

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

State of Minnesota,  
Department of Human Rights,

Complainant,

Vs.

DISCOVERY ORDER

State of Minnesota,  
Department of Corrections,

Respondent.

On July 7, 1986 the Respondent, Department of Corrections, filed a written motion to compel production of two investigative files kept by the Complainant, Department of Human Rights, for charging parties Catherine Schmeising and Carol Cochran. The Complainant filed a written response on July 16, 1986. The Respondent replied on July 30, 1986. The Complainant made a supplemental response to the motion on August 21, 1986 and the Respondent replied in writing on September 5, 1986. The last submission was made by the Complainant on October 3, 1986.

The Complainant was represented on this motion by Erica Jacobson, Special Assistant Attorney General, 204 Administration Building, 50 Sherburne Avenue, St. Paul, Minnesota 55155 and Mark B. Levinger, Special Assistant Attorney General, 515 Transportation Building, St. Paul, Minnesota 55155. The Respondent was represented by Mary J. Theisen, Special Assistant Attorney General, 1100 Bremer Tower, Seventh Place and Minnesota Street, St. Paul, Minnesota 55101.

Based upon the Memoranda, and all of the filings in this case and for the reasons set out in the Memorandum which follows:

IT IS HEREBY ORDERED that the Complainant shall, within 10 days of the date of this Order:

1. Produce for the Respondent, with modifications, if appropriate, the following documents: Ex. A, Nos. 17-20, 27, 29-31, 33-40 and 43.
2. Produce for an in-camera inspection by Administrative Law Judge Peter C. Erickson the following documents: Ex. A, Nos. 16, 21-23, 25-26,

28, and 41-42.

3. That the documents from the Cochran investigative file shall be produced and examined pursuant to the guidelines set out in the Memorandum which follows.

Dated: October 1986.

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GEORGE A. BECK  
Administrative Law Judge

MEMORANDUM

The Respondent Department of Corrections (DOC) has asked the Complainant to produce its investigative files regarding charging parties Catherine Schmeising and Carol Cochran.' In the course of the briefing of this matter the Department of Human Rights (DHR) compiled a listing of the documents in each file and then indicated its willingness to disclose a large number of those documents. Before settlement of the Schmeising charge, 43 documents were still in dispute. The documents now in dispute number 28. Respondent's Memorandum dated September 3, 1986 Exhibit A. Roughly speaking, fourteen of the documents appear to be statements or letters given by the charging party to DHR personnel, seven appear to be intra-departmental memoranda, or an investigator's conclusions or notes, two are letters from the Commissioner or the charging party to a Special Assistant Attorney General, three are letters from non-parties to the Commissioner, and the remaining two (Nos. 25 and 28) are difficult to categorize.

The Complainant initially refused to produce the files citing Minn. Stat. 363.061, subd. 2 (Supp. 1985). That statute provides that most of the material in an open Human Rights investigative case file is confidential. An open case file is defined as one in which no final decision has been reached. Minn. Stat. 363.01, subd. 38 (Supp. 1985). This recent amendment of the Human Rights Act does establish a legislative preference for confidentiality of Human Rights investigative data on an individual. However, the parties are in agreement that Minn. Stat. 363.061, subd. 2 (Supp. 1985) must yield to Minn. Stat. 13.03, subd. 6 (Supp. 1985). That statute provides as follows:

If a state agency . . . opposes discovery of government data or release of data pursuant to court order on the grounds that the data are classified as not public, the party that seeks access to the data may bring before the appropriate presiding judicial officer, arbitrator, or administrative law judge, an action to compel discovery or an action in the nature of an action to compel discovery.

The presiding officer shall first decide whether the data are discoverable or releaseable pursuant to the rules of evidence and of criminal, civil, or administrative procedure appropriate to the action.

If the data are discoverable the presiding officer shall decide whether the benefit to the party seeking access to the data outweighs any harm to the confidentiality

interests of the agency maintaining the data, or of any person who has provided the data or who is the subject of the data, or to the privacy interest of an individual identified in the data. In making the decision, the

'During the pendency of this motion, the parties settled the claim of Catherine Schmeising. This motion therefore only considers production of the Cochran investigative file.

presiding officer shall consider whether notice to the subject of the data is warranted and, if warranted, what type of notice must be given. The presiding officer may fashion and issue any protective orders necessary to assure proper handling of the data by the parties.

The first question then is whether or not the investigative file is discoverable pursuant to the discovery rule of the Office of Administrative Hearings, Minn. Rule 1400.6700, subp. 2 (1985). That rule provides that any

means of discovery available pursuant to the Rules of Civil Procedure for the

the District Court of Minnesota is allowed. If discovery is objected to, the party seeking it must show that it is needed for the proper presentation of its case.' The rule directs the Judge to recognize all privileges recognized at law. Additionally, Minn. Rule 1400.6600 provides that where parts 1400.5100 to 1400.8400 are silent, the Judge must apply the Rules of Civil Procedure for the District Court for Minnesota to the extent that it is

determined appropriate in order to promote a fair and expeditious proceeding.

The Respondent has demonstrated sufficient need within the meaning of Minn. Rule 1400.6700, subp. 2. The documents sought obviously contain material which is potentially relevant to the issues. Additionally, the documents were compiled during 1980 through 1982. The events giving rise to the claims in this case took place between five and seven years ago. Therefore, the documents likely contain fresher recollections.

Additionally,

the Respondent points out that forcing it to duplicate DHR's investigation, even if this were possible, will result in increased costs for the State of Minnesota, as well as further delay in this case.

The OAH Rule also requires recognition of all privileges recognized at law

and references the Rules of Civil Procedure as a guide to be followed. The so-called work product doctrine is codified in Minn. Rule Civil Procedure

26.02. Rule 26.02(3) provides, in part:

a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision 26.02(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case that he is unable without undue hardship to obtain the substantial equivalent of the materials by other

The party also must show that the discovery is not for delay and that the

issues or amounts in controversy are significant enough to justify discovery .  
The record demonstrates that the Respondent has satisfied its burden as to these two factors.

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.'

Additionally, the rule specifically provides for the production of certain witness statements without the required showing of need and hardship. The rule provides that a party may obtain its own witness statements in the hands of another party and that a non-party may obtain his or her statement in the hands of a party as can an opposing party. A statement includes a written statement or a recording. A broader requirement, in some respects, is imposed by Minn. Rule 1400.6700, subp. 1.B. (1985) which requires production of statements made by an opposing party or its witnesses.

In response to the Respondent's request for the two investigative files in question, the Department of Human Rights has asserted a "privilege" under the work product doctrine as set out in Minn. Rules of Civil Procedure, Rule 26.02(3). The rule provides virtually absolute protection for the mental impressions, conclusions or legal theories of an attorney or other representative of a party. In re Murphy, 560 F.2d 326 (8th.Cir. 1977). Other material contained in work product documents can be obtained only upon a showing of substantial need and inability to obtain the equivalent of the materials without undue hardship. DHR must first establish, however, that the documents in question were prepared in anticipation of litigation by it or its agents or attorneys before the work product doctrine attaches. Only then must the Respondent make the required showing.

DHR argues that any document prepared subsequent to the filing of the charge of discrimination is prepared in anticipation of litigation. It suggests that the case law holds that litigation need only be a reasonable contingency for the work product doctrine to apply and if litigation is identifiable because of specific claims that have already arisen, the fact that at the time the document is prepared litigation is still a contingency does not render the privilege inapplicable. United States v. Bonnell, 483 F.Supp. 1070, 1078 (D. Minn. 1979). Stix Products v. United Merchants and Manufacturing, 47 F.R.D. 334, 337 (S.D.N.Y. 1969). The Respondent argues that litigation is not anticipated at the time of the filing of the charge because many, if not most of the charges filed result in no probable cause determinations or otherwise do not result in litigation. The Respondent cites cases in which an insurance investigator's reports have been held not to constitute work product and argues that the DHR investigator is similarly gathering all pertinent information in the ordinary course of business so as to make a recommendation to the Commissioner. Respondent argues that both insurance investigators and DHR investigators are neutral prior to making a recommendation and that in both cases litigation is a remote but possible outcome of initial claims filed. The Complainant suggests that the

appropriate analogy is to the corresponding role of an investigator in a private law firm. While acknowledging that DHR does not initially represent

3A 1970 amendment to the rule gave parties and their agents equal status with attorneys in asserting the work product doctrine. Am. Jur.2d, Depositions and Discovery, 51.

the charging party but is required by statute to make a neutral decision as to the merit of the claim, it argues that a private attorney expects to receive impartial information on the strength and weaknesses of potential claims also.

The determination of this question requires a consideration of the statutory framework for the processing of discrimination complaints. Any person who is aggrieved by a violation of the Human Rights Act can file a charge which must contain the name of the alleged violator as well as the details of the practice complained of. The charge need only contain the facts, which in the judgment of the person filing the charge, constitute an unfair discriminatory practice. Minn. Rule 5000.0400, subp. I. The Commissioner must serve a copy of the charge upon the alleged violator within five days. Minn. Stat. 363.06, subd. 1. The Commissioner is then directed to promptly inquire into the truth of the allegations of the charge. If the investigation discloses no probable cause to credit the allegations of an unfair discriminatory practice, the matter is dismissed, subject to a right to request reconsideration. Minn. Stat. 363.06, subd. 4(2). If probable cause is found, the Respondent is served with a written statement of the alleged facts and "an enumeration of the provisions of law allegedly violated." Minn. Stat. 363.06, subd. 4(3). The Respondent may then be invited to conciliate to settle the matter. Minn. Rule 5000.0800. If conciliation is declined or fails or the Commissioner deems it unlikely to be successful, a written complaint and notice of hearing is served upon the respondent initiating a contested case hearing. Cases are referred to the Attorney General's office prior to the issuance of a complaint.'

The point at which specific claims arise is with the issuance of a determination of probable cause which must contain a list of the provisions of law violated. The charge contains only the facts believed to constitute a violation. As DHR concedes, the Commissioner is conducting a neutral investigation prior to issuance of the probable cause determination, to ascertain if a violation has occurred. Although litigation is a possibility prior to a probable cause determination, it is much more likely after such a determination. The Commissioner becomes an advocate rather than a neutral party after the probable cause determination. It must be remembered that the purpose of the work product doctrine is to assure that an attorney or party will not be inhibited by a fear of disclosure in preparing a case for litigation. Murphy, supra, 560 F.2d 326. That preparation does not and need not begin until probable cause is found.

A similar analysis has been used by the courts for documents prepared by insurance investigators. Generally, insurance adjuster prepared reports or

statements, made before the insurer has decided whether to pay the claim and made in the regular course of business, are not work product and are discoverable. State Farm Fire & Casualty Co. v. Perrigan, 102 F.R.D. 235,

'A probable cause determination on some aspects of the Cochran charge was made on February 12, 1982. The DHR file was then sent to the Attorney General on February 23, 1982. A probable cause determination on the remainder of the claim occurred on May 24, 1982 after an appeal of a denial by the charging party.

237, 239 (W.D.Va. 1984), Carver v. Allstate Ins. Co., 94 F.R.D. 131 (D.Ga. 1981), APL Corp. v. Aetna Casualty & Surety Co., 91 F.R.D. 10, 13, 17 (D.Md. 1980). The Department's investigation to determine probable cause is quite similar to an insurance company's investigation to determine whether a claim should be paid. An investigator for a private law firm, on the other hand, knows that the materials he or she generates will be used to pursue litigation.

The general rule is that materials assembled pursuant to public requirements, materials gathered in the ordinary course of business, or for other non-litigation purposes are not work product and are discoverable. Herr and Haydock, Minnesota Practice-Rule of Civ. Prac. Ann., 26.13. The few administrative agency cases which exist usually hold that agency produced documents are discoverable if prepared in the normal course of events and where the documents would be prepared even if no litigation were to result. United States v. 22.80 Acres of Land, 107 F.R.D. 20, 24-25 (N.D.Cal, 1985) (appraisal by employee of Bureau of Reclamation discoverable in condemnation lawsuit); Goosman v. A. Duie Pyle, 320 F.2d 45, 52 (4th.Cir. 1963), (ICC accident reports filed with agency by truck driver soon after accident). Peterson v. United States, 52 F.R.D. 317, 321 (S.D.Ill. 1971) (IRS field agent report not made in anticipation of litigation). In Abel Investment Co. v. United States, 53 F.R.D. 485 (D.Neb. 1971), the government argued that litigation was anticipated when an individual tax return was randomly selected for survey. However, the court ordered production of a revenue agent's report containing worksheets, notes of conversations, and determinations since the court found that the document was routinely prepared, impartial rather than adversarial, and contained no trial theory. 53 F.R.D. at 489. The court observed that the government would be at a substantial advantage if it could shield such materials. 53 F.R.D. at 490. The Commissioner is charged by statute with preparing or keeping the documents in question; they are prepared in the normal course of the agency's business and are necessary to make an impartial probable cause determination, whether or not the case is ever litigated.

It is therefore concluded that litigation is not anticipated within the meaning of the rule until the probable cause determination is made. However, once that determination is made the Commissioner becomes an advocate, and the matter is very shortly referred to the Attorney General, who prepares and serves the complaint and notice of hearing. At this point the claims are well defined and litigation is clearly anticipated. Both the Attorney General and the Department are entitled at this point to have their hearing preparation materials shielded by the work product doctrine.

The Complainant has therefore established that the work product doctrine is applicable to the documents generated subsequent to a probable cause determination with the exception of certain "witness" statements. The Respondent points out that the Minnesota Supreme Court has interpreted the party and non-party statement language of Rule 26.02(3) as requiring the production of non-party statements without the requisite showing of need. *Ossenfort v. Associated Milk Producers*, 254 N.W.2d 672, 681 (Minn. 1977). Accordingly, the letters described at numbers 37, 40 and 43 of Exhibit A must be produced if they relate to subject matter of this proceeding. There does not appear to be any meaningful distinction between a letter from a non-party and a written statement adopted by a non-party. The Respondent also argues

that the statements of the charging parties must also be produced under the rule. By its terms, however, the rule seems to require a party to produce only statements given to it by other parties. The Ossenfort case would seem to support this interpretation since it applies the substantial need test to production of witness statements of opposing parties. 254 N.W.2d at 681. Chippano v. Champion International Corp., 104 F. R. D. 395 (D. Ore. 1984), cited by DOC, deals with discovery of a statement of the party requesting it in the possession of an opposing party.

As to those materials for which the Complainant has established the applicability of the work product doctrine, it must be considered whether or not the Respondent has demonstrated a substantial need of those documents to prepare its case and whether it is unable to obtain the substantial equivalent of the documents without undue hardship. This showing was not made in the Respondent's initial memorandum. However, in its final Memorandum the Respondent pointed out that many of the witness statements in the investigative files were taken five or six years ago, close to the events in question and may therefore be difficult to duplicate. The Respondent also points to the unique situation in this case of both parties being state agencies, each represented by the Attorney General. The expense and delay that would be occasioned by a denial of the discovery argue in favor of the motion. Unnecessary delay and expense resulting from a delayed disclosure may demonstrate substantial need and undue hardship. Puerto Rico v. S.S. Zoe Colocotroni, 18 F.R. Serv.2d 322 (D.P.R. 1974). Respondent also suggests that it has reason to believe that one of the charging parties gave deposition testimony which contradicts information provided to DHR during its investigation. Additionally, it seeks to learn at what point Carol Cochran alleged sexual harassment. These reasons generally establish a substantial need of the statements by charging parties as well as an inability to obtain this information elsewhere.

Three of the post-probable cause documents (Nos. 26, 41 and 42) are intra-Departmental memos. These documents are likely to contain mental

impressions, conclusions, opinions or legal theories. The majority of federal cases that have disclosed trial preparation materials involve witness statements, such as reports that were made contemporaneously with or shortly after an event. Gillmen v. United States, 53 F.R.D. 316 (S.D.N.Y. 1971). As the Murphy case, supra, indicates, mental impressions, conclusions or legal theories are protected from discovery. However, the Complainant is directed to submit these documents to Administrative Law Judge Peter C. Erickson for an in-camera inspection to determine if they contain any discoverable factual material.

Ten of the post-probable cause documents are communications from Carol Cochran to Department personnel. They likely contain some factual matters relating to this case. Accordingly, since the Respondent has established substantial need, they must be produced. (Document Nos. 27, 29-31, 33-36 and 38-39). The OAH rule, Minn. Rule 1400.6700, subp. 1.B. (1985), also requires the production of written or recorded statements of a party. Although the Complainant is technically the party in this case, it is the charging party's rights which are being enforced, and production of her statements is at least consistent with, if not required by, the OAH rule.

Finally, even though the Respondent was demonstrated its right to discovery of some of the material in the investigative files, it must also be

determined pursuant to Minn. Stat. 13.03, subd. 6 (Supp. 1985) whether the benefit to the Respondent outweighs the harm to the confidentiality interests of the Department of Human Rights and the individuals involved. This determination must be made for both pre- and post-probable cause materials. This determination involves the same considerations discussed in case law relating to an agency "executive" or "deliberative" privilege. That is, first the agency's confidentiality interest must be ascertained and considered and then that interest must be weighed against the benefit to the Respondent of receiving the material.

DHR argues that disclosure of investigatory documents could create a chilling effect on potential witnesses and make investigation of charges more difficult. The Department suggests that investigators might avoid thoroughly investigating the weaknesses of a claim and avoid writing down factual information not favorable towards the charging party. See, J.P. Stevens and Co. v. Perry, 710 F.2d 136, 143 (4th.Cir. 1983). The Perry case was a federal Freedom of Information Act (FOIA) suit initiated by J.P. Stevens after the EEOC had filed a charge against it. The EEOC claimed it was exempt under a FOIA exception which prohibited disclosure to the public of investigatory records if disclosure would interfere with enforcement. The court declined to order a "premature" disclosure of documents. 710 F.2d at 143. In short, although the policy reasons advanced by the court are of interest, the decision did not arise in the course of discovery.

The case law does, however, recognize an agency privilege which protects the confidentiality interests of the agency whether it is a party or is in a neutral position. The privilege is sometimes described as an "executive" privilege which shields intra-agency memoranda including evaluations and recommendations. Branch v. Phillips Petroleum Co., 638 F.2d 873, 882 (5th.Cir. 1981). In federal tax cases an "intra-agency communication privilege" has been recognized which shields the conclusions and opinions of agents, but not computations or facts. Simons-Eastern Co. v. United States, 55 F.R.D. 88, 89 (N.D.Ga. 1972); Brown v. United States, 58 F.R.D. 599, 603 (D.S.Ca. 1973). See also, Carl Zeiss Stifting v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 324-25, (D.D.C. 1966), aff'd 384 F.2d 979 (D.C.Cir. 1966) cert. denied, 389 U.S. 952 (1967). The enforcement of such a privilege is justified in this case since DHR requires confidentiality to permit the candid consideration of the merits of the charges filed with it. This need outweighs the benefit to the respondent of receiving the material. Since the data is not factual in nature, but represents opinions of Department personnel, it may not be particularly probative at hearing. It cannot be said to be crucial to the Respondent's case.

While DHR does have important confidentiality interests in regard to certain documents, such as those containing the conclusions of its employees, the same conclusion cannot be made for factual documents such as the non-party or charging party statements. What must be kept in mind is that the Department is charged with a full and fair investigation of claims of discrimination. Its employees are responsible for witness statements and summaries of evidence obtained which are accurate. Department investigators

are able, in the course of their investigation, to separate witness or charging party statements from the conclusions of investigators so that one will be discoverable while the other will not be. The witness statements are, after all, documents obtained by public employees. They should be available to help in ascertaining the accuracy of the claims made and determining the truth of the matter unless privileged.

The confidentiality interests of the agency is therefore determined to shield any pre-probable case documents containing the conclusions, evaluations, recommendations, or legal theories of DHR personnel. The factual material must be produced, however, since it is not protected by privilege or the work product doctrine. The Department of Human Rights shall produce for the Respondent Ex. A, Nos. 17-20 with any conclusions of DHR personnel deleted. DHR shall provide to Judge Erickson both the expurgated documents and the original for comparison. DHR shall also provide Nos. 16, and 21-23 to Judge Erickson for a determination as to whether they contain any relevant factual material apart from "confidential" material. As to the post-probable cause material in the file, it is concluded that the agency's confidentiality interest is coextensive with the protection afforded by the work product doctrine for "mental impressions, conclusions, opinions, or legal theories." Therefore, a balancing test under Minn. Stat. 13.03, subd. 6 (Supp. 1985) compels the same result as that under the work product analysis, as is explained above.

DHR has also asserted an attorney-client privilege in regard to two documents in the Cochran file, namely, Exhibit A, number 24 and number 32. The assertion was made only in a footnote, however (see, footnote 5, Complainant's response dated July 16, 1986). As the Respondent points out, DHR must establish that the documents contain communications made between the client and attorney not communicated to strangers for the purposes of securing a legal opinion or assistance. Should DHR wish to assert an attorney/client privilege as to these documents, it must submit evidence and argument relevant to the factors necessary to assert the privilege within 10 days of the issuance of this order.

Finally, two documents, namely, Exhibit A, number 25 and number 28 do not appear to fall into any particular category. These two documents shall be submitted to Administrative Law Judge Erickson for an ex parte examination as to their discoverability under the guidelines set out in this memorandum.

G.A.B.