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

October 17, 1994

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. 1324b Proceeding
	)	OCAHO Case No. 93B00054
ROBISON FRUIT RANCH, INC., Respondent.	)	

ORDER DENYING RESPONDENT'S MOTION TO COMPEL

On May 20, 1994, respondent filed a pleading captioned Respondent's Motion to Compel, in which it requested that complainant be ordered to answer fully those of its interrogatories numbered 9, 14, 16, and 19, and to also produce all document copies previously requested by respondent in its requests for production numbered 3 through 11, so that respondent can properly prepare its defense.

On June 3, 1994, complainant filed a pleading captioned Memorandum Of Points And Authorities In Opposition To Respondent's Motion To Compel, in which it claimed to have "produced all information and documents that are relevant and not privileged." Complainant's Memorandum, at 2.

On August 31, 1994, a telephonic prehearing conference was conducted and counsel of record, Carol Mackela, Esquire, and William Morrow, Esquire, together with the undersigned discussed respondent's Motion to Compel. Respondent's counsel was instructed to file a brief in support of his position and to have done so by September 15, 1994.

On September 15, 1994, respondent timely filed its Brief In Support Of Respondent's Motion To Compel Production of Certain Documents. That brief, in contrast to the May 20, 1994, Motion To Compel, limited its request for production of documents to two (2) specific items, or those requests for production of documents numbered 5 and 6:

> Request 5 sought the production of "all investigative reports generated in the above matter."
>
> Request 6 called for the production of "all handwritten notes, memoranda and correspondence generated by the investigator, Gladys Chavez, during her investigation of Robison Fruit Ranch."

Respondent's Motion To Compel, at 5.

On September 29, 1994, complainant filed its response, in which it contended that several of the documents requested by respondent were privileged, and thus nondiscoverable, and also contended that the remainder of the requested documents were not relevant.

The pertinent procedural regulation governing the scope of discovery provides, in pertinent part:

> Unless otherwise limited by order of the administrative Law Judge in accordance with these rules, the parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding.

28 C.F.R. § 68.18(b). If the party upon whom a discovery request is made fails to respond adequately to that request, the party seeking discovery may move the administrative law judge to issue an order compelling a response. 28 C.F.R. § 68.23(a).

Thus, a review of complainant's responses to respondent's document requests is in order to determine whether the information sought by respondent is relevant and whether it is privileged. Respondent will be ordered to file full discovery replies only if it is found that the information requested is both relevant and nonprivileged.

In Request 5, respondent sought the production of "all investigative reports generated in the above matter," while Request 6 called for the production of "all handwritten notes, memoranda and correspondence generated by the investigator." Respondent's two (2) requests for production of documents will be considered collectively as investigator's work product.

In support of its Motion to Compel, respondent first asserted that the investigative reports and notes requested were not prepared in anticipation of litigation, thus making the documents nonprivileged, and therefore discoverable. Although respondent correctly asserted that the attorney work product privilege protects documents prepared in anticipation of litigation, see, e.g., United States v. Northwest Airlines, Inc., 3 OCAHO 452 (9/10/92), respondent was clearly in error in arguing that Investigator Gladys Chavez's reports and notes were not prepared in anticipation of litigation.

Rule 26(b)(3) of the Federal Rules of Civil Procedure addresses the work product doctrine and in pertinent part provides:

> A party may obtain discovery of documents and tangible things otherwise discoverable . . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative . . . 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.

Complainant has correctly noted that the attorney work product privilege protects reports and other material prepared by investigators as well as material prepared by the attorney. See United States v. Nobles, 422 U.S. 225, 238-39 (1975).

As discussed in Northwest Airlines, federal courts, in determining whether materials are prepared in anticipation of litigation under the protection of the work product doctrine, have focused on whether, at the time the investigation occurred, "the prospect of litigation was identifiable because of specific claims that had already arisen." Northwest Airlines, at 8, quoting Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 865 (D.C. Cir. 1980); Kent Corp. v. N.L.R.B., 530 F.2d 612, 623 (5th Cir.), cert. denied 492 U.S. 920 (1976).

One of the main functions of the Office of Special Counsel is to litigate cases involving unfair immigration-related practices under the Immigration Reform and Control Act of 1986 (IRCA). Therefore, investigative reports and other memoranda are prepared at least under the prospect of litigation.

In Smith v. United States Dep't. of Justice, the judge found handwritten notes of an INS investigator made in the course of investigating possible violations to be privileged as attorney work product prepared by an agent in anticipation of litigation. Smith v. United

States Dep't. of Justice, No. 86-6162, 1987 U.S. Dist. LEXIS 8109, at *4 (E.D. Pa. Sept. 2, 1987). Similarly, in Kent Corp. v. N.L.R.B., the Fifth Circuit held that NLRB investigative reports of alleged unfair labor practices were protected under the work product doctrine, even where no complaint was eventually filed, because the prospect of litigation had arisen when the investigative materials were prepared. Kent Corp., 530 F.2d at 623. Id.

OCAHO decisions have been in complete accord with the Smith and Kent Corp. decisions. In Westendorf v. Brown & Root, Inc., it was held that attorney notes and internal memoranda prepared by OSC attorneys in connection with OSC's investigation of a charge were protected from discovery by the work product doctrine, notwithstanding the fact that OSC decided not to file a complaint in that case. Westendorf v. Brown & Root, Inc., 3 OCAHO 405, at 6-7 (2/21/92). Likewise, in United States v. Northwest Airlines, Inc., the under-signed found that documents prepared during that investigation of that charge to be protected under the work product doctrine. Northwest Airlines, at 9.

After reviewing complainant's responses to respondent's assertions and upon examining the relevant case law and procedural regulations, it is clear that Investigator Chavez's reports and notes were prepared in anticipation of litigation, thus making them privileged under the work product doctrine. Ms. Chavez went to respondent's place of business to investigate charges that respondent had violated the provisions of IRCA, clearly under the assumption that litigation could result.

Accordingly, respondent may obtain discovery of these investigative reports only upon a showing of "substantial need of the materials in the preparation of [respondent's] case and that [respondent] is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Fed. R. Civ. P. 26(b)(3).

Respondent has failed to meet its required burden of showing a substantial need for the investigative materials being sought and has also clearly failed to demonstrate that undue hardship would result if it attempted to obtain the requested information from another source. Further, respondent has not advanced any reason, let alone a substantial need of the materials it seeks by way of discovery. Respondent has merely asserted in its May 20, 1994 Motion to Compel that the requested information "may affect issues in the case either as

inconsistent information, impeachment or otherwise affecting credibility of witnesses." Motion To Compel, at 5-6 (emphasis added).

Furthermore, as respondent acknowledged in its September 16, 1994 Brief in Support of Respondent's Motion to Compel Production of Certain Documents, its attorney was present during all of Investigator Chavez's interviews. Brief, at 2. Consequently, and as a practical matter, respondent's counsel had the same opportunity to observe the interviews, take notes, and prepare a post-interview report in the same manner as Investigator Chavez.

Because respondent has failed to make the required showing of substantial need and undue hardship needed to support a request for discovery of documents prepared in anticipation of litigation under Rule 26(b)(3) of the Federal Rules of Civil Procedure, respondent's Motion to Compel Discovery must be denied.

For the foregoing reasons, respondent's Motion to Compel is denied.

The parties are hereby instructed to continue their preparation for the adjudicatory hearing, and to be fully prepared to begin that hearing in Boise, Idaho at 9:00 a.m. on Tuesday, November 29, 1994, the date previously and mutually selected by counsel.

JOSEPH MCGUIRE
Administrative Law Judge