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5 UNITED STATES DISTRICT COURT
6 FOR THE WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 DANIEL MITCHELL, ROBIN BALL, LUKE
9 RETTNER, ARMEN TOOLOEE,
NATHANIEL CASEY, MATTHEW WALD,
SECOND AMENDMENT FOUNDATION, and
NATIONAL RIFLE ASSOCIATION,

10 *Plaintiffs,*

11 v.

12 CHUCK ATKINS, in his official capacity as the
13 Sheriff of Clark County, Washington, CRAIG
14 MEIDL, in his official capacity as the Chief of
Police of Spokane, Washington, and TERESA
15 BERNTSEN, in her official capacity as the
Director of the Washington State Department
of Licensing,

16 *Defendants.*

17 The Honorable Ronald B. Leighton

18 No. 3:19-cv-05106-RBL

19 OPPOSITION TO MOTION FOR
20 PROTECTIVE ORDER

21 ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

In general, discovery is permissible with respect to any nonprivileged matter that is relevant to any party's claim... Courts should not bar a relevant deposition absent extraordinary circumstances as such a prohibition would likely be in error." *Kelley v. Microsoft Corp.*, 2008 WL 5000278, at *1 (W.D. Wash. 2008) (internal citations and alterations omitted). No such extraordinary circumstances are present here.

II. ARGUMENT

The Department objects to the Fed. R. Civ. P. 30(b)(6) notice on two grounds: first, that compliance is unduly burdensome because no person within the Department of Licensing has any *present* knowledge as to the topics, and second, that any testimony will necessarily offer legal opinions. Both objections fail.

First, the Department avers that its Director and employees lack relevant knowledge as to the topics “at this time.” Plainly, as demonstrated in the Motion, as well as in all the Department’s objections to Requests for Production of Documents, Interrogatories, and Requests for Admission, the Department intends—eventually—to supply the Court with facts and documents in support of its defense of the challenged statutes. The Motion asks this Court to allow it to do so at a time of its choosing, and without first disclosing documents, facts, and defense theories to the plaintiffs, as required by the Federal Rules.

Second, the Department objects that because certain common English words are defined in the Notice with reference to a Supreme Court opinion, all questions in the deposition will necessarily elicit only legal opinions. This is wrong, and it is no reason to preclude a deposition.

A. The Department Must Present A Witness With Knowledge.

The Department of Licensing, like every government agency, is subject to Rule 30(b)(6). The Department does not contest this. Plaintiffs are entitled to “obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense . . .” Fed. R. Civ. P. 26(b)(1).

1 Here, several areas of fact inquiry are relevant:¹ (1) the extent to which certain newly banned
 2 firearms are in common use in Washington; (2) whether the owners of those firearms are law-
 3 abiding citizens; (3) whether those firearms are used for lawful purposes; (4) whether those
 4 firearms are dangerous and unusual; (5) whether they are most useful in military service; (6)
 5 whether a ban on their interstate sale affects interstate commerce, and if so, to what extent; (7)
 6 what state interest is served by banning sales of those firearms to young adults; and (8) what state
 7 interest is served by banning interstate sales of those firearms.

8 Plaintiffs are entitled to depose a representative witness prepared to testify as to facts
 9 bearing on these issues, such as the number of Washington residents who own firearms subject to
 10 the bans, what crimes have been committed by those owners, non-criminal uses of the firearms,
 11 and any facts the Department has supporting a contention that the banned firearms are most useful
 12 for military service.

13 **1. Cases Excusing Rule 30(b)(6) Designations For Lack Of Knowledge Are
 14 Inapposite According To The Department's Own Statements.**

15 The Department relies heavily on a series of cases that excuse Rule 30(b)(6) depositions
 16 where an entity cannot prepare a witness because it has no knowledge as to one or more topics.
 17 However, it makes each of those cases inapposite by arguing that it may yet procure and present
 18 facts relevant to every identified topic—but only later, at a time of its own choosing. It does so in
 19 two ways. First, every excuse which pleads lack of knowledge is carefully limited by the phrase “at
 20 this time.” For example, “At this time, Director Berntsen does not anticipate relying on facts obtained
 21 or developed from within DOL at all.” Mot. at 6-7. (The Department further limits this caveat with a
 22 footnote that if it alters its position, it will supplement its responses.) The Department further suggests
 23 that “at this stage the State *may* carry its burden using legislative facts, which would be revealed to
 24 Plaintiffs at the time for ‘exchanging briefs.’” Mot. at 8:21-23. Director Berntsen avers that she lacks
 25 knowledge to testify to the noticed topics only “at this time.” Mot., 6:26; Berntsen Decl. *passim*. While
 26 the Department seeks to avoid the notice, it acknowledges that “If at a later stage of litigation Director
 27

¹ The Department makes no claim that the requested discovery is irrelevant.

1 Berntsén is required to develop adjudicative facts, such facts will be subject to the her [sic] duty of
 2 continuing disclosure.” Mot. at 9:1-2. What the Department plainly proposes, as admitted when it
 3 states it need only produce documents and testimony in summary judgment briefs, is that the “later
 4 stage” means “after the close of discovery,” which also means “when Plaintiffs can’t make use of the
 5 facts.” Unsurprisingly, the Department cites no case for the proposition that it may remain studiously
 6 ignorant of facts supporting its defense until a time of its own choosing, and nonetheless avoid the
 7 obligations imposed by the Rules, including the obligation to present a Rule 30(b)(6) witness with the
 8 accompanying burdens imposed if that witness is unprepared.

9 Indeed, it is for this very reason that Rule 30(b)(6) allows Plaintiffs to seek the Department’s¹
 10 definitive testimony on these topics. The time is now, not later (at summary judgment), when Plaintiffs
 11 can no longer prepare their case. Whatever burden the notice imposes on the Department, it is not
 12 “undue.” Indeed, the Department is free to make no investigation at all, subject to the possible
 13 exclusion of later-discovered facts. There can hardly be much burden from a deposition that entails a
 14 witness stating “I don’t know” to eight questions. Of course, the Department does not want that result
 15 from a Rule 30(b)(6) deposition. Instead, it wants to avoid testifying so that it can present its facts and
 16 case without first being obliged to disclose it to Plaintiffs.

17 The Department hits the bullseye when it notes that “courts have held that the inability to
 18 designate an appropriate representative may preclude the agency from offering evidence on the
 19 same topics later . . . ” Mot. at 8:5-6. However, it argues, incorrectly, that the deposition cannot go
 20 forward at all because, in its view, Plaintiffs “seek[] the the [entity’s] ‘position’ on matters in
 21 dispute, and not just what the [entity] knows.” *Id.* at 8:7-8. That is no reason to quash the
 22 deposition, of course, and each case cited by the Department is one where the Rule 30(b)(6)
 23 deposition did go forward, and the Court later ruled on what preclusive effect it had. To whatever
 24 extent the Department refuses to prepare its witness to testify to relevant facts, the Court may
 25 entertain a motion from Plaintiffs to preclude later evidence. If the Court, faced with such a
 26 Motion, concludes that the questions sought opinions or positions, it can decline to exclude. But

1 the possibility that such a question might be asked, and a motion made and later denied, is no basis
 2 for blocking discovery on relevant topics.

3 **2. The Notice Does Not Seek Expert Testimony.**

4 The Department characterizes the Notice as “essentially seek[ing] expert testimony on
 5 various characteristics of assault rifles, with specific reference to a wide body of complex Second
 6 Amendment jurisprudence . . .” Mot. at 5:23-24.² The Notice seeks no such thing. It directs the
 7 Department to prepare and present a fact witness, ready to testify to the Department’s knowledge
 8 of relevant facts that bear on the Constitutionality (or lack thereof) of the challenged statutes.
 9 Those facts will bear on relevant law, which means that they are actually relevant. If they did not
 10 bear on the relevant law, then they would not be subject to discovery under Rule 26. But they are
 11 relevant, a concession the Department has already made.

12 **3. The Deposition Does In Fact Seek To Pin Down The Department On Its
 13 Litigation Positions; It Is Not “Premature.”**

14 The Department complains that the Notice “seems to be an attempt to *unfairly* pin the
 15 agency down on positions about which it would not be expected to have knowledge apart from
 16 defending this case.” Mot at 6:5-7 (emphasis added). Strike the word “unfairly” and the
 17 Department is exactly correct. But this is not unfair. It is the precise purpose of the Federal Rules
 18 of Civil Procedure which were designed to prevent “trial by ambush.” *Anderson v. Anderson*, 2019
 19 WL 2450609, at *1 (W.D. Wash. 2019). Plaintiffs are entitled to know what the Department knows.
 20 If the Department has declined to inform itself, Plaintiffs are entitled to call attention to the
 21 Department’s current state of knowledge. As noted above, whether a preclusion motion might ever
 22 be presented, and whether or not it might succeed, have no bearing on the Department’s obligation
 23 to present a witness to testify to these relevant topics. The Department’s complaint that “Plaintiffs
 24 seek premature speculation about litigating positions in a manner that implicates work product
 25 protections,” Mot at 6:16-17, is similarly misplaced. A deposition scheduled to take place after the
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27 ² The Notice does not seek any testimony regarding “assault rifles,” a phrase used repeatedly by the Department but
 not used in the Notice or in the statute, which has a specific definition of the term “semi-automatic assault rifle.”

1 Rule 26(f) conference and before the close of discovery is not “premature.” All discovery is aimed,
 2 to some degree, at learning the opponent’s litigating positions. “The Rule 30(b)(6) designee does
 3 not give his personal opinions. Rather, he presents the corporation’s ‘position’ on the topic.”
 4 *United States v. Taylor*, 166 F.R.D. 356, 361-62 (M.D.N.C. 1996). And “implicating” work product
 5 protections does not offer a basis to preclude a witness sitting down to be deposed. *See, e.g., S.E.C.*
 6 *v. Kramer*, 778 F. Supp. 2d 1320 (M.D. Fla. 2011) (reversing order quashing 30(b)(6) deposition of
 7 SEC). In *Kramer*, the SEC objected that only commission counsel had worked on the case, so that
 8 any deposition would not merely implicate, but “would necessarily intrude upon the work product
 9 and deliberative process privileges.” *Id.* at 1328. Noting the ability of a witness to refuse to answer
 10 a specific question that reached too far during the deposition, the District Court reversed a
 11 Magistrate’s order quashing the notice: “Permitting the Commission in this instance to assert a
 12 blanket claim of privilege in response to a Rule 30(b)(6) notice creates an unworkable circumstance
 13 in which a defendant loses a primary means of discovery without a meaningful review of his
 14 opponent’s claim of privilege.” *Id.*

15 It is also no objection that the deposition goes beyond strictly factual inquiries: “the
 16 designee must not only testify about facts within the corporation’s knowledge, but also its
 17 subjective beliefs and opinions. . . . The corporation must provide its interpretation of documents
 18 and events. . . . The designee, in essence, represents the corporation just as an individual represents
 19 him or herself at a deposition.” *Taylor*, 166 F.R.D. at 361 (internal citations omitted).

20 **4. “Localized Facts” Are At Issue.**

21 Before it begins its misleading discourse on how “legislative facts” are not subject to the
 22 Federal Rules of Civil Procedure governing discovery, the Department gives the game away once
 23 more. It states:

24 At this time, Director Berntsen does not anticipate relying on facts obtained or developed
 25 from within DOL at all. That is so because, absent any issue of “localized” facts, it is more
 26 typical in Second Amendment cases for the parties to rely upon case law, statutory
 interpretation, and legislative facts ascertainable to all parties, such as statistics maintained
 by the federal government and social science.

1 Mot. at 6:26-7:4. The Department does not get to decide, by seeking a protective order, that there
 2 are no issues of “localized facts.” The Notice seeks testimony regarding “localized facts.” The
 3 Notice seeks specific facts regarding the prevalence and use of the banned firearms in Washington,
 4 as well as the behavior of the owners of those firearms. Those localized facts are relevant, as the
 5 Department concedes. They are at issue, because Plaintiffs intend to argue their case based on
 6 those facts. The Department cannot refuse to testify to them simply because it prefers to present
 7 other evidence.

8 **5. “Legislative Facts” Are Not Excused From Discovery.**

9 The Department asserts that it need not produce or testify to any facts Plaintiffs seek
 10 because all facts it considers relevant to the litigation are “legislative facts.” For this principle, it
 11 cites the Advisory Committee Note to Fed. R. Evid. 201.³ But that rule, and accompanying note,
 12 address whether a particular fact is or is not subject to that specific Rule’s strictures for a court to
 13 take judicial notice of the fact—the prerogatives of the judiciary, not the discovery obligations of
 14 the parties. The Note does not offer any support for the Department’s claim that “[s]uch facts are
 15 not subject to party discovery . . .” Mot. at 8:4. In fact, the Department (and intervenors) must
 16 produce relevant, responsive, non-privileged documents in their possession, custody, and control,
 17 whether those documents are internally generated or are social science studies procured by the
 18 party. *See* Fed. R. Civ. P. 34(a)(1)(A) (requiring production of “any designated documents”).
 19 They must answer interrogatories, even if the knowledge on which the answer is based comes from
 20 an FBI report. *See* Fed. R. Civ. P. 33(a)(2) (“An interrogatory may relate to any matter that may
 21 be inquired into under Rule 26(b)”). Not a single case cited by the Department (or Intervenors)
 22 stands for the proposition that any defendant may refuse to produce documents simply because
 23 the document in its possession is a social science study, sourced from another government,

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 25
 26

³ Intervenors agree with this position, asserting that “Plaintiffs’ attempts to take discovery on legislative facts reflects
 27 a fundamental misunderstanding of constitutional litigation.” Response, 3:21-22. They cite no case for the principle
 that constitutional litigation is immune from any of the Federal Rules of Civil Procedure.

1 available in the public domain, or is some other form of “legislative fact.”⁴ No case holds that the
 2 Department can decline to answer interrogatories because they ask for contentions as to the
 3 application of fact to constitutional law. No case holds that the Department can refuse to produce
 4 a witness to testify to facts simply because the Department itself currently thinks it will not attempt
 5 to introduce those facts into evidence. While the Department is free to prepare its defense in any
 6 way it chooses, including its apparent preference for relying on “case law, statutory interpretation,
 7 and legislative facts ascertainable to all parties, such as statistics maintained by the federal
 8 government and social science,” Mot. at 7:2-4, it cannot unilaterally decide that Plaintiffs must
 9 litigate their challenge in the same manner. And in any event, there is no support cited—none—for
 10 the proposition on which both the Department and Intervenors base their non-compliance with
 11 discovery: that “legislative facts that are not subject to the rules of evidence and are not subject to
 12 party discovery.” Mot. at 6:25-26. This is, quite simply, not true.

13 The Department concludes that “[i]t is neither fair nor efficient to require a state agency
 14 that has no expertise on the topic at hand to educate itself on a complex set of issues for the
 15 purposes of defending itself in litigation.” Mot. at 8:15-17. The state agency charged with enforcing
 16 a statute that Plaintiffs allege is unconstitutional must, unsurprisingly, educate itself on the statute,
 17 both to justify its continuing enforcement, and to defend the constitutionality of the law. This is
 18 neither unfair nor inefficient. It is the basic requirement of the law.

19 **B. The Notice Seeks Facts, Not Legal Opinions Or Work Product.**

20 The Department seeks to preclude the deposition because of the definitions section in the
 21 Notice. Of course, it does not explain to the Court the history of its discovery objections that led
 22 to the inclusion of a “definitions” section for such simple English words and phrases as “common
 23 use,” “law-abiding,” and “lawful purpose.” Nor did it ever once proffer its own definition of those

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 25 ⁴Intervenors cite *Wiesmueller v. Kosobucki*, 547 F.3d 740 (7th Cir. 2008), for the proposition that responsive documents
 26 in their possession are not subject to production because they are “legislative facts.” In that case, Judge Posner’s
 27 chambers opinion construed Seventh Circuit Rule 28(c) in denying a motion to strike 14 pages of the fact section of
 a motion that discussed the law governing admission to the bar as opposed to specific facts of the litigation which
 concerned waiving the bar exam for candidates from Wisconsin law schools. It is irrelevant to the point of
 Intervenors and the Department.

1 words and phrases, nor did it seek to simply strike the definitions and proceed with the deposition.
 2 No: the Department's position on those words is "heads, I win; tails you lose."

3 Plaintiffs have asked the Department for documents, for contentions, and for admissions
 4 as to whether or not the banned rifles are in common use by law-abiding citizens for lawful
 5 purposes. When Plaintiffs used these common words and phrases without offering a definition, the
 6 Department objected. *See* Ard Decl. Exh. A at 6. When Plaintiffs defined the words with reference
 7 to the relevant Supreme Court opinion, the Department objected again. To this Court, it objects
 8 that the definition renders all testimony "legal opinion." In response to RFAs, it objected that
 9 even with a definition, the terms are "vague and ambiguous" because "[c]ontrary to Plaintiffs'
 10 proposed definition, *District of Columbia v. Heller*, 554 U.S. 570 (2008), does not comprehensively
 11 define the term." *See* Ard Decl. Exh. B at 2-3.

12 Enough. Plainly, a deposition will have to open with discussion of the relevant lexicon, to
 13 ensure that the record is clear on what the Department knows and doesn't know about the meaning
 14 of these simple English words. But the Department cannot prevent a deposition from going forward
 15 by bandying frivolous objections citing its own incomprehension of the English language.

16 The Department broadens its objection beyond the mere use of a definition which is
 17 intended to ensure that the witness and counsel have a mutual, shared understanding of words:

18 Plaintiffs may contend that the eight topics are in fact intended to elicit "facts." For
 19 example, viewed in isolation, Topic 1—"the extent to which SAR are in common use in
 Washington"—has a factual predicate. But viewed in context, that topic is plainly designed
 20 to elicit a legal conclusion—as are all the other topics. Plaintiffs cannot plausibly argue that
 the purpose of such questions is for a general state licensing and record-keeping agency to
 21 educate a group of Plaintiffs—including gun rights and advocacy organizations—on the
 facts concerning assault rifles and their users.

22 Mot. at 10:3-9. Plaintiffs do actually contend that the eight topics are intended to elicit just plain
 23 facts, not scare quote "facts." All the topics, whether viewed in isolation or in any other way, have
 24 a factual predicate. And that factual predicate is what Plaintiffs are allowed to explore with the
 25 Department's designated witness.

26 The Department argues that "in context, that topic is plainly designed to elicit a legal
 27 conclusion . . ." Why so? Because, it says "Plaintiffs cannot plausibly argue that the purpose of

such questions is for a general state licensing and record-keeping agency to educate a group of Plaintiffs—including gun rights and advocacy organizations—on the facts concerning assault rifles and their users.” No, Plaintiffs absolutely do not argue that.⁵ Indeed, if the purpose of the questions was self-education, they would be improper. Instead, the purpose is for Plaintiffs to learn, and the Department to disclose, the relevant facts underlying the Department’s defense of the challenged statutes. Neither this nor any other civil discovery occurs for the purpose of “educating a group of Plaintiffs.” Discovery is for discovering facts, documents, witnesses, and legal theories of a party-opponent. “The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case.” Rule 26 Advisory Committee notes on 1946 amendments; *accord In Re National Western Life Ins. Deferred Annuities Litigation*, 2011 WL 1304587, at *4 (S.D. Cal. 2011). That purpose is served by the Department’s witness answering relevant questions.

The Department continues its objection by asserting that “[p]lainly, the purpose of the deposition would be to seek to have a lay witness opine on supposed ‘facts’ that specifically underlie legal conclusions.” Mot. at 10:13-15. Its argument and case cites are entirely misplaced.

But first, it is vital to note that once again, the Department is playing “heads I win, tails you lose.” It cites *Fidelity Management & Research Co. v. Actuate Corp.*, 275 F.R.D. 63 (D. Mass. 2011) in support of its proposed protective order. But in that case, the Court noted particularly that “it is not clear that a 30(b)(6) deposition is the best method for obtaining the information. Rather, it can be argued that contention interrogatories are a better vehicle.” Of course, here, Plaintiffs tried contention interrogatories first. The Department’s response was no better than its Motion: Plaintiffs are not entitled to discovery. *See* Ard Decl. Exh. A at 6. Similarly, the Court in *JPMorgan Chase Bank v. Liberty Mut. Ins. Co.*, 209 F.R.D. 361 (S.D.N.Y. 2002) blocked a Rule 30(b)(6) deposition on topics it held were not only factually irrelevant, they also sought exclusively legal

⁵ As noted above, not one of the topics has anything to do with “assault rifles.” The topics solicit facts concerning “SAR,” where “[t]he term ‘SAR’ has the meaning of RCW 9.41.010(26).” That statute defines the term “semi-automatic assault rifle.”

1 conclusions, and conclusions as to which “plaintiff never sought permission of the Court to
 2 propound a contention interrogatory . . .” *Id.* at 363.⁶

3 The mere fact that the Department has refused to respond to contention interrogatories is
 4 alone sufficient under these cases to allow the Rule 30(b)(6) deposition to go forward. Contrary to
 5 the Department’s contention, the topics in the Notice are not “window dressing” that seek “to
 6 commit the lay witness to a legal conclusion as to what level of protection assault rifles should
 7 receive under *Heller* and its progeny.” Mot. at 10. Again, as discussed above, the Definitions
 8 section of the Notice exists solely because the Department claims not to understand the words
 9 “common use,” “lawful purpose,” and “law-abiding citizen” absent a definition. The definitions
 10 were given with specific reference to *Heller* exclusively to prevent additional game-playing by the
 11 Department as to the appropriateness or relevance of the definition. Thus, the Department’s claim
 12 that “Plaintiffs reveal the primarily legal thrust of the deposition topics by including a ‘Definitions’
 13 section that would require the deponent to parse six of the proposed topics in reference to the
 14 Supreme Court’s *Heller* decision . . .”, Mot. at 10, should be ignored. If the Definitions are struck,
 15 the Department will refuse to answer based on incomprehension. If they remain, the Department
 16 will refuse to answer on the grounds of work product or legal opinion. If they are re-written, the
 17 deposition will consume hours of debate on what the meaning of the word “is” is.

18 Nor does the Notice “seek to commit the lay witness to a legal conclusion.” Mot. at 10. Of
 19 course, legal ramifications may follow from the facts known to the Department. The Supreme
 20 Court has held that the State may not impose restrictions on weapons that are in common use for
 21 lawful purposes by law abiding citizens. But testifying to the facts regarding those topics does not
 22 require the witness to commit to a legal conclusion. It must only commit to the facts to which the
 23 witness testifies. This Court will make what it will of the legal ramifications of that testimony. To
 24 whatever extent the facts sought in the Rule 30(b)(6) topics underlie the Department’s legal
 25

26 ⁶ The Department also relies on *ANZ Advanced Technologies, LLC v. Bush Hog, LLC*, 2010 WL 11575130 (S.D. Ala.
 27 2010). The Court in that case never identifies which topics “must be interpreted as seeking either defendants’ legal
 conclusions or the facts specifically underlying those legal conclusions.” *Id.* at *6. Without knowing what topics
 were objectionable, Plaintiffs find the case uninformative as to the current notice.

1 conclusions, the Department cannot shield the facts simply because it may or may not have reached
 2 a legal conclusion.

3 Thus, for example, in *Kramer*, a recent case dealing with Rule 30(b)(6) notices to the SEC,
 4 the agency sought to preclude a the deposition

5 because Commission counsel lacked “independent knowledge” of the facts and because
 6 only Commission counsel worked on the case, [therefore] a deposition of the Commission
 7 would necessarily intrude upon the work product and deliberative process privileges.
 8 Kramer, however, sought to discover only the facts underlying the claim against him and
 9 not the mental impressions of Commission counsel. Rule 30(b)(6) contains no requirement
 10 that Kramer first seek by other means of discovery the facts underlying the claim against
 11 him. Under Rule 30(b)(6), the Commission could designate any person (*i.e.*, someone other
 12 than counsel) to depose in response to Kramer’s request. To the extent that Kramer’s
 13 subsequent examination sought either the work product or mental impression of
 14 Commission counsel, the Commission’s designated deponent retained the right to refuse
 15 to answer on the basis of privilege. Permitting the Commission in this instance to assert a
 16 blanket claim of privilege in response to a Rule 30(b)(6) notice creates an unworkable
 17 circumstance in which a defendant loses a primary means of discovery without a
 18 meaningful review of his opponent’s claim of privilege.

19 *Kramer*, 778 F. Supp. 2d at 1328.⁷ This is plainly the result sought by the Department: no discovery,
 20 no facts, no information should change hands until the summary judgment briefs are filed. To this
 21 end, the Department asserts that “the agency will not be able to address the noticed topics absent
 22 specific legal counsel and advice.” True. But that does not shield facts from discovery. *UMG*
 23 *Recordings, Inc. v. Grande Communications Networks, LLC*, 2018 WL 4627276 (W.D. Tex. 2018)
 24 cited by the Department, closed off questions as to two specific topics that sought specific opinions
 25 on federal law. These topics seek facts. It is no basis for objection that counsel are involved in
 26 preparing witnesses or identifying facts. “[T]he attorney-client privilege does not protect facts
 27 communicated to an attorney. Moreover, clients cannot refuse to disclose facts which their
 attorneys conveyed to them and which the attorneys obtained from independent sources. When a
 corporation produces an employee under Fed. R. Civ. P. 30(b)(6) to testify to corporate knowledge,

7 *Kramer* expressly distinguished *Buntrock*, cited by the Department as follows: “In some cases, however, the Commission has successfully avoided a Rule 30(b)(6) deposition based on the work-product privilege, to the extent that the Commission **otherwise produces the documents and information** collected in the Commission’s investigation and to the extent that the opposing party may obtain additional, non-privileged information by other, less intrusive means.” *Kramer*, 778 F. Supp. 2d at 1327. Here, of course, no other available means of discovery has prevailed upon the Department to produce documents.

1 the employee must provide responsive underlying factual information even though such
2 information was transmitted through or from corporate lawyers.” *Sprint Communications Co., L.P.*
3 *v. Theglobe.com, Inc.*, 236 F.R.D. 524, 529 (D. Kan. 2006) (footnotes omitted).

4 **III. CONCLUSION**

5 The Department has failed to meet its burden of showing that the discovery requested by
6 Plaintiffs is unduly burdensome, seeks only legal opinions, or is otherwise improper. The scheduled
7 Rule 30(b)(6) deposition will allow the Plaintiffs to learn the Department’s knowledge of, and
8 position regarding, important factual issues critical to the Plaintiffs’ theory of the case. The Motion
9 for Protective Order should be denied.

10

11 October 30, 2019.

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1 **CERTIFICATE OF SERVICE**

2 I certify under penalty of perjury under the laws of the United States of America that on
3 October 30, 2019, I filed the foregoing, together with the supporting Declaration of Joel Ard, with
4 the Court's CM/ECF system, which will give notice to all parties and counsel of record.

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7 
8 _____
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