

1 **I. INTRODUCTION**

2 GEO’s attempt to obtain Washington’s privileged and confidential attorney work product
3 should be rejected. Although GEO has known about the so-called “NWDC Memo” since at least
4 April 2019, when Washington disclosed it in a privilege log, GEO only now seeks to compel it
5 because GEO is following through on its litigation threat first-made in January 2020—that it
6 would seek to obtain the NWDC Memo in retaliation for Washington seeking to compel GEO
7 to produce responsive financial information. *See* ECF Nos. 396, 409. There is no good cause or
8 justifiable reason to consider GEO’s current motion.

9 Even if its motion is considered, the NWDC Memo is attorney client privileged and work
10 product in its purest form: It is a legal analysis prepared by Assistant Attorneys General (AAGs),
11 provided internally to other senior attorneys in the Office of the Attorney General (AGO) and to
12 a client of the AGO, the Department of Labor & Industries (L&I), which has authority to enforce
13 the Minimum Wage Act and must consider the same legal issues identified in the NWDC Memo.
14 The Court should deny GEO’s attempt to obtain Washington’s privileged and confidential legal
15 analysis that is irrelevant to the facts at issue more than a year after discovery ended.

16 **II. PROCEDURAL BACKGROUND**

17 **A. The Court Repeatedly Rejects GEO’s Arguments That Washington’s Alleged**
18 **Political Motivations Are Relevant to Its Defense**

19 The Court is familiar with this case and its history: Washington seeks a declaration that
20 GEO must comply with the MWA and disgorge its unjust gains from paying detainee workers
21 \$1 per day for work performed at the Northwest Detention Center (NWDC). Discovery closed
22 on June 21, 2019, *see* ECF No. 171, and the case is set for a bifurcated trial, pending availability
23 to hold a jury trial on the MWA claim in light of the COVID-19 pandemic, to be followed by a
24 bench trial on Washington’s unjust enrichment claim. *See* ECF No. 388.

25 Throughout the three years of litigation, GEO has repeatedly accused Washington of
26 pursuing a politically motivated enforcement action. *See* ECF No. 10 at 32 (alleging that “[t]he

1 current Attorney General’s political interest [is] in anti-Trump rhetoric”); ECF No. 188 at 11
2 (arguing entitlement to unclean hands where “[t]he State’s decision to wait until a claim against
3 GEO was politically beneficial calls into question the State’s motivations and ability to recover
4 in equity”). In short, GEO’s argument is that Washington’s position as to whether the MWA
5 applied to the NWDC changed in 2017 for political reasons and that L&I’s differing position in
6 2014 proves it. *Id.* As part of these efforts, GEO has repeatedly referred the Court to the same
7 set of L&I email communications from 2014 indicating that L&I employees mistakenly
8 determined, in response to a technical question from the Governor’s Office and outside
9 advocates, that they would not be able to enforce the MWA as applied to detainees at NWDC.
10 *See* ECF No. 403 at 5; *see also*, ECF No. 131 (attaching 2014 emails from L&I); ECF No. 183
11 at 8-9 (recapping 2014 emails); ECF No. 188 at 7, 11 (citing same to support unclean hands and
12 laches arguments); ECF No. 300 (attaching 2014 L&I emails).

13 However, the Court repeatedly and rightfully has refused to consider GEO’s arguments
14 regarding Washington’s reasons for filing this lawsuit or L&I’s prior emails as a defense to
15 Washington’s claims. After explicit consideration of the L&I emails, the Court dismissed GEO’s
16 defenses of laches and unclean hands, reasoning that, even if L&I did know about GEO’s MWA
17 practices in 2014, a three year delay in filing this enforcement action does not defeat
18 Washington’s claims. *See* ECF No. 202. Six months later, the Court similarly rejected GEO’s
19 attempt to reopen discovery against state agencies, including L&I, based on similar arguments.
20 *See* ECF No. 322, 326. And, finally, in January 2020, the Court granted Washington’s motions
21 in limine (MILs) to exclude evidence of the AGO’s prosecutorial discretion as well as L&I’s
22 prior history of enforcement at the NWDC. *See* ECF Nos. 357, 374; Declaration of Marsha Chien
23 in Support of State of Washington’s Opposition to GEO’s Motion for In Camera Review (Chien
24 Decl.) ¶ 3, Ex. A at 6:23-7:1 (transcript excerpts of the Apr. 13, 2020 hearing on MILs).

25 **B. The NWDC Memo at Issue**

26 GEO nevertheless seeks the so-called “NWDC Memo” to continue its arguments that

1 this action is politically motivated. ECF No. 403 at 5, 9. AAGs drafted the NWDC Memo, which
2 analyses legal claims and strategy relating to enforcement of the MWA against GEO for work
3 detainees perform while held at the NWDC. Chien Decl. ¶ 4. The NWDC Memo was drafted in
4 the summer of 2017 in anticipation of this litigation, filed shortly thereafter, on September 20,
5 2017, and in consultation with AAGs that represent L&I. *Id.* ¶ 5. After it was completed, the
6 NWDC Memo was provided to senior officials in the AGO, and three days before the complaint
7 was filed, one of the AAGs litigating this case provided it to Tammy Fellin of L&I. ¶ 6, Ex. B.
8 L&I enforces the MWA, is a client of the AGO, and needed to understand the legal analysis
9 supporting MWA enforcement in federal immigration detention centers as the issue had, as GEO
10 repeatedly points out, previously come up in 2014. *Id.* Afterwards, the NWDC Memo was used
11 by L&I employees tasked with enforcing the MWA to understand their ability to enforce the
12 MWA against GEO. *See* ECF No. 300 at 101; *see* Chien Decl. ¶ 7, Ex. C (Grice Dep.) at 91:4-
13 6, 98:18-25, 99:23-100:1 (recognizing that the NWDC Memo provides legal advice as to how
14 the MWA may apply at the NWDC and that L&I staff utilized that advice in 2018 when
15 considering issues related to MWA enforcement at NWDC).

16 GEO now seeks to compel the NWDC Memo, wildly assuming that it was drafted “to
17 convince the . . . media and the public why the AG should take it upon himself to sue GEO using
18 public resources.” ECF No. 403 at 11. Not so—and GEO knows it. Washington provided a
19 privilege log to GEO on April 26, 2019, Chien Decl. ¶ 8, Ex. D. The documents Washington
20 listed on its log included, among others, internal communications between AAGs within the
21 AGO regarding the legal analysis on issues in this case for more than one month before this case
22 was filed, including not only AAGs from the Civil Rights Division, but AAGs who regularly
23 advise L&I, as well. Additionally, the privilege log specifically identified the NWDC Memo and
24 email between AAG La Rond Baker and Tammy Fellin of L&I that is the subject of GEO’s
25 motion.¹ *See id.* (privilege log sent Apr. 26, 2019).

26 ¹ The log inadvertently identified the documents as being dated 9-19-2017 rather than 9-18-2017.

1 After receiving the privilege log, GEO followed up with Washington’s counsel raising
2 perceived concerns with the privilege log and other agency discovery issues, including questions
3 seeking additional information about the log entries for the NWDC Memo and associated emails.
4 See ECF No. 216-9 (May 14, 2019 letter from S. Armstrong to L. Baker) at 2-3. In response, on
5 May 20, 2019, Washington clarified that the privilege log entries GEO asked about referred to
6 “legal memos regarding the Northwest Detention Center that were drafted by Assistant
7 Attorneys General, provided to leadership in the Attorney General’s Office, housed in the shared
8 drive of the Attorney General’s Office and withheld on the basis of attorney-client privileged.”
9 ECF No. 216-11 (May 20, 2019 letter from L. Baker to S. Armstrong).

10 Shortly after, on May 24, 2019, GEO moved to compel discovery related to L&I,
11 including certain challenges to Washington’s common interest entries on its privilege logs. ECF
12 No. 215. GEO nowhere identified the NWDC Memo in that motion or challenged Washington’s
13 privilege designation, despite having Washington’s privilege log and discussing the specific
14 entries for the NWDC Memo before filing. *Id.*; Chien Decl. ¶ 9. Washington opposed the motion,
15 arguing the information requested, including Washington’s interpretation of federal and/or state
16 wage laws, was not responsive to any RFP GEO had issued and not relevant. ECF No. 219 at 8.
17 The Court agreed and denied GEO’s motion, recognizing that GEO “failed to identify a specific
18 response for production to which the State did not respond” and finding that GEO failed to
19 demonstrate that the requested discovery was relevant and proportional to the needs of the case.
20 ECF No. 243 at 5-6. Although GEO filed a Public Record Request (PRR) with L&I and obtained
21 a redacted version of the NWDC Memo in August 2019, discovery closed in both this case and
22 the related *Nwauzor* action without GEO raising the NWDC Memo again.

23 **C. GEO’s Reasons for Seeking to Compel the NWDC Memo Now**

24 GEO next raised the issue of the NWDC Memo to Washington over six months later on
25 January 17, 2020. As part of communications regarding Washington’s request for GEO’s Letter
26 to ICE and related financial calculations, GEO asserted, for the first time, a challenge to

1 Washington’s privilege designations of the NWDC Memo in an attempt to dissuade Washington
2 from filing its own motion to compel. Specifically, GEO’s counsel stated, in an email about
3 GEO’s financial materials, including the GEO Letter to ICE at issue in Washington’s recent
4 motion: “*Please know that should the State file a motion seeking to unredact the letter to ICE,*
5 *GEO will likewise move to unredact the attached document.*” ECF No. 397-9 at 2; *see* Chien
6 Decl. ¶ 10, Ex. E (Jan. 17, 2020 email from GEO counsel, attaching the NWDC Memo as
7 Wonhoff Ex. 263) (emphasis added).

8 On August 20, 2020, Washington moved to compel GEO to produce its Letter to ICE
9 and the underlying financial calculations upon which it was based. ECF Nos. 396, 405. The
10 Court granted Washington’s motion on September 14, 2020, noting that the timing of
11 Washington’s motion was “well explained in Plaintiff’s pleadings and are justified by the
12 circumstances presented.” ECF No. 409 at 2. Two weeks after Washington moved to compel
13 production of this financial information, GEO filed its motion to compel an unredacted NWDC
14 memo. *See* ECF No. 396, 403. Prior to filing the instant motion, GEO did not contact Washington
15 to meet and confer pursuant to LCR 37.

16 III. ARGUMENT

17 Washington respectfully requests that the Court deny GEO’s motion. First, GEO was not
18 merely dilatory and its motion is not merely late. The motion was—according to GEO’s own
19 counsel—filed not because the information is needed, but solely in response to Washington
20 separately seeking GEO’s financial documents. Because it is a retaliatory litigation tactic and
21 GEO does not even attempt to establish good cause for consideration of its belated motion, the
22 Court should deny it summarily. Even if the Court does consider GEO’s motion, however, the
23 NWDC Memo GEO seeks is privileged, constitutes attorney work product, and is not relevant.
24 Nothing in GEO’s motion warrants an order modifying the case schedule and requiring
25 production of the unredacted NWDC Memo.
26

1 **A. No Good Cause Exists to Consider GEO’s Motion at This Stage of the Case**

2 GEO’s motion should be denied because it is untimely and no good cause exists to
3 consider it. A court may, in its discretion, consider a motion out of time for “good cause.” Fed.
4 R. Civ. P. 16(b)(4); LCR 16(b)(6). Good cause may exist, as it did in Washington’s recent motion
5 to compel, where new evidence is discovered that could not reasonably have been discovered
6 earlier. *See* ECF No. 396. It does *not* exist, however, due to a party’s tactical decision to refrain
7 from seeking the relief at issue until years or months later. *MMMT Holdings Corp. v. NSGI*
8 *Holdings, Inc.*, No. C12-01570RSL, 2014 WL 2573290, at *4 (W.D. Wash. June 9, 2014); *see*
9 *Jasnosz v. J.D. Ott Co.*, No. C09-09552JLR, 2011 WL 3563345, at *3 (W.D. Wash. Aug. 12,
10 2011) (recognizing lack of good cause where moving party “provided no explanation as to why
11 he had not brought a motion to compel within the time limits provided”).

12 Here, GEO nowhere argues that there is good cause—or any justifiable reason—for the
13 timing of its motion. *Cf.* ECF No. 403. Nor could it: GEO was not diligent in pursuing the relief
14 it now seeks. It could easily have filed the instant motion long ago if it believed that it had a
15 basis to obtain the NWDC Memo in discovery. As detailed above, GEO and Washington
16 discussed the privileged nature of the NWDC Memo in May 2019, before the close of discovery.
17 *See* ECF Nos. 216-9, 216-11. Yet, GEO did not challenge the privilege designation of, or seek
18 to compel, the NWDC Memo. Moreover, as GEO’s motion makes clear, GEO separately
19 obtained the redacted NWDC memo and accompanying email via PRR to L&I. *See* ECF No.
20 300 at 101-13 (attaching Wonhoff Ex. 263, marked Aug. 22, 2019). GEO not only used the
21 redacted NWDC Memo and L&I emails at length in depositions of L&I representatives, *see* ECF
22 No. 300 at 50-55, GEO filed a brief making the same accusations against the AGO it now
23 presents here. *See, e.g.*, ECF No. 299 at 11-13 (Sept. 10, 2019); ECF No. 300 at 47 (Sept. 10,
24 2019) (deposition testimony of L&I representative on Sept. 5, 2019 about NWDC Memo); *see*
25 *id.* at 101-13. Yet GEO offers no explanation why, despite having the document, knowledge
26 about its basic contents, and a privilege log identifying it as privileged more than a year ago,

1 GEO waited until now to file the instant motion.

2 Although it is clear GEO does not require the unredacted NWDC Memo for its defense,
3 the Court need not guess about why GEO filed the instant motion now. On January 17, 2020,
4 GEO explicitly threatened to bring this motion if, and only if, Washington sought the Court's
5 involvement in requiring GEO to produce relevant and responsive financial information that
6 GEO was withholding. *See* Chien Decl. ¶ 10, Ex. E (GEO's Jan. 17, 2020 email). Since
7 Washington filed its recent and successful motion seeking GEO's financial materials based on
8 newly obtained deposition testimony from GEO's CFO, GEO appears to want to follow through
9 on its threat. GEO's own motion suggests that it was filed not because GEO truly needs the
10 NWDC memo, but is in fact a response to Washington's own motion seeking GEO's financial
11 information. *See* ECF No. 403 at 2 (asking the Court consider its request "should this Court find
12 it appropriate to reopen discovery in response to the State's recently filed motion.").

13 But Washington's motion did not seek to re-open discovery. Nor did the Court order the
14 re-opening of discovery. The Court limited its order to compelling GEO to produce certain
15 documents no later than September 18, 2020, as a supplement to GEO's prior productions. ECF
16 No. 409 at 2. Unlike the "circumstances presented" in Washington's motion, which warranted
17 relief, *id.*, no new evidence exists to warrant consideration of GEO's untimely motion here. GEO
18 repeatedly made the decision that it did not in fact need the unredacted NWDC Memo. The Court
19 should therefore reject GEO's litigation tactic and deny GEO's motion for lack of good cause.

20 **B. The NWDC Memo Is Attorney-Client Privileged and Attorney Work Product**

21 Even if the Court does consider GEO's motion, Washington respectfully urges the Court
22 to deny it. The NWDC Memo exemplifies the type of document that is protected by the attorney-
23 client privilege and attorney work product protections: It is a legal analysis prepared by Assistant
24 Attorneys General regarding the application of the MWA to detainee work at the NWDC,
25 prepared in anticipation of litigation, and shared with a client agency to provide legal advice and
26 inform their dual enforcement of the MWA.

1 **1. The NWDC Memo Is an Attorney-Client Privileged Communication**

2 Attorney-client privilege protects confidential communications between an attorney and
3 client for the purposes of obtaining legal advice. *In re Grand Jury Investigation*, 974 F.2d 1068,
4 1070 (9th Cir. 1992). “The attorney-client privilege is the oldest of the privileges for confidential
5 communications known to the common law.” *Upjohn Co. v. United States*, 449 U.S. 383, 389
6 (1981). “Its purpose is to encourage full and frank communication between attorneys and their
7 clients and thereby promote broader public interests in the observance of law and administration
8 of justice. The privilege recognizes that sound legal advice or advocacy serves public ends[.]”
9 *Id.* As such, the attorney-client privilege protects the “two-way street” of confidential
10 communications between attorneys and clients, *United States v. Bauer*, 132 F.3d 504, 507-08
11 (9th Cir. 1997), and necessarily includes communications containing “an attorney’s advice.”
12 *United States v. Chen*, 99 F.3d 1495, 1501 (9th Cir. 1996); *United States v. ChevronTexaco*
13 *Corp.*, 241 F. Supp. 2d 1065, 1069 (N.D. Cal. 2002) (“[I]t is widely accepted that the privilege
14 encompasses not only (qualifying) communications *from* the *client* to her attorney but also
15 communications *from* the *attorney* to her client in the course of providing legal advice.”).

16 As relevant here, the attorney-client privilege extends to governmental agencies and
17 government employees who receive advice from government lawyers,² where the government
18 shows that the “documents involved the provision of specifically legal advice or that they were
19 intended to be confidential and were kept confidential.” *Our Children's Earth Found. v. Nat'l*
20 *Marine Fisheries Serv.*, 85 F. Supp. 3d 1074, 1086-87 (N.D. Cal. 2015) (citations omitted). The
21 privilege applies when legal advice is sought or provided “from a professional legal advisor in
22 [her] capacity as such.” *Chen*, 99 F.3d at 1501. A government agency’s legal analysis
23 memoranda, and the legal advice contained within it, “embody the quintessential type of
24 attorney-client communications meant to be protected by the attorney-client privilege.”

25

26 ² GEO’s citation to the Rule of Professional Conduct 1.13(h) to suggest otherwise is inapposite. *See* ECF No. 403
at 8. RPC 1.13(h) identifies the government client for lawyers who are not a public officer or employee. All of the
AAGs referenced here are public officers or employees.

1 *CP Salmon Corp. v. Pritzker*, 238 F. Supp. 3d 1165, 1174 (D. Alaska 2017). “To conclude
2 otherwise would only serve to chill agency attorneys from providing candid advice to agency
3 decision-makers for fear that anything they communicate in an internal legal memorandum
4 would later be subject to disclosure.” *Id.*

5 In the Ninth Circuit, an eight-part test establishes attorney-client privilege:

6 (1) When legal advice of any kind is sought (2) from a professional legal adviser
7 in his or her capacity as such, (3) the communications relating to that purpose,
8 (4) made in confidence (5) by the client, (6) are, at the client's instance,
9 permanently protected (7) from disclosure by the client or by the legal adviser
10 (8) unless the protection be waived.

11 *United States v. Martin*, 278 F.3d 988, 999 (9th Cir. 2002). Washington meets each of these
12 elements establishing the NWDC Memo as an attorney-client privileged communication.

13 *First*, the NWDC Memo conveys legal advice: It is a legal analysis prepared by AAGs
14 regarding enforceability of the MWA as applied to the NWDC. *Second*, the advice was prepared
15 by AAGs assigned to the Civil Rights Division, in consultation with AAGs assigned to the L&I
16 Division, all of whom are attorneys acting in their official capacities on behalf of the State. *See*
17 Chien Decl. ¶ 8; Ex. D (privilege log documenting CRD AAGs communications re: NWDC
18 Memo in August 2017 with James Mills, L&I AAG). *Third*, the NWDC Memo relates to, and
19 contains, legal advice regarding the application of the MWA to detainee labor at the NWDC,
20 communicated to L&I given the agency’s enforcement work. Chien Decl. ¶5-6. *Fourth*, the
21 information conveyed in the NWDC Memo was made in confidence, as evidenced by the
22 privilege notice on the Memo, in the file name of the document, and in the accompanying notice
23 of privilege and confidentiality in the transmission email. *See* ECF No. 403 at 17; Chien Decl.
24 ¶ 6 (showing the NWDC Memo is marked “ATTORNEY CLIENT PRIVILEGED
25 COMMUNICATIONS” and “CONFIDENTIAL”). *Fifth*, the communication is from an AAG
26 in the Attorney General’s Office and was provided to one of its client agencies, L&I. ECF No.
403 at 17; Chien Decl. ¶ 5-6. *Sixth*, the client agency has asserted that the NWDC Memo is
protected by the attorney-client privilege and redacted it in response to a PRR. *See* ECF No. 403

1 at 17-28. *Seventh*, the attorney-client privilege is, therefore, claimed by both the legal advisors,
2 the AAGs, on the privilege log, and by the client, L&I, through its redactions and in response to
3 a PRR. *Id. Eighth*, and finally, the privilege has not been waived: L&I used the NWDC Memo
4 internally when using it to determine how to consider certain complaints, and neither L&I nor
5 the AGO have waived the privilege by sharing it outside the agency.

6 GEO nevertheless asserts the attorney-client privilege never existed, or has been waived
7 by AAGs providing the legal advice memo to a client agency, L&I, without establishing any
8 evidence that the AAGs or L&I shared it with a third party.³ ECF 403 at 10. Sharing attorney-
9 client communications with an outside third party “destroys the confidentiality of the
10 communications and the privilege protection that is dependent upon that confidentiality.” *Nidec*
11 *Corp. v. Victor Co. of Japan*, 249 F.R.D. 575, 578 (N.D. Cal. 2007). Here, the NWDC Memo
12 retains its privilege, because it was provided in confidence, marked “attorney-client privileged,”
13 and that privilege has been maintained by both the AGO and L&I thereafter, even in response to
14 PRRs. *See Martin*, 278 F.3d at 999; *cf. United States v. Ruehle*, 583 F.3d 600, 609 (9th Cir. 2009)
15 (communications were not “made in confidence,” but for the purpose of disclosure to outside
16 auditors); *United States v. Richey*, 632 F.3d 559, 567 (9th Cir. 2011) (communication related to
17 appraisal and value of easement and for submission to the IRS was not made for the purpose of
18 providing legal advice). As a legal matter, there also is no possibility of waiver, as lower level
19 employees cannot waive the attorney-client privilege. “[T]he power to waive the corporate
20 attorney-client privilege rests with the corporation's management and is normally exercised by

21 ³ Even if the Court concluded that the specific AAGs that drafted the NWDC Memo waived attorney-client privilege
22 in disclosing it to L&I, the memo is still protected under the common interest doctrine, which is an exception to
23 waiver and allows “attorneys for different clients pursuing a common legal strategy to communicate with each
24 other.” *In re Pac. Pictures Corp.*, 679 F.3d 1121, 1129 (9th Cir. 2012). Here, there is an on-going and joint effort
25 between AAGs in the Civil Rights Division and L&I Divisions of the AGO to develop a common legal strategy
26 regarding enforcement of the MWA at the NWDC. Indeed, as shown by L&I’s PRR responses to GEO’s request,
all AAGs and the L&I staff involved agreed to hold all the legal strategy contained in the NWDC Memo
confidential. Contrary to GEO’s assertions otherwise, *see* ECF No. 403 at 10-11, *Sanders v. Washington* directly
supports application of the common interest doctrine here. 240 P.3d 120, 127, 133-34 (Wash. 2010) (concluding
AGO could claim documents were privileged “even if it shared them with other agencies” under the common
interest doctrine).

1 its officers and directors.” *Chen*, 99 F.3d at 1502 (quoting *Commodity Futures Trading*
2 *Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985)). Finally, GEO’s “sword-shield” argument is
3 similarly unpersuasive. Washington has *not* put its own legal advice at issue and does *not* rely
4 on the memo to prove its claims. To the contrary, GEO, and only GEO, seeks to use the NWDC
5 Memo so that it can argue this enforcement action is “politically motivated.” *See* ECF No. 403
6 at 9.

7 **2. The NWDC Memo Is Attorney Work Product**

8 The “work product doctrine is a ‘qualified privilege’ that protects ‘certain materials
9 prepared by an attorney acting for his client in anticipation of litigation.’” *Hernandez v.*
10 *Tanninen*, 604 F.3d 1095, 1100 (9th Cir. 2010) (quoting *United States v. Nobles*, 422 U.S. 225,
11 237-38 (1975)). Here, GEO effectively admits that the document it seeks is work product
12 privileged as it recognizes the AAGs prepared the NWDC Memo in anticipation of litigation.
13 ECF No. 403 at 8-10. GEO seeks the NWDC Memo anyway, claiming it is in search of “similar
14 facts” between the 2014 and 2017 analysis. *Id.* GEO’s argument is misplaced. While the work-
15 product privilege does not allow withholding of “relevant and non-privileged facts [that] remain
16 hidden in an attorney’s file,” *Hickman v. Taylor*, 329 U.S. 495, 511 (1947), GEO has provided
17 no evidence that there are any such facts here, as the NWDC Memo is pure legal analysis
18 prepared by attorneys in anticipation of litigation.

19 Even if the Court found the attorney-client privilege was waived by providing it to a
20 client agency, which it should not, “[o]ne may waive the attorney-client privilege without
21 waiving the work product privilege,” because “[t]he work product rule is not based on the
22 confidentiality of the attorney-client relationship, and it does not disappear when the balloon
23 wall of confidentiality is breached unless the breach ‘has substantially increased the
24 opportunities for potential adversaries to obtain the information.’” *Goff v. Harrah's Operating*
25 *Co.*, 240 F.R.D. 659, 661 (D. Nev. 2007) (citing Charles A. Wright et al., *Federal Practice and*
26 *Procedure: Civil* § 2024, 369 & n.52 (2d ed. 1994)); *see also In re EchoStar Commc'ns*,

1 448 F.3d 1294, 1301 (Fed. Cir. 2006) (“work product waiver is not a broad waiver of all work
2 product related to the same subject matter like the attorney-client privilege”). As such, the
3 NWDC Memo is work product and it should not be disclosed.

4 **C. The NWDC Memo Is Neither Relevant nor Responsive**

5 Finally, even if GEO’s motion was not procedurally barred and the NWDC Memo was
6 not privileged, the NWDC Memo is not responsive to RFPs GEO issued nor relevant, and if
7 GEO uses it as it says it intends to, will contravene the Court’s Orders on Washington’s MILs.

8 *First*, GEO fails to identify a discovery request to which the NWDC memo was
9 responsive and therefore that it should have ever been produced at all. Indeed, this is the same
10 problem with GEO’s demands the Court cited the last time it denied GEO’s attempt to compel
11 documents related to the “State’s assessment of federal and/or state law as it relates to the
12 operation of work programs, including the use of contractors.” *See* ECF No. 243 at 5-6 (denying
13 GEO motion to compel additional state agency documents from L&I). *Second*, as the Court held
14 previously, discovery about the State’s assessment of federal and/or state law as it relates to the
15 operation of work programs is not relevant and is not proportional to the needs of the case. *Id.*
16 The NWDC Memo nowhere bears on GEO’s practices as a factual matter, and it was not
17 communicated to GEO such that GEO could have relied on it in determining whether to pay
18 detainees \$1 or more for the work they perform. Indeed, the memo is no more relevant to the
19 claims as “evidence” than the briefs filed on the docket in this case. *Third*, the Court has already
20 barred GEO from presenting evidence or argument regarding the State’s prosecutorial discretion,
21 including GEO’s assertions that this case is politically motivated, and L&I’s prior history of
22 enforcement at the NWDC. *See* ECF No. 357 at 1-4, 10; Chien Decl. ¶ 3, Ex. A (orders on MILs
23 No. 1 and 5). There is no need for GEO to present the unredacted NWDC Memo to argue that
24 which is barred, as GEO proposes in its motion. *See* ECF No. 403 at 5, 9.

25 **IV. CONCLUSION**

26 For the foregoing reasons, Washington requests that the Court deny GEO’s motion.

1 Dated this 21st day of September 2020.

2 Respectfully submitted,

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that the foregoing document was electronically filed with the United
3 States District Court using the CM/ECF system. I certify that all participants in the case are
4 registered CM/ECF users and that service will be accomplished by the CM/ECF system.

5
6 Dated this 21st day of September 2020, in Seattle, Washington.

7 

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9 Legal Assistant

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