters, advisories, and Powerpoint materials). NEA seeks to explore the extent of YMC's knowledge of the trend for charter schools to affirm the right of teachers to serve on charter school governing boards.
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> Request No. 3: advice, counsel and opinion documents transmitted between CLCS and YMC relating to conflict of interest issues (i.e., including but not limited to the issue of teachers serving on governing boards).
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> Request No. 4: documents generated, received or circulated internally among YMC attorneys regarding union avoidance strategies. NEA seeks communications and discussions leading to the drafting of communications and publications regarding union avoidance.
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> Request No. 5: documents regarding union avoidance strategies in the form of lectures, presentations, trainings, continuing legal education, meetings, publications, inter-office memoranda, emails, etc.

(ALJ Order Denying Motion to Quash Subpoena Duces Tecum dated September 15, 2016, p. 3; footnotes omitted (ALJ Order Denying).)

The ALJ denied, in part, the motion to quash, but restricted the time period for the documents requested from January 1, 2009 to June 2014. The ALJ found, however, that NEA stated a viable claim under a "cat's paw" theory,[6] and that the information sought by NEA in the subpoena was relevant to test that theory. The ALJ further noted that CLCS had introduced evidence disputing anti-union animus, thereby placing that matter at issue. Regarding the relationship between CLCS and its law firm YMC, the ALJ found that although YMC is not an

[6] The "cat's paw" refers to a fable, likely Aesop's, about a cat and a monkey watching some chestnuts roasting on a fire. (*Reeves v. Safeway Stores* (2004) 121 Cal.App.4th 95, 116, fn. 14.) The monkey convinced the unwitting cat to swipe the chestnuts off the fire, burning its paw in the process. When the cat turned to retrieve its bounty, it saw that the monkey had already opened and eaten all of the chestnuts. (*Ibid*.) In legal parlance, the "cat's paw" doctrine allows for imputation of retaliatory animus where "an intermediary, for whatever reasons, simply carried out the will of the actuator." (*Ibid*.)

employee of CLCS, it is an agent because CLCS retained YMC to provide a legal opinion and relied on YMC in its decision-making process. The ALJ found that there was a waiver of attorney-client privilege because "CLCS ha[d] disclosed and interjected a privileged communication into the record, thereby waiving the privileges." (ALJ Order Denying, p. 5.)

After the Subpoena issued, NEA withdrew its requests for communications between YMC and clients other than CLCS. The ALJ acknowledged this action and stated in his order that NEA now sought only communications amongst YMC's attorneys and between YMC and other law firms or entities on the conflict of interest issue, and other documents circulated within the firm that do not involve representation of specific clients.[7]

DISCUSSION

The powers granted to the Board under EERA section 3541.3, subdivision (h), include the power "[t]o hold hearings, subpoena witnesses, administer oaths, take the testimony or deposition of any person, and in connection therewith, to issue subpoenas duces tecum to require the production and examination of any employer's or employee organization's records, books, or papers relating to any matter within its jurisdiction." (See also PERB Regulation 32150, subd. (a) [the Board may issue at the request of any party a subpoena for production of documents at the hearing].)[8] Upon a motion to revoke a subpoena, the Board shall revoke the

[7] NEA has not objected in any way to this characterization by the ALJ.

[8] We note here CLCS's initial argument to the ALJ that PERB lacks jurisdiction to issue a subpoena requesting documents from a third party, in this case YMC, because the language in EERA section 3541.3, subdivision (h) identifies only an "employer's or employee organization's records." We do not read this portion of the statute as restricting PERB's ability to issue a subpoena requesting documents only from either "an employer" or "an employee organization." We view EERA section 3541.3, subdivision (h), instead as an illustration of the broader language that precedes it, an interpretation that is apparent from the language in subdivision (i), which grants PERB the power to "investigate unfair practice charges or alleged violations of this chapter, and take any action and make any determinations in respect of these

subpoena if the evidence requested to be produced is not relevant to any matter under consideration in the proceeding or the subpoena is otherwise invalid. (*Id*. at subd. (d).)

A Board agent in the conduct of a hearing has the authority to inquire fully into all issues and obtain a complete record upon which the decision can be rendered, to issue subpoenas, and to rule upon petitions to revoke subpoenas. (PERB Regulation 32170, subds. (a) and (c).) In unfair practice case hearings, rules of privilege apply. (PERB Regulation 32176.)

If a witness refuses to comply with a subpoena, PERB may bring an action in superior court or other court of competent jurisdiction for an order to enforce compliance with a subpoena. (EERA, § 3541.3, subd. (j); PERB Regulation 32150, subd. (f).) Under PERB Regulation 32150, subdivision (f),

> A request that the Board apply for an order may be made by the General Counsel at any stage of the proceedings. The Board shall seek enforcement on recommendation of the General Counsel unless in the judgment of the Board the enforcement of such subpoena or notice would be inconsistent with law or the policies of the applicable Act. . . .

The scope of a court's inquiry in an agency subpoena enforcement proceeding is narrow. (*United States v. Morton Salt Co.* (1950) 338 U.S. 632, 653; *Okla. Press Pub. Co. v. Walling* (1946) 327 U.S. 186, 208; *National Labor Relations Board v. International Medications Systems Ltd.* (9th Cir. 1981) 640 F.2d 1110, 1114; *National Labor Relations Board v. Frederick Cowan & Company, Inc*. (2d Cir. 1975) 522 F.2d 26, 28; see also *Public Employment Relations Bd. v. Superior Court* (1993) 13 Cal.App.4th 1816, 1824-1825.) While

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charges or alleged violations as the board deems necessary to effectuate the policies of this chapter…" Moreover, such a limitation on PERB's jurisdiction to issue a subpoena requesting documents from a third party would hinder PERB's ability to fulfill it's a core duty of "[i]nquir[ing] fully into all issues and *obtain a complete record* upon which the decision can be rendered." (PERB Regulation 32170, subd. (a) (emphasis added).)

there is no direct case law regarding the standard for enforcement of PERB subpoena duces tecum, California cases regarding general administrative subpoenas provide that a superior court will enforce a subpoena when: (1) the inquiry is one that the agency demanding production is authorized to make; (2) the demand is sufficiently definite to enable a respondent's ability to comply; and (3) the information sought is relevant. (*Agricultural Labor Relations Bd. v. Richard A. Glass Co.* (*1985*) *175 Cal.App.3d 703*; *Board of Medical Quality Assurance v. Hazel Hawkins Memorial Hospital* (1982) 135 Cal.App.3d 561, 565; *Brovelli v. Superior Court of Los Angeles County* (1961) 56 Cal.2d 524, 529.)

Overbroad

The ALJ determined the requests as written in the Subpoena were overly broad with respect to documents generated or received after June 2014, the time of the decision to remove employee board members, finding such subsequent documents were not materially relevant. However, the requests, as modified by the ALJ, still span a period of nearly five years, from January 2009 through June 2014. According to the initial charge, CLCS was not created until approximately June 2012, yet this fact appears not to have been considered by the ALJ. We find this fact relevant to properly constraining the time span of the Subpoena. We therefore find the time span of the Subpoena, even as modified by the ALJ, overbroad and decline to seek enforcement in its current state.

Furthermore, in his description of NEA's requests, the ALJ acknowledged that NEA had withdrawn its request for YMC communications with clients other than CLCS thereby narrowing the scope of the requests in Requests Nos. 1 and 2. However, nothing in the ALJ's findings appears to narrow the scope of the Subpoena in this manner. To the extent the Subpoena continues to seek disclosure of documents pertaining to conflicts of interest

involving other entities or clients of YMC other than CLCS, such request is overbroad and we likewise decline to seek enforcement of the Subpoena in its current state.

Relevance

PERB Regulation 32150, subdivision (d), governing motions to quash a subpoena state that the Board "shall revoke the subpoena *if the evidence requested to be produced is not relevant* to any matter under consideration in the proceeding or the subpoena is otherwise invalid." (Emphasis added.) Although relevance, by itself, does not end the inquiry of whether a matter is discoverable, generally, discovery depends in first instance on whether the requested information is even relevant to a subject matter of the litigation, such as a claim or defense of a party to the action. (Code Civ. Proc., § 2017.010; *Greyhound Corp. v. Superior Court In and For Merced County* (1961) 56 Cal.2d 355, 390; *Doak v. Superior Court for Los Angeles County* (1968) 257 Cal.App.2d 825, 830.)

Although motive is not relevant to a prima facie interference allegation (*Carlsbad Unified School District* (1979) PERB Decision No. 89, pp. 10-11), it may be part of the respondent's affirmative defense, such as a legitimate business purpose. (*State of California (Department of Corrections & Rehabilitation)* (2012) PERB Decision No. 2285-S, pp. 8-9; *Regents of the University of California* (2012) PERB Decision No. 2300-H, p. 29.) In such cases, PERB analyzes the proffered defense similar to a "mixed motive" discrimination case, by determining not only whether the employer's stated justification is legitimate, but also whether it was the reason for the employer's action. (*Regents of the University of California* (1984) PERB Decision No. 470-H, adopting proposed decision at pp. 49-50.) Thus, motive and specifically whether a respondent's proffered motive is pretextual, may be an issue relevant to an employer's defense to an interference allegation. (*Ibid*.)

CLCS asserts that it relied in good-faith on legal advice provided by YMC when it removed teachers from the CLCS governing board. Whether good-faith reliance on legal advice is available as a defense to an interference (or discrimination) allegation is unclear. We have located no PERB decision recognizing this defense to either an interference or discrimination allegation. Nevertheless, unless a claim or defense is patently frivolous, the fact that it may not ultimately prevail does not preclude discovery of the facts necessary to test or refute it. (*Public Employment Relations Bd. v. Superior Court*, *supra*, 13 Cal.App.4th 1816, 1824.)

Assuming that a defense of good-faith reliance on the advice of counsel can be considered at this stage of the preceding, a respondent asserting that defense has the burden of proving both that it was in fact advised by counsel to take a particular action or refrain from taking a particular action, and that it did so in good faith. (*Regents of the University of California*, *supra*, PERB Decision No. 470-H, adopting proposed decision at pp. 49-50.) As a result, the charging party cannot be denied information designed to test an element of that defense, including whether the respondent acted in good faith, by objecting to the relevance of the information. If information is relevant to one party's claim or defense, it is relevant for all parties to the proceeding, and must be disclosed upon proper request unless subject to privilege or protection.

NEA seeks information that it believes will reveal that the legal opinion prepared by YMC was a pretext for anti-union animus. NEA asserts that the case is proceeding under both an interference and a retaliation/discrimination theory, the latter of which requires demonstration of animus. As an affirmative defense, CLCS has argued that it was not motivated by animus, but instead relied on the advice of YMC in deciding to remove teachers

from the CLCS Board. NEA has, therefore, raised a viable theory of liability and it should be allowed to test that theory by obtaining relevant documents that may support it unless such request is subject to privilege or protection.

Attorney-Client Privilege/Attorney Work Product

Attorney-client privilege, codified at Evidence Code, section 954, provides that a client "has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer." The confidential communication subject to the attorney-client privilege is defined as "information transmitted between a client and his or her lawyer in the course of that relationship . . . and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship." (*Fireman's Fund Ins. Co. v. Superior Court* (2011) 196 Cal.App.4th 1263, 1273 (internal quotations omitted; italics omitted), citing Evid. Code, § 952.) Protected confidential communications include the legal opinions of the attorney, even if they have not been communicated to the client (*ibid*.), and the protection applies to legal advice regardless of whether litigation is contemplated (*Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, 119-120 (*Wellpoint*)).

The work-product protection is separate and distinct from attorney-client privilege and may still protect documents upon the client's waiver of attorney-client privilege. (*Handgards, Inc. v. Johnson & Johnson* (N.D. Cal. 1976) 413 F.Supp. 926, 929.) Absolute work product is defined as a "writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories" and provides that absolute work product "is not discoverable under any circumstances." (Code Civ. Proc., § 2018.030, subd. (a).) Absolute work product is entitled to absolute protection unless the privilege is waived. (*Fireman's Fund Ins. Co. v. Superior Court, supra*, 196 Cal.App.4th at p. 1281.) Qualified work product is defined as the work of

an attorney that does not qualify as absolute, and is subject to discovery only if it is determined that "denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice." (Code Civ. Proc., § 2018.030, subd. (b).) Work-product protection encompasses both the written and unwritten work of attorneys, and prohibits discovery of an attorney's "statements [that] are likely to reveal the attorney's mental impressions, opinions and theories of the case." (*Fireman's Fund Ins. Co. v. Superior Court*, *supra*, 196 Cal.App.4th at pp. 1280.)

Waiver

Waiver of the attorney-client privilege occurs where the holder of the privilege, "without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone." (Evid. Code, § 912, subd. (a).) Waiver of the attorney-client privilege may be implied when a holder of the privilege places the contents of the privileged communications at issue in the case and that disclosure is required for a fair adjudication of the action. (*Wellpoint*, *supra*, 59 Cal.App.4th at p. 128; *Handgards, Inc. v. Johnson & Johnson*, *supra*, 413 F.Supp. at p. 929 ["deliberate injection of the advice of counsel into a case waives the attorney-client privilege as to communications and documents relating to the advice"].) Work-product protections may be waived in the same manner as attorney-client privilege. (*Wellpoint*, at p. 128; *State of California (Department of Veterans Affairs)* (2004) PERB Decision No. 1686-S, p. 5.)

When a waiver of attorney-client and/or work product privilege occurs, the scope of waiver will be narrowly construed. (*Wellpoint*, *supra*, 59 Cal.App.4th at p. 128; *Transamerica Title Ins. Co. v. Superior Court* (1987) 188 Cal.App.3d 1047, 1052; *2,022 Ranch, L.L.C. v. Superior Court* (2003) 113 Cal.App.4th 1377, 1395 (disapproved on other grounds).) As such,

"[p]rivileged communications do not become discoverable simply because they are related to issues raised in the litigation." (*Transamerica Title Ins. Co. v. Superior Court*, citing *Schlumberger Limited v. Superior Court* (1981) 115 Cal.App.3d 386, 393.) In cases examining the scope of a client's waiver of privilege, courts have found that particular relevant communications with the client, or the client's litigation file were subject to disclosure, but not other privileged documents not directly placed at issue in the case. (See *Merritt v. Superior Court* (1970) 9 Cal.App.3d 721, 730 [client's placement of attorney's mental state directly at issue in bad faith claim waived privilege over relevant communications and work product demonstrating attorney's state of mind while handling the particular case].) It is not the case that when a litigant places at issue a certain mental state or belief, that the "source and substance of *all* information" leading to that mental state then becomes discoverable. (*Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 608-9.) Instead, "the scope of the waiver [is] determined primarily by reference to the purpose of the privilege," which in the case of a client's "deliberate injection of the advice of counsel into a case[,] the attorney-client privilege as to *communications and documents relating to the advice*" will be waived. (*Transamerica Title Inc. Co. v. Superior Court*, *supra*, 188 Cal.App.3d at pp. 1052-1053 (emphasis added).) With those principles in mind, we now turn to a discussion of privilege/protection and waiver as to each of the outstanding categories of requested information.

With respect to Request Nos. 1 and 2, the ALJ determined that both requests involved the same issues and sought "non-privileged" documents related to conflict of interest and charter school governing board issues, which are relevant to the NEA's theory of liability. We recognize that opinions formed outside the attorney-client relationship, such as a pre-existing document expressing the opinion of another person or entity, do not become attorney-client

privileged, simply because they are communicated to the client. (*Wellpoint* , *supra*, 59 Cal.App.4th at p. 119.) And, to the extent that any documents included in Request Nos. 1 and 2 include truly non-privileged documents, CLCS would be required to produce such documents. However, Request Nos. 1 and 2 on their face appear to seek privileged communications in that they seek "advice, counsel, and opinion" (Request 1), and YMC's "determinations and/or opinions" (Request 2), yet the ALJ's order does not address the scope of any waiver as to privileged materials in relation to these requests. Because Request Nos. 1 and 2 seek potentially privileged documents, we decline to seek enforcement of Request Nos. 1 and 2 as they are presently written.

With respect to Request No. 3, the ALJ determined that the request specifically did not violate the attorney-client and attorney work-product privileges because CLCS had "disclosed and interjected a privileged communication into the record, thereby waiving the privileges," but limited the request to documents related to the "issue of employee membership on the governing board." (ALJ Order Denying, p. 5.) In cases where implied waiver is found, the courts have allowed disclosures of privileged information where the client places into issue a matter that is normally privileged, or when the client, the holder of the privilege, places into issue the decisions, conclusions, and mental state of the attorney. (*Transamerica Title Ins. Co. v. Superior Court*, *supra*, 188 Cal.App.3d at pp. 1052-53.) In *Mitchell v. Superior Court*, *supra*, 37 Cal.3d at p. 609, the Court in recognizing the theory of implied waiver, determined that the party seeking to discover privileged information can show waiver by demonstrating that the client has placed the privileged communication at issue and fairness requires disclosure. By placing the opinion letter into evidence, and by introduction of testimony by a

YMC attorney, both CLCS and YMC waived attorney-client privilege and work product.[9] Therefore, with respect to Request No. 3, we agree with the ALJ's findings, including the limitation that CLCS need only produce documents related to the issue of employee membership on the governing board.

Request No. 4 is for documents "generated, received, or circulated" both internally to YMC, and provided to third parties by YMC in the conduct of lectures and presentations that relate to union avoidance strategies. Request No. 5 is for documents "generated, received, or circulated" both internally to YMC, and provided to third parties by YMC in the conduct of lectures and presentations that relate to union avoidance strategies. While these requests may present significant problems of attorney-client privilege and attorney work product protections, the issue before us is YMC's representation at hearing that it has no documents responsive to these requests. The ALJ's order instructs CLCS to have an attorney for YMC provide a declaration, executed under penalty of perjury, supporting its assertion. The ALJ order does not instruct CLCS to produce documents. Since the ALJ's order addressing these two requests is limited, we need not engage here in a discussion of whether Request Nos. 4 and 5 include privileged communications. If no documents responsive to Requests No. 4 and 5 exist, it is incumbent on YMC to provide a declaration to that effect.

Conclusion

We decline to seek enforcement of the Subpoena in its current state and remand this matter back to the ALJ for greater clarification of the scope of any potential waiver as to

[9] Because CLCS and its attorneys deliberately chose to put the attorney's legal advice and their communications with CLCS at issue by asserting as CLCS's defense that it relied in good faith on the legal advice provided by its attorneys, we do not see the Board's decision as opening up PERB proceedings to attempt to discover another party's privileged communications or its attorney's work product.

Request Nos. 1 and 2, as well as the proper time span and scope of the Subpoena as a whole prior to the Board's seeking enforcement of the Subpoena.

Order

The Board hereby REMANDS this matter to the Public Employment Relations Board (Board) Office of Administrative Law to reexamine the scope of the subpoena duces tecum consistent with the analysis set forth herein.

Members Winslow and Banks joined in this Decision.