UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

JAMES D. WESTENDORF,	)	
Complainant,	)	
	)	
v.	)	8 U.S.C. § 1324b Proceeding
	)	CASE NO. 91200179
BROWN & ROOT, INC.,	)	
Respondent.	)	
	)	

ORDER DENYING COMPLAINANT'S MOTION FOR A SUBPOENA DECES TECUM

Complainant's motion/request for the issuance of a subpoena duces tecum to be served on the Office of Special Counsel, Department of Justice (OSC) was filed with this office on February 6, 1992. A review of the procedural history in this case provides a clear understanding of the problems presented by this motion.

On July 23, 1991, James D. Westendorf, Complainant herein, filed a Complaint and accompanying affidavits with the Office of Special Counsel (OSC), Department of Justice, against Brown & Root, Inc. (B & R), alleging discrimination on the basis of citizenship status by B & R in violation of the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324b (IRCA).

On September 9, 1991, OSC sent a letter to Mr. Westendorf informing him that they had investigated his case and had not found reasonable cause to believe that he was the victim of citizenship status discrimination. OSC further advised Mr. Westendorf that OSC would not file a complaint regarding his charge of citizenship status discrimination with the Office of the Chief Administrative Hearing officer (OCAHO), but instructed him that he could file his own complaint directly with OCAHO within ninety (90) days of receipt of the letter.

On October 21, 1991, Mr. Westendorf, acting pro se, filed a Complaint with OCAHO alleging that he was a U.S. Citizen and that on May 1, 1991, he had applied for the position of instrument fitter with B & R; that he was qualified for the job; and that B & R knowingly and

intentionally refused to hire him because of his citizenship status in violation of 8 U.S.C. § 1324b.

On December 16, 1991, Respondent filed its Answer to the Complaint denying, inter alia, that on May 1, 1991, it knowingly and intentionally refused to hire Complainant because of his citizenship status; and further stated that Complainant was not hired because he would not provide B & R with his social security number which B & R requires from all prospective employees so that the company can comply with federal tax withholding laws.

On January 7, 1992, I issued my standard "Order Directing Prehear-ing Procedures" which directed, inter alia, the parties to begin discovery. It is in connection with Complainant's attempt to complete his discovery by applying for a subpoena duces tecum that the matter is now before me.

On or about January 14, 1992, Complainant sent a letter to OSC requesting copies of all documents explaining the facts that led OSC to a finding of no reasonable cause to believe that he was a victim of unfair immigration-related employment practice.

On January 23, 1992, OSC responded to Complainant's letter agreeing to furnish some of the documents requested, but denying others. In its response, OSC stated that the decision not to file a Complaint was based on the facts described in Complainant's affidavit submitted with his initial charge form, the information contained in the charge form, and information provided by Brown & Root in response to OSC's request for information and documents. OSC sent copies of these documents to Complainant.

OSC, however, declined to provide Complainant with its internal memoranda, attorney notes, including notes of witness interviews and telephone conversations, and attorney outlines made in connection with its investigation of the case. OSC told Complainant that the reasons for declining to provide him with these other papers or documents were because the materials were prepared in anticipation of litigation, were attorney work product, were subject to the deliberative process privilege and were withheld pursuant to 5 U.S.C. § 552(b)(5).

Complainant argues, inter alia, that he is entitled to these papers and documents because (1) his need for the material goes to the heart of his Complaint; (2) he is not seeking all the documents or papers that OSC describes as the reason for the denial; and (3) the last sentence

of U.S.C. § 552(b)(5) states "but communications that relate to discussions, already made must be released."

My decision to grant or deny Complainant's request for an administrative subpoena will be based upon OCAHO's regulation covering discovery requests, 28 C.F.R. § 68.18,[1] the Administrative Procedure Act, the Federal Rules of Civil Procedure and federal decisions. 28 C.F.R. § 68.1 states "that the Rules of Civil Procedure for the district courts of the United States may be used as a general guideline in any situation not provided for or controlled by these rules, the Administrative Procedure Act, or by any other applicable statute, executive order or regulation."

28 C.F.R. § 68.18(a) contains the general provisions applicable to discovery in cases before this administrative tribunal and is similar in language and scope to Rule 26(a) of the Federal Rules of Civil Procedure. 28 C.F.R. § 68.18(b) describes the scope of discovery and is similar in language to Rule 26(b)(1) of the Federal Rules of Civil Procedure. Rule 26(b)(3) of the Federal Rules of Civil Procedure covers the work product doctrine and provides protection only for "documents and tangible things." The rule states, inter alia, that:

> a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or trial by another party or for that other party's representative (including the other party's attorney . . .) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation . . . .

Although the Freedom of information Act (the Act), does provide for disclosure of public information, there are exemptions. 5 U.S.C. § 552(a). The Act exempts from disclosure to the public, inter alia, the "inter- agency or intra-agency memorandum or letters which would not be available by law to a party other than an agency in litigation with an agency." 5 U.S.C. § 552(b)(5). Federal courts have held that the attorney's work product privilege falls within the exemption provision of this section. See Merrill v. Federal Open Market Committee of Federal Reserve System, 413 F. Supp. 494 (D.D.C. 1976),

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[1] Rules of Practice and procedure for Administrative Hearings __ Fed. Reg. __ (19--) (to be codified at 28 C.F.R. Part 68 (hereinafter cited as 28 C.F.R. § 68).

aff'd 565 F.2d 778 (D.C. Cir. 1977), vacated, 443 U.S. 340 (1979), on remand, 516 F. Supp. 1028 (D.D.C. 1981); United States v. J. B. Williams Co., Inc., 402 F. Supp. 796 (S.D. N.Y. 1975) (the Court stated that subsection 5 of this section embraces attorney work product privilege referred to in the United States Supreme Court's decision in Hickman v. Taylor).

The OCAHO regulations covering discovery do not have any provisions similar to Rule 26(b)(3) of the Federal Rules of Civil Procedure, nor section 552(b)(5) of the Freedom of Information Act. I will, therefore, rely on federal court decisions interpreting the meaning and application of the work product doctrine as guidance in deciding this motion.

Discussion of the work-product doctrine must begin with the Supreme Court's seminal decision in Hickman v. Taylor, 329 U.S. 495 (1947).[2] In Hickman, at 510, the Supreme Court recognized a qualified immunity from discovery for the "work product of the lawyer;"such material could only be discovered upon a substantial showing of "necessity or justification." An exemption from discovery was necessary because, at the Hickman Court stated:

> Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Id. at 511.

This did not mean, the Court said, that all written materials obtained or prepared by a lawyer with an eye to litigation are necessarily free from discovery in all cases. The Court further stated that:

> Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. Such written statements and documents might, under certain

[2] Although parts of the doctrine have been codified in provisions such as Federal Rules of Civil Procedure 26(b)(3), legal commentators suggest Hickman continues to be the standard by which courts interpret those provisions and protect the work product when those provisions do not apply. See generally Clermont, Surveying Work Product 68 Cornell L. Rev. 755 (1983); Note, The Work Product Doctrine, 68 Cornell L. Rev. 760 (1983).

> circumstances, be admissible in evidence or give clues as to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration. And production might be justified where the witnesses are no longer available or can be reached only with difficulty.

Id. at 511.

Hickman implies, and the Federal Rules of Civil Procedure 26(b)(3) prescribe, that the work product entitled to protection may be divided into two categories: "opinion" work product, which reflects or reveals an attorney's mental processes, and "ordinary" work product. Under the rule, ordinary work product is subject to discovery upon a showing of need and hardship, but the court "shall protect against disclosure the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

Some federal cases suggest that the protection given opinion work is absolute. Duplan Corp. v. Moulinage de Chavanoz, 509 F.2d 730, 733-34 (4th Cir. 1974), cert. denied, 420 U.S. 997 (1975). Also, see Wright, Law of Federal Courts, § 82, at 411 (1976). Although the Supreme Court, in UpJohn Co. v. United States, 449 U.S. 383 (1981), did not decide whether or not opinion work product is absolutely privileged it did indicate that a higher standard of need would be applied to discovery of opinion work product than to discovery of ordinary work product. Ibid at 400-402.[3]

Some of the papers or documents which Complainant seeks through its motion for a subpoena are OSC attorney's opinion work product, and other papers are clearly ordinary work product, i.e. statements of witnesses. Under either standard referred to in UpJohn, Complainant has not made a sufficient showing of necessity or justification in its motion to allow disclosure of OSC's internal memorandum and notes of witness interviews.

What is unique about this motion is that Complainant is not seeking discovery of work product information from the other party or its legal representatives, but rather from the OSC who investigated his allegations of alleged discrimination to determine whether or not there is

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[3] One legal commentato's view is "that protection of opinion work product is not absolute, but that consideration must be given to such factors as the extent to which the attorney's mental processes are involved, the inhibiting effect that disclosure would have, and the extent to which the discovering party is seeking a free ride on the attorney's thinking." See Epstein, Aidley, Austen and Martin, The Attorney Client Privilege and the Work Product Doctrine, Section of Litigation ABA (2nd ed. 1982).

reasonable cause to believe that his charges were true. I do not find, however, that OSC's relationship to Complainant as an investigator of his allegations affects the application of the attorney work product rule to OSC internal documents prepared in anticipation of litigation.

Federal case law does not support the disclosure of internal memoranda written by or for attorneys in the Department of Justice in connection with civil litigation absent special circumstances. See United States v. Aluminum Co. of America, 34 F.R.D. 241 (E.D. Mo. 1963). Moreover, statements taken by an attorney of witnesses or memorandum of such statements in anticipation of litigation are clearly work product protected by the doctrine. See, Harper and Row Publisher's Inc. v. Decker, 423 F.2d 487, 492 (7th Cir. 1970), aff'd by an equally divided court, 400 U.S. 348 (1971), reh'g denied, 401 U.S. 950 (1971). Also, see Badhwar v. U.S. Department of Air Force, 829 F.2d 182 (D. Cir. 1987) (where the court held that statement by third-party witnesses of airplane crash to military accident investigative boards were exempt from disclosure under Freedom of Information Act exemption).

Complainant has not shown that there are any special circumstances requiring that he be allowed to have OSC outlines of the case or its notes of interviews of witnesses in order to prepare this case for trial. Although Complainant is pro se, OSC has provided him with the most important part of its investigation in this case, which was all the information submitted by B and R to OSC relating to its investigation of the allegations of discrimination in this case. Apparently, the only other information which OSC considered in its decision not to file a Complaint in this case came from Complainant.

In view of the fact that Complainant's application for a subpoena duces tecum seeks matters which are protected from discovery by the work product doctrine, Complainant's application is hereby DENIED.

SO ORDERED.
Dated this 21st day of February, 1992.

ROBERT B. SCHNEIDER
Administrative Law Judge