BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD
OF THE STATE OF KANSAS

The International Association of Firefighters, Local No. 135,	)	
Petitioner,	)	
vs.	)	Case No. 75-CAE-8-1994
The City of Wichita, Kansas,	)	
Respondent.	)	

ORDER ON PETITIONER'S MOTION TO COMPEL DISCOVERY

On April 13, 1994, Petitioner filed its Second Request for Production of certain documents. Respondent responded to that request on May 27, 1994, and an amended response on June 3, 1994, producing some of the requested documents but objecting to other of the requests for production, and supplying a "Privilege Log" identifying 25 documents the Respondent asserted were privileged and, therefore, exempt from discovery. Petitioner filed a Motion to compel discovery of the items claimed to privileged. The parties were allowed the opportunity to file briefs and affidavits in support of their respective positions.

Discovery

The Kansas Administrative Procedures Act, K.S.A. 77-501 et seq. directs that *"Discovery shall be permitted to the extent allowed by the presiding officer . . ."* By policy of the Public Employee Relations Board, discovery is controlled by the Kansas Rules of Civil Procedure, K.S.A. 60-226 et seq. K.S.A. 60-226(b) on the scope of discover states:

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> *"Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows: (1) In General: Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Except as permitted under paragraph (3) of this subsection, a party shall not require a deponent to produce, or submit for inspection, any writing prepared by, or under the supervision of, an attorney in preparation for trial.*
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> *"(3) Trial preparation: Materials. Subject to the provisions of subsection (b)(4) of this section, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) of this subsection and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including is 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 and that he 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 impression, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."*

Thus discovery may be had as to any matter, not privileged, provided it is relevant and that it relates to the claim of the defense of the party seeking discovery or that of any party. A relevant *"fishing expedition"* is not longer improper, and the discovery is no longer confined to evidence to support a party's own cause of action. Gard, Kansas Code of Civil Procedure 2d, §60-226 at 163. K.S.A. 60-226(b) conforms to Rule 26 of the Federal Rules of Civil Procedure except for the addition in the Kansas statute the sentence at the end of the first paragraph of

subsection (b).[1] It is appropriate, therefore, to look to federal decisions for guidance on questions related to what is discoverable.

The discovery provisions of the Federal Rules of Civil Procedure are designed to encourage open exchange of information by litigants, and have consistently been interpreted to favor disclosure. *See e.g.* Hickman v. Taylor, 329 U.S. 495, 500-01 (1947); Burns v. Thiokol Chem. Corp., 483 F.2d 300, 304 (CA 5, 1973); Edgar v. Finley, 312 F.2d 533, 535 (CA 8, 1963); Martin v. Reynolds Metals Corp., 297 F.2d 49, 56 (CA 9, 1961). Courts have determined the purposes of the discovery provisions to include avoiding surprise at trial by preventing the introduction of

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[1] K.S.A. 60-226(b) makes it plain that the procedures of subsection (b)(3) provide the exclusive method for discovering from a deposition witness attorneys' work product documents. But, according to Gard, Kansas Code of Civil Procedure 2d, §60-226 at 162:

> "[T]he retention is meaningless in view of the proviso which makes the protection 'except as permitted under paragraph (3) of this subsection.' Paragraph (3) now makes discovery of work product available upon showing of 'substantial need' for it and 'undue hardship' if it were denied.
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> . . .
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> "The effect of the new rule is sensible and realistic in that it makes discovery of work product subject to the rule of Hickman v. Taylor, 396 US 495, 91 L.Ed. 451, 67 S.Ct. 385, which makes disclosure depend on need which outweighs the public policy consideration of protecting the product of trial preparation. But inquiry into 'mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation,' is protected from discovery. . ."

undisclosed facts,[2] framing the issues for trial,[3] preventing delays in litigation,[4] and eliminating the *"sporting theory"* of justice.[5] To further these goals, the Federal Rules of Evidence provide for access to all information *"relevant to the subject matter involved in the pending action"* unless such information is privileged.

Privilege

As stated above, discovery may be had to any matter not privileged. Privilege is a doctrine of concealment, and represents an exception to the general rule that the public has *"a right to every man's evidence."* 8 Wigmore, Evidence §2192, at 70 (McNaughton rev. ed. 1961). If a privilege exists, information by be withheld,

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[2] In the leading case of Hickman v. Taylor, 329 U.S. 495 (1947), the United States Supreme Court stated: "The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure. . . . [C]ivil trials in the federal courts no longer need be carried on in the dark." In a subsequent case, U.S. v. Proctor & Gamble Co., 356 U.S. 677 (1958), the Court further noted: "Modern instruments of discovery serve a useful purpose.. . . They together with pretrial procedures make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." Id. at 682. Finally, in Shelak v. White Motor Co., 581 F.2d 1155 (CA 5, 1978), the appellate court stated: "Plaintiff's disregard for the federal rules of discovery in this area created a 'trial by ambush' which those rules are designed to prevent. The rules are designed to narrow and clarify the issues and to give the parties mutual knowledge of all relevant facts, thereby preventing surprise." Id. at 1159.

[3] See, e.g. Oppenheimer Fund Inc. v. Sanders, 437 U.S. 340, 351 (1978)("Consistent with the notice-pleading system established by the Rules, discovery is not limited to the issues raised by the pleadings, for discovery is designed to help define and clarify the issues."). See also, Nutt v. Black Hills Stage Lines, Inc., 452 F.2d 480, 483 (CA 8, 1971)("The federal discovery rules were designed to provide each party with the fullest pretrial knowledge of the facts and to clarify and narrow the issues to be tried."),

[4] See U.S. v. Lever Bros. Co., 193 F.Supp. 254, 258 (1961)("All agree that one of the prime purposes of the federal discovery procedure is to facilitate adequate pretrial preparation, and thereby to avoid subsequent delay at the trial.").

[5] "The Federal Rules of Civil Procedure . . . carried out the basic concept that the purpose of litigation is not to conduct a contest or to oversee a game of skill, but to do justice as between the parties and to decide controversies on their merits. . . . [T]his is done in the interest of reducing to a minimum what years ago was so aptly called by Professor Wigmore, I believe, 'the sporting theory of justice.'", Holtzoff, The Elimination of Surprise in Federal Practice, 7 Vand. L.Rev. 576, 577-78 (1954). "One of the purposes of the Federal Rules of Civil Procedure was to take the sporting element out of litigation, partly by affording each party full access to evidence in the control of his opponent." 8 C. Wright & A. Miller, Federal Practice and Procedure, Sec. 2001, at 19 n. 20 (1970).)

even if relevant to the lawsuit and essential to the establishment of plaintiff's claim. Baldrige v. Shapiro, 455 US 345, 360 (1981). This means that materials relevant to the issue in dispute are, for some reason paramount to the administration of justice, to be hidden from disclosure. Bank of Dearborn v. Saxon, 244 F.Supp. 394, 39 (ED Mich. 1965). Privileges *"are designed to protect weighty and legitimate competing interests"* and are not to be *"lightly created nor expansively construed for they are in derogation of the search for truth."* U.S. v. Nixon, 418 U.S. 683, 709-10 (1974). As stated in 8 J.Wigmore, Evidence §2291, at 554 (McNaughton rev.ed. 1961), regarding privilege: *"Its befits are all indirect and speculative; its obstruction is plain and concrete. . . . It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle."*

There are two types of privilege; absolute and qualified. An absolute privilege, once satisfactorily established by the claiming party, provides complete protection from disclosure of a document or communication. By contrast, where a qualified privilege has been established, disclosure may still be required upon a requisite showing of need by the requesting party.

The burden of proof is upon the party asserting the claim of privilege. The adversary party, by virtue of the obvious fact that it has not seen the documents, cannot be expected to bear the burden of establishing a lack of privilege. Duplan Corp. v.

Deering Milliken, Inc., 397 F.Supp. 1146, 1161 (1975). The party who seeks to apply the privilege cannot rely on general allegations to meet its burden of proof. In re Diasonics Securities Litigation, 110 FRD 570, 573 (1986). The invoking party has *"the burden of showing with sufficient certainty that the elements [of the privilege] do, in fact, exist."* U.S. v. Covington & Burling, 430 F.Supp. 1117, 1122 (1977). As stated in Int'l Paper Co. v. Fibreboard Corp., 63 FRD 88, 94 (1974):

> *"A proper claim of privilege requires a specific designation and description of the documents within its scope as well as precise and certain reasons for preserving their confidentiality. Unless the affidavit is precise to bring the document within the rule, the court has no basis on which to weigh the applicability of the claim of privilege. An improperly asserted claim of privilege is not claim of privilege at all. . . [A] party resisting disclosure on the ground of the attorney/client privilege must by affidavit show sufficient facts as to bring the identified and described document within the narrow confines of the privilege."*

To properly support a privilege claim at least three requirements must be satisfied. First, there must be a *"specific designation and description of the documents"* claimed to be privileged. Black v. Sheraton, 371 F.Supp. 97 (1974). The description should set forth the document's author(s), recipient(s), date of preparation or submission, the purpose or intent of the document, and subject matter. Second, it should explain why each document, or divisible segment thereof, is privileged. Finally, there must be a demonstration of *"precise and certain reasons for preserving"* the confidentiality of the governmental communications, as well as a demonstration of why

disclosure would be harmful . Black v. Sheraton, supra. To the extent that the document contains segregable factual data, that information should be released. If the document contains non-segregable factual data, the index should state the existence of that material and explain why it is not segregable. Weaver & Jones, The Deliberative Process Privilege, 54 Mo.L.Rev. 279, 293 (19). It is against this standard that the adequacy of Respondent's claim of privilege will be tested. A failure to satisfy all the elements of the claim will result in the privilege being denied.

The twenty-five documents sought to be protected by Respondent from discovery fall within one or more of three claimed privileges; 1) the attorney-client privilege; 2) the attorney work-product privilege; and 3) what the Respondent refers to as an executive session privilege. Since the parties do not agree on how these privileges should be applied, or, in the case of the *"executive session privilege"*, whether such privilege exists, a brief examination of these privileges appears advisable.

A. Attorney-Client Privilege

The law has long recognized as privileged from disclosure confidential communications made as part of the professional relationship between attorney and client. In fact, it has been

recognized as the oldest of the privileges for confidential communications known to the common law. 8 J. Wigmore, Evidence §2290 (McNaughton rev. 1961). Its purpose is to encourage full and frank communication between attorneys and their clients, and thereby promote broader public interests in the observance of law and administration of justice. Upjohn Co. v. U.S., 449 U.S. 383, 389 (1981). The primary rationale for this privilege is that "*[i]n order to promote freedom of consultation of legal advisors by clients, the apprehension of compelled disclosure by the legal advisers must be removed; hence the law must prohibit such disclosure except on the client's consent.*" 8 J.Wigmore, Evidence §2291, at 554 (McNaughton rev.ed. 1961).

The attorney-client privilege is an absolute privilege, and provides complete protection from disclosure of communications between the attorney and the client so as to foster full and frank disclosure between the attorney and his or her client. The privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice. *See* Trammel v. U.S., 445 U.S. 40, 51 (1980).

It is well established that the party seeking to assert the attorney-client privilege has the burden of proving the applicability of the privilege. In re Diasonics Securities Litigation, 110 FRD 570, 573 (1986). Two statements on the rule of

attorney-client privilege, setting forth the conditions which must exist if the privilege is to be recognized, have been quoted most often by modern American courts and are commonly applied in both federal and state law cases. The more concise of the two statements is that of Professor Wigmore:

> *"(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or the legal advisor (8) except when the protection be waived."* 8 J.Wigmore, Evidence §2292, at 554 (McNaughton rev.ed. 1961).

The second widely quoted definition of the privilege is that enunciated by Judge Wyzanski in U.S. v. United Shoe Machinery Corp., 89 F.Supp. 357, 358,59 (D.Mass. 1950):

> *"The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client."*

In order to determine whether the privilege is applicable, it may first be necessary to establish whether a professional legal relationship was in fact created. U.S. v. Kovel, 296 F.2d 918, 924 (1961). The mere existence of an attorney-client relationship does not raise a presumption of confidentiality. 8 J.Wigmore, Evidence, §2311 (McNaughton rev. 1961). Each of the eight conditions set out

in 8 J.Wigmore, Evidence, §2292, at 554 (McNaughton rev. 1961), cited above, must be satisfied before the claimed privilege will attach to a communication. As the Supreme Court has stated: *"[S]ince the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose. Accordingly, it protects only those disclosures -- necessary to obtain informed legal advice -- which might not have been made absent the privilege."* Fisher v. U.S., 425 U.S. 391, 403 (1976). When the context suggests the intent of a communication is not primarily for the purpose of legal advice, the attorney-client privilege may not be invoked simply because an attorney was involved in the communications. The Attorney-Client Privilege Under Siege, at 436 (1989). *See also* Trammel v. U.S., 445 U.S. 40, 50-51 (1980)[all privileges should be construed strictly because they impede the public's fundamental right to every person's evidence); Herbert v. Lando, 441 U.S. 153 (1979)[evidentiary privileges in litigation are disfavored]. Accordingly, a communication between an attorney and a client is not privileged unless it is necessary for the rendition of a legal opinion or legal advice.

The burden of proof is on the party asserting the attorney-client privilege to demonstrate that a professional legal relationship existed. U.S. v. Landof, 591 F.2d 26 (CA9 1978)[where appellant had failed to show that corporation's counsel was acting

either as an attorney or an agent in meeting in which principals of corporation were receiving advice from another attorney about pending criminal investigation, the counsel was a "third party" whose presence destroyed privilege as to all statements made at the meeting].

The attorney-client privilege applies only to situations in which the attorney is consulted in a professional legal capacity and covers only those communications relating to the rendition of legal advice or services. These communications must be utilized distinctly for legal as opposed to business advice. The attorney-client privilege does not attach where the attorney is giving technical or business, as opposed to legal, advice. *See* In re Natta, 264 F.Supp. 734 (1974). Lawyers representing businesses, whether as house counsel or outside counsel, often serve a dual role as legal and business advisors. Where the primary role of the lawyer is that of a business advisor or associate, or where the particular communications contain wholly or largely business advice, the privilege will probably not apply. *See e.g.* U.S. v. Faltico, 586 F.2d 1267 (CA8 1978);Humphreys, Hutchinson & Moseley v. Donovan, 568 F.Supp. 6, 75 (1983)[the privilege does not apply to activities of an attorney in the capacity of labor consultant]; U.S. v. IBM Corp., 66 FRD 206, 2145 (1974)[privilege does not apply to communications concerning the negotiation and settlement of contracts]; Attorney Gen. of the U.S. v. Covington & Burling, 430

F.Supp. 1117, 1121-22 (1977)[assisting in nonlegal aspects of contract negotiations not within scope of professional relationship protected by privilege].

Similarly, the courts have held that, as a general proposition, the attorney-client privilege is not intended to protect communications regarding matters which may be handled as easily by laymen as by lawyers. Underwood Storage, Inc. v. U.S. Rubber Co., 314 F.Supp. 546 (1970). Thus the privilege does not apply where the attorney renders nonlegal services as a negotiator. J.P. Foley & Co., 65 FRD 523, 526-27 (1974)[privilege would not apply if attorney's role in negotiations was that of a negotiator rather than legal advisor]; Attorney Gen. of the U.S. v. Covington & Burling, 430 F.Supp. 1117, 1121-22 (1977)[assisting in nonlegal aspects of contract negotiations]; Commercio e. Industria Continental SA v. Dressler Indus., 19 FRD 513, 514 (1956)[privilege *"should certainly not be extended to communications between an attorney and his client pertaining to the attorney's negotiations with a third party over terms and details of business transactions"*].

Likewise, a corporation may not immunize interdepartmental and other corporate documents merely by transmitting them to counsel. See Simon v. GD Searle & Co., 816 F.2d 397, 402-04 (CA8 1987)[Transfer of business documents to lawyer to keep lawyer informed of business matters was not implied request for business

advice that would trigger privilege]; U.S. v. Aluminum Co. of Am., 193 F.Supp.251, 253 (1960)[*"The mere fact that the original was sent to counsel under circumstances which preserve the privilege does not attach a privilege to the copy which was sent to an executive as a reply to a separate request for non-privileged business data."*]; FTC v. TRW, Inc., 479 F.Supp. 160, 163 (1979)[document prepared for simultaneous review by legal and nonlegal personnel not prepared primarily to seek advice and therefore not privileged].

Finally, The attorney-client privilege protects only confidential communications (both written and oral) made as part of a professional attorney-client relationship. It does not bar independent inquiry into the same facts which were incorporated into the communications. Philadelphia v. Westinghouse Electric Corp., 205 F.Supp. 830, 831 (1962). *See also* Dudek v. Circuit Court, 150 N.W.2d 387, 399 (Wis. 1967)[*"the courts have noted that a party cannot conceal a fact merely by revealing it to his lawyer"*]. Thus it does not immunize from disclosure the client's knowledge of the facts nor client records or documents not prepared to assist counsel in rendering legal services. As the Supreme Court stated in Upjohn Co. v. U.S., 449 U.S. 383 (1981):

> *"[T]he protection of the privilege extends only to communications and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, "What did you say or write to the attorney?" but may not refuse to disclose any relevant*

> *fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney."* Id. at 395.

Once the attorney-client privilege has been established, it may be lost by the client's waiver. The client may waive the privilege either expressly or impliedly by disclosing the matter to others, or by failing to expressly assert the privilege. Disclosure may occur by failing to maintain the necessary confidentiality. *See* Duplan Corp. v. Deering Milliken, Inc., 397 F.Supp. 1146, 1163 (1975)[Documents which have passed around the offices of a corporation for review by all who care to read them cannot have the attorney-client privilege attach. Such communications from an attorney to the corporate client do not have the requisite confidentiality to warrant the attorney-client privilege]. The municipal corporation as client presents a particular problem here in determining which communications between an attorney and its employees and elected officials at the various levels of management within the government are protected by the

attorney-client privilege, and must be examined on a case-by-case basis.[6]

B. Work Product Privilege

The City also asserts that some of the documents sought by the IAFF are covered by the work-product privilege, and therefore discoverable only upon a showing of 1) substantial need for the materials in preparation of its case and 2) that the IAFF is unable to discover the substantial equivalent of the materials by other means. While the attorney-client privilege shields confidential communications between an attorney and client, the work-product privilege protects materials prepared in anticipation of litigation. Work product consists of tangible and intangible

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[6] At the inception of the attorney-client privilege, clients were individuals. The advent of the municipal corporation as a distinct legal entity, however, created the paradox vis-a-vis the privilege that attorneys, clients and the courts are still grappling with today. The situation is analogous to that of the corporation in private business. A corporation is a legal fiction, and as a purely legal entity has no existence apart from law. The non-corporeal nature of the corporate client creates the paradox and makes the applicability of the attorney-client privilege unpredictable; the corporation is the holder of the privilege and the attorney owes his allegiance to the corporation - not the corporation's officers, directors, and employees. Yet, the attorney and the corporate client may only communicate with each other through its officers, directors and employees. Thus, the paradox exists.

Instead of adopting a specific test to determine which employees may come within the privilege, the court in Upjohn Co. v. U.S. adopted a case-by-case analysis utilizing several factors to determine the applicability of the privilege:

(1) Whether the communications were made by corporate employees to corporate counsel at the direction of corporate superiors in order to secure legal advice from counsel;

(2) Whether the information needed by corporate counsel to formulate the advice was unavailable to upper-level management;

(3 Whether the communication concerned matters within the scope of the employee's corporate duties;

(4) Whether the employees were aware that the communications were made in order to allow the corporation to obtain legal advice; and

(5) Whether the communications were ordered to be kept confidential and had been kept confidential by the corporation.

material which reflects an attorney's efforts at investigating and preparing a case, assembling of information, determination of the relevant facts, preparation of legal theories, planning of strategy, and recording of mental impressions. In re Grand Jury Subpoena, 622 F.2d at 935 (1979). The purpose of the privilege is to protect the *"written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties."*

In contrast to the attorney-client privilege: (1) the attorney is the holder of the privilege; (2) the privilege is not confined to information/materials gathered by an attorney but includes materials gathered by his or her agents at his or her direction; (3) applies only to documents prepared in anticipation of litigation and not for ordinary business purposes; and (4) can be waived only by the attorney; and is qualified.

In order to be protected by the work-product doctrine, the documents or items must have been prepared in *"anticipation of litigation or for trial."* Where documents are prepared with more than one purpose in mind, it will be considered work-product only if *"the primary motivating purpose"* behind its preparation was *"to aid in possible future litigation."* *See* Binks Manufacturing Co. v. National Presto Industries, Inc., 709 F.2d 1109, 1119 (CA7 1983). The appropriate inquiry to establish the work-product privilege

focuses on the purpose of the document and the intent of the document's creator.

The mere presence of mental impressions, conclusions and legal theories within documents cannot be determinative of whether the materials are in fact prepared in anticipation of litigation. Certainly, some documents may contain mental impressions, conclusions and legal theories, even though the documents are not prepared in anticipation of litigation. Resolution of the question of what documents are prepared in such anticipation should be made by consideration of factors other than the mere presence of mental impressions, conclusions and legal theories, to the extent possible. Abel Investment Co. v. U.S., 53 F.R.D. 485, 488 (1971).

Material that is prepared, or knowledge that is obtained as part of any organization's normal course of business is not work-product, because it cannot be said to have been prepared *"primarily"* to aid in possible future litigation. *See* American Bankers Insurance Co. v. Colorado Flying Academy, 97 FRD 515, 517 (1983). Likewise, the work-product objection is not proper where the discovery requested asks for underlying factual information in a party's possession.

The work-product privilege must be asserted *"in a manner specific enough to allow the court to adjudicate the merits of its invocation . . . a mere assertion of the privilege without a description of the document tailored to the assertion, is*

insufficient." U.S. v. Exxon Corp., 87 FRD 624, 637 (1980). The information that must be provided includes *"the source of the information, whether the communication occurred in confidence, and whether the source was a lawyer working as an attorney for the [party]."* FTC v. Shaffner, 626 F.2d 32, 37 (CA7 1980). The party invoking the privilege must provide specific information sufficient to carry its burden and thus to permit the court to consider the claimed privilege. Cargill Inc. v. Cementation Co. America, Inc., 377 So.2d 1334 (CA1 1979)[*"a party seeking to avoid production of a writing otherwise discoverable bears the burden of proving that it was obtained in anticipation of litigation"*].

Once the material is established as work-product, it is protected, unless the discovering party can establish *"substantial need of the materials in preparation of his case"* and *"that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means."* Recent case law confirms that the traditional sanctity of attorney work-product prior to trial is losing ground. Concerns about efficiency, and fair results, combined with increasing efforts to involve attorneys in managing risks on the corporate level, and by government to regulate with disclosure and reporting requirements, seem to be producing this change.

In the landmark case of Hickman v. Taylor, 329 U.S. 495, 510 (1946), the Court held that *"written statements, private memoranda*

and personal recollections prepared or formed by an adverse party's counsel in the course of legal duties" are not subject to discovery in the absence of a showing of *"necessity or justification."* The principle extends broadly so long as (1) trial is being prepared for, and (2) the lawyer's traditional trial-related skills are being used. Novick v. Pennsylvania R. Co., 18 FRD 296 (1955).

Despite the importance of this general policy against invading the privacy of an attorney's program of trial preparation, the Court recognized that it must yield to a showing by the one seeking discovery that the material sought is necessary to the presentation of his case, or that a denial of access to it would cause undue hardship or prejudice. Thus, the court qualified or limited protection of attorney work-product from discovery:

> *"Were production of written statements and documents to be precluded under [all] circumstances, the liberal ideals of the deposition-discovery portions of the Federal Rules of Civil Procedure would be stripped of much of their meaning. But the general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order."* Hickman v. Taylor, 329 U.S. 495, 511-12 (1946).

C. Executive Session Privilege

The City assets what it calls an "Executive Session Privilege." The origin of such a privilege, the City argues, is the Kansas statutes relating to public meetings and access to public records that makes information as to matters occurring in executive session of governmental bodies privileged from discovery

during litigation. The Kansas Open Records Act, provides, in pertinent part:

> *"(a) It is declared to be the public policy of this state that public records shall be open for inspection by any person unless otherwise provided by this act, and this act shall be liberally construed and applied to promote such policy.*
> *"(b) Nothing in this act shall be construed to require the retention of a public record not to authorize the discard of a public record." K.S.A. 45-216.*

K.S.A. 45-218 provides:

> *"All public records shall be open for inspection by any person, except as otherwise provided by this act, and suitable facilities shall be made available by each public agency for this purpose."*

And K.S.A. 45-221 provides, in pertinent part:

> *"Except to the extent disclosure is otherwise required by law, a public agency shall not be required to disclose:*
> * * *
> *"(2) Records which are privileged under the rules of evidence, unless the holder of the privilege consents to the disclosure.*
> * * *
> *"(15) Records pertaining to employer-employee negotiations, if disclosure would reveal information discussed in a lawful executive session under K.S.A. 75-4319 and amendments thereto.*
> * * *
> *"(25) Records which represent and constitute the work product of an attorney. . . ."*

The Kansas Open Meetings Act, in pertinent part, states:

> *"(a) In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the policy of this state that meetings for the conduct of governmental affairs and the transaction of governmental business to be open to the public.*
> *"(b) It is declared hereby to be against the public policy of this state for any such meeting to be adjourned to another time or place in order to subvert the policy of open public meetings as pronounced in subsection (a). K.S.A. 75-4319.*

K.S.A. 75-4318(a) provides:

> *"Except as otherwise provided by state or federal law . . . all meetings for the conduct of the affairs of, and the transaction of business by, all legislative and administrative bodies and agencies of the state and political and taxing sub-divisions thereof, including boards, commissions, authorities, councils, committees,*

> *subcommittees and other subordinate groups thereof, receiving or expending and supported in whole or in part by public funds shall be open to the public and no binding action by such bodies shall be by secret ballot, but any administrative body that is authorized by law to exercise quasi-judicial functions shall not be required to have open meetings when such body is deliberating matters relating to a decision involving such quasi-judicial functions."*

Finally, K.S.A. 75-4319 provides:

> *"(a) Upon formal motion made, second and carried, all bodies and agencies subject to this act may recess, but not adjourn, open meetings for closed or executive meetings. . . . Discussion during the closed or executive session meeting shall be limited to those subjects stated in the motion.*
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> *"(b) No subjects shall be discussed at any closed or executive meeting, except the following:*
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> * * *
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> *(2) consultation with an attorney for the body or agency which would be deemed privileged in the attorney-client relationship;*
> *(3) matters relating to employer-employee negotiations whether or not in consultation with the representative or representatives of the body or agency; . . ."*

No Kansas case deciding whether either the Open Meetings Act or the Open Records Act provides such a privilege against required disclosure in litigation has been called to the presiding officer's attention. No statutory provision can be found which specifically gives a governmental body an executive session privilege from the type of discovery requested by Petitioner. Likewise, no generally recognized common law privilege which would give protection from this type of discovery can be cited.

Clearly, the purpose of the Open Meetings Act or the Open Records Act is to provide the general public with access to information previously unavailable. However, that same information was not unavailable from required disclosure for purposes of litigation unless it was subject to a privilege. The exceptions

set forth in the Kansas Open Records and Open Meetings Acts clearly appear to be exceptions to the newly created duty to disclose to the public. Information covered by those exceptions retains the same confidentiality that it had before enactment of the legislation. That confidentiality did not necessarily involve a privilege from required disclosure in litigation.

The need of parties involved in litigation to information determining their rights is usually stronger than the need of the general public to be informed on a matter. In enacting the Open Meetings Act and the Open Records Act, and creating exceptions to disclosure thereunder, the legislature was balancing the need of the public to be informed against the need for governmental confidentiality in certain limited areas. The legislature was not balancing the need of litigants for information against the need for confidentiality.

The Kansas Open Records Act can be compared to the federal Freedom of Information Act ("FOIA") which was conceived in a effort to permit access by the citizenry to most forms of government records. In essence, the FOIA provides that all documents are available to the public unless specifically exempted by the Act itself. Similarly, the Kansas Open Records Act, K.S.A. 45-216 et seq., is an affirmative act requiring disclosure of public records unless the request places an unreasonable burden on the agency or, if the request is repetitive in nature, is intended to disrupt the

agency's function. K.S.A. 45-216 and K.S.A. 45-218(e); State of Kansas, Depart. of SRS, Parsons State Hospital and Training Center v. PERB, 249 Kan. 163 (1991). The Kansas Open Records Act designates 35 categories of records that public agencies *"shall not be required to disclose."* K.S.A. 45-221(a). K.S.A. 45-221 does not prohibit disclosure but makes the decision to release the information discretionary with the custodian of the records. State of Kansas, Depart. of SRS, Parsons State Hospital and Training Center v. PERB, 249 Kan. 163 (1991).

The disclosure provisions of the Freedom of Information Act have been interpreted broadly to reflect a Congressional policy favoring free and open disclosure of a wealth of material to the public. Under the FOIA, all material is subject to disclosure unless specifically listed as exempt. The federal courts have repeatedly stated that the FOIA exemptions from disclosure must be construed narrowly, in such a way as to provide the maximum access consonant with the overall purpose of the Act. *"The Legislative plan creates a liberal disclosure requirement limited only by specific exemptions which are to be narrowly construed."* Getman v. NLRB, 450 F.2d 670, 672 (1971).

Similarly, the discovery provisions of the Federal Rules of Civil Procedure have as their goal the liberal disclosure of information to parties engaged in civil litigation in federal courts. In interpreting the Kansas Open Records Act, the supreme

court in State of Kansas, Depart. of SRS, Parsons State Hospital and Training Center v. PERB, 249 Kan. 163, 170 (1991), the court concluded:

> *"KORA does not allow an agency unregulated discretionary power to refuse to release information sought by the public. The stated policy of KORA is that all public records are to be open to the public for inspection unless otherwise provided in the Act. As used in KORA "public" means 'of or belonging to the people at large.' 'Public inspection' refers to the right of the public to inspect governmental records when there is a laudable object to accomplish or a real and actual interest in obtaining the information. Neither PERB nor the Union are subject to the limitations of KORA when acting under the government sanctioned activities of PEERA."* (Emphasis added).

Information disclosable under the FOIA is not considered privileged for discovery purposes. *See* Moore-McCormack Lines, Inc. v. I.T.O. Corp., 508 F.2d 945 (CA 4, 1974). It does not follow, however, that information unavailable under the FOIA will be unavailable through discovery. Courts have refused to equate exemption under the FOIA with privilege from agency discovery procedures. In McClelland v. Andrus, 606 F.2d 1278 CADC, 1979), the defendant agency shielded a report from disclosure on the ground that it came within the purview of various exemptions of the FOIA. The court considered reliance upon the FOIA misplaced in that the plaintiff sought the report as a party to an agency proceeding, rather than as a requester under the FOIA. The agency's discovery rules, not the provisions of FOIA, should therefore have been applied. Because the document was relevant, it could be shielded from disclosure only upon a separate showing of privilege by the agency.

In Jupiter Painting Contracting Co. v. U.S., 87 FRD 593 (E.D.Pa. 1980), the court recognized the error in assuming that a discovery privilege necessarily follows from exemption under the FOIA:

> *"With regard to a qualified privilege, such as governmental privilege, FOIA exemption cannot even directly delimit claims of privilege since it does not take into account the degree of need for the information exhibited by the [requester]. . . Only for an absolute privilege, such as attorney-client, where all [parties] stand on equal footing, does FOIA consistently tract the scope of discovery available against the Government."*

The court in Frankel v. SEC, 460 F.2d 813, 818 (CA 2, 1972) reached a similar conclusion finding that information properly withheld under the FOIA may still be obtained through discovery if the private party's need for the material exceeds the government's need for confidentiality. *See also* Kerr v. U.S. District Court, 511 F.2d 192 (CA9, 1975)[exemptions under the FOIA do not provide evidentiary privileges from discovery]; Canal Authority v. Froehlke, 81 F.R.D. 609 (M.D.Fla. 1979)[the FOIA serves to place no limits on the discovery process].

In Pleasant Hill Bank v. U.S., 58 F.R.D. 97, 99 (W.D.Mo. 1973), the court found it unnecessary to decide if the documents were exempt under the FOIA: *"Even if we posit arguendo that the . . . documents are exempt from disclosure, it does not necessarily follow that they are privileged for purposes of civil discovery."* The court analogized the relationship between the FOIA and the Rules to the relationship between the FOIA and the Federal Rules of Evidence and concluded:

> *"The disclosure exemptions of the [Freedom of Information] Act were not intended to and do not create or show by their own force a privilege within the meaning of Rule 26(b)(1) disqualifying a Government document from discovery. since defendant relies only upon an assertion of exemption under the Act, in the mistaken belief that exemption is equivalent to privilege, and since the . . . documents do not bespeak privilege on their face, we are not now in a position to honor the claim of privilege."*

Accordingly, the "Executive Session Privilege" as contemplated by Respondent cannot be deemed to exist by virtue of the Kansas Open Meetings and Open Records Acts.

The problem presented here is a phase of the inherent conflict between the usually predominate public policy of maintaining court and administrative proceedings as forums for the determination of the truth and public policy which for some reason favors that certain matters be kept in confidence. *See* McCormick, Evidence § 72(a), at 170 (3d ed. 1984). There can be no question that discussions between members of a governmental body concerning collective bargaining strategy do originate in a confidence that they will not be disclosed. The court in IELRB v. Homer Comm. Cons. Scho. Dist., 160 Ill.App.3d. 730 (1987) observed that this confidentiality was essential to the full and satisfactory maintenance of the relationship between the parties:

> *"Fear of disclosure would alter the atmosphere of free discussion necessary to formulating bargaining strategy, and thus crimp the collective-bargaining process. Also, the damage that would result from disclosing these communications would be greater than the benefit gained by using this information to discover and punish unfair labor practices."* Id. at 2156.

The IELRB v. Homer Comm. Cons. Scho. Dist. court, after concluding that no recognized common law privilege covered such

discussions concluded that some sort of qualified privilege should be created:

> *"Even though the cited provisions of the Open Meetings Act and the Freedom of Information Act are not deemed to have spoken to the question of whether the deliberations of the protected meetings where collective-bargaining strategy was discussed were immune from discovery for litigation purposes, that legislation may be considered to have indicated a strong public policy to protect the confidentiality of such deliberations. The concepts of collective bargaining included a recognition of the disparity of interests involved which, inherently, makes the bargaining process an adversarial one at times. The process is damaged if the parties cannot plan their bargaining strategy under circumstances where they have a reasonable expectations of confidentiality. Allowance of that confidentiality does not in any way hinder the opportunity of the parties to respect each other and to recognize their common interests."* IELRB v. Homer Comm. Cons. Scho. Dist., 160 Ill.App.3d. 730, 737 (1987).

While not disputing some sort of privilege should cover collective bargaining strategy discussions, exception is taken to the IELRB v. Homer Comm. Cons. Scho. Dist. court's conclusion that no existing privileged is available which can be asserted to protect such communications from discovery. An appropriate privilege would appear to be the governmental deliberative-process privilege.[7]

Among the evidentiary privileges traditionally recognized by the courts is a subcategory of the executive or governmental privilege, which is termed the predecisional privilege. See NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975). Under this privilege the government may properly withhold documents requested by its

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[7] A careful reading of the IELRB v. Homer Comm. Cons. Scho. Dist. case reveals that that their collective-bargaining-executive-session privilege closely resembles the deliberative-process privilege, with the same elements required to be showed by the party claiming the privilege.

adversaries during discovery, that reflect "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated. Id. at 150. Its particular purposes are (1) to encourage open, frank discussions on policy matters between subordinates and their superiors by assuaging fear of public ridicule or criticism; (2) to protect against premature disclosure of proposed policies before they have been finally formulated or adopted; and (3) to protect against confusing the issues and misleading the public by disclosure of reasons that were not in fact the actual reasons for the agency's actions. Coastal States Gas Corp. v. Depart. of Energy, 617 F.2d 854, 866 (1980). Typically such exchanges would be inhibited were the participants to expect that their remarks would be disseminated publically. Id., 617 F.2d at 866. Thus, by protecting from disclosure the ebb and flow of the deliberative process, the pre-decisional privilege seeks to ensure the quality of governmental decisionmaking. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150-52 (1975).

At the same time, courts have held that the pre-decisional privilege is limited and, for example, would not include "purely factual material," even if such material is contained in "deliberative memoranda." EPA v. Mink, 410 U.S. 73, 87-88 (1973). In determining whether material is "purely factual" or deliverative, a court must have "an understanding of the function

of the documents in issue in the context of the administrative process which generated them." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 138 (1975). Moreover, the government has the burden of proof on the applicability of the pre-decisional privilege. Gulf Oil Corp. v. Schlesinger, 465 F.Supp. 913, 917 (1979).

In order for the deliberative process privilege to apply, several requirements must be satisfied. First, teh communicaiton must have been predecisional. In other words, it must have been made before the deliberative process was completed. Second, the communication must be deliberative in character. It is not enough that a statement was made during the deliberative process. Rather, the statement itself msut be "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters. Weaver & Jones, The Deliberative Process Privilege, 54 Mo.L.Rev. 279 (19).

Documents Claimed Privileged by Respondent

1. **November 18, 1993, memo from Carl Wagner regarding negotiations procedure.**

Respondent's position: Document No. 1 is a legal opinion of Carl Wagner, then Senior Assistant City Attorney, given to City employees, Susan Smith, Mike Deiters, Lynette Wolfe, Paul Steinbrenner and Gary Rebenstorf. (See Affidavit of Carl Wagner at para. 2). Such document is clearly an attorney-client communication.

Wagner affidavit #1: 2. "In regard to certain additional items on the Privilege Log, Item 1 is a Memorandum from me to Susan Smith, a personnel officer for the City who often dealt with classification and compensation issues, which copies Mike Deiters, Lynette Wolfe, Paul

Steinbrenner and Gary Rebenstorf, in regard to contract negotiations with IAFF. It specifically contains my opinions on contract modification on the firefighters for 1994."

Determination:

a). No attorney-client privilege will be recognized.

1). According to Wagner, the purpose of the memo was to give his opinions on contract modification for the firefighters. There is no indication that this memo was in response to a request by Susan Smith for a legal opinion, or simply represented the business opinion of Wagner, as the person responsible for monitoring negotiations, as to how the firefighter contract should be modified.

2). Even if it were assumed that the memo to Susan Smith was covered by the attorney-client privilege, the copies to Deiters, Wolfe and Steinbrenner would not be covered since there was no showing of who these individuals are or that they should be equated with the City for purposes of this information; that the communication concerned matters within the scope the employee's duties; and whether the communications were ordered to be kept confidential and had been kept confidential by the employees such that it was not given to, or maintained in a manner that made it available to, other employees. (See footnote #6).

2. **December 3, 1993, letter from Bill Dye to Chris Cherches relaying opinion of Carl Wagner.**

Respondent's position: Document No. 2, as stated in the Privilege Log is a letter from Bill Dye to City Manager Chris Cherches, relaying the opinion of Carl Wagner, then Senior Assistant City Attorney. Even it if is argued that Dye never acted as an attorney, a point disputed by respondent, the letter still reflects an attorney-client communication. There has not been, and cannot seriously be, an argument that Mr. Wagner's function was anything other than attorney. (See Affidavit of Bill Dye at para. 2). The argument made by petitioner, in regard to Document No. 2 and elsewhere, that client communications with an attorney are privileged only if it specifically in response to a request for legal advice is an extraordinarily narrow view of privileged communications. It is also consistent with the broad scope of confidentiality recognized by the Kansas Supreme Court.

Dye Affidavit #2: "In regard to various other items on the Privilege Log, Item 2 is my letter to Chris Cherches dated December 3, 1993, which copies Mike Deiters, Carl Wagner, Paul

Steinbrenner and Gary Rebenstorf. It contains my legal opinions as well as Carl Wagner's legal opinions of the City in regard to the status of negotiations in light of the pending PERB charge."

Determination:

a). No attorney-client privilege will be recognized for the relationship between Dye and the City.

1). It appears Dye was hired by the City primarily to serve as its chief negotiator in meet and confer proceedings with the firefighters. Any legal opinions he may offer are subsidiary and ancillary to that position. The claim of privilege indicates the purpose served by Dye relative to this communication was primarily as a business advisor, and does not show the intent of the communication was primarily for the purpose of providing legal advice. His opinions would not be covered under the attorney-client privileged.

b). An attorney-client privilege may be recognized for the relationship between Wagner and the City, and consequently Dye as its representative.

1). This item, when combined with the claim of privilege provided for items 23 and 24 appear to establish an attorney-client relationship between the City and Wagner relative to the pending prohibited practice complaint and FLSA litigation. If established, the opinions rendered by Wagner to Dye would be privileged.

c). Any attorney-client privilege established as a result of the communications between Wagner and Dye pursuant to (b) above were waived as a result of copies of the communications being sent to Deiters and Steinbrenner.

1). While the letter to Cherches conveying the opinions of Wagner would be covered by the attorney-client privilege since Cherches, as City Manager, must reasonably be presumed to stand in the place of the City, the copies to Deiters and Steinbrenner would not be covered since there was no showing of who these individuals are or that they should be equated with the City for purposes of this information; that the communication concerned

matters within the scope the employee's duties; and whether the communications were ordered to be kept confidential and had been kept confidential by the employees such that it was not given to, or maintained in a manner that made it available to, other employees. (See footnote #6).

3. **Bill Dye notes of June 8, 1993, executive session with City Council regarding union proposals.**

Respondent's position: Document No. 3 has been previously addressed by respondent. It should not be produced for the reason that Executive Session activities are protected, as well as attorney-client communication.

Dye Affidavit #2: "In regard to Item 3, pertaining to my notes at the Executive Session on June 8, 1993, it reflects confidential discussions with the Council and the City's legal counsel about the negotiations. As I previously indicated in my first Affidavit, there was continuous discussions of the legal issues presented by the impact of the FLSA lawsuit referred to therein on the negotiations and visa versa. As such, I do not recall any occasion in an Executive Session about the firefighters negotiations where those legal ramifications and that lawsuit were not discussed and discussions would have occurred on that topic in that Executive Session."

Determination:

a). An attorney-client privilege will be recognized for the relationship between City Council and the City's legal counsel.

1). Notes reflecting their discussions during the executive session will be privileged.

b). No Executive Session privilege will be recognized for the June 8, 1993 meeting.

1). The claim of Executive Session privilege is supported by only the general statement cited above from the second affidavit of Dye. As is readily apparent, Dye is unable to recall the specifics of that Executive Session or the matters discussed; only the general recollection that the ramifications of the FLSA litigation on negotiations were discussed. As the affidavit now stands, the finder-of-fact has little more than its *sua sponte* speculation with which to weigh the applicability of the claim. As noted above, an improperly asserted claim of privilege is no claim

of privilege. To recognize such a broad claim in which the Respondent has given no precise or compelling reasons to shield this document from discovery, "would make a farce of the whole procedure." Black v. Sheraton Corp. of America, 371 F.Supp. 97, 101 (1974).

4. **Bill Dye notes of June 7, 1993, meeting with Chris Cherches, Paul Steinbrenner, Gary Rebenstorf, Carl Wagner, and Mike Deiters regarding negotiations.**

Respondent's position: Likewise, with respect to the conference held on June 7th between City officials and Mr. Dye, Mr. Rebenstorf and Mr. Wagner, this conference is clearly privileged. Those notes contain the privileged discussions with the City's attorneys regarding various strategies that were contemplated during negotiations as well as the FLSA litigation.

Document No. 4 has also been previously addressed. Petitioner's argument is really no more than a request for the specific contents of the documents. Obviously, providing very specific information would defeat the privilege. Petitioner again ignores the privileged nature of Executive Sessions.

Dye Affidavit #2: "Item 4 which reflects confidential discussions between myself and Mr. Cherches, Mr. Steinbrenner, Mr. Rebenstorf, Mr. Deiters and Mr. Wagner on June 7, 1993. As reflected in my previous Affidavit, we would have also discussed the FILA lawsuit and the legal ramifications on the negotiations in that conference."

Determination:

a). No attorney-client privilege will be recognized for the relationship between Dye and the City.

1). It appears Dye was hired by the City primarily to serve as its chief negotiator in meet and confer proceedings with the firefighters. Any legal opinions he may offer are subsidiary and ancillary to that position. The claim of privilege indicates the purpose served by Dye relative to this communication was primarily as a business advisor, and does not show the intent of the communication was primarily for the purpose of providing legal advice. His notes would not be covered under the attorney-client privileged since he is not considered to be serving in an attorney-client relationship.

b). An attorney-client privilege will be recognized for the relationship between Wagner and Rebenstorf and the City relative to the discussions concerning the FILA litigation.

1). The discussions between Cherches and City counsel concerning the FLSA litigation would be covered by the attorney-client privilege since Cherches, as City Manager, must reasonably be presumed to stand in the place of the City, as the client.

c). The attorney-client privilege will be deemed to have been waived since it included others than counsel and the City's representative.

1). The discussions included Deiters and Steinbrenner but there was no showing in the claim of privilege who these individuals are or that they should be equated with the City-client for purposes of this communication; that the communication concerned matters within the scope the employee's duties; and whether the communications were ordered to be kept confidential and had been kept confidential by the employees such that it was not revealed to other employees. (See footnote #6).

d). No attorney-client privilege will be recognized for the discussions concerning the strategies for negotiations at the June 7, 1993 meeting.

1). As previously explained, when the context suggests the intent of a communication is not primarily for the purpose of legal advice, the attorney-client privilege may not be invoked simply because an attorney was involved in the communications. Here, the affidavit only alludes to the meeting being for the purpose of discussing "various strategies that were contemplated during negotiations." There is no indication that this meeting was intended primarily for the purpose of obtaining legal advice. Rather, it would appear it was utilized for the giving of business, as opposed to legal, advice, i.e. the development of bargaining strategies. Notes relative to these discussions

would not be privileged under the attorney-client privilege.[8]

e). No Executive Session privilege will be recognized for the June 7, 1993 meeting.

1). Respondent fails to provide any supportive information as to how this meeting would qualify as an executive session.

5. **Two pages of documents discussed with City Council during executive session regarding negotiations.**

Respondent's position: Document 5 is two pages prepared for and presented to the City Council in Executive Session and is, therefore, protected. (See Affidavit of Mike Deiters at para. 3) It includes the handwritten notes of Bill Dye which are further protected. (See Affidavit of Bill Dye at para. 3)

Dye Affidavit #2: "Item 5 is my copy of the second document labeled as Document 14. To my knowledge, this document was prepared for a confidential discussion with the City Council and the City's legal counsel in Executive Session. I also recall that I attended at least one meeting with Mr. Cherches, Mr. Steinbrenner, Mr. Wagner and Mr. Deiters where the subject of the document was discussed. To my knowledge, the document contains my notes and reflects the confidential discussions at the latter meeting. In that meeting, we would have also had confidential legal discussions on the FLSA case as to how it relates to negotiations."

Deiters Affidavit: "3. Item 5 consists of two pages of documents which I prepared for discussion in Executive Session with the City Council and legal counsel; these pages both contained notations made by Bill Dye. The documents include notes, research analysis, and recommendations. I am not aware of any time that Item 5 or any part thereof was publicly cited or identified in an open meeting of the City Council."

Determination:

a). No Executive Session privilege will be recognized for Document 5.

1). While what was said by the City Council members and legal counsel relative to the document and its relationship to negotiation proposals or positions

[8] This should not be taken to indicate that such discussions are not privileged under another theory. A case could be made that these discussions are exempt under the governmental deliberative process privilege. However, this privilege was not raised by Respondent. Respondent had three opportunities to raise such a claim of privilege and failed to do so. Accordingly, it shall be presumed to have waived the privilege by implication.

may be exempt from discovery, the document itself was prepared by one other than a City Council member or legal counsel outside the executive session, and presumably, has been maintained by others than the City Council members and legal counsel after the meeting. There is no indication in the claim of privilege whether the document was ordered to be kept confidential and had been kept confidential by the employees such that it was not given to, or maintained in a manner that made it available to, other employees. (See footnote #6).

2). According to Dye, the subject matter of the documents were discussed by certain individuals outside the Executive Session, and there is no indication in the claim of privilege whether all these individuals were also present during the Executive Session. If not, the privilege would have been waived, if it had been established. The party asserting the claim has the burden of establishing that a privilege has not been waived.

3). The claim presented no precise or compelling reasons to shield the document from discovery. (See Item 3(b)(1) above).

4). The affidavit of Deiters indicates the Documents contains "research analysis." To the extent that these constitute "facts" they are discoverable regardless of the existence of a privilege, if segregable. There is no indication in the claim of privilege to indicate that such facts are not segregable.

b). An attorney-client privilege will be recognized for any discussions concerning the FLSA litigation so any notes of Dye on document 5 relating solely to that document will be privileged.

6. **Memorandum to file from Dick Ewy regarding July 6, 1993, executive sessions with City Council regarding FLSA litigation.**

Respondent's position: Document No. 6 is clearly privileged, as is apparent from the Privilege Log. It is a memorandum from Dick Ewy, an attorney known to petitioner as representing the respondent in the FLSA litigation, about an Executive Session regarding the pending FLSA litigation; the memo is to Mr. Ewy's file. (See Affidavit of Dick Ewy; minutes of July 6, 1993,

City Council meeting, Attachment B). It is readily apparent that the document is attorney work product, possibly reflecting attorney and client communications, which occurred during a privileged Executive Session. There can be no serious argument that the document is not subject to disclosure.

Determination:

a). An attorney-client and work-product privilege will be recognized for the memorandum.

7. **June 9, 1993 correspondence from Bill Dye to Carl Wagner regarding negotiations.**

Respondent's position: Document No. 7 is a communication from Bill Dye to Carl Wagner. Even if it is assumed that Bill Dye never served in any legal capacity, his communication with the City's attorney is surely privileged. (See Affidavits of Bill Dye at para. 4).

Dye Affidavit #2: "In regard to Item 7, this is a letter from myself to Carl Wagner enclosing various documents. It also encloses my draft of a proposed Stipulation in regard to negotiations and how it relates to the FLSA litigation and solicits his input on the Stipulation."

Determination:

a). An attorney-client privilege will be recognized for the letter.

1). The letter is to be considered a request for legal opinion concerning a proposed stipulation and as such is protected by the attorney-client privilege.

b). No attorney-client privilege will be recognized for the various documents enclosed with the letter.

1). The claim of privilege presented no precise description of the various documents enclosed with the letter so as to allow the fact-finder sufficient information upon which to make a determination of whether a privilege applies. Since the burden is upon the party asserting the privilege to provide the necessary proof it is entitled to it, no privilege as to the documents has been established.

8. August 5, 1993, memorandum from Bill Dye to Robert Howard regarding July 27, 1993, executive session.

Respondent's position: Document No. 8 is both a reflection of Executive Session events and as an attorney-client communication or attorney-attorney communication. As petitioner is aware, Robert Howard is an attorney who represents the City in the pending FLSA litigation. Even if petitioner is correct that there is absolutely no protection for Executive Session and Bill Dye was never a legal advisor, both positions which are contested by respondent, the document is privileged because it is a communication between Bill Dye, a City representative and the City's attorney. (See Affidavit of Bill Dye at para. 5).

Dye Affidavit #2: "Item 8 is a memorandum, which I considered confidential, from myself to Robert Howard, a senior partner in my firm who advises the City in a legal capacity and represents it in the FLSA litigation, in regards to an Executive Session with the City Council and the City's legal counsel held on July 27, 1993, on negotiations. It reflects confidential discussions at the Executive Session. In addition, the Memorandum refers to an Executive Session actually held on August 10, 1993,[9] but misdated as being held on August 3, 1993. It contains my impressions in regard to that Executive Session and my opinion on who should attend the Executive Session."

Determination:

a). No Executive Session privilege will be recognized for Document 5.

1). The claim presented no precise or compelling reasons to shield the document from discovery. (See Item 3(b)(1) above).

b). Even if an Executive Session privilege were determined to have been established to the information contained in the August 5, 1993 memo as a result of Dye's presence at the executive session, it was waived when the information was communicated to a third party not privy to the Executive Session.

1). The Executive Session privilege was intended to maintain the confidentiality of communications that took place during the executive session. Once a party to the executive session releases those communications to a third party, with or without permission of the other parties to that confidence,

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[9] There appears to be a mistake in the dates contained in this paragraph of the affidavit. If the memorandum from Bill Dye was dated August 5, 1993, it would seem impossible that it could contain information relative to an executive session which occurred on August 10, 1993, five days in the future.

the confidential nature of the communications is destroyed. There is nothing in the claim of privilege to indicate that Mr. Howard attended the executive session and was privy to that confidential information.

c). No attorney-client privilege will be recognized for the Memorandum of August 5, 1993.

1). There is nothing in the claim to indicate that Dye, at the time he drafted the memorandum, was acting as a representative of the City. There is no assertion that he had been directed by the City Council to inform Mr. Howard of the discussions that took place in the executive session, that it was information requested by Mr. Howard in response to a request for legal advice; or that it was intended to solicit legal advice from Mr. Howard. It is assumed that the memorandum was more in the nature of one law partner advising another law partner, representing a mutual client, of information the second law partner might not otherwise have access.

9. **Carl Wagner's handwritten notes dated April 22, 1993, of telephone conference with Bill Dye regarding negotiations.**

Respondent's position: With respect to Items No. 9, how petitioner can claim that Mr. Dye's communication with one of respondent's in-house attorneys (Carl Wagner) is not privileged is never fully explained. These conversations concerned Mr. Dye's opinions about negotiations including his legal concerns in regard to the same. As such, they are protected opinion work product. (Affidavit of Wagner, para. 6). Even assuming that Mr. Dye is acting only as a negotiator, he is still communicating with an attorney on a confidential basis about a legal matter involving the City during the time that negotiations were taking place.

Wagner Affidavit #1: "In regard to various items on the Privilege Log which I reviewed, I did have telephone conferences with Mr. Dye on April 22, 1993 and April 27, 1993, (Items Nos. 9 and 11) and have reviewed those notes. Those notes reflect confidential discussions between myself and Mr. Dye wherein Mr. Dye gave his legal opinions and concerns on the negotiations, vis-a-vis, the pending FLSA litigation."

Determination:

a). No attorney-client privilege will be recognized for the relationship between Dye and the City relative to the April 22, 1993 discussions.

1). See reasoning set forth in 4(a)(1) above. Dye's legal opinions concerning negotiations are not exempt from discovery under the attorney-client privilege.

b). No attorney-client privilege will be recognized for the relationship between Dye and Wagner relative to the April 22, 1993 discussions.

1). As previously explained, when the context suggests the intent of a communication is not primarily for the purpose of legal advice, the attorney-client privilege may not be invoked simply because an attorney was involved in the communications. Here, the affidavit only alludes to the meeting being for the purpose of discussions "wherein Mr. Dye gave his legal opinions and concerns on the negotiations . . . " There is no indication that this meeting was intended primarily for the purpose of Mr. Dye obtaining legal advice. Rather, it would appear it was utilized for business, as opposed to legal, advice on negotiations. This is supported by Wagner's responsibilities of monitoring those negotiations. Notes relative to these discussions would not be privileged under the attorney-client privilege.[10]

c). No attorney work-product privilege will be recognized for Dye's communications on April 22, 1993.

1). See reasoning set forth in 4(a)(1) above for why Dye is not to be considered acting in a legal capacity in his relations with the City relative to his duties as chief negotiator.

d). No attorney work-product privilege will be recognized for Wagner's notes of the April 22, 1993 discussions as they relate to negotiations, but will apply for notes dealing with the FLSA litigation.

1). The attorney work-product privilege applies only to documents prepared in anticipation of litigation

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[10] This should not be taken to indicate that such discussions are not privileged under another theory. A case could be made that these discussions are exempt under the governmental deliberative process privilege. However, this privilege was not raised by Respondent. Respondent had three opportunities to raise such a claim of privilege and failed to do so. Accordingly, it shall be presumed to have waived the privilege by implication.

and not for ordinary business purposes. Respondent appears to take the position since negotiations are an adversarial situation, all actions taken by the parties should be considered taken in anticipation of future litigation, and therefore any document prepared by counsel during those negotiations are work-product. This gives the privilege too broad of a reach. As the court in Abel Investment Co. v. U.S., 53 F.R.D. 485, 490 (1971) reasoned in rejecting a similar argument:

> "If this court were to so hold, it would indeed put the government in a position markedly advantageous to that of a private litigant. I think that any government agency whose determinations might lead to litigation could show the same continuity, as all serve the same master; but to hold that any intra-agency or inter-agency report which eventually could be relayed to the attorney who must try the case for the government is a report or document prepared in anticipation of litigation would be effectively to shield all government reports. This is, I think, clearly contrary to the intent of Rule 26."

Litigation cannot be anticipated in every case when the City undertakes meet and confer negotiations. The City has failed to provide specific, articulated facts known to it on April 22, 1993 that would convince a reasonable person that these negotiations would end in litigation. Since no showing was made, it cannot be concluded that the notes were prepared in anticipation of litigation instead of by Wagner in the normal course of business as the monitor of the negotiations. The notes sought to be discovered by the petitioner are not trial preparation material and are not protected from discovery.

10. **Memo to Mike Deiters and Gary Rebenstorf from Carl Wagner regarding negotiations.**

Respondent's position: Document No. 10 is an April 22, 1993 memo to Mike Deiters, the City's Employee Relations Officer, with a copy to City Attorney, Gary Rebenstorf, from Carl Wagner, then Assistant City Attorney, regarding, in part, negotiations and communications with Bill Dye. It is privileged by reason it being an attorney-client communication (See Affidavits of Carl Wagner at para. 3 and Gary Rebenstorf at para. 3).

Wagner Affidavit #1: "Item 10 is a Memorandum from me to Mike Deiters which copies Gary Rebenstorf in regard to various confidential personnel matters. It contains the legal opinions and advice of both Rebenstorf and myself. It also contains the legal opinions of Bill Dye in regards to negotiations as it relates to the FLSA case."

Determination:

a). An attorney-client privilege will be recognized for the opinions of Wagner and Rebenstorf contained in the Memorandum.

1). The letter is to be considered a request for legal opinion concerning a proposed stipulation and as such is protected by the attorney-client privilege.

b). No attorney-client privilege will be recognized for the legal opinions of Dye contained in the Memorandum.

1) As previously explained, when the context suggests the intent of this section of the memorandum is not primarily for the purpose of legal advice, the attorney-client privilege may not be invoked simply because an attorney was involved in the communications. Here, it appears that Wagner is simply acting as a conduit for transferring the opinions of Dye to Deiters. The attorney-client privilege does not attach simply because the information is communicated through an attorney. Notes relative to these discussions would not be privileged under the attorney-client privilege.[11]

c). No attorney work-product privilege will be recognized for Wagner's memorandum of the April 22, 1993 as it relates to negotiations, but will apply to those portions dealing with the FILA litigation.

1). For the reasons set forth in 9(d)(1).

11. **Carl Wagner's handwritten notes dated April 27, 1993, of telephone conference with Bill Dye regarding negotiations.**

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[11] This should not be taken to indicate that such discussions are not privileged under another theory. A case could be made that these discussions are exempt under the governmental deliberative process privilege. However, this privilege was not raised by Respondent. Respondent had three opportunities to raise such a claim of privilege and failed to do so. Accordingly, it shall be presumed to have waived the privilege by implication.

Respondent's position: With respect to Item No. 11, how petitioner can claim that Mr. Dye's communication with one of respondent's in-house attorneys (Carl Wagner) is not privileged is never fully explained. These conversations concerned Mr. Dye's opinions about negotiations including his legal concerns in regard to the same. As such, they are protected opinion work product. (Affidavit of Wagner, para. 6). Even assuming that Mr. Dye is acting only as a negotiator, he is still communicating with an attorney on a confidential basis about a legal matter involving the City during the time that negotiations were taking place.

Wagner Affidavit #1: "In regard to various items on the Privilege Log which I reviewed, I did have telephone conferences with Mr. Dye on April 22, 1993 and April 27, 1993, (Items Nos. 9 and 11) and have reviewed those notes. Those notes reflect confidential discussions between myself and Mr. Dye wherein Mr. Dye gave his legal opinions and concerns on the negotiations, vis-a-vis, the pending FLSA litigation."

Determination:

a). The reasoning and determination set forth Item #9 are equally applicable here.

12. **Memo from Mike Deiters to Paul Steinbrenner, Carl Wagner, and Lynette Wolfe regarding April 27, 1993 meeting with Carl Wagner and Foulston & Siefkin.**

Respondent's position: Document No. 12 is a memorandum written by Mike Deiters to Paul Steinbrenner with a copy to Carl Wagner and Lynette Wolfe regarding a meeting he had with attorneys from Foulston & Siefkin and Carl Wagner. The memo is a summary of the opinions of attorney regarding FILA litigation and negotiations. (See Affidavits of Mike Deiters at para. 4 and Carl Wagner at para. 4). The document is a reflection of an attorney-client communication and, accordingly, privileges.

Wagner Affidavit #1: "Item 12 is a memorandum from Mike Deiters to Paul Steinbrenner which copies myself and Lynette Wolf. It reflects a meeting that was held between Bill Dye, Gloria Flentje (a partner at Foulston & Siefkin who was involved as counsel for the City of Wichita in the FLSA case), Mike Deiters and myself. It reflects a consensus of the legal opinions and concerns by and of the lawyers in regard to negotiations in light of the FLSA case. I believe it is protected by the attorney-client privilege for it reflects those confidential privileged discussions."

Determination:

a). Any attorney-client privilege established as a result of the communications between Deiters and counsels at the April 27th meeting were waived as a result of copies of the communications being sent to Steinbrenner and Wolfe.

1). While the Memorandum from Deiters to Wagner conveying the opinions of counsel at the April 27, 1993 meeting would be covered by the attorney-client privilege, the copies to Steinbrenner and Wolfe would not be covered since there was no showing who these individuals are or that they should be equated with the City-client for purposes of this information; that the communication concerned matters within the scope the employee's duties; and whether the communications were ordered to be kept confidential and had been kept confidential by the employees such that it was not given to, or maintained in a manner that made it available to, other employees. (See footnote #6).

13. **Copy of IAFF proposal with Carl Wagner's handwritten notes.**

Respondent's position: Document 13 has been produced.

14. **Documents discussed with City Council during executive session with Carl Wagner's handwritten notes.**

Respondent's position: With respect to Item No. 14 of respondent's Privilege Log, this item concerns the documents prepared for a meeting with the City's legal staff and its management and another document that arose out of that discussion which was prepared for a confidential discussion and for discussion in Executive Session with the City Council. In fact, Mr. Wagner's handwritten notes appear on both. The documents themselves also contain certain cost projections in regard to the negotiations. (Affidavit of Wagner, para. 7). Thus, these items would reveal conversations protected both by the attorney-client as well as the Executive Session privileges. Moreover, in contrast to petitioner's argument, these documents were prepared for discussion with counsel and / or the City Council in Executive Session. (Affidavit of Wagner, para. 7). Thus, they were not "preexisting" documents created out of the blue (as petitioner maintains on page 3 of his brief), but were documents actually created for those privileged sessions and / or discussions.

Wagner Affidavit #1: "In regard to the documents labeled as Item No. 14, the first document was prepared for a discussion with, as I recall, Mr. Steinbrenner and myself as well as Mr. Dye and Mr. Dieters. Those discussions included confidential discussions of legal issues in regard to the negotiations including certain cost projections in regard to the negotiations and that document was prepared specifically for that confidential discussion. Another document was then prepared as a result of that meeting for specific discussion with the City Council during Executive Session. I met a second time with Mr. Steinbrenner, Mr. Cherches, Mr. Dye and Mr. Deiters about the document. I considered the meeting confidential. I do recall that we spoke about all issues raised by the firefighters including the FILA litigation at this second meeting. I have also made notes on each of those documents during those meetings. On the

first document, it includes requests for legal advice in light of Judge Kelly's ruling in the FILA case and / or my thought, impressions and opinions on the negotiations."

Determination:

a). An attorney-client privilege will be recognized for the first document prepared for the meeting with the City's legal staff, Mr. Steinbrenner, Mr. Dye and Mr. Deiters, and Mr. Wagner's notes on same.

1). The document is to be considered a communication with counsel prepared to facilitate a legal opinion concerning negotiations.

b). An attorney-client privilege will not be recognized for the cost projections included in the first document prepared for the meeting with the City's legal staff, Mr. Steinbrenner, Mr. Dye and Mr. Deiters, and Mr. Wagner's notes on same.

1). The privilege does not protect facts, and these projections, without more information concerning same, would fall within that category.

c). An attorney work-product privilege will be granted for the notes of Wagner concerning the FILA litigation.

d). No Executive Session privilege will be recognized for the Second document prepared as a result of the first meeting for specific discussion with the City Council during Executive Session.

1). The claim of Executive Session privilege is supported by only the general statement. There is no indication as to the date the Executive session took place. The claim presented no precise or compelling reasons to shield the document from discovery. (See Item 3(b)(1) above).

2). The Executive Session privilege was intended to maintain the confidentiality of communications that took place during the executive session. Wagner's affidavit indicated the document was discussed with Steinbrenner, Cherches, Dye and Deiters. There is nothing in the claim of privilege to indicate that these individuals attended the executive session and were thus privy to that confidential

information. By sharing the document with others outside the executive session, any such privilege must be considered waived.

e). An attorney-client privilege will be not be recognized for the second document prepared as a result of the first meeting for specific discussion with the City Council during Executive Session.

1). There is nothing in the assertion of privilege to indicate the document was to be considered a communication with counsel prepared to facilitate a legal opinion concerning negotiations. Rather, the affidavit appears to indicate the document was prepared specifically for the City Council.

15. **Copy of proposed stipulation between IAFF and City, with highlighting and Carl Wagner's handwritten note attached.**

Respondent's position: With respect to Item Nos. 15 and 16, these items, although they do not contain any confidential communications, those documents are clearly protected opinion work product of the City's attorney, Carl Wagner. All three items contain his impressions and opinions of the various proposals about how to handle negotiations vis-a-vis the FLSA lawsuit and are entitled to protection here especially in light of the pending FLSA litigation that these proposals centered upon. (Affidavit of Wagner, para. 8). (See "clean" copies of these documents, with Mr. Wagner's notes redacted (sic), attached hereto as Exhibits A and B. One of these documents was marked with a highlighted the highlighted notes on the stipulation as well. This is clearly Mr. Wagner's work product.

As mentioned, even without the FILA litigation, it ignores reality to say that these proceedings were not adversarial in nature even assuming that a PERB charge had never been filed or was never on the horizon. This is nothing more than a blatant attempt to raid an attorney's file who is viewing the proceedings from a legal standpoint -- a view that was required in the course of his duties as an Assistant or Senior Assistant City Attorney monitoring the negotiations. (Affidavit of Wagner, para. 3).

Wagner Affidavit #1: "In regard to Item No. 15, I did make a note on the proposed Stipulation sent over by Ron Innes, the attorney for the IAFF. That note concerned the FLSA lawsuit that was currently pending at the time and it contains my thought or opinion on what should be in the stipulation."

Wagner Affidavit #2: "I further need to correct my first Affidavit in regard to Item 15. I now believe that the Stipulation referred to was a Stipulation which may have been actually drafted by Bill Dye and not Ron Innes. However, my comments about my note in regard to what needs to be in the Stipulation are still accurate."

Determination:

a). An attorney work-product privilege will be granted for the notes of Wagner concerning the FLSA litigation that represent a legal opinion or thought process.

b). No attorney work-product privilege will be recognized for Wagner's notes on the proposed stipulation which represent his opinions as to what should be in the stipulation.

1). The attorney work-product privilege applies only to documents prepared in anticipation of litigation and not for ordinary business purposes. (See Item 9(d)(1) above for rationale).

2). There is nothing in the claim of privilege which would show the notes of Wagner relative to the proposed stipulation were primarily for the purpose of rendering a legal rather than business determination concerning the adequacy of the stipulation.

c). No attorney work-product privilege will be recognized for the proposed stipulation, sans Wagner's notes.

1). There has been no showing that it was the work-product of Wagner or other counsel in the employee of the City.

16. **Copy of Ron Innes' June 11, 1993 letter to Bill Dye and Mike Deiters with highlighting and Carl Wagner's handwritten notes.**

Respondent's position: With respect to Item Nos. 15 and 16, these items, although they do not contain any confidential communications, those documents are clearly protected opinion work product of the City's attorney, Carl Wagner. All three items contain his impressions and opinions of the various proposals about how to handle negotiations vis-a-vis the FLSA lawsuit and are entitled to protection here especially in light of the pending FLSA litigation that these proposals centered upon. (Affidavit of Wagner, para. 8). (See "clean" copies of these documents, with Mr. Wagner's notes redacted, attached hereto as Exhibits A and B. One of these documents was marked with a highlighted the highlighted notes on the stipulation as well. This is clearly Mr. Wagner's work product.

As mentioned, even without the FILA litigation, it ignores reality to say that these proceedings were not adversarial in nature even assuming that a PERB charge had never been filed or was never on the horizon. This is nothing more than a blatant attempt to raid an attorney's file who is viewing the proceedings from a legal standpoint -- a view that was required in the course of his duties as an Assistant or Senior Assistant City Attorney monitoring the negotiations. (Affidavit of Wagner, para. 3).

Wagner Affidavit #1: "In regard to Item No. 16, the letter sent by Mr. Innes concerning a stipulation on how to treat the negotiations, vis-a-vis the FLSA lawsuit, I made additional comments on the viability of that stipulation on the stipulation itself with a highlighted given that litigation. Those notes contain my reactions, opinions and impression of Mr. Innes' proposal."

Determination:

a). An attorney work-product privilege will be granted for the notes of Wagner concerning the FILA litigation that represent a legal opinion or thought process.

17. ***Carl Wagner's handwritten notes of telephone call with Bill Dye, dated June 14, 1993.***

Respondent's position: With respect to Item No. 17, how petitioner can claim that Mr. Dye's communication with one of respondent's in-house attorneys (Carl Wagner) is not privileged is never fully explained. These conversations concerned Mr. Dye's opinions about negotiations including his legal concerns in regard to the same. As such, they are protected opinion work product. (Affidavit of Wagner, para. 6). Even assuming that Mr. Dye is acting only as a negotiator, he is still communicating with an attorney on a confidential basis about a legal matter involving the City during the time that negotiations were taking place.

Document No. 17 is Carl Wagner's handwritten memo of a telephone conversation between he and Bill Dye. Again, Mr. Wagner was clearly an attorney for the City and communication with him by Mr. Dye would be protected. This document was previously addressed. (See affidavit of Carl Wagner at para. 9).

Wagner Affidavit #1: "Item No. 17 reflects a telephone conversation on June 14, 1993, with Mr. Dye wherein Mr. Dye gives his opinion on the proposed stipulation on the negotiations, vis-a-vis the FLSA lawsuit. I considered all of these calls confidential discussions."

Wagner Affidavit #2: "In regard to Item 17, Mr. Dye did offer his legal opinion on the stipulation."

Determination:

a). An attorney-client privilege will be recognized for the notes of Wagner relative to that conversation.

1). It appears the communications concerned the exchange of information and discussion of legal advice relative to negotiations and the FLSA litigation.

18. **July 14, 1993 memo from Mike Deiters to Paul Steinbrenner, Carl Wagner and Lynette Wolfe regarding negotiating advice.**

Respondent's position: Document No. 18 is a protected memorandum written to Paul Steinbrenner, Carl Wagner and Lynette Wolfe regarding Mike Deiters' communication with Bill Dye regarding recommendations in negotiations and soliciting input. (See Affidavits of Mike Deiters at para. 5 and Carl Wagner at para. 5). It is an attorney-client communication. Wagner Affidavit #1: "Item No. 17 reflects a telephone conversation on June 14, 1993, with Mr. Dye wherein Mr. Dye gives his opinion on the proposed stipulation on the negotiations, vis-a-vis the FLSA lawsuit. I considered all of these calls confidential discussions.

Wagner Affidavit #1: "Item 18 is a memorandum from Mike Deiters to Paul Steinbrenner which copies myself and Lynette Wolf which requests negotiation advice and also reflects the opinions of Bill Dye in regard to negotiations including his opinion on the IAFF negotiations. I believe it would be protected by the attorney-client privilege."

Determination:

a). No attorney-client privilege will be recognized for the memorandum form Mike Deiters.

1). As previously explained, when the context suggests the intent of this section of the memorandum is not primarily for the purpose of legal advice, the attorney-client privilege may not be invoked simply because an attorney was involved in the communications. Also, as previously stated, a document prepared for simultaneous review by legal and nonlegal personnel are considered not prepared primarily to seek legal advice and therefore not privileged.

2). It appears Dye was hired by the City primarily to serve as its chief negotiator in meet and confer proceedings with the firefighters. As such no attorney-client privilege attaches relative to his communications with the City. (See rationale in Item 2(a)(1) above).

19. **Bill Dye's notes of August 10, 1993, executive session with City Council, misdated August 3, 1993.**

Respondent's position: With respect to Item No. 19, Mr. Dye's notes of August 10, 1993, these notes are the notes of Mr. Dye with regard to the Executive Session held on August 10, 1993. As discussed, those notes are clearly his work product during the negotiation process. These notes were prepared during an Executive Session with counsel and were not done at the table with the Union. The parties clearly were in an adversarial position by that date and, accordingly, Mr. Dye's work product privilege applies. Likewise, the petitioner was present

during this Executive session during the time that Mr. Dye took notes on its presentation. It certainly has no "substantial need" to obtain these materials when it was present when Mr. Dye took his notes regarding its claims and may obtain the same information by referring to what it said.

Determination:

a). No attorney-client privilege will be recognized for the memorandum from Mike Deiters.

1). It appears Dye was hired by the City primarily to serve as its chief negotiator in meet and confer proceedings with the firefighters. As such no attorney-client relationship attached. (See rationale in Item 2(a)(1) above). There being no attorney-client relationship, there is no attorney work-product privilege which can be invoked by Mr. Dye relative his notes and documents. The "adversarial position" argument is also without merit, without additional information provided in the claim. (See rationale in Item 9(d)(1) above).

20. **August 16, 1993 memo from Paul Steinbrenner to Carl Wagner regarding negotiations.**

Respondent's position: Document No. 20 a memorandum from Assistant City Manager Paul Steinbrenner to Carl Wagner, then Senior Assistant City Attorney, regarding negotiations, as was set forth in the Privileged Log. (See Affidavit of Carl Wagner at para. 6).

Wagner Affidavit #1: "Item 20 is a memorandum from Paul Steinbrenner to me with copies to Chris Cherches and Gary Rebenstorf in regard to negotiations and negotiation strategy. I believe it to be protected by the attorney-client privilege."

Determination:

a). No attorney-client privilege will be recognized for the memorandum form Mike Deiters.

1). As previously explained, when the context suggests the intent of this memorandum is not primarily for the purpose of legal advice, the attorney-client privilege may not be invoked simply because an attorney was involved in the communications. There is no indication in the claim of privilege that the communication was prepared at the request of legal counsel, or to assist legal counsel in rendering a legal opinion. Additionally, there is no

indication that a legal opinion was requested by Mr. Deiters. Rather, the memorandum, according to Wagner's affidavit, simply sets forth Deiters' opinions regarding negotiations and strategy. Deiters' is not claimed to be an attorney representing the City.

2). The attorney-client does not attach merely because the document is transmitted to an attorney, especially where there is not showing that the purpose was to seek legal advice rather than to keep counsel informed of business matters.

21 & 22. **September 16, 1993, memo to Larry Garcia, with copy to Carl Wagner, from Gary Rebenstorf.**

Respondent's position: Document No. 21 and 22 are an exchange of memos between City Attorney Gary Rebenstorf and Fire Chief Larry Garcia, regarding a legal matter. (See Affidavit of Gary Rebenstorf at para. 4). The memos are both attorney-client communication.

Rebenstorf Affidavit: "In September 1993, Fire Chief Garcia requested legal advice on an issue involving a particular employee and a contract with IAFF Local #135. Item 21 is my memorandum to Chief Garcia requesting specific information necessary to formulate a legal opinion and Item 22 is his response. Copies of Items 21 and 22 were given to Carl Wagner, then Senior Assistant City Attorney. Both memoranda were confidential attorney client communications, which I consider to be privileged."

Determination:

a). An attorney-client privilege will be recognized for theses documents.

1). It appears the communications represent a request for information necessary for rendering a legal opinion and the response to that request to legal counsel.

23. **Carl Wagner's handwritten notes of November 30, 1993, telephone conversation with Ron Innes regarding negotiations.**

24. **Carl Wagner's handwritten notes of November 30, 1993, telephone conversation with Bill Dye regarding negotiations.**

Respondent's position: With respect to Item 23 and 24, these items are actually one document dated November 30, 1993. (Affidavit of Wagner, para 9). Of course, these notes were taken by

Mr. Wagner after the petitioner had filed an unfair labor charge in September, 1993 and in part concerned the FLSA litigation. (Affidavit of Wagner, para. 9). Clearly the parties were in an adversarial position at that point and thus Mr. Wagner's notes constitute his work product. Likewise, that same document reflects a confidential discussion that he had with Mr. Dye. That conference is privileged for therein Mr. Dye offers his opinions on various strategies in the negotiations and he is clearly providing legal advice to the City. (Affidavit of Wagner, para. 9). Furthermore, the document contains Mr. Dye's mental impressions and opinions and, for that reason, should not be disclosed.

Wagner Affidavit #1: "In regard to my handwritten notes of November 30, 1993, reflecting telephone conversations with Ron Innes and then with Bill Dye (Item Nos. 23 and 24), both notes are on the same sheet of paper and reflect conversations I had with both individuals. I consider the latter call to be confidential and my notes reflect Mr. Dye's legal opinions and advice regarding the negotiations as well as the FILA litigation. We did discuss the FILA litigation in that call including legal issues involved therein. Likewise, my notes reflect discussions with Mr. Innes including discussions on a newly filed discrimination case against the City of Wichita filed by two of the firefighters with Mr. Innes as their counsel that was then pending where two firefighters had claimed, inter alia, that they were being retaliated against. These conversations were also after this PERB charge was filed by the firefighters in early September, 1993."

Determination:

a). An attorney-client privilege will be recognized for this document relative to the conversations with Mr. Dye.

1). By this time the City and the IAFF had assumed true adversarial positions with the filing of the prohibited practice complaints with PERB. The conversation with Mr. Dye came shortly after Wagner's telephone call with Mr. Innes during which the PERB complaint, the FLSA litigation, and the new discrimination case were discussed. It is reasonable to presume that the conversation with Mr. Dye represented a request for, and exchange of, information and opinion on these actions to assist Wagner in performing his legal responsibilities. As such, the conversation would be privileged.

b). An attorney work-product privilege will be recognized for this document relative to the conversations with Mr. Dye and Mr. Innes.

1). For the reasons set forth in (a)(1) above, the notes of Wagner relative to these conversations will be considered privileged.

25. **December 1, 1993, letter to Carl Wagner from Bill Dye with Carl Wagner's handwritten notes.**

Respondent's position: Document 25 is a three page document from Bill Dye to Carl Wagner, then Senior Assistant City Attorney. It includes Carl Wagner's handwritten notes. (See Affidavits of Carl Wagner at para. 7 and Bill Dye at para. 6). It is an attorney-client communication and attorney work product. It should be noted that drafts of legal documents, such as this, are entitled to attorney work product protection.

Wagner Affidavit #1: "Item 25 is a letter directed to me from Bill Dye which contains a draft letter dated December 1, 1993. It is a draft of the final letter that is listed as Item 2. It contains my legal opinions in regard to the negotiations as a result of the PERB charge. It contains my written notes (my work product) which are my modifications of the letter and I consider it to be both attorney-client privilege and work-product."

Dye Affidavit #2: "Item 25 is a letter directed to from me dated December 1, 1993, enclosing a draft of a letter dated December 1, 1993. It is basically a draft of Item 2 and contains the same legal opinions from Mr. Wagner and myself in regard to negotiations in relationship to the pending PERB charge."

Determination:

a). An attorney work-product privilege will be recognized for this document.

1). The draft letter obviously represents a proposal submitted to Wagner for legal opinion and modification. The resulting letter with his comments and suggestions represent his work product which would be privileged.

In Camera Inspection

It should be noted that in reaching the above determinations as to the applicability of a claimed privilege, considerable difficulty was encountered by the presiding officer due to the fragmented manner in which the claim of privilege was presented, the lack of specificity, and the apparent conflicts in statements as to what information was contained in the requested documents. As to Items 2, 3, 5, 7, 8, 9, 12, 14, 17, 20, 23, and 25 there

remains some doubt as the application, or denial thereof, of the claimed privilege. The alternatives available to relieve this doubt appear to be three: 1) given that Respondent has had three opportunities to provide information necessary to satisfy the elements required to meet it burden to establish a claim, and that there is only approximately one month before the formal hearing begins, to proceed according to the determinations set forth above; 2) allow the Respondent additional time to supplement its claims; and 3) to order an in camera inspection of the documents.

The third alternative appears the most acceptable. In Carl Zeiss Stiftung v. VEB Carl Zeiss, Jena, 40 FRD 318 (DDC 1966), the court indicated when an in camera inspection would be appropriate:

> *"In camera inspection . . . is appropriate where it appears with reasonable clarity that the party seeking production is entitled to access to some of the materials demanded. Examination in this type of situation enables the separation of what should be disclosed from what should not be revealed. Again, it may be that the balance between competing needs for confidentiality and disclosure cannot be made without analysis of the disputed data. Here the inspection enables the weighing to be done in the privacy of the judge's chambers. In each situation, however, a need, actual or potential, for production adequately appears, and the examination affords the means for fulfilling that need."* Id. at 331-32.

The Respondent should be able to provide the above Items to the presiding officer in a relatively short period of time, and it should also require an equally short period of time for the presiding officer to review the documents and make a final determination as to any privilege which may attach. In this manner, it can be ensured that Respondent's privileged

communications will be protected while Petitioner will have access to unprotected documents in a timely fashion before the hearing.

As a corollary, a finder-of-fact is duty-bound, where it orders production of documents in which there are strong policy reasons against public disclosure, to limit the availability and use of those documents and their contents by carefully drawn protective provisions. *See e.g.* Baim & Blank, Inc. v. Bruno-New York, Inc., 17 FRD 346 (SDNY 1955). Respondent may seek such orders as it deems necessary.

Showing of Need

Where the privilege established is a qualified one, the privilege may be overcome by a showing of necessity. IELRB v. Homer Community Dist. 208, 135 LRRM 2154, 2158 (1989). In Equal Employment Opportunity Comm'n v. University of Notre Dame Du Lac, 715 F.2d 331, 338 (CA7 1983), the court articulated what must be shown to defeat a qualified privilege:

> *"Before determining whether to compel disclosure of materials covered by the qualified privilege, the court must apply a balancing test to determine whether the need of the party seeking disclosure outweighs the adverse effect such disclosure would have on the policies underlying the privilege. [citations omitted]. Under the 'particularized need' standard, 'a party's need varies in proportion to the degree of access he has to other sources of information he seeks.' [Citations omitted]. A party must conduct thorough and exhaustive discovery to exploit each and every possible source of information prior to seeking those materials protected by the qualified privilege. 'Exploratory' searches will not be condoned. Similarly, the mere fact that certain information may be relevant or useful does not establish a 'particularized need' for disclosure of information. [Citations omitted]. The party seeking disclosure must show*

> *a 'compelling necessity' for the specific information requested."*

What is basically involved in each case is an *ad hoc* balancing of individual need for the materials against the harm resulting from any such disclosure. *See* A.O. Smith v. F.T.C., 403 F.Supp. 1000, 1015-16 (1975). In support of granting a privilege is the rationale that effective and efficient governmental decision making depends on the free and uninhibited flow of ideas, and that candor will be stifled if officials know that their advice may be revealed.[12] Wolfe v. Depart. of Health & Human Serv., 839 F.2d 768, 773 (1988)[*"the quality of administrative decision-making would be seriously undermined if agencies were forced to operate in a fishbowl"*]. Thus a document is protected if its disclosure would reveal *"the methods by which a decision is reached, the matters considered, the contributing influences, or the role played by the work of others."* Carl Zeiss Stiftung v. VEB Carl Zeiss, Jena, 40 FRD 318 (DDC 1966).

The other side of the balancing test, the requestor's need for information is a crucial factor. Courts have recognized that a party's need for information may tip the balance in favor of disclosure. See Columbia Packing Co. V. U.S. Dept. of Agriculture, 563 F.2d 495, 499 (CA1 1977). As noted in Firestone Tire and

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[12] As Justice Brennan observed, a paradox inheres in the privilege's rationale: "So as to enable the government more effectively to implement the will of the people, the people are kept in ignorance of the workings of their government. Herbert v. Lando, 441 U.S. 153, 195 (1979)(dissenting opinion).

Rubber Co. v. Coleman, 432 F.Supp. 1359 (N.D. Ohio 1976), the court ordered disclosure of certain information stating:

> *"Analytical information in the defendant's exclusive possession . . . is crucial to the plaintiff's claim in this particular case. The Court must order the defendants to reveal [it] . . . because the whole document directly relates to the plaintiff's claim, and the plaintiff has no alternative method of obtaining that information."*

The courts, however, require strong demonstrations of need from litigants. Importance was given to the degree to which the party seeking discovery has other access to the information sought. The party seeking the information must have exhausted every other potential source of the same information. Courts will examine whether similar information is available from other sources and can be obtained without compromising the agencies' deliberative processes. Mere relevancy was stated to be an insufficient ground for requiring disclosure. IELRB v. Homer Comm. Cons. Scho. Dist., 160 Ill.App.3d. 730, 739 (1987). Even if the information has great importance, disclosure is not automatic.

The passage of time can have an important impact on the need to protect communications from disclosure. It might be inhibiting if, immediately after a decision is made, all deliberations related to that decision are publicly revealed. But, as time passes, the impact of disclosure on the willingness of these and other officials to give frank, candid advice may diminish. As a result, disclosure might be more appropriate. Weaver & Jones, The Deliberative Process Privilege, 54 Mo.L.Rev. 279, 293 (19).

There is in addition, in some circumstances, a public interest in opening for scrutiny the government's decision making process. The public has a fundamental interest in preventing illegal acts which strike at the foundation of democratic government. Any evidence which concerns a government's legal acts are not privileged. Black v. Sheraton Corp. of America, 371 F.Supp. 97, 101-02 (1974). A privilege should never be allowed to shield wrongdoing. The Attorney-Client Privilege Under S5iege, at 598 (1989). Government documents are protected from discovery so that the public will benefit from more effective government; when the public interest in effective government would be furthered by disclosure, the justification for the privilege is attenuated. Thus, for example, where the documents sought may shed light on alleged government malfeasance, the privilege is denied. Moorhead v. Lane, 125 FRD 680, 685 (CD Ill. 1989); *See also* Carr v. Monroe Manufacturing Co., 431 F.2d 384, 389 (CA5 1970). The court in IELRB v. Homer Comm. Cons. Sch. Dist., 160 Ill.App.3rd 730, 740 (Ill. 1987), reached a similar conclusion:

> *"Ordinarily, the unfair labor practices charged can be shown on the basis of what the party agreed to or refused to agree to, by its pronouncements or by the acts of its agents such as would occur if threats were made. However, if, for instance, the school district's governing board should tacitly agree in a strategy session that it would never settle, evidence of that tacit agreement would not be privileged."*

Other broader public interest concerns would also favor disclosure. The judiciary's need for accurate information to

guarantee informed decision making is one of them. Mobil Oil Corp. v. Depart. of Energy, 520 F.Supp. 414, 419 (1981).

ORDER

IT IS THEREFORE ORDERED that Respondent shall file with the presiding officer, on or before September 2, 1994 the Items in its Privilege Log numbered 2, 3, 5, 7, 8, 9, 12, 14, 17, 20, 23, and 25. Then, *in camera*, and out of the presence of any party, attorney or representative of any party, the presiding officer shall examine the documents and material presented. After the foregoing procedure has been followed, the presiding officer shall, in due course, supplement its determinations set forth above as to which, if any, of those documents and materials or portions thereof are subject to discovery.

IT IS FURTHER ORDERED that as to the remaining items on the Privilege Log, the above determination is controlling as to Petitioner's Motion to Compel.

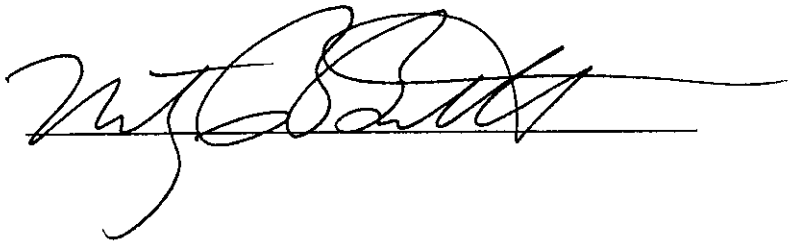
IT IS FURTHER ORDERED that a determination on the Petitioner's request for attorney fees and costs relative to its Motion to Compel is reserved, and will be addressed at a future date.

So Ordered this 24th day of August, 1994.

Monty R. Bertelli
Executive Director
Public Employees Relations Board
512 W. 6th Street
Topeka, Kansas 66603

CERTIFICATE OF SERVICE

I, Monty R. Bertelli, Executive Director of the Public Employee Relations Board, of the Kansas Department of Human Resources, hereby certify that on the 26th day of August, 1994, a true and correct copy of the above and foregoing Order was hand delivered to the following at the City Attorney's office, City Hall, Wichita, Kansas:

Petitioner: Steve Bukaty

Respondent: Kelly Rundell