The Burger Court Opinion Writing Database

FTC v. Grolier, Inc.

462 U.S. 19 (1983)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 1, 1983

Re: No. 82-372, FTC v. Grolier, Inc.

Dear Byron:

I join.

Regards,

Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 17, 1983

Re: FTC v. Grolier, No. 82-372

Dear Byron:

I agree with your result in this case. However, I do have some comments on your draft.

I had always thought that this was essentially a Rule 26 case rather than a FOIA case. The sole relevance of the fact that the case arises under FOIA, in my view, is that under Sears we treat all privileges as though they were absolute. That, however, is not a matter of the coverage of the privilege, but of whether discovery of covered material can be had despite the privilege. As far as coverage goes, however, the scope of the work product privilege is exactly the same whether the case arises under Exemption 5 or in ordinary litigation. This is important because the CADC's "related litigation" test, as I understand it, is not a way of overcoming a privilege where it applies, but a matter of defining whether or not it applies at all. The CADC's discussion, for example, is entitled "Temporal Scope of the Work-Product Privilege". Indeed, it could not be otherwise in light of Rule 26, which defines quite narrowly the sort of showing that can overcome the privilege, rather than escaping its coverage altogether.

For this reason, I would prefer to rest entirely on the first of the two alternative grounds in your draft--that Rule 26 itself contains no related litigation test. Besides the literal language you point out, I think the SG's brief makes out a strong case why the purposes and policies of the privilege are undercut by the CADC's construction.

I'm not persuaded, however, by some of your other arguments. On pp. 8-9, you argue that assuming arguendo that there is a related litigation test under Rule 26 itself, it should not be applied under Exemption 5 because that would require a preliminary showing that there was no related litigation. To me, that is a misreading of the word "routinely" in Exemption 5.

In the first place, under either Exemption 5 or Rule 26, it is ordinarily the party asserting a privilege that has the burden of showing its applicability. Hence, is it not the Government, and not the party seeking disclosure, that is required to make the preliminary showing to which

you refer? In that sense, the issue whether there is any related litigation is of a kind with the issue whether the material sought was prepared in preparation for trial. Surely the latter question does not implicate Exemption 5, even though it presents an issue that must be resolved in each case before discoverability can be decided.

That point aside, moreover, I understand "routinely" to mean "without a special showing of need or hardship"; if so, it does not, as you seem to suggest, mean "without any antecedent showing". If it meant the latter, Exemption 5 would cover virtually all discovery, since a party seeking discovery must show at a minimum that what it seeks is "relevant to the subject matter involved in the pending action." As I see it, a given discovery request either does fall within the scope of the privilege (because there is related litigation), in which case it is per se exempt under Exemption 5; or else it is outside the scope of the privilege (because there is no related litigation), in which case it is per se disclosable under FOIA unless another exemption applies.

I am also troubled by your apparent suggestion, in the paragraph on pp. 7-8, that "routinely" means something like "in most district courts under current case law". Surely under Exemption 5, a district court is to assay the applicability of an asserted privilege by what it takes to be the correct view of the privilege, not the current majority view.

Finally, it seems to me that your first full paragraph on page 8 doesn't really do justice to the CADC's opinion. As I read their reasoning, they did not say that the qualified nature of the work product privilege is material to its application under FOIA. Rather, they said that it is instructive in construing the privilege under Rule 26, reasoning that because the privilege is only a qualified one, it should not be read too broadly. See App. to Pet. for Cert. 5. (Having said that, however, I should note that I disagree with their reasoning; I think instead that the existence of an "escape hatch" through a showing of hardship relieves qualms we might otherwise have about extending the privilege when there is no related litigation.)

I hope you may find these comments useful. I'd prefer not to write separately if I can avoid it.

Sincerely,

WJB, Jr.

Justice White

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 25, 1983

Re: No. 82-372

FTC v. Grolier

Dear Byron:

I shall be writing separately in this case. I hope to have it around fairly soon.

Sincerely,

Bill

Justice White

Copies to the Conference

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-372

FEDERAL TRADE COMMISSION, ET AL., PETITIONERS *v.* GROLIER INCORPORATED

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

[June ——, 1983]

JUSTICE BRENNAN, concurring in part and concurring in the judgment.

The Court rests its judgment on two alternative holdings: one a construction of Federal Rule of Civil Procedure 26(b)(3), *ante*, at 6–7; the other a more limited holding under Exemption 5 of the Freedom of Information Act (FOIA), 5 U. S. C. §552(b)(5), *ante*, at 7–8. I find the latter holding unpersuasive and would accordingly rest exclusively on the former.

I

I agree wholeheartedly with the Court that Rule 26(b)(3) itself does not incorporate any requirement that there be actual or potential related litigation before the protection of the work-product doctrine applies. As the Court notes, "the literal language of the Rule protects materials prepared for *any* litigation or trial as long as they were prepared by or for a party to the subsequent litigation." *Ante*, at 6. A contrary interpretation such as that adopted by the Court of Appeals would work substantial harm to the policies that the doctrine is designed to serve and protect. We described the reasons for protecting work product from discovery in *Hickman* v. *Taylor*, 329 U. S. 495 (1947):

"In performing his various duties, . . . it is essential that

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: _____

Recirculated: JUN 2 2 1983

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 1

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-372

FEDERAL TRADE COMMISSION, ET AL., PETITIONERS *v.* GROLIER INCORPORATED

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

[June ——, 1983]

JUSTICE BRENNAN, with whom JUSTICE BLACKMUN joins, concurring in part and concurring in the judgment.

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"In performing his various duties, . . . it is essential that

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: MAY 13 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82–372

FEDERAL TRADE COMMISSION, ET AL., PETITIONERS *v.* GROLIER INCORPORATED

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

[May ——, 1983]

JUSTICE WHITE delivered the opinion of the Court.

The Freedom of Information Act (FOIA), 5 U. S. C. § 552, mandates that the Government make its records available to the public. Section 552(b)(5) exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." It is well established that this exemption was intended to encompass the attorney work-product rule. The question presented in this case is the extent, if any, to which the work-product component of Exemption 5 applies when the litigation for which the requested documents were generated has been terminated.

In 1972, the Federal Trade Commission undertook an investigation of the Americana Corporation, a subsidiary of respondent Grolier Incorporated. The investigation was conducted in connection with a civil penalty action filed by the Department of Justice.[1] In 1976, the suit against Americana was dismissed with prejudice when the Government declined to comply with a District Court discovery order. In

[1] *United States* v. *Americana Corp.*, Civ. No. 388–72 (D N.J.). Americana was charged with violation of a 1948 cease-and-desist order in making misrepresentations regarding its encyclopedia advertisements and door-to-door sales.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 23, 1983

Re: 82-372 - FTC v. Grolier

Dear Bill,

Thank you for your comments on the circulating draft in this case. I am recirculating with some changes, but I'm afraid they will not allay all of your concerns.

Sincerely yours,

Byron

Justice Brennan

~~Copies to the Conference~~

cpm

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: _____

Recirculated: MAY 24 1983

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 6-8

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-372

FEDERAL TRADE COMMISSION, ET AL., PETITIONERS *v.* GROLIER INCORPORATED

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

[May ——, 1983]

JUSTICE WHITE delivered the opinion of the Court.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 16, 1983

Re: No. 82-372-Federal Trade Commission v. Grolier Incorporated

Dear Byron:

Please join me.

Sincerely,

T.M.

Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 25, 1983

Re: No. 82-372 - FTC v. Grolier, Inc.

Dear Byron:

I shall wait to see what Bill Brennan has to say in this case.

Sincerely,

Harry

Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 2, 1983

Re: No. 82-372 - FTC v. Grolier, Inc.

Dear Bill:

Please join me in your separate opinion for this case.

Sincerely,

Harry

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 16, 1983

82-372 FTC v. Grolier, Inc.

Dear Byron:

Please join me.

Sincerely,

Lewis

Justice White

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 16, 1983

Re: No. 82-372 FTC v. Grolier, Inc.

Dear Byron:

Please join me.

Sincerely,

Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 16, 1983

Re: 82-378 - FTC v. Grolier

Dear Byron:

Please join me.

Respectfully,

Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 20, 1983

No. 82-372 FTC v. Grolier Incorporated

Dear Byron,

Please join me.

Sincerely,

Sandra

Justice White

Copies to the Conference