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UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

01/10/2001 11:01:00

MIDDLE DISTRICT OF FLORIDA  
TAMPA, FLORIDA

UNITED STATES EQUAL EMPLOYMENT  
OPPORTUNITY COMMISSION,

Plaintiff,

vs.

Case No: 8:00-CV-2012-T-24EAJ

ENTERPRISE LEASING COMPANY OF  
FLORIDA, d/b/a ENTERPRISE  
RENT-A-CAR,

Defendant.

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O R D E R

Before the court is defendant's **Motion to Compel More Complete Responses to Request to Produce and for Sanctions** (Dkt. 24); plaintiff's response (Dkt. 28); plaintiff's **Notice of Filing Declaration of EEOC Chairwoman Ida L. Castro** (Dkt. 39)<sup>1</sup>; defendant's **Memorandum in Response to Declaration of Ida L. Castro** (Dkt. 46); defendant's **Notice of Filing Supplemental Materials in Support of Defendant's Motion to Compel** (Dkt. 66); and **Plaintiff's Response to Defendant's Notice of Filing Supplemental Materials in Support of Defendant's Motion to Compel** (Dkt. 70).

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The court provided plaintiff with a brief period of time in which to invoke the deliberative process privilege. Plaintiff subsequently filed the declaration of Ida L. Castro, EEOC Chairwoman.

Oral argument has been held. After oral argument, plaintiff submitted its withheld documents for an in camera inspection by the court (Dkt. 40). This review has now been completed.

**I. BACKGROUND**

This dispute arises from discovery sought by defendant, Enterprise Leasing Company of Florida ("defendant" or "Enterprise"), in connection with an employment discrimination lawsuit filed against it in October of 2000. Defendant served its First Request for Production of Documents on plaintiff, Equal Employment Opportunity Commission ("plaintiff" or "EEOC"), on January 12, 2001. Plaintiff served its response on February 20, 2001 and objected to twenty-seven of the twenty-nine requests. Plaintiff asserted to twenty-four of the document requests various privileges, including attorney-client privilege, deliberative process privilege, and work-product doctrine, and attached a document privilege log to its response.

Defendant now brings its motion to compel plaintiff to produce more complete responses to its request to produce and for sanctions. (Dkt. 24). Plaintiff responds that it has already produced all of the "non-privileged" documents in its possession and that its log is sufficiently detailed to establish the basis of the claimed privileges. (Dkt. 28).

## II. DEFENDANT'S MOTION TO COMPEL

Defendant contends that plaintiff's reliance on the attorney-client privilege, deliberative process privilege, and work-product doctrine are not well-founded. These objections to disclosure by plaintiff are addressed separately.

### A. Attorney-Client Privilege

Plaintiff asserts that the attorney-client privilege protects withheld documents responsive to Production Request Numbers 2, 4-7, 9-10, and 18-23. Moreover, plaintiff argues that the common interest rule protects from disclosure communications between the EEOC and Antonio Anglin ("Anglin"), the charging party, in this case. Defendant contends, on the other hand, that the documents are not privileged because there was no attorney-client relationship between Anglin and the EEOC prior to the EEOC's decision to sue defendant.

"The party invoking the attorney-client privilege has the burden of proving that an attorney-client relationship existed and that the particular communications were confidential." United States v. Schaltenbrand, 930 F.2d 1554, 1562 (11<sup>th</sup> Cir. 1991) (citation omitted).

Confidential communications between an attorney and his or her client remain protected unless the privilege is waived by

disclosure to a third party.<sup>2</sup> In re Grand Jury Subpoenas, 902 F.2d 244, 248 (4<sup>th</sup> Cir. 1990). The common interest rule is an exception, however. Id. at 249. The common interest rule protects communications made by one party to an attorney for another party where a joint legal effort or strategy is undertaken by the parties and their respective counsel. United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989) (citation omitted), cert. denied, 502 U.S. 810 (1991). The parties must share identical legal interests. Katz v. AT&T Corp., 191 F.R.D. 433, 437 (E.D. Pa. 2000) (citations omitted). Interests that are merely similar in nature are insufficient. Id.

Defendant contends that prior to the EEOC's decision to sue, the EEOC was acting as a neutral party in investigating the charges asserted by Anglin, the charging party. Therefore, according to defendant, the EEOC was not aligned with either party and communications between Anglin and EEOC attorneys or agents are not privileged.

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Communications between EEOC attorneys and EEOC staff members are protected by the attorney-client privilege as long as the elements are otherwise met. See, e.g., Silvester v. Am. Broadcasting Cos., 839 F.2d 1491, 1499 n.6 (11<sup>th</sup> Cir. 1988) (where in-house attorney acted as a lawyer, not as an editor, his communications with his company's editorial employees, as well as his pre-broadcast notes and work product, were protected by the attorney-client privilege); EEOC v. The Pasta House Co., No. 4:94CV1715 TIA, 1996 WL 153959, at \*1 (E.D. Mo. Feb. 6, 1996) (confidential communications between EEOC attorneys and EEOC Commissioners were protected by the attorney-client privilege).

A number of courts have held that confidential communications between an aggrieved employee and EEOC attorneys and their agents are protected by the attorney-client privilege. See generally EEOC v. Johnson & Higgins, Inc., No. 93 CIV. 5481(LBS), 1998 WL 778369, at \*4 (S.D.N.Y. Nov. 6, 1998); EEOC v. Chemtech Int'l Corp., Civ. A. No. H-94-2848, 1995 WL 608333, at \*1-2 (S.D. Texas May 17, 1995); EEOC v. HBE Corp., No. 4:93-CV-722(CEJ), 1994 WL 376273, at \*2 (E.D. Mo. May 19, 1994); Bauman v. Jacobs Suchard, Inc., 136 F.R.D. 460, 461-63 (N.D. Ill. 1990); Gormin v. Brown-Forman Corp., 133 F.R.D. 50, 53 (M.D. Fla. 1990); EEOC v. Georgia-Pacific Corp., No. 69-101, 1975 WL 267, at \*2-3 (D. Or. Nov. 10, 1975). The attorney-client relationship still exists even when the charging party has his or her own private counsel. Chemtech Int'l, 1995 WL 608333, at \*1-2.

Such privilege applies to communications made prior to the initiation of charges, since communications made for the purpose of securing legal services or assistance are privileged. Bauman, 136 F.R.D. at 462 (holding attorney-client privilege applicable to communications that took place before EEOC filed complaint); Georgia-Pacific, 1975 WL 267, at \*2-3 (holding attorney-client privilege applicable where plaintiff brought case as an individual plaintiff against employer but sought EEOC's legal assistance in assuring compliance with judgment).

In the instant case, the court must first determine whether the documents at issue qualify for protection pursuant to the attorney-client privilege. If the elements of the attorney-client privilege are met, then the court must determine whether the common interest rule prevents their disclosure.

The court has conducted an in camera review of the withheld documents and the privilege log which accompanies them. With respect to plaintiff's Tab 10, Number 74, the court finds that the document is protected by the attorney-client privilege. The document reflects notes taken by the investigator concerning a telephone conference she had with an EEOC attorney for the purpose of securing legal advice. Accordingly, this document need not be disclosed to defendant.<sup>3</sup>

Plaintiff's Tab 15, Number 1235, is likewise protected by the attorney-client privilege. The document consists of the investigator's notes concerning a voice mail message she received from an EEOC attorney concerning the matter at hand.<sup>4</sup>

Plaintiff's Tab 16, Numbers 1236-1240, is protected by the attorney-client privilege.<sup>5</sup> The document consists of the

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Plaintiff also asserts that the deliberative process privilege protects this document from disclosure. The court need not address the applicability of the deliberative process privilege, as the document is protected by the attorney-client privilege.

<sup>4</sup>See supra note 3.

<sup>5</sup>See supra note 3.

investigator's notes concerning a meeting she had with an EEOC attorney and the attorney's instructions to the investigator.

Plaintiff's Tab 22, Numbers 2166-2177, consists of a letter from the EEOC trial attorney to the investigator regarding the investigation. This document is protected by the attorney-client privilege.

Plaintiff's Tab 23, Numbers 2188-2190, is protected by the attorney-client privilege. First, the document is a communication between Anglin's attorney, Mitchell D. Franks ("Franks"), and an EEOC investigator, in each individual's professional capacity. Second, the document involves matters within the scope of Anglin's attorney-client relationship with both Franks and with EEOC counsel. Accordingly, the elements of the attorney-client privilege are met with respect to this document.

Since this document was prepared by Anglin's private attorney, the court must next determine whether the common interest rule protects it from disclosure. First, as the aggrieved party in a suit brought by the EEOC, Anglin has an attorney-client relationship with the EEOC's attorneys and investigators. Johnson & Higgins, 1998 WL 778369, at \*4; Chemtech Int'l, 1995 WL 608333, at \*1-2; HBE Corp., 1994 WL 376273, at \*2; Bauman, 136 F.R.D. at 461-62; Georgia-Pacific, 1975 WL 267, at \*2-3.

Second, Anglin's attorney and the EEOC have a common interest in pursuing a discrimination claim against defendant. Thus, the

court finds that the parties are aligned and have identical legal interests. See Katz, 191 F.R.D. at 437; Chemtech, 1995 WL 608333, at \*2.

Accordingly, document number 2188-2190 is privileged and need not be disclosed pursuant to the attorney-client privilege and the common interest rule.<sup>6</sup>

Next, plaintiff's Tab 29, Numbers 2286-2292, consists of a fax transmittal from the EEOC's Tampa Area Director to an EEOC trial attorney. The document includes the charge of discrimination, letter of determination, and correspondence to and from the Tampa Area Director and defendant. Plaintiff provided a redacted version of this document to defendant. The remaining portions of the document are protected by the attorney-client privilege.<sup>7</sup>

Plaintiff's Tab 30, Numbers 2296-2302, consists of a fax transmittal and correspondence<sup>8</sup> between defendant's counsel and the investigator. The fax transmittal and correspondence to defendant's counsel, Numbers 2296-2300, are protected by the

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Plaintiff also asserts the document is protected by the work-product doctrine. Since the attorney-client privilege protects this document from disclosure, the court need not address the applicability of the work-product doctrine.

<sup>7</sup> See supra note 3.

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Correspondence to defendant's counsel from the investigator appears to be draft correspondence for the attorney's review.



attorney-client privilege.<sup>9</sup> However, the correspondence from defendant's counsel to the EEOC investigator, Numbers 2301-2302, is not privileged and shall be disclosed to defendant.

Next, plaintiff's Tab 31, Numbers 2303-2311, consists of an investigative memorandum that was faxed by the investigator's supervisor to the EEOC attorney.<sup>10</sup> The document is protected by the attorney-client privilege.<sup>11</sup> Tab 31, Numbers 2312-2314 is a letter from Franks to the EEOC relating to a settlement proposal. It is also protected by the attorney-client privilege.

Plaintiff's Tab 32, Number 2315, consists of a Westlaw research cover sheet. This document is not protected by the attorney-client privilege. The document is, however, protected by the work-product doctrine, which will be discussed in Section B, infra.

Plaintiff's Tab 34, Numbers 2344-2346, consists of the handwritten notes of an EEOC attorney. It is covered by the attorney-client privilege.

Next, plaintiff's Tab 36, Numbers 2359-2360, consists of a memorandum and legal transmittal form from the investigator's

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<sup>9</sup> See supra notes 3 and 6.

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Number 2304 is missing from the documents submitted in camera. This omission is not fatal to the asserted privilege, given the nature of the privilege.

<sup>11</sup> See supra note 3.

supervisor to an EEOC attorney. The attorney-client privilege protects this document from disclosure.<sup>12</sup>

Plaintiff asserts the attorney-client privilege with respect to Tab 38, Number 2410, which consists of a case synopsis prepared by an EEOC attorney. This document is not protected by the attorney-client privilege. However, it is protected by the work-product doctrine as discussed infra, Section B.

Plaintiff's Tab 40, Numbers 2429-2431, consists of a memorandum by an EEOC attorney. After reviewing the document, the court is unable to determine the document's intended recipient. Accordingly, the court cannot conclude that the document is protected by the attorney-client privilege. It is, however, protected by the work-product doctrine, discussed infra, Section B.

Finally, plaintiff asserts both the attorney-client privilege and work-product doctrine with respect to Tab 41, Numbers 2432-2440. This document is a memorandum from one EEOC attorney to another. The attorney-client privilege does not protect this document. On the other hand, it is covered by the work product doctrine, discussed infra, Section B.

**B. Work-Product Doctrine**

Plaintiff asserts that several documents are protected by the work-product doctrine because they were prepared in anticipation of litigation and contain legal analysis.

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<sup>12</sup> See supra note 3.

Defendant, on the other hand, contends that the documents are not protected by the work-product doctrine because they were prepared in the EEOC's investigatory capacity. Further, according to defendant, the documents are relevant to the allegations in the complaint. Additionally, defendant argues the documents would be helpful in comparing Anglin's earlier statements with his recent deposition testimony. Finally, the documents may not be obtained from any other source, according to the defendant.

Federal Rule of Civil Procedure 26(b)(3) provides that a party may obtain materials "prepared in anticipation of litigation or for trial . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Moreover, Rule 26(b)(3) provides that, in ordering discovery of work product materials when the required showing has been made, "[t]he court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of any attorney or other representative of a party concerning the litigation."

Thus, plaintiff's documents located at Tabs 32, 38, 40, and 41 are primarily mental impressions of attorneys and are protected by

the work-product doctrine.<sup>13</sup> To the extent that any factual work product is contained in these documents, defendant has not made a sufficient showing of substantial need and undue hardship. The memorandum located at Tab 39 does not appear to relate to the instant case as it refers to a bank as the workplace in question. This document need not be disclosed because it is not relevant.

**C. Deliberative Process Privilege**

Plaintiff asserts that certain documents contain, inter alia, investigator's interpretations and analysis of the data provided by defendant concerning its liability and that the analysis is inextricably intertwined with the factual information, thereby making redaction impossible.

Defendant responds that the deliberative process privilege does not protect the documents because they contain factual information. Accordingly, any documents containing factual information should be disclosed with agency analysis, if any, redacted therefrom.

The deliberative process privilege applies to "communications relating to policy formulation at the higher levels of government; it does not operate indiscriminately to shield all decision-making

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With respect to Tabs 34 and 38, plaintiff also asserts that they are protected from disclosure under the deliberative process privilege. As these documents are protected under the work-product doctrine, the court need not address the applicability of the deliberative process privilege.

by public officials." Grossman v. Schwarz, 125 F.R.D. 376, 381 (S.D.N.Y. 1989) (citation omitted). The privilege was designed to protect from disclosure those

governmental processes related to legal and policy decisions which cannot be carried out effectively if they must be carried out under the public eye. Government officials would hesitate to offer their candid and conscientious opinions to superiors or co-workers if they knew that their opinions of the moment might be made a matter of public record at some future date.

Branch v. Phillips Petroleum Co., 638 F.2d 873, 881-82 (5<sup>th</sup> Cir. 1981).<sup>14</sup>

The deliberative process privilege consists of two elements. Florida House of Representatives v. United States Dept. of Commerce, 961 F.2d 941, 945 (11<sup>th</sup> Cir. 1992), cert. dismissed, 506 U.S. 969 (1992). First, the government must establish that the document is predecisional, or "prepared in order to assist the decisionmaker in arriving at his [or her] decision." Id. (quoting Renegotiation Bd. v. Grumman Aircraft Eng'g Corp., 421 U.S. 168, 184 (1975)). Second, the document must be deliberative in that it involves "a direct part of the deliberative process" by making recommendations or expressing opinions on legal or policy matters.<sup>15</sup>

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In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding the case law of the Fifth Circuit handed down as of September 30, 1981.

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Basically, the second element involves answering the question, "Does it contain advice or opinion or does it reflect the give-and-take of the consultative process?" Florida House of Representatives, 961 F.2d at 949. Stated differently, if the

Id. (citations omitted). Moreover, the privilege does not protect factual information that is neither inseparably intertwined with the agency's analysis nor reflective of the agency's deliberative process. Branch, 638 F.2d at 882 (citations omitted); see also In re Sealed Case, 121 F.3d 729, 737 (D.C. Cir. 1997); Roberts v. Hunt, 187 F.R.D. 71, 74-75 (W.D.N.Y. 1999).

The party invoking the privilege bears the burden of establishing its existence. King v. Conde, 121 F.R.D. 180, 189 (E.D.N.Y. 1988) (discussing procedures that govern all discovery disputes over police records in federal civil rights actions where privilege is claimed, regardless of the label used to classify the privilege); see also Grossman, 125 F.R.D. at 381 (addressing deliberative process privilege). A department head or other responsible agency official must personally review the documents and then state in an affidavit the factual basis for the privilege. Grossman, 125 F.R.D. at 381. "The factual basis must be stated with particularity, so that the court can make an intelligent and informed choice as to each requested piece of information." Id. (citing King, 121 F.R.D. at 189). An assertion by the government agency's attorney or the document's author is insufficient, as are mere conclusory statements. Id. (citing King, 121 F.R.D. at 189);

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information in the documents appears to be advice or opinion, then it is deliberative. Id.

see also United States v. O'Neill, 619 F.2d 222, 225 (3d Cir. 1980).

At oral argument, plaintiff argued that an agency attorney can assert the deliberative process privilege, rather than a department head or other official, citing Scott v. PPG Industries, Inc., 142 F.R.D. 291 (N.D. W. Va. 1992), as authority.

In Scott, the court analyzed the deliberative process privilege in terms of oral testimony at a deposition, not documents requested by a party, and held that the deponent could invoke the privilege without first obtaining the authority of an agency department head or other official. 142 F.R.D. at 293-94. Thus, the court distinguished the method for invoking the privilege as it relates to testimony about privileged documents, not as it relates to the documents themselves, which is at issue in the present case. Id.

Despite its initial assertions, Plaintiff has now filed the affidavit of EEOC Chairwoman Ida L. Castro. (Dkt. 39).

Procedurally, plaintiff has properly invoked the deliberative process privilege with respect to its withheld documents. Ms. Castro's affidavit states: (1) that she personally reviewed the withheld documents; 2) the reasons for invoking the privilege; and 3) the nature of the documents.

Moreover, plaintiff's amended privilege log identifies each specific document withheld and relevant information, where

applicable, such as the date, addressee, author, document type, description, number of pages, privilege asserted, and the production request to which it pertains. This information is sufficiently detailed to invoke the deliberative process privilege.

Since plaintiff has properly invoked the deliberative process privilege, the court now turns to its merits. To determine whether plaintiff's claim of privilege is meritorious, the court must analyze whether the documents are both predecisional and deliberative. See Florida House of Representatives, 961 F.2d at 945.

Defendant seeks documents that plaintiff categorizes as either 1) internal memoranda; 2) internal notes; 3) internal correspondence; or 4) attorney research and documentation.

All of the documents appear to be predecisional since they were created prior to the EEOC's issuance of a right to sue letter in 2000 and prior to the filing of its complaint in October of 2000. Accordingly, the documents satisfy the first element of the deliberative process privilege.

Next, the court must evaluate whether the documents are deliberative. A document is deliberative if it reflects subjective opinions rather than factual information. Roberts, 187 F.R.D. at 74 (citation omitted). Plaintiff claims that the withheld documents contain "analysis, opinions, and recommendation regarding merits of charge and further charge processing." (Dkt. 39.)



Plaintiff also claims that to the extent the documents contain factual information, it would be impossible to extract the facts from the analyses without revealing privileged information. Defendant, on the other hand, argues that even if the documents are deliberative, they should be produced pursuant to a protective order.

The court has reviewed the withheld documents in camera and will now address whether the claimed deliberative process privilege prevents their disclosure.<sup>16</sup>

Plaintiff's Tab 1, Numbers 7-12, consists of an internal memorandum from an EEOC investigator to the District Director. Plaintiff asserts that it has provided defendant with a redacted version of this document. Upon review, however, the court finds that plaintiff's version redacted more information than was protected under the deliberative process privilege. Specifically, plaintiff provided defendant with all of page 7, except for the "Recommendation" line and only a small portion of page 8. Plaintiff shall also provide defendant with the remaining portions of page 8, excluding the two paragraphs pertaining to Anglin's prima facie case. Similarly, plaintiff shall provide defendant with pages 9-11, and 12, excluding the last paragraph entitled "Conclusion."

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Because this is the only basis for non-production asserted by plaintiff, the applicability of any other privileges need not be addressed.

Plaintiff's Tab 2, Numbers 13-15, consists of a memorandum from an EEOC investigator to the headquarter's library researcher regarding request for EEO-1 and demographics reports. The document is not protected by the deliberative process privilege because it does not contain the analysis, opinion, or recommendation of the EEOC investigator. Thus, it shall be disclosed to defendant.

Plaintiff's Tab 3, Numbers 16-17, consists of an "On-Site Report." This document shall be disclosed to defendant excluding the last paragraph on Number 17. The document contains factual investigative information, with the exception of the last paragraph, which contains the investigator's opinion.

Next, plaintiff's Tab 4, Numbers 18-33, consists of the investigator's handwritten notes. The document, with the exception of the two lines of Number 18 and Numbers 32-33, is factual in nature and does not include the investigator's analysis or opinion to assist in the agency's determination of this matter. Accordingly, the document shall be disclosed to defendant, except for the first two lines of Number 18 and Numbers 32-33.

Plaintiff's Tab 5, Numbers 35-36, also consists of the investigator's handwritten notes. Likewise, this document is not protected by the deliberative process privilege because it contains factual information uncovered during the investigation. Thus, this document shall be disclosed to defendant in its entirety.

Similarly, plaintiff's Tab 6, Numbers 37-39, consists of the investigator's handwritten notes. This document is factual in nature and is subject to disclosure to defendant.

Plaintiff's Tab 7, Number 40, consists of an EEOC supervisor's handwritten notes. Although it is barely legible, it does not appear to contain any opinion or recommendation concerning the matter at hand, and thus shall be disclosed to defendant.

Plaintiff's Tab 8, Number 47, consists of six questions to consider for a prospective witness. It does not contain opinion or recommendation and does not satisfy the requirements of the deliberative process privilege. Accordingly, it shall be disclosed.

Plaintiff's Tab 9, Number 73, consists of handwritten notes by the investigator concerning a discussion she had with her supervisor. This document is protected by the deliberative process privilege. First, it was prepared in order to assist in the decision-making process. Second, the document is deliberative in nature and contains the agency's analysis of the EEOC charge(s). Accordingly, plaintiff need not disclose this document to defendant.

Next, plaintiff's Tab 11, Number 77, consists of the investigator's handwritten notes concerning her investigation. It does not contain recommendations or opinion on a legal matter. Accordingly, this document shall be disclosed to defendant.

Plaintiff's Tab 12, Number 306, consists of a draft letter with handwritten notations prepared by the investigator to be sent to defendant. Neither the handwritten notes nor the letter contain opinions or recommendations. It shall be disclosed.

Plaintiff's Tab 13, Numbers 1155-1192, consists of handwritten notes by the investigator. With the exception of the notes on Number 1156, the document is not protected by the deliberative process privilege. Thus, plaintiff shall disclose Numbers 1155 and 1157-1192, but not Number 1156, to the defendant.

Plaintiff's Tab 14, Number 1193, consists of handwritten notes by the investigator to her supervisor and it is protected by the deliberative process privilege as it contains the investigator's opinion, prepared in order to assist in the EEOC's determination of the charges against defendant.

Plaintiff's Tab 17, Numbers 1241-1254a, consists of a draft request for information, "class case development" containing guidelines for investigating the case, and handwritten notes by the investigator. The deliberative process privilege elements are met with respect to this document; therefore, it need not be disclosed to defendant.

Plaintiff's Tab 18, Numbers 1254b-1258, consists of a memorandum from an EEOC investigator to an EEOC researcher detailing the manner in which the investigator should request

computerized data from defendant. This document is also protected by the deliberative process privilege.

Plaintiff's Tab 19, Numbers 1259-1275, consists of the investigator's handwritten notes. Numbers 1260 and 1262-1264 fall within the deliberative process privilege. The remaining portions, Numbers 1259, 1261, and 1265-1275, are not protected by the deliberative process privilege and shall be disclosed to defendant.

Plaintiff's Tab 20, Numbers 1829-1844, consists of a compilation of workforce data by the Chief of the Research and Technical Information Program Research and Survey Division, preceded by a two page memorandum. This document, including the data, is protected by the deliberative process privilege. Not only was the document prepared to assist in the decision-making process, but also it contains statistical analysis of the demographics of defendant's workforce. Statistical analysis is characterized as "opinion" information for purposes of the deliberative process privilege and is protected from disclosure. Florida House of Representatives, 961 F.2d at 949-50 (adjusted block level census data were opinion, not fact).

Plaintiff's Tab 21, Numbers 1846-1849, consists of an on-site report for charges 151980236, 151971795, and 151980074. The document is not protected by the deliberative process privilege as it contains purely factual information obtained during the investigation. Consequently, plaintiff shall disclose this

document to defendant. Part of Number 1847 is obscured by two business cards. The entire page shall be produced.

Plaintiff's Tab 24, Numbers 2191-2207, consists of a compilation of data by the Chief of the Research and Technical Information Program Research and Survey Division. As with Tab 20, this document is protected by the deliberative process privilege.

Plaintiff asserts that it provided defendant with Numbers 2214-2216, plaintiff's Tab 25. Thus, the court need not address whether this document is privileged.

Plaintiff's Tab 26, Numbers 2234-2264, consists of an investigative memorandum prepared by the investigator. The deliberative process privilege applies to portions of this document; however, it contains factual portions that can be segregated. Specifically, the document shall be produced with the following portions redacted: **Number 2236** - the last two paragraphs continuing with the first two sentences on the next page; **Number 2237** - the last two sentences of the second paragraph, and the fifth and six paragraphs in their entireties; **Number 2239** - the second paragraph; **Number 2244** - the first two paragraphs; **Number 2246** - all but the first paragraph; **Number 2247** - the first five paragraphs; **Number 2248** - the last six paragraphs; **Number 2250** - the first three paragraphs; **Number 2253** - the first paragraph and the last paragraph; **Number 2255** - the four paragraphs under the heading "Comparisons:"; **Number 2257** - the second paragraph under

the heading "Promotion History"; **Number 2260** - the second paragraph under the heading "Promotion History"; **Number 2262** - the first line; **Number 2263** - the seventh paragraph; and **Number 2264** - the first and last paragraphs under the heading "Analysis:". The entirety of **Numbers 2241, 2243, 2249, 2251, 2252, 2254** is opinion and is covered by the deliberative process privilege.

Plaintiff's Tab 27, Numbers 2265-2269, consists of the investigator's handwritten notes. This document is factual in nature and not protected by the deliberative process privilege.

Plaintiff asserts that its document listed as Tab 28, Numbers 2270-2285, is the same as the document listed in Tab 20. Accordingly, the court's analysis with respect to Tab 20 applies equally to Tab 27.

Plaintiff's Tab 33, Numbers 2316-2343,<sup>17</sup> consists of the investigator's notes and analysis. The deliberative process privilege protects portions of this document from disclosure. However, the document contains factual portions that are not inseparably intertwined with analysis. Accordingly, the document shall be disclosed to defendant with the following paragraphs redacted from certain pages: **Number 2316** - the six paragraphs following the "Analysis" heading; **Number 2323** - the last three

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The court notes that numbers 2317-2321 are missing from the sealed document submitted by plaintiff. Plaintiff shall promptly submit these for in camera review within 10 days.

paragraphs; **Number 2324** - the first two paragraphs; **Number 2326** - all but the first paragraph; **Number 2327** - the first five paragraphs; **Number 2329** - the last four paragraphs; **Number 2330** - the first three paragraphs; **Number 2331** - all paragraphs except the first line; **Number 2335** - the first five paragraphs; **Number 2342** - the first line; and **Number 2343** - the seventh paragraph which begins with the number "4". However, **Number 2332** and **Number 2334** shall not be disclosed as these pages are covered by the deliberative process in their entirety.

Plaintiff's Tab 35, Numbers 2356-2358, consists of handwritten notes by the investigator and a Federal Express receipt. The handwritten notes, Numbers 2356-2357, are protected by the deliberative process privilege because they contain opinions. The Federal Express receipt, Number 2358, however, is not protected and shall be disclosed.

Plaintiff asserts that Tab 37 is a duplicate of Tab 26. Therefore, the analysis under Tab 26 applies equally to Tab 37.

The deliberative process privilege is a qualified privilege that may be overcome by a showing that the need for the documents outweighs the interest in not disclosing them. United States v. Farley, 11 F.3d 1385, 1389 (7<sup>th</sup> Cir. 1993) (citations omitted); see also In re Sealed Case, 121 F.3d at 737-38.

In the case at bar, defendant argues that the documents are relevant to plaintiff's allegations. Moreover, defendant asserts



that the documents would illuminate the strengths and weaknesses of plaintiff's case and would also reveal any inconsistencies in the facts as articulated by Anglin, defendant's former employee and EEOC complainant, in his recent deposition.

Relevancy alone is an insufficient reason to overcome the privilege. Farley, 11 F.3d at 1390. Also, defendant has not shown how information concerning the deliberative process leading up to the EEOC's action is relevant to impeachment of Anglin.<sup>18</sup>

Accordingly, defendant has not shown that its need for the redacted portions of the documents outweighs the potential harm to the EEOC's decision-making process.

**D. Medical Records**

At oral argument, defendant argued that Anglin's medical records are in plaintiff's control and should, therefore, be produced as requested by plaintiff. Specifically, defendant contends that since Anglin is the EEOC's client, the records are in its control. Plaintiff responded that it has no medical records in its possession.

At oral argument, the court ordered that release forms be provided to Anglin's attorney for execution. Accordingly, the issue as to the medical records appears moot.

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Nothing in defendant's supplemental materials (Dkt. 66) strengthens defendant's arguments for overcoming the deliberative process privilege.

**III. DEFENDANT'S MOTION FOR SANCTIONS**

The **Motions for Sanctions** is **DENIED** subject to reconsideration if circumstances warrant.

**Conclusion**

It is hereby **ORDERED and ADJUDGED** that:

- 1) defendant's **Motion to Compel More Complete Responses to Request to Produce and for Sanctions** (Dkt. 24) is **GRANTED in part** and **DENIED in part**;
- 2) plaintiff shall produce the documents described in this order within ten days from the date of this order;
- 3) within the same time-period, plaintiff shall file in camera Numbers 2317-2321 of Tab 33 for review by the court.

**DONE and ORDERED** at Tampa, Florida this 10<sup>th</sup> day of December, 2001.

  
ELIZABETH A. JENKINS  
United States Magistrate Judge

Copies to:  
Counsel of record

Date Printed: 12/11/2001

Notice sent to:

— M. Teresa Rodriguez, Esq.  
Equal Employment Opportunity Commission  
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