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No. 82-372

In the Supreme Court of the United States

OCTOBER TERM, 1982

FEDERAL TRADE COMMISSION, ET AL., PETITIONERS

v.

GROLIER INCORPORATED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5), exempts from mandatory disclosure the work-product of government attorneys when the litigation for which the material was prepared has ended and the government cannot demonstrate that related litigation exists or potentially exists.

PARTIES TO THE PROCEEDING

The parties in the court of appeals, in addition to those named in the caption, were the members of the Federal Trade Commission. At present, the members of the Commission are James C. Miller, III, Chairman, and Michael Pertschuk, David M. Clanton, and Patricia P. Bailey, Commissioners.

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No.

FEDERAL TRADE COMMISSION, ET AL., PETITIONERS

v.

GROLIER INCORPORATED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, *et al.*, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-14a) is reported at 671 F.2d 553. The opinion of the district court (App. E, *infra*, 21a-23a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 1982 (App. B, *infra*, 15a) and a timely petition for rehearing was denied on April 7, 1982 (Apps. C and D, *infra*, 16a, 19a). By orders of June 29, 1982 and August 3, 1982, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 4, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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STATUTE INVOLVED

Subsection (a)(3) of the Freedom of Information Act, 5 U.S.C. 552(a)(3), provides:

> Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

Subsection (a)(4)(B) of the Freedom of Information Act, 5 U.S.C. 552(a)(4)(B), provides:

> On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its actions.

Subsection (b)(5) of the Freedom of Information Act, 5 U.S.C. 552(b)(5), provides:

> (b) This section does not apply to matters that are—
>
> * * * * *

> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

STATEMENT

This Freedom of Information Act ("FOIA") suit arose out of a request by respondent Grolier Incorporated for documents of the Federal Trade Commission ("FTC") concerning, among other things, a covert investigation by the FTC of one of Grolier's subsidiaries, the Americana Corporation (App. A, *infra*, 1a).[1] Americana had been the defendant in a civil penalty action filed by the Department of Justice in 1972 (*United States* v. *Americana Corp.*, Civil No. 388-72 (D.N.J.)) (App. A, *infra*, 1a).[2] The FTC complied in part with the FOIA request, but it withheld part or all of seven documents relating to the investigation of Americana. Grolier then brought suit in the United States District Court for the District of Columbia to compel release of those documents.

---

[1] In addition to records relating to the Americana investigation ("Category A" records), Grolier also requested records relating to covert investigations of any of its 14 subsidiaries ("Category B" records) and records relating to covert investigations of any related person, company or entity ("Category C" records). However, Grolier's district court complaint was confined to Category A and B records, and Grolier later withdrew any claim for further disclosure of Category B documents. Thus, Grolier's appeal involved only Category A records. See Appellant's Opening Brief at 2 n.1.

[2] The civil penalty action was based upon an alleged violation of a 1949 cease and desist order prohibiting misrepresentations in door-to-door sales and false advertising. It was dismissed with prejudice in 1976 after the Commission declined to comply with a district court order directing it to turn over certain documents to the defendant (App. A, *infra*, 2a).

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The FTC contended that certain of the documents,[3] including the four still at issue (*i.e.*, Numbers 3, 5, 6, and 7), fell within Exemption 5 of the FOIA, 5 U.S.C. 552(b)(5), because they were work-product compiled by FTC attorneys in anticipation of the civil penalty action against Americana and therefore would normally be privileged in the civil discovery context. Because Exemption 5 "exempt[s] those documents, and only those documents, normally privileged in the civil discovery context" (*NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975)), the FTC maintained that the documents sought by Grolier were exempt from disclosure.

After reviewing the documents in camera, the district court found (App. E, *infra*, 23a) that they "encompass opinions by attorneys regarding the evidentiary needs of the Americana action" and that "[t]hey also discuss specific methods of obtaining evidence in that litigation." The court held (*ibid.*) that "the documents [fell] within the rubric of 'mental impressions, conclusions, opinions or legal theories' " under Rule 26(b)(3) of the Federal Rules of Civil Procedure and that they accordingly fell within Exemption 5 of the FOIA.

[3] The FTC withheld two other documents—Numbers 1 and 2—on the grounds that they were work-product and pre-decisional. Court of Appeals Joint Appendix ("C.A. App.") 60-61. The district court upheld the withholding under the work-product rationale (C.A. App. 113). Grolier subsequently withdrew its claim for disclosure of document 2 (App. A, *infra*, 2a n.3). The court of appeals affirmed the district court's judgment regarding document 1 under the pre-decisional rationale (*id.* at 8a).

The Commission also withheld document 4 as an attorney-client communication (C.A. App. 62). Both the district court and the court of appeals upheld the withholding on this basis (C.A. App. 113-114; App. A, *infra*, 2a n.3).

A divided court of appeals vacated the district court's judgment regarding those four documents. The panel majority conceded that "[t]here is no question that the documents involved were work-product prepared as a part of the *Americana* action" (App. A, *infra*, 2a). However, the majority stated that the applicability of Exemption 5 of the FOIA depended upon "whether these documents continue to be privileged against disclosure several years after the *Americana* suit was terminated" (*ibid.*).

The court below noted (App. A, *infra*, 3a-4a, quoting *In re Murphy*, 560 F.2d 326, 334 (8th Cir. 1977) emphasis added in opinion) that several courts of appeals and district courts had held that "there is 'a *perpetual* protection for work product' extending beyond the termination of the litigation for which the documents were prepared." However, the court concluded (App. A, *infra*, 5a) that "[e]xtending the work-product protection only to subsequent related cases best comports with the fact that the privilege is qualified, not absolute." The court reasoned (*id.* at 6a) that effective legal representation would not be adversely affected by disclosure of attorneys' mental impressions, conclusions, opinions, or legal theories "[w]hen litigation has ended and no potential for related actions exists * * *." Accordingly, the court held (*id.* at 7a; emphasis in original) that "in the context of an FOIA request, attorney work-product from terminated litigation remains exempt from disclosure *only when* litigation related to the terminated action exists or potentially exists."

Applying that test to the present case, the court of appeals rejected the suggestion that Grolier's FOIA suit constituted related litigation (App. A, *infra*, 8a) and stated (*id.* at 7a) that "there does not appear to be any suit or potential suit related to the original *Americana* action." The court therefore remanded the case "for

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ry, a court may enter a protective order permitting disclosure of work product only to particular persons and "only on specified terms and conditions" (Fed. R. Civ. P. 26(c)(2)).

Under the FOIA, by contrast, such an individualized approach is not possible. The FOIA does not "by its terms, permit inquiry into particularized needs of the individual seeking the information, although such an inquiry would ordinarily be made of a private litigant." *EPA* v. *Mink*, 410 U.S. 73, 86 (1973). Instead, the FOIA requires information subject to disclosure to be made "available to any person" (5 U.S.C. 552(a)(3)), and a large percentage of FOIA requests are made by firms and individuals acting in a representative capacity precisely so that the identity of the person, company, or organization seeking the information will not be known. For these reasons, "at best, the discovery rules can only be applied under Exemption 5 by way of rough analogies." *EPA* v. *Mink*, *supra*, 410 U.S. at 86. Accordingly, in *NLRB* v. *Sears, Roebuck & Co.*, *supra*, 421 U.S. at 149, this Court held that "it is reasonable to construe Exemption 5 to exempt those documents, and only those documents, normally privileged in the civil discovery context." The Court carefully emphasized (*id.*, at 149 n.16) that "it is not sensible * * * to require disclosure of any document which would be disclosed in the hypothetical litigation in which the private party's claim is the most compelling." Rather, the question is whether the information sought would " 'routinely be disclosed' in private litigation" (*ibid.*, quoting H.R. Rep. No. 1497, 89th Cong., 2d Sess 10 (1966)).

Applying this teaching to the question presented by the instant case yields a result precisely opposite to that reached by the court of appeals. Of course, if the work-product privilege is perpetual in the context of civil dis-

covery, then work product from terminated litigation would not be available under the FOIA regardless of whether there was any potential for related litigation. But even if, as the court below suggested (App. A, *infra*, 4a), "the work-product privilege extends to subsequent cases only when they are related," it would not follow that "in the context of an FOIA request, attorney work-product from terminated litigation remains exempt from disclosure *only when* litigation related to the terminated action exists or potentially exists" (*id.* at 7a; emphasis in original). On the contrary, if work-product from terminated litigation would not be discoverable in a related civil case, because of the absence of a showing of need, then that material would not " 'routinely be disclosed' in private litigation" (*NLRB* v. *Sears, Roebuck & Co.*, *supra*, 421 U.S. at 149 n.16, quoting H.R. Rep. No. 1497, *supra*, at 10) and it would consequently be unavailable under the FOIA.

Moreover, the test imposed by the court of appeals' decision—whether "litigation related to the terminated actions exists or potentially exists" (App. A, *infra*, 7a)—is ambiguous and unworkable. First, it is far from clear what is meant by "related" litigation. Cases may be related in countless ways. For example, they may involve similar facts; the same or similar investigative techniques, causes of action, or defenses; or the same investigators, trial attorneys, or supervisory personnel. There are also infinite degrees of relatedness. For instance, all cases brought by a particular agency are related in an important sense, and disclosure of work product from an agency's past cases may provide a regulatee or potential litigant with valuable information about the agency's investigative and litigative techniques. Thus, the court of appeals' decision imposes upon the federal agencies and ultimately the courts the difficult task of

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determining what sort of relationship is required and just how close the relationship between cases must be to fall within the court of appeals' construction of Exemption 5. Developing those standards is likely to take many years and much litigation, and applying them to the thousands of FOIA requests filed each year will be a truly burdensome chore. Even if it were clear what is meant by "related" litigation, it would still be necessary for those charged with processing FOIA requests to survey all cases pending in all courts in order to determine whether any "related" cases exist.

While the concept of "related litigation" is ambiguous, the concept of litigation that "potentially exists" is meaningless for all practical purposes. In our litigious society, what sort of litigation does not "potentially" exist at any time? In addition, the very fact of a FOIA request seeking information from government litigation files provides some reason for believing that there is a potential for related litigation. Furthermore, the obligation of proving the potential for related litigation might in some circumstances require the government to disclose the existence of sensitive investigations. Indeed, FOIA requests might be filed for the purpose of ascertaining whether any such investigations are then under way.

2. The apparent premise of the court of appeals' ruling—that the work-product privilege terminates unless related litigation exists or potentially exists—is without judicial precedent, unworkable, and contrary to the holdings of all courts of appeals that have decided the question.

The rationale underlying the work-product privilege was set forth in *Hickman* v. *Taylor*, *supra*. The Court recognized (329 U.S. at 511) that allowing the discovery of facts and documents assembled by attorneys in

preparation for litigation would grievously harm the adversary process:

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

Although *Hickman* was not concerned with an attempt to secure work-product for use in subsequent, unrelated litigation, the courts of appeals that have reached this issue have all recognized that the *Hickman* rationale remains applicable when work-product from terminated litigation is sought through discovery in a subsequent case. *In re Murphy*, 560 F.2d 326, 335 (8th Cir. 1977) ("The mischief engendered by allowing discovery of work product recognized in *Hickman* would apply with equal vigor to discovery in future, unrelated litigation"); *Duplan Corp.* v. *Moulinage et Retorderie de Chavanoz*, 487 F.2d 480, 484 n.15 (4th Cir. 1973) (the conclusion that the work-product privilege survives "only if the two cases are 'closely related' * * * is incompatible with the essential basis of the *Hickman* decision"); *Duplan Corp.* v. *Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 735 (4th Cir. 1974), cert. denied, 420 U.S. 997 (1975); *Duplan Corp.* v. *Deering Milliken, Inc.*, 540 F.2d 1215, 1219 (4th Cir. 1976); *United States* v. *Leggett & Platt, Inc.*, 542 F.2d 655, 660 (6th Cir. 1976), cert. denied, 430 U.S. 945 (1977). In all, five decisions by three different Circuits (the Fourth, Sixth, and Eighth) have concluded that the work-product privilege remains in force after the conclusion of the litigation for which the material was pre-

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pared and without regard to the existence or potential existence of related litigation.[5]

The reasoning of the court below in refusing to follow the prior decisions of three other circuits is also unsound. While acknowledging that disclosure of work-product assembled for pending litigation would have deleterious effects, the court reasoned (App. A, *infra*, 6a) that "[w]hen litigation has ended and no potential for related actions exists, concerns about possible inroads on the integrity of the adversary system greatly diminish." The court thus agreed that an attorney will hesitate to commit matters to writing if they may be used against him by his immediate adversary, but it believed that the attorney will have no such inhibitions if the same materials may be used against him by a future adversary in an "unrelated" case. This is not sensible. Rather, as the Fourth, Sixth, and Eighth Circuits have recognized, if work-product prepared in connection with terminated litigation were freely discoverable in subsequent, "unrelated" litigation, much of what the Court sought to prevent in *Hickman* would take place. Attorneys would be more reluctant to amass materials that reflect unfavorably upon their clients for fear that those materials might be used to their clients' disadvantage in subsequent litigation or in some

[5] Moreover, the perpetual nature of the work-product privilege is an implicit premise of this Court's analysis in *NLRB* v. *Sears, Roebuck & Co.*, *supra*. In that case, Sears filed a FOIA request seeking, among other things, intra-agency memoranda of the NLRB directing the filing of a complaint. Many such memoranda pertained to "cases which had been closed * * * because litigation before the Board had been completed" (421 U.S. at 145). However, the Court did not distinguish between open cases and closed cases but rather concluded (*id.* at 159-160) that all such memoranda had been "prepared in contemplation of the upcoming litigation [and therefore fell] squarely within Exemption 5's protection of an attorney's work product."

other way. Attorneys would be hesitant to commit to writing candid judgments that might cause them personal embarrassment if later disclosed. And potentially valuable files might be destroyed in many instances for the purpose of avoiding such disclosures.

The rule adopted by the court below would have a particularly adverse and demoralizing effect on government attorneys. The working papers of government attorneys would be subject to disclosure, not only in civil discovery, but under the FOIA as well. Yet government attorneys are far more dependent upon the existence of comprehensive written files than most of their counterparts in private practice: government cases tend to be larger and to last longer; government attorneys tend to be more transient; coordination of the positions taken in many varieties of cases is of unusual importance; and maintaining supervision and coordination in an organization as vast and complex as the United States government naturally requires great reliance upon past records. If the decision below is permitted to stand "much of what is now put down in writing would remain unwritten" (*Hickman* v. *Taylor*, *supra*, 329 U.S. at 511), and both the quality and consistency of government litigation is likely to suffer.

The court of appeals attempted to bolster its conclusion by relying upon what it characterized as a "substantial body of case law [that] supports the conclusion that the work-product privilege extends to subsequent cases *only when* they are related" (App. A, *infra*, 4a; emphasis added). However, none of the cases cited by the court reached that question. In each of those cases, the court declined to permit the discovery of attorney work-product in a subsequent, related case. See *Republic Gear Co.* v. *Borg-Warner Corp.*, 381 F.2d 551, 557 (2d Cir. 1967); *Hercules, Inc.* v. *Exxon Corp.*, 434 F.Supp. 136,

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153 (D.Del. 1977); *Midland Investment Co.* v. *Van Alstyne, Noel & Co.*, 59 F.R.D. 134, 138 (S.D.N.Y. 1973); *Philadelphia Electric Co.* v. *Anaconda American Brass Co.*, 275 F.Supp. 146, 148 (E.D.Pa. 1967). Indeed, none of the cases even contains dictum embracing the court of appeals position.[6]

The remainder of the court of appeals' analysis is equally unpersuasive. The court stated (App. A, *infra*, 5a) that "[e]xtending the work-product protection only to subsequent related cases best comports with the fact that the privilege is qualified, not absolute." But simply because the privilege is qualified in one respect—*i.e.*, some privileged materials may be obtained in civil discovery where sufficient need is shown (see Fed. R. Civ. P. 26(b)(3))—it does not follow that the privilege must be qualified in every other respect as well. In other words, just because a court may conclude in a particular case that a litigant's need for privileged materials justifies disclosure, it does not follow that the interests served by the privilege lose all force "[w]hen litigation has ended and no potential for related actions exists" (App. A, *infra*, 6a). As we have explained (see pages 12-13, *supra*), those interests remain important.

Finally, the court observed (App. A, *infra*, 6a; emphasis in original):

> [W]e deal in this case, *not* with the civil discovery situation, but rather with a Freedom of Information Act request. Here, the presumption in favor of disclosure is at its zenith.

[6] In *Republic Gear Co.*, the Second Circuit simply distinguished the case before it, which involved an attempt to obtain work-product from related cases pending on appeal, from district court cases involving work-product from completed litigation (381 F.2d at 557 & n.5). The three district court cases hold that work-product from previous, related cases is not discoverable. Those cases do not state that work-product from previous, unrelated cases is discoverable.

If the court meant by this statement to suggest that work-product privileged in civil discovery is nevertheless available under the FOIA despite Exemption 5, then the court's decision squarely contravenes both the plain language and legislative history of Exemption 5 and its construction by this Court (see *NLRB* v. *Sears, Roebuck & Co.*, *supra*, 421 U.S. at 149; *FOMC* v. *Merrill*, *supra*, 443 U.S. at 353).

3. The court of appeals' decision will prove particularly burdensome for the government because every withholding of agency records under the FOIA may be challenged in the District of Columbia Circuit. See 5 U.S.C. 552(a)(4)(B). Indeed, Department of Justice figures reveal that 38% of the FOIA suits brought in 1981 were filed in that Circuit.[7] Hence, the government cannot easily afford to await further development of this issue in other circuits. In these circumstances, this Court should grant review to consider whether the FOIA mandates the disclosure of vast quantities of the work-product of government attorneys.

[7] A panel of the District of Columbia Circuit recently followed *Grolier* and remanded a FOIA suit to the district court to determine whether certain documents satisfied the *Grolier* test (*Moody* v. *IRS*, No. 81-2142 (D.C. Cir. June 25, 1982)).

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CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1982

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1939

GROLIER INCORPORATED, a Corporation, APPELLANT,

v.

FEDERAL TRADE COMMISSION, Michael Pertschuk, Chairman, and Paul Rand Dixon, David M. Clanton, and Robert Pitofsky, Commissioners, APPELLEES.

Argued Sept. 29, 1981

Decided Feb. 5, 1982

Before: WRIGHT, MACKINNON and WALD, Circuit Judges.

PER CURIAM:

Appellant Grolier filed suit under the Freedom of Information Act (FOIA)[1] seeking documents relating to a covert investigation of one of its subsidiaries, the Americana Corporation. Federal Trade Commission (FTC) lawyers prepared these documents as part of a civil penalty action filed against Americana in 1972 by the Department of Justice. *United States* v. *Americana Corp.*, Civil No. 388-72 (D. N.J.). The *Americana* action involved alleged misrepresentation in door-to-door sales and false advertising. The action was dismissed with prejudice on

[1] 5 U.S.C. § 552 (1976).

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November 17, 1976 after the FTC disobeyed a court order to turn over certain materials to the defendants.

In this FOIA case the District Court held that certain requested documents—Numbers 1, 3, 5, 6, and 7—constituted attorney work-product and that the FTC properly withheld them pursuant to Exemption 5[2] of the Freedom of Information Act.[3] *Grolier, Inc.* v. *FTC*, D. D.C. Civil Action No. 79-1215, Memorandum filed February 21, 1980 at 3, Joint Appendix (JA) 113; *Grolier, Inc.* v. *FTC*, D. D.C. Civil Action No. 79-1215, Memorandum filed June 13, 1980 at 2, JA 118.

There is no question that the documents involved were work-product prepared as part of the *Americana* action. Rather, the question on appeal is whether these documents continue to be privileged against disclosure several years after the *Americana* suit was terminated.

I. TEMPORAL SCOPE OF THE WORK-PRODUCT PRIVILEGE

Exemption 5 of FOIA "exempt[s] those documents, and only those documents, normally privileged in the civil discovery context." *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149, 95 S.Ct. 1504, 1515, 44 L.Ed.2d 29 (1975). In the civil discovery context, however, there exists a "dispute among the courts as to * * * whether the protection afforded by the [work-product] privilege lapses once the litigation has ended or the prospects of litigation have faded[.]" *Coastal States Gas Corp.* v. *Dep't of Energy*,

[2] *Id.* § 552(b)(5).

[3] Grolier has withdrawn its claim for disclosure of Document 2. As for Document 4, we affirm the District Court's judgment that the document was exempt from disclosure under Exemption 5 as an attorney-client communication.

617 F.2d 854, 865 (D.C.Cir.1980). Indeed, courts have followed three different approaches in deciding whether the work-product privilege extends beyond the termination of litigation.[4]

At one extreme, some courts have concluded that the work-product privilege applies only if the materials were prepared in anticipation of the very suit before the court; documents prepared for one case are thus freely discoverable in a different case. *E.g.*, *United States* v. *Internat'l Business Machines Corp.*, 66 F.R.D. 154, 178 (S.D.N.Y.1974) (document must be prepared in anticipation of litigation in the case in which the special immunity accorded to such material is sought); *Honeywell, Inc.* v. *Piper Aircraft Corp.*, 50 F.R.D. 117, 119 (M.D.Pa.1970) (same); *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 207 F.Supp. 407, 410 (M.D.Pa.1962) (materials must be prepared for the case at bar); *Gulf Construction Co.* v. *St. Joe Paper Co.*, 24 F.R.D. 411, 415 (S.D.Tex.1959) (same); *Tobacco & Allied Stocks, Inc.* v. *Transamerica Corp.*, 16 F.R.D. 534, 537 (D.Del.1954) (same). At least one of these courts has noted that the seminal case of *Hickman* v. *Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947), involved materials prepared in anticipation of the litigation then before the court. *Gulf Construction Co.* v. *St. Joe Paper Co.*, *supra*, 24 F.R.D. at 415.

At the other extreme, some courts have held that there is "a *perpetual* protection for work product" extending beyond the termination of the litigation for which the

[4] Most cases dealing with this subject are from District Courts. Few discovery cases reach the appellate level because interlocutory orders are not appealable under the final order doctrine. Note, 1974 Duke L.J. 799, 817 n.95.

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documents were prepared and reaching all subsequent suits. *In re Murphy,* 560 F.2d 326, 334 (8th Cir. 1977) (emphasis added). *Accord, Duplan Corp.* v. *Moulinage et Retorderie de Chavanoz,* 487 F.2d 480, 483-484 (5th Cir. 1973) (rationale for work-product rule scarcely less applicable to a closed case than to one still being contested); *United States* v. *O.K. Tire Co.*, 71 F.R.D. 465, 468 n.7 (D.Idaho 1976); *Burlington Industries* v. *Exxon Corp.*, 65 F.R.D. 26, 43 (D.Md.1974).

A third, intermediate approach is that the extension of the work-product privilege from one case to a subsequent one turns on "whether the first action was complete and upon the relationship between the first and second actions." 4 J. Moore, Federal Practice ¶ 26.64[2] at 26-415 (2d ed. 1979). In the same vein, another leading commentator had found the "sounder view" to be that "documents prepared for one case have the same protection in a second case, *at least if the two cases are closely related.*" 8 C. Wright & A. Miller, Federal Practice and Procedure § 2024 at 201 (1970) (emphasis added). *See* Cooper, *Work Product of the Rulesmakers,* 53 Minn.L.Rev. 1269, 1299 n.100 (1969) (view that privilege terminates is tenable "only when there is no danger of disclosure to others pursuing claims related to the claims involved in the litigation giving rise to the one-time work product materials").

A substantial body of case law supports the conclusion that the work-product privilege extends to subsequent cases only when they are related. *See, e.g., Republic Gear Co.* v. *Borg-Warner Co.*, 381 F.2d 551, 557 (2d Cir. 1967); *Hercules Inc.* v. *Exxon Corp.*, 434 F.Supp. 136 153 (D.Del.1977); *Midland Investment Co.* v. *Van Alstyne, Noel & Co.*, 59 F.R.D. 134, 138 (S.D.N.Y.1973). The paradigmatic situation situation is posed by *Philadelphia Electric Co.* v. *Anaconda American Brass Co.*, 275

F.Supp. 146 (E.D.Pa.1967), where documents prepared in defense of a criminal antitrust action were found to be within the work-product rule in a subsequent civil antitrust suit.[5]

Extending the work-product protection only to subsequent related cases best comports with the fact that the privilege is qualified, not absolute.[6] *Hickman* v. *Taylor, supra,* 329 U.S. at 511, 67 S.Ct. at 393. " '[B]ecause the privilege obstructs the search for truth and because its benefits are, at best, "indirect and speculative," it must be "strictly confined within the narrowest possible limits consistent with the logic of its principle." ' " *In re Grand Jury Proceedings (FMC Corp.),* 604 F.2d 798, 802-803 (3d Cir. 1979) (*quoting In re Grand Jury Proceedings (Sun Co.),* 599 F.2d 1224, 1235 (3d Cir. 1979)).

[5] This intermediate view is consistent with *Mervin* v. *FTC*, 591 F.2d 821 (D.C.Cir. 1975), which the dissent cites. In *Mervin* the plaintiff brought suit for disclosure of documents under the FOIA *and* for job reinstatement and damages on the basis that his dismissal was wrongful. *Id.* at 824. Mervin sought disclosure of documents prepared by government attorneys while defending an earlier suit for job reinstatement he had brought, which had been dismissed for failure to exhaust administrative remedies. *Id.* at 825. Thus the documents Mervin sought as part of his second suit for reinstatement were the government's work product from his first suit for reinstatement. The two actions were not merely closely related, they were identical.

[6] Indeed, courts extending the privilege to subsequent cases have often relied on the qualified nature of the privilege in doing so. *See, e.g., United States* v. *Leggett & Platt, Inc.*, 542 F.2d 655, 660 (6th Cir. 1976), *cert. denied,* 430 U.S. 945, 97 S.Ct. 1579, 51 L.Ed.2d 792 (1977) ("Were the work product doctrine an unpenetrable protection against discovery, we would be less willing to apply it to work produced in anticipation of other litigation. But the work product doctrine provides only a qualified protection against discovery * * *.").

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The purpose of the privilege, as this court has made clear, "is to encourage effective legal representation *within the framework of the adversary system* by removing counsel's fears that his thoughts and information will be invaded by his adversary. In other words, the privilege focuses on the integrity of the adversary trial process itself * * *." *Jordan* v. *U.S. Dep't of Justice*, 591 F.2d 753, 775 (D.C.Cir.1978) (*en banc*) (emphasis in original; footnote omitted). Therefore, in order to fall within the scope of the privilege a document "*must* 'relate to the conduct of either ongoing or prospective trials; [it must] include factual information, mental impressions, conclusions, opinions, legal theories or legal strategies relevant to any on-going or prospective trial.' " *Exxon Corp.* v. *FTC*, 663 F.2d 120, 129 (D.C.Cir.1980) (emphasis added; brackets in original) (*quoting Jordan* v. *U.S. Dep't of Justice*, *supra*, 591 F.2d at 775-776).

When litigation has ended and no potential for related actions exists, concerns about possible inroads on the integrity of the adversary system greatly diminish. Indeed, "where the work-product materials in question were prepared for a distinct and prior * * * litigation, long completed, the policies underlying the work-product privilege have already been achieved." *In re Grand Jury Proceedings*, 73 F.R.D. 647, 653 (M.D.Fla.1977).

Moreover, we deal in this case, *not* with the civil discovery situation, but rather with a Freedom of Information Act request. Here, the presumption in favor of disclosure is at its zenith. "[D]isclosure, not secrecy, is the dominant objective of the Act." *Dep't of Air Force* v. *Rose*, 425 U.S. 352, 361, 96 S.Ct. 1592, 1599, 48 L.Ed.2d 11 (1976). As this court wrote in *Mead Data Central, Inc.*

v. *U.S. Dep't of Air Force*, 566 F.2d 242, 259 (D.C. Cir.1977):

> The exemptions from the mandatory disclosure requirement of the FOIA are both narrowly drafted and narrowly construed in order to counterbalance the self-protective instincts of the bureaucracy which, like any organization, would prefer to operate under the relatively comforting gaze of only its own members rather than the more revealing "sunlight" of public scrutiny. Where there is a balance to be struck, Congress and the courts have stacked the scales in favor of disclosure and against exemption.
>
> * * * * * *

Accordingly, we hold that, in the context of an FOIA request, attorney work-product from terminated litigation remains exempt from disclosure *only when* litigation related to the terminated action exists or potentially exists.

II. APPLICATION OF THE "RELATED LITIGATION" TEST

Grolier seeks documents prepared for the *Americana* action. Since that suit was dismissed with prejudice five years ago, it cannot be resurrected. Grolier is also a plaintiff in a Ninth Circuit case challenging an FTC order, but that case and order apparently are not related in any way to the *Americana* action. *See* FTC's "Statement of Material Facts as to Which There is No Genuine Issue," ¶ 9, JA 25. In addition, the FTC has long abandoned the covert investigation techniques discussed in the requested documents.

Under these circumstances, there does not appear to be any suit or potential suit related to the original *Americana* action. Nonetheless, since this issue has not been fully explored, we remand the case to the District Court

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for reconsideration of the applicability of the work-product privilege in light of the apparent absence of related litigation. This judgment applies to Documents 3, 5, 6, and 7. With respect to Document 1, while we find that the work-product privilege may not apply, the document is still exempt from disclosure under Exemption 5 because it is clearly a pre-decisional document. *See Jordan* v. *U.S. Dep't of Justice*, *supra*, 591 F.2d at 774. Thus, the judgment of the District Court as to Document 1 is affirmed.

The dissent would affirm the District Court's judgment because it concludes that "the present [FOIA] suit could not be more directly related to the *Americana* litigation." Dissent at 4. While we agree that the work-product privilege extends to a second case *if* the second case is closely related to the first, *see id.* at 3 (*citing* C. Wright & A. Miller), Judge MacKinnon has, in our judgment, misapplied this test. Indeed, we find it illogical to use the filing of an FOIA suit as the sole basis for foreclosing appellant's access to the requested documents. Under the dissent's theory, any material that was work product at any time would never be disclosable under FOIA because the filing of the FOIA suit itself would constitute "related" litigation. We reject this strange view of the related litigation test.

The *Americana* suit was a civil penalty action involving misrepresentation in door-to-door sales and false advertising. The government's investigation and litigation strategy in such an action obviously would have little, if anything, to do with its strategy in defending this FOIA suit. The FOIA suit does not in any way relate to the substance of the earlier litigation. Thus, *for purposes of the work-product privilege*, the two cases are neither "closely related" nor even "related."

III. CONCLUSION

For the reasons given above, we affirm the judgment of the District Court as to Documents 1 and 4. However, we vacate the judgment of the District Court as to Documents 3, 5, 6, and 7, and remand the case for reconsideration of the applicability of the work-product privilege in light of the apparent absence of litigation related to the *American* suit.

So ordered.

MACKINNON, Circuit Judge (dissenting in part and concurring in part).

I concur in the Judgment insofar as it affirms the Judgment of the District Court with respect to Documents 1 and 4 but respectfully dissent from the vacation of the Judgment of the District Court with respect to Documents 3, 5, 6 and 7 and the remand to the District Court.

The majority opinion does not apply existing law. In my opinion the Judgment of the District Court as to Documents 3, 5, 6 and 7 should be affirmed on the ground that said documents are exempt from disclosure as the "working papers" of the attorneys and within the "attorney-client privilege" as reflected in the exemption set forth in 5 U.S.C. § 552(b)(5) ("Exemption 5") and because the termination of the litigation to which the work-product relates does not destroy this privilege. The majority opinion gives no credence to the "attorney-client privilege" of the work-product rule as embodied in Exemption 5.

The work-product rule was first articulated by the Supreme Court in *Hickman* v. *Taylor*, 329 U.S. 495, 512, 67 S.Ct. 385, 394, 91 L.Ed. 451 (1947). There the Court, dealing primarily with work-product, i.e., statements taken by attorneys from potential witnesses, said:

> 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

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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.

Much later, the Supreme Court noted in *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 154, 95 S.Ct. 1504, 1518, 44 L.Ed.2d 29 (1975) that the work-product rule was available to Government attorneys:

> It is equally clear that Congress had the attorney's work-product privilege specifically in mind when it adopted Exemption 5 and that such a privilege had been recognized in the civil discovery context by the prior case law. . . . [The] case law clearly makes the attorney work-product rule of *Hickman* v. *Taylor* . . . applicable to Government attorneys in litigation. Whatever the outer boundaries of the attorney's work-product rule are, the rule clearly applies to memoranda prepared by an attorney in contemplation of litigation which set forth the attorney's theory of the case and his litigation strategy.

Our opinion in *Mervin* v. *FTC*, 591 F.2d 821, 825 (D.C.Cir.1978) is to the same effect: (". . . it is clear that Exemption five includes the attorney work-product privilege").

The *Sears* opinion, by Justice White, also pointed out that the traditional "attorney-client privilege" was subsumed in the work-product rule carried into FOIA by Exemption 5:

> The Senate Report states that Exemption 5 "would include the working papers of the agency attorney *and documents which would come within the attorney-client privilege if applied to private parties*," S.Rep.No. 813, p. 2. . . .

421 U.S. at 154, 95 S.Ct. at 1518. (Emphasis added).

As the majority notes, the documents in question in the instant case clearly qualify as work-product. Majority at

2. Under the applicable rules, "[p]arties may obtain discovery regarding any matter, not privileged" and when discovery is ordered the court is admonished to "protect against disclosure of the mental expressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." F.R.Civ.P. 26. Documents 5, 6 and 7 are memoranda prepared by an attorney that reveal the attorney's thought processes in the preparation of the case.

Document 3 contains advice and instructions given by an attorney as to procedures that the Government should follow with respect to the preparation of certain aspects of the case. This is clearly the work-product of an attorney setting forth his mental processes, opinion and legal theory. It is also *clearly* within the traditional "attorney-client privilege." There is no question that it is protected from disclosure by Exemption 5.

My *in camera* inspection of the six documents involved in this case convinces me that they are *all* covered by the work-product rule, and, accordingly, by Exemption 5. There is *nothing* therein that is not work-product or that plaintiff would need to start a lawsuit.

The majority neatly sidesteps this point by saying, in essence, that even though the documents are *bona fide* work-product, the work-product rule and Exemption 5 are inapplicable insofar as no litigation related to the original *Americana* suit, *United States* v. *Americana Corp.*, Civil No. 388 72 (D.N.J.), is currently under way and the methods of obtaining evidence discussed in the documents have apparently been long since discontinued.

This argument is *not* supported by the facts or the law. It is sound case law that "documents prepared for one case have the same protection in a second case, at least if the two cases are closely related." C. Wright & A. Miller, Federal Practice and Procedure § 2024 at 200-201 (1970).

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See Duplan Corp. v. *Moulinage et Retorderie de Chavanoz*, 487 F.2d 480, 484 (4th Cir. 1971) (upon the termination of litigation the work-product documents of an attorney prepared incident thereto do not lose the qualified immunity extended to them under Rule 26(b)(3)); *Republic Gear Co.* v. *Borg-Warner Corp.*, 381 F.2d 551, 557-58 (2d Cir. 1967) (documents prepared by non-party attorney in prior litigation are protected from adversary disclosure in subsequent litigation as attorney's work-product and by attorney-client privilege where documents reflected attorney's mental processes); *Philadelphia Electric Company* v. *Anaconda American Brass Co.*, 275 F.Supp. 146, 147 (E.D.Pa.1967) (documents prepared in defense of a criminal antitrust action are within the work-product rule in a subsequent civil action).

Other cases also hold that the work-product privilege as carried forth by Exemption 5 is not destroyed by the termination of initial litigation. In *Mervin* v. *FTC*, *supra*, wherein a former FTC employee sued unsuccessfully to force disclosure of documents related to an earlier suit for reinstatement, this court held that the work-product privilege may extend past the end of the litigation to which the work-product relates. *See also National Public Radio* v. *Bell*, 431 F.Supp. 509, 512 (D.D.C.1977) ("Despite plaintiff's unsupported contention that Exemption 5 protection 'disappear[s] when no further legal action is in prospect,' there can be no doubt but that the documents in question fall squarely within the protective scope . . . the exemption").

In the instant case, as the majority suggests, petitioner's request for disclosure relates directly to the FTC's April, 1973, investigation of Americana Corporation and Grolier Incorporated. That investigation resulted in *United States* v. *Americana Corporation*, *supra*, a civil

penalty action filed by the government. The suit was dismissed on November 16, 1976.

Petitioner, who was a co-defendant in the earlier *Americana* suit, now requests disclosure under FOIA of documentary material prepared, and advice given, by government counsel that related directly to strategy and tactics to be followed by the government in the *Americana* litigation. Contrary to the majority's remarkable assertion that "the two cases are neither 'closely related' nor even 'related'," Majority at 9, the present suit could not be more directly related to the *Americana* litigation. The work-product privilege as embodied in Exemption 5, inclusive of the "attorney-client privilege [as] applied to private parties," would even in the majority's judgment, have applied in *Americana*. Therefore, it properly extends to the instant case as well. The majority attempts to divert attention from this most obvious of conclusions by decrying the fact that according to such a finding, "any material that was work product at any time would never be disclosable under FOIA because the filing of the FOIA suit itself would constitute 'related' litigation." At 557. This lament bespeaks a fundamental failure to grasp the *raison d'etre* of Exemption 5. It was precisely to protect *bona fide* work product and privileged attorney-client matter from the likes of FOIA requests that Exemption 5 was enacted in the first place. *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. at 154, 95 S.Ct. at 1518; *Mervin* v. *FTC*, 591 F.2d at 825. A FOIA request such as is made in the instant case is the typical "related" litigation contemplated by the statute. As such, it is properly turned away on Exemption 5 grounds.

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The requested material is thus exempt as expressing the attorney's thoughts and stategies,[1] and because the ideas expressed constitute *privileged* advice by an attorney to his client, *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. at 154, 95 S.Ct. at 1518. I would accordingly affirm the Judgment of the District Court in all respects and hold that the documents are exempt from disclosure under 5 U.S.C. § 552(b)(5).

[1] The analysis of the majority places great weight on the fact that "[t]he government's investigation and litigation strategy in such an action obviously would have little, if anything, to do with its strategy in defending this FOIA suit." At 557. I am hard pressed to glean how this point bears the slightest relevance to this proceeding. The relative strategies in the two suits in question are immaterial in this inquiry. *All* we are concerned with here is that the strategies in the *original Americana* litigation were *bona fide* work product. That they constitute *privileged* advice by an attorney to his client, *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. at 154, 95 S.Ct. at 1518. I would accordingly affirm the Judgment of the District Court in all respects and hold that the documents are exempt from disclosure under 5 U.S.C. § 552(b)(5).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1939

GROLIER INCORPORATED, a Corporation, APPELLANT,

v.

FEDERAL TRADE COMMISSION, Michael Pertschuk, Chairman, and Paul Rand Dixon, David M. Clanton, and Robert Pitofsky, Commissioners, APPELLEES.

Before: WRIGHT MACKINNON and WALD, Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed from in this case is affirmed in part, vacated in part, and the case is remanded for further proceedings in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

George A. Fisher
GEORGE A. FISHER
Clerk

Date: February 5, 1982

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APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1939

GROLIER INCORPORATED, a Corporation, APPELLANT,

v.

FEDERAL TRADE COMMISSION, Michael Pertschuk, Chairman, and Paul Rand Dixon, David M. Clanton, and Robert Pitofsky, Commissioners, APPELLEES.

Before: WRIGHT MACKINNON and WALD, Circuit Judges

ORDER

On consideration of appellees' petition for rehearing, filed March 22, 1982, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam
For the Court

GEORGE A. FISHER, Clerk

By: Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judge MacKinnon would grant the petition for rehearing.

Filed April 7, 1982

ORDERED

It is ORDERED by the Court, *sua sponte*, that the panel order of April 7, 1982 is amended by making the attached statement a part thereof.

Per Curiam
For the Court

GEORGE A. FISHER, Clerk

By: Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

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Statement of Circuit Judges Wright and Wald on Petition for Rehearing

The opinion of the majority addressed the applicability of the work-product privilege as incorporated in Exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5) (1976). Exemption 5 also encompasses material that is part of the deliberative process within a government agency. *Taxation With Representation Fund* v. *IRS*, 646 F.2d 666, 676-677 (D.C. Cir. 1981); *Mead Data Central, Inc.* v. *Dep't of Air Force*, 566 F.2d 242, 256 (D.C. Cir. 1977). The government has never at any stage of the proceedings, including its application for rehearing and its suggestion for rehearing *en banc*, raised the deliberative process privilege with respect to Documents 3, 5, 6, and 7, the documents subject to remand and potential release. With respect to these documents the government has relied solely on the work-product privilege. *See* Index to Documents, *Grolier, Inc.* v. *FTC*, D. D.C. Civil Action No. 79-1215, at 3-4 (Joint Appendix 62-63). Thus the majority opinion did not address the applicability of the deliberative process privilege to these documents, and we do not now.

Filed April 10, 1982

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1939

GROLIER INCORPORATED, a Corporation, APPELLANT,

v.

FEDERAL TRADE COMMISSION, Michael Pertschuk, Chairman, and Paul Rand Dixon, David M. Clanton, and Robert Pitofsky, Commissioners, APPELLEES.

Before: ROBINSON, Chief Judge, WRIGHT, TAMM, MACKINNON, ROBB, WALD, MIKVA, EDWARDS, GINSBURG and BORK, Circuit Judges

ORDER

Appellees' suggestion for rehearing *en banc* has been circulated to the full Court and a majority of the judges have not voted in favor thereof. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam
For the Court

GEORGE A. FISHER, Clerk

By: Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

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Circuit Judges Tamm, MacKinnon, Robb and Ginsburg would grant the suggestion for rehearing *en banc*. Circuit Judges Mikva and Bork did not participate in this order.

Filed April 7, 1982

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Civil Action No. 79-1215

GROLIER INCORPORATED, a Corporation, PLAINTIFF,

v.

FEDERAL TRADE COMMISSION, Michael Pertschuk, Chairman, and Paul Rand Dixon, David M. Clanton, and Robert Pitofsky, Commissioners, DEFENDANTS.

MEMORANDUM

This is a Freedom of Information Act ("FOIA") case. The defendants claim that exemption (b)(5) of the FOIA, 5 U.S.C. § 552(b)(5) permits nondisclosure of seven withheld documents. On February 21, 1980, the court released a memorandum opinion addressing cross-motions for summary judgment. That opinion granted summary judgment on behalf of the defendants with respect to documents numbered 1, 2, and 4. But the court ordered *in camera* inspection for the remaining four documents. The court herein grants summary judgment on behalf of the defendant with respect to documents numbered 3, 4, 6, and 7.

The February 21, 1980 opinion noted that exemption 5 encompasses both the privilege for confidential agency memoranda and the attorney-client and work-product privileges. The FTC claims work-product pursuant to the

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four documents presently at issue. The February 21 opinion further noted:

> The court questions whether these documents qualify as work product. That evaluations, opinions, recommendations and thought processes can constitute work product is beyond dispute. But the key to the work product privilege is whether the FTC prepared such documents "with an eye toward litigation, *Hickman* v. *Taylor*, *supra*, at 394, or "in anticipation of litigation or for trial." Federal Rule of Civil Procedure 26(b)(3). As stated by Professor Wright:
>
> > Prudent parties anticipate litigation and begin preparation prior to the formal commencement of an action. Thus the test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.
>
> C. Wright, *Law of Federal Courts*, § 82 at 408-09 (1976).
>
> It is unclear from the *Vaughn* index whether the FTC prepared the documents at issue with an eye toward the Americana litigation. The court therefore orders the FTC to produce these documents for *in camera* inspection. The Supreme Court in *EPA* v. *Mink*, *supra* at 93, expressly approved of this procedure. It noted that "if it [the agency] fails to meet its burden without *in camera* inspection, the District Court may order such inspection."

Opinion at 4-5.

The court's *in camera* review of these materials reveals that they fall within the parameters of the work-product privilege. Three of the four documents inspected—numbered 3, 6, and 7—refer directly to the Americana litigation. The fourth, document number 5, indirectly refers to the civil action employing the term "matter."

The four documents encompass opinions by attorneys regarding the evidentiary needs of the Americana action. They also discuss specific methods of obtaining evidence in that litigation. Accordingly, the documents fall within the rubric of "mental impressions, conclusions, opinions or legal theories," Rule 26(b)(3), of the case.

There is also little question that the FTC prepared these documents "with an eye toward litigation." *Hickman* v. *Taylor*, 329 U.S. 495, 511 (1947). Stated otherwise, the "document[s] can fairly be said to have been prepared or obtained because of the prospect of litigation." C. Wright, *Law of Federal Courts*, § 82 at 409 (1976). In fact, the FTC prepared the documents at issue pursuant to an ongoing civil penalty action. The documents therefore constitute work product; the FTC properly withholds these memoranda pursuant to exemption five of the FOIA. 5 U.S.C. § 552(b)(5).

An appropriate Judgment accompanies this Memorandum.

/s/ Thomas A. Flannery
THOMAS A. FLANNERY
United States District Judge

Dated: 6-12-80

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