Michigan Education Association *and* Michigan Executive Directors Association (MEDA). Case 07–CA–261392

September 23, 2026

DECISION AND ORDER

BY CHAIRMAN MURPHY AND MEMBERS PROUTY, MAYER , AND MACY

On April 13, 2022, Administrative Law Judge Melissa M. Olivero issued the attached decision. The Charging Party filed exceptions and a supporting brief, and the Respondent filed an answering brief. Additionally, the General Counsel filed cross-exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

Consistent with the Supreme Court's guidance in *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979), the Board is required to balance a union's need for relevant but assertedly confidential information possessed by an employer against any legitimate and substantial confidentiality interest established by the employer. See, e.g., *GTE California, Inc*., 324 NLRB 424, 426 (1997). In *BP Exploration, Inc.*, 337 NLRB 887 (2002), the Board assumed arguendo that the *Detroit Edison* balancing test applied to lawyer-client communications subject to the attorney-client privilege. As the Board there stated, however, "[i]t may be that such communications hold a special place in the laws and values of our society and are thus not subject to the balancing test of *Detroit Edison*." Id. at 887. Our dissenting colleague would find that communications covered by the attorney-client privilege are not subject to *Detroit Edison* balancing. For the reasons cogently articulated by the dissent, we agree.

As our dissenting colleague notes, "[t]he attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Its purpose is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." Id. Simply put, the attorney-client privilege is meant to ensure that "clients . . . make full disclosure to their attorneys." *Fisher v. United States*, 425 U.S. 391, 403 (1976). The protection of the attorney-client privilege is critically important because "[i]n light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, constantly go to lawyers to find out how to obey the law," particularly where, as with labor and employment laws, "compliance with the law . . . is hardly an instinctive matter." *Upjohn*, 449 U.S. at 392 (internal quotations omitted). Employers with unionized workforces and unions would be discouraged from being completely forthcoming with their attorneys if they could not be certain that their privileged communications would be protected from disclosure if a union requested them, which in turn would make voluntary compliance with labor and employment laws more difficult. "An uncertain privilege . . . is little better than no privilege at all." *Upjohn*, 449 U.S. at 393.

In view of the important public interest served by the attorney-client privilege, we agree with our dissenting colleague that the *Detroit Edison* balancing test does not apply to a claim that requested information is protected from disclosure by the attorney-client privilege. If a party establishes that requested information is covered by the attorney-client privilege, the Act does not require it to provide that information to the requester, regardless of whether it has shown that its interest in maintaining the attorney-client privilege outweighs the requester's need for the requested information or that it offered to accommodate the request. For the reasons stated by the judge, we agree that the information requested by the Union was covered by the attorney-client and attorney work product privileges and that the Respondent did not violate the Act by failing to provide it.[2]

[1] The Charging Party has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Chairman Murphy notes that the judge did not find this to be a complicated case, and neither does he. As found by the judge, the investigatory reports prepared by outside counsel for the Respondent—reports that indisputably contained legal advice—are covered by both attorney-client privilege and work-product privilege under relevant federal law as well as Board law.

Chairman Murphy joins all of his colleagues in finding that the balancing test set forth in *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979), does not apply to cases involving materials protected by attorney-client privilege.

[2] Our dissenting colleague agrees that the Act does not require a party to disclose information protected by the attorney-client privilege but asserts that much of it is not so protected. Our colleague also contends

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. September 23, 2026

James R. Murphy, Chairman

Scott A. Mayer, Member

James R. Macy, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER PROUTY, dissenting.

This case raises important issues regarding the National Labor Relations Board's application of the attorney-client privilege and the work-product doctrine in the context of a request for information and the effect that assurances of confidentiality given to interviewees during a workplace investigation have on a union's request for information related to the investigation. The Charging Party, Michigan Executive Directors Association (the Union), has requested information regarding two internal investigations of harassment complaints to determine whether the Respondent, Michigan Education Association, complied with the requirements in the discrimination and harassment policy in the parties' collective-bargaining agreement and whether it treated disparately a unit employee who had a complaint filed against her by a president of a Local of the Respondent (who was also a member of the Respondent's Board of Directors). Administrative Law Judge Melissa M. Olivero dismissed the allegation that the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act by failing and refusing to furnish the Union with the requested information because she found that the Respondent established that the requested information is protected from disclosure by the attorney-client privilege, the work-product doctrine, and the Respondent's interest in preserving the confidentiality of information provided by interviewees during the investigations. I note that the Board has unanimously agreed that the attorney-client privilege is not subject to the balancing test set forth in *Detroit Edison Corp. v. NLRB*, 440 U.S. 301 (1979). For the reasons discussed below, however, contrary to my colleagues, I would reverse the judge and find that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide most of the requested information to the Union.

I. BACKGROUND

The Respondent is a labor organization that represents employees in both K–12 and higher education throughout the State of Michigan. The Union represents a unit of 20 executive directors and 1 executive director/organizer, who are jointly employed by the Respondent and its Local Option Coordinating Councils, which have been described as conglomerates of Locals.[1] The executive directors' duties include negotiating collective-bargaining agreements for units of employees represented by the Respondent, administering those collective-bargaining agreements, engaging in mediation, and presenting cases in arbitration. The Respondent and the Union have been parties to a series of collective-bargaining agreements covering the executive directors, and the collective-bargaining agreement in force at all times relevant to the present case was effective from January 1, 2019, to December 31, 2021, and will hereinafter be referred to as "the parties' CBA."

Appendix K of the parties' CBA is the Employee Discrimination and Harassment Policy and Complaint Procedure (the Discrimination and Harassment Policy). This policy prohibits discrimination or harassment on the basis of "religion, race, creed, disability, color, national origin, age, sex, sexual orientation, height, weight, or marital status" and prohibits retaliation against an individual for raising a complaint or participating in an investigation or proceeding under the policy. The Discrimination and Harassment Policy requires that "either a Human Resources director or other manager . . . or nonemployee investigator" fully investigate allegations of discrimination and harassment and that such investigations (and any disciplinary or corrective action that may result from them) be "consistent with the collective bargaining agreement and generally accepted standards of due process and just cause." The Discrimination and Harassment Policy also requires that all employees cooperate in investigations under the policy and states that "[i]nformation obtained during the investigation will only be shared on a need-to-know basis and as provided for by the policy and applicable Federal and State law."

The Discrimination and Harassment Policy lays out the procedure for investigating complaints made under the policy. The investigator will interview the complainant,

that the information is not protected as attorney work product. For the reasons stated by the judge, we disagree.

[1] At one point in her decision, the judge mistakenly stated that the Respondent and the Union are joint employers.

the respondent, and any pertinent witnesses to the incident(s) raised in the complaint and will gather any other relevant facts and supporting documents. The investigator will then determine the merit of the complaint and recommend any appropriate disciplinary and/or corrective action. At the conclusion of the investigation, the investigator will prepare a written report, which will be "provided to Human Resources and other pertinent individuals as necessary to ensure proper resolution and follow-up regarding th[e] matter." Additionally, either the investigator or the Respondent will provide "a written summary of the complaint, response, investigation findings, and whether any corrective action was taken to the complainant and the respondent." If no violation of the policy is found, the Respondent must provide to the complainant and respondent the results of the investigation and the reasons for finding no violation. The policy instructs that documentation regarding the investigation will not be placed in an employee's personnel file unless disciplinary or corrective action results.

Appendix L of the parties' CBA is the Safe Workplace Policy. The Safe Workplace Policy provides that allegations of threats of violence or violent acts will be fully investigated and will result in disciplinary or corrective action as warranted and that all employees are expected to cooperate in investigations under the policy. The Safe Workplace policy states further that documentation regarding investigations will not be placed in an employee's personnel file unless the allegations are substantiated.

The parties' CBA also contains a grievance procedure for all contract violations, where the aggrieved party may present the grievance in writing within 45 days of the alleged violation or within 45 days of becoming aware of it. The grievance procedure sets forth a two-step process, and the Union may file for a resolution via binding arbitration if the grievance is not resolved internally.

Additionally, the parties' CBA states that the Respondent "will not discriminate against any bargaining unit member with respect to hours, wages or any terms or conditions of employment by reasons of membership in [the Union], participation in activities of [the Union], or institution of any grievance under this Agreement."

On November 4, 2019, the Union's President, Troy Scott, submitted to the Respondent's Human Resources (HR) Director, Tracy Stablein, a complaint under the Discrimination and Harassment Policy on behalf of unit executive director Amy Zitzelberger. This complaint alleged that Liza Parkinson, President of the Utica Education Association (a Local of the Respondent), had engaged in "ongoing and repeated harassing, intimidating, and threatening conduct, which ha[d] created a hostile working environment for Ms. Zitzelberger" and detailed numerous examples of the alleged harassment.[2] On January 16, 2020,[3] Zitzelberger raised a concern about possible retaliation for submitting this complaint and alleged three particular incidents to be retaliatory.

The Respondent retained attorney Sheralee Hurwitz of the law firm of Fahey Schultz Burzych Rhodes to conduct an investigation of the complaint against Parkinson.[4] Hurwitz investigated both the complaint against Parkinson and Zitzelberger's subsequent concern about possible retaliation. Hurwitz first reviewed the Discrimination and Harassment Policy and the complaint. Hurwitz then conducted preliminary legal research into the allegations in the complaint and gathered any relevant documents. She next sent emails to the individuals who she intended to interview with letters attached explaining that they had been identified as witnesses and that their interviews would be kept confidential. At the start of each interview, Hurwitz reiterated to the interviewees that any information provided during the interview would be kept confidential. Hurwitz prepared a detailed outline of questions before the interviews and typed notes into the outlines during the interviews, but she did not have the interviewees review her interview notes and affirm their accuracy.[5] At the end of each interview, Hurwitz reiterated that the information provided would be kept confidential.

After completing the interviews, Hurwitz reviewed her interview notes to determine whether the allegations in the complaint against Parkinson had been substantiated. Hurwitz then drafted an investigation report, which included the following: a summary of the complaint; a statement of her investigation process; a reiteration of the Discrimination and Harassment Policy; summaries of her interview notes; an application of the relevant law to the facts; her findings, conclusions, and recommendations; and pertinent exhibits.[6] Hurwitz sent the Parkinson investigation report to the Respondent's Executive Director,

[2] Parkinson was the Respondent's 6-C Coordinating Council Chair and a member of the Respondent's Board of Directors at that time.

[3] All dates hereinafter are in 2020, unless otherwise noted.

[4] Hurwitz has conducted six to eight internal investigations for the Respondent.

[5] The judge referred to these notes as "witness statements" or "witness statement summaries" in her decision. I will refer to them as "interview notes" because the Board has traditionally defined "witness statements" in a manner that does not encompass these notes. See generally *New Jersey Bell Telephone Co.*, 300 NLRB 42, 43 (1990), enfd. 936 F.2d 144 (3d Cir. 1991).

[6] Hurwitz testified that she does not attach every document that she receives during an investigation as an exhibit but that she does attach documents that she receives from interviewees if they either substantiate the allegation that she is investigating or demonstrate that the allegation is not substantiated. Hurwitz testified further that she received approximately 50 pages of documents during her investigation of the complaint

Michael Shoudy.[7] Shoudy sent copies of this report to the Respondent's General Counsel, Lisa Harrison, the Respondent's Associate Executive Director, Marcia Kamienecki,[8] and HR Director Stablein. Hurwitz also drafted an investigation summary for the investigation of the complaint against Parkinson. Besides the investigation report and the investigation summary, Hurwitz did not provide the Respondent with any other documents that she developed during, and as a result of, the investigation of the complaint against Parkinson. On February 10, the Respondent emailed a copy of the investigation summary to Zitzelberger and Union President Scott.

According to the Parkinson investigation summary, Hurwitz concluded that although Utica Education Association President Parkinson and unit executive director Zitzelberger had a "strained and problematic working relationship" that "should be addressed to alleviate the ongoing operational difficulties" in their workplace, the Discrimination and Harassment Policy was not violated and that the complaint therefore called for no corrective action. Hurwitz did, however, recommend that the Respondent hire "an outside consultant or mediator to facilitate a plan and strategies for more courteous and productive communication" between Parkinson and Zitzelberger. The investigation summary did not specifically explain why Hurwitz concluded that the Discrimination and Harassment Policy was not violated, but Hurwitz testified that she reached that conclusion because she did not find that any of the allegedly harassing conduct cited in the complaint against Parkinson was motivated by one of the protected characteristics listed in the Discrimination and Harassment Policy. The investigation summary did not indicate if Hurwitz made any findings regarding the concern about possible retaliation raised by Zitzelberger. The investigation summary indicated that Hurwitz interviewed Zitzelberger, Parkinson, and three witnesses identified by Zitzelberger.

On February 11, Cathy Murray, President of the Port Huron Education Association (a Local of the Respondent), submitted a complaint on behalf of unit executive directors Timm Couto and Elizabeth Pyden and nonunit employee Sande Nightingale alleging that unit executive director Mara Wirtz violated the Discrimination and Harassment Policy and the Safe Workplace Policy by yelling at, attacking, belittling, terrorizing, frightening, threatening, and intimidating those individuals.[9] The Respondent retained Hurwitz to conduct an investigation of this complaint as well. Hurwitz followed the same process for the investigation of the complaint against Wirtz as she did for the investigation of the complaint against Parkinson, which is discussed in detail above, and the Wirtz investigation report includes the same contents as the Parkinson investigation report.[10] Hurwitz sent the Wirtz investigation report to the Respondent's nonunit Executive Director, Shoudy, who then sent copies to General Counsel Harrison and nonunit Associate Executive Director Kamienecki.[11] Hurwitz also provided an investigation summary for the complaint against Wirtz to the Respondent. Besides the investigation report and the investigation summary, Hurwitz did not provide the Respondent with any other documents that she developed during, and as a result of, the investigation of the complaint against Wirtz. On April 13, the Respondent emailed a copy of the investigation summary to Wirtz. Union President Scott was not copied on this email, but he testified that the Union received the Wirtz investigation summary.

According to the Wirtz investigation summary, Hurwitz concluded that the complaint did not involve a violation of the Discrimination and Harassment Policy because none of the witnesses identified a protected characteristic listed in that policy as the reason motivating Wirtz' allegedly objectionable conduct, but she made no conclusive findings regarding whether Wirtz' conduct violated the Safe Workplace Policy or was in retaliation for the submission of the complaint. Hurwitz did not recommend that any corrective action be taken but did recommend that "[s]pecific staff members" be counseled about future expectations. On April 15, consistent with Hurwitz' recommendations, Kamienecki sent an email to Wirtz, on which Scott was copied, to inform Wirtz of the new professional expectations that would go into effect immediately and to warn her that failure to meet those professional expectations would result in appropriate discipline up to and including discharge. On May 8, in response to concerns raised by the Union, the Respondent sent an email to Wirtz to reiterate the new professional expectations that she

against Parkinson, but she could not recall how many of those pages she attached to the Parkinson investigation report as exhibits.

[7] Shoudy is the Respondent's highest-ranking management official and answers to the Respondent's Board of Directors. He is not in the bargaining unit represented by the Union.

[8] Kamienecki is one level below Shoudy in the Respondent's management hierarchy and is not in the bargaining unit represented by the Union.

[9] Murray was a member of the Respondent's Board of Directors at this time.

[10] The Parkinson and Wirtz investigation reports were not entered into evidence, and the Board has not otherwise reviewed them. I therefore rely exclusively on Hurwitz' testimony regarding the contents of those reports.

Hurwitz did not testify regarding how many pages of documents she received during her investigation of the complaint against Wirtz or how many exhibits she attached to the Wirtz investigation report.

[11] HR Director Stablein did not take part in the resolution of the complaint against Wirtz because of her close personal relationship with Murray.

would have to meet but to clarify that those "expectations [were] not to be considered corrective action or discipline." This email was placed in Wirtz' personnel file.[12]

Nonunit Executive Director Shoudy testified that he and HR Director Stablein made the decisions to hire outside attorney Hurwitz to conduct the investigations of the complaints against Utica Education Association President Parkinson and unit executive director Wirtz. Shoudy listed several reasons why the Respondent had Hurwitz, rather than its HR department, investigate those complaints, including that both complaints raised serious issues and concerns about retaliation, involved Local presidents who were members of the Respondent's Board of Directors (i.e., Parkinson and Port Huron Education Association President Murray, who filed the complaint against Wirtz), and had the potential for litigation. Shoudy testified further that because of the relationships that Parkinson and Murray had with himself and officials in the Respondent's HR department, he and Stablein ultimately "felt like for any appearance of fairness that [the investigations] needed to be assigned to outside counsel, something that we should not handle in our HR department."

On May 15, Union President Scott sent an email to the Respondent with the following request for information:

> On or about February 10, 2020, the [Respondent] provided a summary to the Union and Amy Zitzelberger with regard to the harassment complaint filed against Liza Parkinson on behalf of Amy Zitzelberger.
>
> On or about April 13, 2020, the [Respondent] provided a summary to the Union and Mara Wirtz with regard to the harassment complaint filed against Mara Wirtz by Cathy Murray.
>
> Both investigations have been completed and closed. As such, pursuant to well established NLRB case law, the Union is requesting both investigatory reports and any and all other supporting documents developed during, and as a result of, the investigation[s].
>
> This request is made pursuant to the National Labor Relations Act.

On June 1, the Respondent's outside attorney, Helen Mills, replied to Scott by email with a letter denying the Union's May 15 information request in its entirety. Mills stated that the Union did not assert, and the Respondent did not understand there to be a basis to assert, that the requested information is related to processing a grievance or administering the parties' CBA. Mills then claimed that portions of the requested information are protected by the attorney-client privilege and the work-product doctrine, without specifying which portions. Mills next asserted that the Respondent fulfilled its obligations under the parties' CBA by providing investigation summaries to the complainant and respondent for each complaint. Finally, Mills conceded that any "[w]itness statements contained within the requested materials . . . are not protected by the [attorney-client] privilege," but she asserted that the Respondent did not have to provide witness statements to the Union because of the confidentiality requirements in the Discrimination and Harassment Policy and because the Respondent gave assurances of confidentiality to all of the witnesses interviewed during both investigations.

On June 4, Scott replied to Mills by email. Scott stated that "[a]s a party to the negotiated [Discrimination and] Harassment Policy, the Union has an obligation to ensure each investigation was done properly, in conformance with policy, due process was afforded and adhered to, and proper resolution and follow-up were completed." Scott asserted that the Union believed that neither investigation was conducted properly, that the Respondent ignored certain relevant facts to justify the outcomes, that the Respondent handles investigations in a disparate manner depending on the identities of the complainant and respondent (i.e., "employee v. member/leader"), and that unit executive directors Zitzelberger, who filed the complaint against Parkinson, and Wirtz were not afforded due process. Scott claimed that the Union raised concerns regarding the proper conduct of the investigations and due process on multiple occasions but that the Respondent ignored those concerns. Scott also claimed that both Zitzelberger and Wirtz were experiencing ongoing harassment as a result of the complaints. Scott argued that certain requested information is presumptively relevant but that, in any case, he had asserted an adequate basis for the relevance of the requested information within that June 4 email.

The Respondent did not respond to Scott's June 4 email. The Union filed the unfair labor practice charge in this case on June 8.

II. DISCUSSION

The judge did not make a specific finding regarding whether the information that the Union requested on May 15 is relevant. However, applying the balancing test established by the Supreme Court of the United States in *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979), the judge found that the Respondent established legitimate and substantial confidentiality interests in the requested information based on the attorney-client privilege, the work-product doctrine, and the assurances of confidential-

[12] Subsequent to the events at issue in this case, the Respondent removed the May 8 email from Wirtz' personnel file.

ity provided to interviewees during the investigations of the complaints against Utica Education Association President Parkinson and unit executive director Wirtz. The judge further found that the Respondent's legitimate and substantial confidentiality interests outweigh the Union's need for that information and that the Respondent offered an accommodation by providing the Parkinson and Wirtz investigation summaries to the Union. As a result, the judge dismissed the allegation that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the Union with the information that it requested on May 15. My colleagues have affirmed the judge's dismissal of that allegation because they find that the requested information is covered by the attorney-client privilege and the work-product doctrine for the reasons put forward by the judge.

For the reasons discussed below, I would find that the information requested by the Union on May 15 is relevant to the Union's performance of its duties as the collective-bargaining representative of the unit of executive directors. Additionally, I would find that the Respondent has established that the attorney-client privilege applies to the portions of the Parkinson and Wirtz investigation reports that contain specific legal advice but, contrary to the judge's findings, has failed to establish that the rest of those investigation reports (or any of the other requested documents) are protected by the attorney-client privilege, the work-product doctrine, or a confidentiality interest based on the assurances of confidentiality that the Respondent provided to the interviewees. Accordingly, I would find that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to furnish the Union with the investigation reports (other than the portions that contain specific legal advice) and any and all other supporting documents developed during, and as a result of, the Parkinson and Wirtz investigations.

A. Relevance of the Requested Information

As mentioned above, the judge did not make a specific finding regarding the relevance of the information that the Union requested on May 15. The General Counsel cross-excepts to the judge's failure to do so and argues that the requested information is presumptively relevant and that, in any case, the Union articulated the relevance of the requested information in its June 4 email in response to the Respondent's denial of the Union's May 15 information request. I agree that the information is relevant.[13]

An employer has a statutory obligation, as part of its duty to bargain, to provide to a union that represents a unit of its employees requested information that is relevant to the union's performance of its duties as the employees' exclusive collective-bargaining representative. See generally *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152–154 (1956). Requested information pertaining to employees in the bargaining unit is presumptively relevant. See *E.I. Du Pont de Nemours & Co.*, 366 NLRB No. 178, slip op. at 4 (2018); *Public Service Co. of New Mexico*, 360 NLRB 573, 574 (2014), enfd. 843 F.3d 999 (D.C. Cir. 2016). When requested information is not presumptively relevant, the burden to demonstrate relevance is "not exceptionally heavy." *Leland Stanford Junior University*, 262 NLRB 136, 139 (1982), enfd. 715 F.2d 473 (9th Cir. 1983). "The Board uses a broad, discovery-type standard in determining relevance in information requests, . . . and potential or probable relevance is sufficient to give rise to an employer's obligation to provide information." *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994). Information that relates to "the policing and/or proper application of the terms of the collective-bargaining agreement between the parties" is relevant. *Yeshiva University*, 315 NLRB 1245, 1248 (1994). It is also well established that a "union is entitled to information to assess whether it should exercise its representative function and whether the information will warrant further action, such as filing a grievance or bargaining about a disputed matter." *Public Service Co. of New Mexico*, 360 NLRB at 574.

On May 15, the Union requested the investigation reports from the investigations of the complaints against Utica Education Association President Parkinson and unit executive director Wirtz and "any and all other supporting documents developed during, and as a result of" those investigations.[14] The Parkinson investigation involved a harassment complaint that was submitted on behalf of a

[13] Moreover, I note that the Respondent expressly stated in its Answering Brief to the General Counsel's Cross-Exceptions that it does not dispute the relevance.

[14] The Respondent seems to argue that it has no duty to provide documents that the Respondent's outside attorney/investigator, Hurwitz, developed during, and as a result of, those investigations but did not provide to the Respondent, such as Hurwitz' interview notes. However, "an employer has a duty to supply relevant requested information which may not be in its possession, but where the information likely can be obtained from a third party with whom the employer has a business relationship." *International Protective Services*, 339 NLRB 701, 705 (2003); see also *West Penn Power Co. v. NLRB*, 394 F.3d 233, 245 (4th Cir. 2005) (finding that an employer "had the 'affirmative obligation to make reasonable efforts to obtain [from its contractors] relevant information,' that is, information needed by the [u]nion to police the collective bargaining agreement" (first alteration in original) (quoting *Public Service Co. of Colorado*, 301 NLRB 238, 246 (1991))). The Respondent has failed to demonstrate that Hurwitz' interview notes and other documents that she created during the investigations are unavailable, as both Hurwitz and Shoudy testified that the Respondent could have requested that Hurwitz provide such documents to it but did not do so. See, e.g., *International Protective Services*, 339 NLRB at 705 (finding that an

unit employee. The Wirtz investigation involved a harassment complaint against a unit employee that was filed on behalf of, among others, two unit employees. Because both investigations addressed incidents that involved members of the bargaining unit represented by the Union, I would find that the requested information is presumptively relevant. See *Postal Service*, 332 NLRB 635, 636 (2000) (finding that an investigation report requested by a union "addressed an incident that involved members of the bargaining unit, and was presumptively relevant").

In any event, the Union explained the relevance of the requested information in its June 4 email in response to the Respondent's denial of the Union's May 15 information request.[15] As stated in that email, the Union needs the requested information to ensure that the Respondent conducted each investigation properly and in accordance with the Discrimination and Harassment Policy, adhered to the due process requirement in that policy, reached the proper resolution under that policy, and completed the appropriate follow up required by that policy. Additionally, the requested information will allow the Union to assess whether the Respondent treated the complaints at issue in a disparate manner based on the identities of the complainant and respondent in each matter (i.e., Local president/member of the Respondent's Board of Directors v. unit executive director) and whether further action, such as the filing of a grievance, is warranted. See *Public Service Co. of New Mexico*, 364 NLRB 1017, 1024 (2016) (finding that interview notes and an investigation report requested by a union were "relevant to whether the [employer's] investigation was initiated and undertaken to discriminate against [the investigated employee] in violation of the contract—a matter over which the [u]nion was considering pursuing a grievance").[16] Overall, I would find that the requested information is "essential to the Union's 'obliga[tion] [] to police and administer the contract'" and is therefore relevant. *Menorah Medical Center* , 362 NLRB 1746, 1751 (2015) (quoting *Ohio Power Co.*, 216 NLRB 987, 992 (1975), enfd. 531 F.2d 1381 (6th Cir. 1976)), enfd. in relevant part 867 F.3d 1288 (D.C. Cir. 2017); see also id. at 1748 (finding that requested information, including investigatory materials, "was relevant to the [u]nion's ability to (a) effectively monitor and enforce the terms of the collective-bargaining agreement, (b) enable the [u]nion to compare incidents that cause nurses to become targets of investigations, and (c) determine whether to file a grievance on behalf of unit employees who might have unknowingly been the victims of discriminatory investigations and discipline").

B. Attorney-Client Privilege

Before turning to the merits of the Respondent's attorney-client-privilege claim, I must first determine whether the judge was correct to apply the *Detroit Edison*[17] balancing test to that claim. Pursuant to *Detroit Edison*, when an employer claims that relevant information requested by a union is confidential, "the Board is required to balance a union's need for the information against any 'legitimate and substantial' confidentiality interests established by the employer." *Pennsylvania Power & Light Co.*, 301 NLRB 1104, 1105 (1991). The party asserting a confidentiality interest has the burden of proof. See ibid. Thus, the employer must establish that it has a legitimate and substantial confidentiality interest in the requested information and must also demonstrate that its legitimate and substantial confidentiality interest outweighs the union's need for that information. See *Piedmont Gardens*, 362 NLRB 1135, 1139 (2015), enfd. as clarified sub nom. *American Baptist Homes of the West v. NLRB*, 858 F.3d 612 (D.C. Cir. 2017); *Howard Industries*, 360 NLRB 891, 892 (2014). However, "[e]ven if the Board concludes that the

employer "was not privileged to ignore [a union's information] request because the [requested 401(k)] account information was not in its direct possession but was with the plan administrator"); *Public Service Co. of Colorado*, 301 NLRB at 246 (finding that an employer failed to demonstrate that requested information was unavailable where it did not request that its subcontractor provide it with the information sought by the union); *United Graphics, Inc.*, 281 NLRB 463, 466 (1986) (finding that an employer failed to demonstrate that requested information was unavailable where it did not request that the employment agency from which it obtained temporary workers provide it with the information sought by the union).

[15] Because the judge declined to credit the testimony of the Union's President, Scott, as to why the Union made the May 15 information request, I do not rely on that testimony in assessing the relevance of the requested information.

[16] The parties disagree as to whether the Union could have timely filed a grievance related to the Parkinson investigation at the time that the Union made the May 15 information request—which was more than 3 months after the Respondent provided the Parkinson investigation summary to the Union. However, it is well established that an employer must provide relevant requested information to a union regardless of the potential merits of any grievance to which the requested information relates. See *Endo Painting Service*, 360 NLRB 485, 485 (2014), enfd. mem. 679 F. App'x 614 (9th Cir. 2017). "This principle applies even if the employer has a colorable procedural defense to the grievance." Ibid. (internal quotations omitted); see also *O & G Industries, Inc.*, 269 NLRB 986, 987 (1984) (finding that the employer's contention that the grievance to which the information request pertained was nonarbitrable was "not a valid basis on which a request for information may not be honored"). Thus, it is not necessary to determine whether the Union could have timely filed a grievance regarding the Parkinson investigation at the time of the May 15 information request because such a determination would have no bearing on the analysis here. In any event, regardless of whether the Union could have timely filed such a grievance at that time, the requested information is related to the Parkinson investigation and will aid the Union in ensuring the proper application of the CBA and in determining whether the Respondent treated Wirtz disparately as compared to Parkinson.

[17] *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979).

confidentiality interest outweighs the requester's need, the party asserting confidentiality may not simply refuse to provide the information, but must seek an accommodation that would allow the requester to obtain the information it needs while protecting the party's interest in confidentiality." *Piedmont Gardens*, 362 NLRB at 1137.

The Board has not previously decided whether the *Detroit Edison* balancing test applies to an employer's claim that information requested by a union is protected from disclosure by the attorney-client privilege. In *BP Exploration, Inc.*, 337 NLRB 887 (2002), the Board declined to pass on whether the *Detroit Edison* balancing test "is to be applied to lawyer-client communications." Id. at 887. Instead, the Board assumed arguendo that the *Detroit Edison* balancing test applied to the employer's claim that certain reports requested by the union were protected by the attorney-client privilege and found that the employer satisfied the requirements of that test in that case. See ibid. The Board did observe, however, that "[i]t may be that [communications covered by the attorney-client privilege] hold a special place in the laws and values of our society and are thus not subject to the balancing test of *Detroit Edison*." Ibid. For the reasons discussed below, in agreement with my colleagues, I believe that this observation was correct.

As the Supreme Court has recognized, "[t]he attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The purpose of the attorney-client privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." Ibid.; see also ibid. ("The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client."). Simply put, the attorney-client privilege is meant to ensure that "clients . . . make full disclosure to their attorneys." *Fisher v. United States*, 425 U.S. 391, 403 (1976). The protection of the attorney-client privilege is critically important because "[i]n light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, constantly go to lawyers to find out how to obey the law," particularly where, as with labor and employment laws, "compliance with the law . . . is hardly an instinctive matter." *Upjohn*, 449 U.S. at 392 (internal quotations omitted). If the Board were to hold that the *Detroit Edison* test applies to claims of attorney-client privilege, then an employer may have to disclose communications, even after establishing that those communications are covered by the attorney-client privilege, in circumstances where the Board finds that the requesting union's need for those communications outweighs the employer's interest in maintaining the privilege or that the employer failed to offer the union an accommodation. Moreover, as the Board recognized in *BP Exploration*, the prospect of the compelled disclosure of requested information covered by the attorney-client privilege to remedy an unfair labor practice would raise a substantial concern that the privilege would thereby be waived in all circumstances. See 337 NLRB at 890. Employers with unionized workforces would be discouraged from being completely forthcoming with their attorneys if they could not be certain that their privileged communications would be protected from disclosure if a union requested them, which in turn would make voluntary compliance with labor and employment laws more difficult. "An uncertain privilege . . . is little better than no privilege at all." *Upjohn*, 449 U.S. at 393.

Accordingly, I agree with my colleagues that the *Detroit Edison* balancing test does not apply to a claim that requested information is protected from disclosure by the attorney-client privilege. Thus, if a party establishes that requested information is covered by the attorney-client privilege, the Act does not require it to provide that information to the requester, regardless of whether it has shown that its interest in maintaining the attorney-client privilege outweighs the requester's need for the requested information or that it offered to accommodate the request.

Turning to the merits of the Respondent's claim of attorney-client privilege, the judge found that the investigation reports from the investigations of the complaints against Utica Education Association President Parkinson and unit executive director Wirtz and the interview notes of the Respondent's outside attorney/investigator, Hurwitz, are covered by the privilege.[18] The Union excepts, asserting that the Respondent failed to establish that the requested information is covered by the attorney-client privilege. The General Counsel cross-excepts, asserting the same. The Respondent contends that the Union's exceptions and the General Counsel's cross-exceptions are without merit.

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[18] The judge specifically found that the attorney-client privilege covers "Hurwitz' reports and the witness statements *they contained*" (emphasis added), which is confusing since Hurwitz testified that she did not include her interview notes in the investigation reports, and the judge seemed to recognize them as separate documents in the immediately preceding discussion and elsewhere throughout her decision. In my analysis below, I will assume that the judge found that Hurwitz' interview notes are covered by the attorney-client privilege as standalone documents.

The attorney-client privilege "generally protects from disclosure confidential communications between attorneys and their clients for the purpose of obtaining or providing legal advice." *BP Exploration*, 337 NLRB at 889 (citing *Patrick Cudahy, Inc.*, 288 NLRB 968, 969 (1988)). Hence, "[t]he privilege covers both the communications which provide[] [the legal] advice and the communications that flow[] from client to attorney as a basis for generating the advice." *Patrick Cudahy*, 288 NLRB at 971. The Board will look to the decisions of Federal courts for guidance in applying the attorney-client privilege.[19] See id. at 970 fn. 11.[20]

As an initial matter, I reject any suggestion that the fact that the Respondent hired an attorney to conduct the Parkinson and Wirtz investigations, on its own, establishes that the investigation reports and any other documents created during the investigations are covered by the attorney-client privilege. See generally *Humphreys, Hutcheson & Moseley v. Donovan*, 755 F.2d 1211, 1219 (6th Cir. 1985) ("[T]his court recognized that the attorney-client privilege does not envelope everything arising from the existence of an attorney-client relationship and emphasized that the attorney-client privilege is an exception carved from the rule requiring full disclosure, and as an exception, should not be extended to accomplish more than its purpose." (internal quotations omitted)); *United States ex rel. Fisher v. Network Software Associates*, 217 F.R.D. 240, 244 (D.D.C. 2003) ("The [attorney-client] privilege does not automatically attach to any and all communications between an attorney and a client; it is specific and narrow in scope."); see also *Spectrum Systems International Corp. v. Chemical Bank*, 581 N.E.2d 1055, 1061 (N.Y. 1991) ("Nor is [an investigative] report privileged merely because an investigation was conducted by an attorney . . . . "). However, I also reject the Union's and the General Counsel's argument that the requested information cannot be covered by the attorney-client privilege because Hurwitz was acting as an investigator. Communications arising out of a factual investigation conducted by an attorney in connection with the provision of legal services and advice may be covered by the attorney-client privilege. See, e.g., *Sandra T.E. v. South Berwyn School District 100*, 600 F.3d 612, 620 (7th Cir. 2009) ("[W]hen an attorney conducts a factual investigation in connection with the provision of legal services, any notes or memoranda documenting client interviews or other client communications in the course of the investigation are fully protected by the attorney-client privilege."); *In re Allen*, 106 F.3d 582, 603 (4th Cir. 1997) ("[W]e must reject the legal theory espoused by district court that the attorney-client privilege does not apply here, simply because [the attorney's] assigned duties were investigative in nature. The relevant question is not whether [the attorney] was retained to conduct an investigation, but rather, whether this investigation was related to the rendition of legal services." (bracketing added; internal footnote and quotations omitted)); *United States v. Rowe*, 96 F.3d 1294, 1297 (9th Cir. 1996) ("[F]act-finding which pertains to legal advice counts as professional legal services." (internal quotations omitted)). Thus, to determine whether the investigation reports and Hurwitz' interview notes are covered by the attorney-client privilege, the key question is whether Hurwitz' investigations of the complaints against Parkinson and Wirtz were, to a sufficient extent, for the purpose of providing legal services and advice.[21]

Hurwitz' investigations of the complaints against Parkinson and Wirtz potentially had both legal and nonlegal purposes. An obvious nonlegal purpose of the investigations was to satisfy the requirements of the Discrimination and Harassment Policy in the parties' CBA. See *Buckley, LLP v. Series 1 of Oxford Insurance Co., NC, LLC*, 876 S.E.2d 248, 248 (N.C. 2022) ("In today's business world, investigations of alleged violations of company policy, including policies prohibiting sexual harassment or dis-

[19] While I primarily look to the decisions of Federal courts for guidance, the decisions of State courts applying the attorney-client privilege can be instructive as well.

[20] Federal courts place the burden of demonstrating that the attorney-client privilege applies to communications on the party asserting the privilege. See, e.g., *United States v. Ivers*, 967 F.3d 709, 715 (8th Cir. 2020); *FTC v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 892 F.3d 1264, 1267 (D.C. Cir. 2018); *In re County of Erie*, 473 F.3d 413, 418 (2d. Cir. 2007). The Board has also previously recognized that "[a]s with all evidentiary privileges, the burden of proving the attorney-client privilege rests on the party asserting it." *Cellco Partnership d/b/a Verizon Wireless*, 365 NLRB No. 93, slip op. at 19 (2017), enf. denied on other grounds 892 F.3d 1256 (D.C. Cir. 2018). However, in *Patrick Cudahy*, the Board "start[ed] from the principle that a matter committed to a professional legal adviser *is prima facie so committed for the sake of legal advice* . . . for some aspect of the matter, and is therefore within the privilege unless it clearly appears to be lacking in aspects requiring legal advice." 288 NLRB at 970 (internal quotations omitted; emphasis and some alterations in original). Even assuming that pursuant to *Patrick Cudahy* the burden shifted to the General Counsel, I would find, for the reasons discussed below, that the General Counsel has demonstrated that the attorney-client privilege does not apply to the Parkinson and Wirtz investigation reports in their entirety or Hurwitz' interview notes.

[21] Because I would find, for the reasons discussed below, that the provision of legal services and advice was neither the primary purpose nor even a significant purpose of Hurwitz' investigations, it is not necessary to pass on the Union's claim that Hurwitz' interview notes, as standalone documents, cannot qualify as communications between an attorney and a client since Hurwitz did not provide her interview notes to the Respondent.

For the same reason, I would find it unnecessary to pass on the General Counsel's claim that the Respondent waived its right to raise its attorney-client-privilege claim as to Hurwitz' interview notes by stating in its June 1 response to the Union's May 15 information request that "[w]itness statements contained within the requested materials . . . are not protected by the [attorney-client] privilege."

crimination, are ordinary business activities and, accordingly, the communications made in such investigations are not necessarily made in the course of giving or seeking legal advice for a proper purpose." (internal quotations omitted)). Another potential nonlegal purpose of the investigations was to make more general recommendations for how to address the complaints beyond discipline and/or corrective action, as evidenced by the fact that Hurwitz made such recommendations. See *Koumoulis v. Independent Financial Marketing Group, Inc.*, 29 F. Supp. 3d 142, 147–148 (E.D.N.Y. 2014) (finding that outside counsel's recommendations for how to deal with an employee's personnel issues and complaints "plainly [was] not legal advice, but rather human resources advice"). The investigations also potentially had, at least in part, a legal purpose, as Hurwitz testified that the Parkinson and Wirtz investigation reports include legal advice to the extent that they analyze whether a court would likely find that unlawful discrimination occurred.

Federal courts often refer to communications between attorneys and clients that have both legal and nonlegal purposes as "dual-purpose communications." See, e.g., *In re Grand Jury*, 23 F.4th 1088, 1090–1091 (9th Cir. 2022), cert. granted 143 S.Ct. 80 (2022), cert. dismissed as improvidently granted 143 S.Ct. 543 (2023). As the United States Court of Appeals for the Ninth Circuit has recognized, "most, if not all, of [the Federal circuit courts] that have addressed [when the attorney-client privilege applies to dual-purpose communications] have opted for some version of the 'primary purpose' test." Id. at 1094 & fn. 3 (citing *Alomari v. Ohio Department of Public Safety*, 626 F. App'x 558, 572–573 (6th Cir. 2015), cert. denied 577 U.S. 1144 (2016); *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 760 (D.C. Cir. 2014); *In re County of Erie*, 473 F.3d 413, 420 (2d Cir. 2007); *United States v. Robinson*, 121 F.3d 971, 974 (5th Cir. 1997), cert. denied 522 U.S. 1065 (1998)). The primary-purpose test traditionally requires a determination of whether the primary or predominate purpose of the dual-purpose communication at issue was to give or receive legal advice, as opposed to business or other nonlegal advice—with the "natural implication" being that "a dual-purpose communication can only have a single 'primary' purpose." *In re Grand Jury*, 23 F.4th at 1091. However, the United States Court of Appeals for the District of Columbia Circuit applies a version of the primary-purpose test that does not "presume that a communication can have only one primary purpose." *In re Kellogg Brown & Root*, 756 F.3d at 759. Instead, the D.C. Circuit asks "[w]as obtaining or providing legal advice *a* primary purpose of the communication, meaning one of the significant purposes of the communication?" Id. at 760 (emphasis in original). The D.C. Circuit has reasoned that "trying to find *the* one primary purpose for a communication motivated by two sometimes overlapping purposes (one legal and one business, for example) can be an inherently impossible task" and that "[i]t is often not useful or even feasible to try to determine whether the purpose was A or B when the purpose was A and B." Id. at 759 (emphasis in original); see also *Boehringer Ingelheim Pharmaceuticals*, 892 F.3d at 1267–1268. In *In re Grand Jury*, the Ninth Circuit recognized the merits of the D.C. Circuit's reasoning but saw no need to adopt that reasoning there, noting that no other Federal circuit court had yet adopted the D.C. Circuit's version of the primary-purpose test. 23 F.4th at 1094; see also *Epic Games, Inc. v. Apple Inc.*, 161 F.4th 1162, 1179–1180 (9th Cir. 2025) (declining, once again, to adopt the D.C. Circuit's version of the primary-purpose test because there was still no indication that any of its other sister circuits had embraced that version, and because adopting that version would not have changed its determination that the disputed documents were produced for business, rather than legal, purposes), cert. granted in part on other grounds 25-1311, 2026 WL 1871316 (U.S. June 30, 2026); *In re Polaris, Inc.*, 967 N.W.2d 397, 408 fn. 1 (Minn. 2021) ("Because we apply the attorney-client privilege narrowly, we agree with the overwhelming majority of state courts that have adopted the predominant purpose test and conclude that legal advice must be *the* primary purpose of the communication." (emphasis in original)).

The Board seemingly encountered dual-purpose communications, even if it did not use that term, in *Patrick Cudahy*, 288 NLRB 968 (1988), which involved an employer's petition to revoke subpoenas to the extent that they requested documents covered by the attorney-client privilege. See id. at 968. In that case, a law firm had been hired to assist and provide legal advice to the employer in connection with contract negotiations with a union representing its employees. Ibid. The judge had determined that the attorney-client privilege did not apply to the documents at issue because "the task for which the law firm was employed and the work performed by the law firm was, in his opinion, more in the nature of affording business assistance than rendering legal advice to [the employer]." Id. at 970. The Board "note[d] that the presence of business considerations intertwined with legal advice does not necessarily destroy the privileged nature of communications between attorney and client." Ibid. It then found that the judge "failed to recognize that the process of collective bargaining invites the contribution of legal advice at all of its stages and that a primary purpose for the law firm's employment by [the employer] was to render legal advice throughout contract negotiations with the [u]nion." Id. at 971. The Board ultimately found that the attorney-client privilege covered the advice that the law firm provided to the employer in helping it prepare for and conduct negotiations. See ibid.;[22] cf. *National Football League*, 309 NLRB 78, 97 (1992) (finding that notes taken by an employer's general counsel, who performed legal and nonlegal work, were not covered by the attorney-client privilege where the notes "primarily reflected discussions of purely business matters" and were taken "to understand the business decisions made so that he could implement them as part of his administrative functions").

The Board's decision in *Patrick Cudahy* supports applying the primary-purpose test in Board proceedings. Although *Patrick Cudahy* does not definitively establish which version of that test the Board should apply, it is unnecessary to resolve that question here. Under either the traditional version or the D.C. Circuit's version, the provision of legal services and advice was not a significant enough purpose of Hurwitz' investigations of the complaints against Parkinson and Wirtz to shield the investigation reports (in their entirety) or Hurwitz' interview notes from disclosure pursuant to the attorney-client privilege.

The primary purpose—indeed, the overwhelming purpose—of Hurwitz' investigations of the complaints against Parkinson and Wirtz clearly was to satisfy the requirements of the Discrimination and Harassment Policy in the parties' CBA. That policy specifies in great detail the procedure that the Respondent and the Union have mutually agreed to apply when employees lodge complaints like those made against Parkinson and Wirtz. As discussed above, the policy required that the complaints against Parkinson and Wirtz be investigated and that the investigator determine the merits of each complaint, recommend any appropriate discipline and/or corrective action, and produce a written report for each investigation. Hurwitz testified that she was "acting as investigator" and that her "marching orders [were] here's your policy, here's a complaint, investigate the complaint, comply with the policy." She did not indicate that she was specifically asked to provide legal advice. Thus, Hurwitz' understanding of the scope of her work for the Respondent was to conduct the investigations of the complaints against Parkinson and Wirtz consistent with, and as required by, the collectively bargained Discrimination and Harassment Policy. Additionally, while the Respondent's nonunit Executive Director, Shoudy, testified that concerns about potential litigation played at least a part in the Respondent's decision to have outside counsel conduct the Parkinson and Wirtz investigations, he did not testify that the Respondent hired Hurwitz because it concluded that it needed the advice of an attorney, rather than an internal HR official, to determine how to handle those complaints. To the contrary, Shoudy's testimony establishes that the Respondent's overriding reason for hiring outside counsel to perform the investigations was to avoid the appearance of any conflicts of interest given that both investigations involved presidents of Locals of the Respondent who were also members of the Respondent's Board of Directors (i.e., Parkinson and Port Huron Education Association President Cathy Murray, who filed the complaint against Wirtz). Specifically, Shoudy testified that he and the Respondent's HR Director, Stablein, ultimately "felt like for any appearance of fairness that [the investigations] needed to be assigned to outside counsel, something that we should not handle in our HR department." Accordingly, *the* primary purpose of Hurwitz' investigations of the complaints against Parkinson and Wirtz was not to provide legal services and advice. As a result, the attorney-client privilege does not cover the investigation reports in their entirety or Hurwitz' interview notes under the traditional version of the primary-purpose test.

Moreover, the provision of legal services and advice was not even a significant purpose of the Parkinson and Wirtz investigations. As discussed above, Hurwitz testified that the investigation reports contained legal advice only to the extent that they analyzed whether a court would likely find that unlawful discrimination occurred. There is no evidence that the Respondent specifically requested this legal advice. Hurwitz' "marching orders" were to investigate the complaints in compliance with the Discrimination and Harassment Policy. That she provided limited legal advice in the investigation reports seems to be a function of the fact that, as Shoudy testified, the Discrimination and Harassment Policy addresses employment discrimination covered by State and Federal law. Thus, even the limited legal advice in the investigation reports appears to be a function of Hurwitz attempting to conduct the investigations in strict compliance with the parties' Discrimination and Harassment Policy, as the Respondent instructed her to do.

In sum, the record establishes that the overwhelming purpose of Hurwitz' investigations of the complaints against Parkinson and Wirtz was to satisfy the requirements of the Discrimination and Harassment Policy in the parties' CBA and that the provision of legal services and advice was not even a significant purpose of those investigations. The limited legal advice included in the investigation reports appears to have been merely incidental to the Respondent's instruction to Hurwitz to conduct the

[22] In *Patrick Cudahy*, the Board noted that in cases not involving the policy considerations relevant to collective bargaining, "the analysis of the relationship of legal advice to business decisions and actions may be different and it may not necessarily result in as broad an application of the privilege as [there]." Id. at 971 fn. 12.

investigations in strict compliance with the Discrimination and Harassment Policy. This case simply does not present circumstances where determining the primary purpose of an investigation and the communications that resulted is "an inherently impossible task." *In re Kellogg Brown & Root*, 756 F.3d at 759. The present case is thus easily distinguishable from *Patrick Cudahy* because, as discussed above, there the Board found that "a primary purpose for the law firm's employment by [the employer] was to render legal advice throughout contract negotiations with the [u]nion." 288 NLRB at 971.[23] Because the record evidence does not show that the primary purpose, or at least a significant purpose, of the Respondent's decision to hire outside counsel to conduct the contractually required investigations of the complaints against Parkinson and Wirtz was to obtain legal services and advice, I would find that the attorney-client privilege does not cover the investigation reports in their entirety or Hurwitz' interview notes.

Nevertheless, I recognize that portions of the investigation reports may contain legal advice. "Importantly," as the United States Court of Appeals for the Second Circuit has recognized, "redaction is available for documents which contain legal advice that is incidental to the nonlegal advice that is the predominant purpose of the communication." *In re County of Erie*, 473 F.3d at 421 fn. 8; see also *Ivers*, 967 F.3d at 717 ("[C]ourts routinely decide which specific communications between a client and his attorneys are privileged, and they often segregate privileged and non-privileged communications in particular conversations or documents."); *In re Polaris*, 967 N.W.2d at 408 ("The [attorney-client] privilege does not protect the entirety of the document if legal advice is merely one purpose and not the primary purpose of the communication. We stress, however, that even when the predominant purpose of the communication is business advice, the attorney-client privilege will protect any portions of the document that contain legal advice." (internal citation and footnote omitted)). Thus, I would find that the attorney-client privilege protects from disclosure the portions of Hurwitz' investigation reports that specifically contain legal advice and would allow those portions of the reports to be redacted. See *Boise Cascade Corp*., 279 NLRB 422, 432–433 (1986) (finding that the information that was privileged from disclosure by the attorney-client privilege was "strictly limited to those portions of the feasibility study or report that related directly to advice from counsel to the corporate client"). I find this approach to be most appropriate in light of the purpose of the attorney-client privilege, as this approach "protects only those disclosures—necessary to obtain informed legal advice—which might not have been made absent the privilege," while not preventing the Union from accessing relevant communications that would have been made regardless of whether Hurwitz provided limited legal advice to the Respondent. *Fisher*, 425 U.S. at 403. Accordingly, I would find that the attorney-client privilege covers only the portions of the investigation reports that specifically contain legal advice and that those portions of the reports are not subject to disclosure.

C. Work-Product Doctrine

The judge found that the investigation reports from the investigations of the complaints against Utica Education Association President Parkinson and unit executive director Wirtz and the interview notes of the Respondent's outside attorney/investigator, Hurwitz, are covered by the work-product doctrine because those documents were prepared in anticipation of foreseeable litigation.[24] On exceptions, the General Counsel and the Union assert that the Respondent failed to establish that the requested information is covered by the work-product doctrine. For the reasons discussed below, I agree with these exceptions.

The work-product doctrine was first recognized by the Supreme Court more than 75 years ago in *Hickman v. Taylor*, 329 U.S. 495 (1947), and was later codified in Federal Rule of Civil Procedure 26(b)(3). As a general matter, the work-product doctrine is intended to "protect[] from disclosure written material prepared by a party or his representative in anticipation of litigation or for trial." *Central Telephone Co. of Texas*, 343 NLRB 987, 988 (2004). In *Central Telephone*, the Board described the application of the work-product doctrine as follows:

> The essential question in determining whether a document qualifies as work product is 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. Work product protection will be accorded

[23] *BP Exploration,* cited by the judge, is clearly distinguishable from the present case as well. In that case, the Board found that the requested reports at issue "related to the purpose of obtaining legal advice, as opposed to making a potential business decision" where the employer's attorney requested those reports "to gather the necessary facts to adequately advise his clients as to whether the Respondent's facilities were in compliance with AKOSH's safety standards" and to aid in anticipated litigation with regard to citations that an AKOSH inspector intended to issue within 90 days. *BP Exploration*, 337 NLRB at 889. Thus, in *BP Exploration*, unlike the present case, there was no question that the employer's primary purpose in commissioning the production of the requested reports was to aid its attorney in providing legal advice regarding the impending safety citations.

[24] The judge did not find that any other documents created during the Parkinson and Wirtz investigations are covered by the work-product doctrine, and the Respondent has not excepted to her failure to do so.

> where a document was created because of anticipated litigation, and would not have been created in substantially similar form but for the prospect of that litigation. In order to meet this standard, the party representative must at least have had a subjective belief that litigation was a real possibility, and that belief must have been objectively reasonable. The prospect of litigation need not be actual or imminent; it need only be fairly foreseeable. The privilege extends to documents prepared in anticipation of foreseeable litigation, even if no specific claim is contemplated at the time the documents are prepared. Thus, it is not necessary for a specific claim to have been threatened or filed at the time of the document's creation, as long as the document was prepared in anticipation of foreseeable litigation.

Id. at 988–989 (internal quotations, citations, and footnote omitted; emphasis in original).[25] In *Central Telephone*, the Board also acknowledged that documents created "in the ordinary course of business do not fall within the ambit of work product protection." 343 NLRB at 989. The party asserting work-product protection bears the burden of establishing that it applies. See *Public Service Co. of New Mexico*, 364 NLRB at 1019. For the reasons discussed below, I would reverse the judge and find that the Respondent failed to establish that the Parkinson and Wirtz investigation reports or Hurwitz' interview notes are protected from disclosure by the work-product doctrine.

In finding that litigation was foreseeable as a result of the complaints against Parkinson and Wirtz, the judge relied on the nature of those complaints and Hurwitz' testimony that litigation was foreseeable in both investigations. However, even assuming that the Respondent established through this evidence that it reasonably believed that it was fairly foreseeable that litigation could arise out of the complaints against Parkinson and Wirtz, that showing does not, on its own, establish that the investigation reports and Hurwitz' interview notes were created *because of* anticipated litigation and would not have been created in a substantially similar form but for the prospect of litigation. See *Binks Mfg. Co. v. National Presto Industries*, 709 F.2d 1109, 1119 (7th Cir. 1983) ("'The fact that a defendant anticipates the contingency of litigation resulting from an accident or event does not automatically qualify an "in house" report as work product . . . . A more or less routine investigation of a possibly resistable claim is not sufficient to immunize an investigative report developed in the ordinary course of business.'" (alteration in original) (quoting *Janicker v. George Washington University*, 94 F.R.D. 648, 650 (D.D.C. 1982))).

In *Public Service Co. of New Mexico*, an employer directed its in-house labor counsel to investigate whether an employee who attended a meeting in his capacity as union steward should have been disciplined for his conduct during that meeting. See 364 NLRB at 1022–1023. The employer's in-house labor counsel testified that "she directed the investigation and, at the outset, felt it was part of her duty to limit the potential damage of [a] pending unilateral-change charge and a potential charge that [the investigated employee] threatened to file over his treatment at the meeting." Id. at 1025. The Board found that the employer failed to demonstrate that the investigation report and interview notes were covered by the work-product doctrine because the testimony described above was insufficient to establish that the "investigation was undertaken with an eye toward litigation" or that "the notes and report would not have been created in substantially similar form but for the prospect of that litigation." Ibid. (internal quotations omitted).

Hurwitz' testimony is not even as compelling as the testimony found to be insufficient in *Public Service Co. of New Mexico*. Here, unlike in that case, Hurwitz did not cite any pending or threatened litigation related to the complaints against Parkinson and Wirtz at the time of the investigations.[26] Further, Hurwitz did not testify that any anticipated litigation influenced her view of her duties in conducting the investigations. Hurwitz simply testified that she believed that litigation was a realistic possibility because, based on her experience, "[t]here is always the potential [for litigation] when somebody files an internal complaint" since "they can always go to the EEOC." If the testimony of the employer's in-house labor counsel was insufficient to establish that her investigation report and interview notes were covered by the work-product doctrine in *Public Service Co. of New Mexico*, then Hurwitz' testimony, on which the judge heavily relied, is certainly not sufficient to establish that the Parkinson and Wirtz investigation reports and Hurwitz' interview notes are protected by the work-product doctrine here.

Other evidence on which the judge relied does not support her finding that the work-product doctrine applies to the investigation reports and Hurwitz' interview notes either. The Union's admission that it sought the investiga-

[25] The protection of the work-product doctrine is not absolute under the Federal Rules of Civil Procedure, as a party may obtain otherwise protected documents by showing that "it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." Fed.R.Civ.P. 26(b)(3)(A). Even if that showing is made, "the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation" will still be protected from disclosure, however. Fed.R.Civ.P. 26(b)(3)(B).

[26] With regard to the Parkinson complaint, Hurwitz testified that Zitzelberger, on whose behalf the complaint was filed, had filed grievances in the past.

tion reports to assess whether to file grievances and its June 4 threat to file an unfair labor practice charge both occurred after the Parkinson and Wirtz investigations concluded and thus could not have influenced those investigations. Moreover, neither of those potential sources of litigation is directly related to the complaints against Parkinson and Wirtz, as the Union sought the requested information to determine whether to file grievances regarding how the investigations were conducted and threatened to file an unfair labor practice charge against the Respondent for failing to provide that information. Additionally, the fact that the investigations were conducted by an attorney does not, on its own, establish that the investigation reports and Hurwitz' interview notes are covered by the work-product doctrine. See *Public Service Co. of New Mexico*, 364 NLRB at 1025 (finding that an investigation report and interview notes created by an attorney were not covered by the work-product doctrine).

Other evidence in the record similarly fails to establish that the work-product doctrine applies to the Parkinson and Wirtz investigation reports and Hurwitz' interview notes. As discussed above, regardless of any anticipated litigation, the Discrimination and Harassment Policy required that the complaints against Parkinson and Wirtz be investigated and that the investigator produce a written report for each investigation, which clearly cuts against finding that the work-product doctrine applies to the investigation reports and Hurwitz' interview notes. See *Detroit Newspaper Agency*, 317 NLRB 1071, 1073 (1995) (finding that a requested audit "was prepared in the ordinary course of the [employer's] business, rather than in anticipation of litigation," where "the audit was part of the annual audit of safety matters undertaken in all [employer] facilities"); see also *Miller v. Federal Express Corp.*, 186 F.R.D. 376, 387–388 (W.D. Tenn. 1999) (finding that the work-product doctrine did not apply to documents concerning an employer's investigation into an employee's filing of an internal discrimination complaint if they were created prior to the employee filing an external EEOC complaint because the employer's "standard procedures for investigating and handling its internal [discrimination] claims are pursued in every instance as much for adjusting employee relations in the ordinary course of business as for preparing for anticipated litigation").

These facts are not necessarily dispositive if the Respondent can show that the "scope and character" of the investigations were "because of the possibility of litigation." See *Central Telephone*, 343 NLRB at 989 fn. 4. In *Central Telephone*, the Board found that the work-product doctrine protected from disclosure notes taken by an HR specialist during her investigation of four union officers/employees for alleged falsification of time records, even though the Board "[did] not contend that, in the absence of possible litigation, there would have been no investigation." Id. at 989 & fn. 4. The Board found that the investigation notes would not have been created in a substantially similar form but for the prospect of litigation and that the investigation was not a routine one conducted in the ordinary course of business because the HR specialist had conducted such an extensive investigation only once or twice before; was directed to perform the investigation by an in-house counsel, rather than her supervisor; and did not routinely discuss possible terminations with this in-house counsel, who supervised other attorneys. See id. at 989.

Here, unlike in *Central Telephone*, the Respondent has not shown that the scope and the character of the Parkinson and Wirtz investigations were because of anticipated litigation and that the investigation reports and Hurwitz' interview notes would not have been created in substantially similar form but for the prospect of litigation. The Respondent is correct that its nonunit Executive Director, Shoudy, testified that concerns about potential litigation were at least a factor in the Respondent's decision to have outside counsel conduct the Parkinson and Wirtz investigations. However, as discussed above, the Respondent's overriding reason for hiring outside counsel to perform those investigations was to avoid the appearance of any conflicts of interest given that both investigations involved presidents of Locals of the Respondent who were also members of the Respondent's Board of Directors (i.e., Parkinson and Port Huron Education Association President Cathy Murray, who filed the complaint against Wirtz). Thus, the Respondent would have hired Hurwitz to conduct the Parkinson and Wirtz investigations regardless of any concerns about potential litigation. Further, Hurwitz did not testify that the prospect of litigation influenced the manner in which she conducted those investigations or drafted the investigation reports. Instead, she testified that the Discrimination and Harassment Policy "gave specific parameters" for "how to proceed with the investigation" and that her practice in an investigation is to "go back to the policy a lot" to "check and double check that I went through the process." The Respondent simply has not established that the investigations of the complaints against Parkinson and Wirtz were anything other than routine investigations performed in the ordinary course of business in line with the requirements of the Discrimination and Harassment Policy to which the parties have mutually assented. Thus, the present case is clearly distinguishable from *Central Telephone*.

In sum, I would find that the Respondent has failed to establish that the investigation reports and Hurwitz' interview notes were created *because of* anticipated litigation and would not have been created in a substantially similar form but for the prospect of litigation. Accordingly, I would reverse the judge's finding that the work-product doctrine applies to those documents.[27]

D. Assurances of Confidentiality

Applying *Northern Indiana Public Service Co.*, 347 NLRB 210 (2006) (*NIPSCO*), the judge found that the Respondent established a legitimate and substantial confidentiality interest in the requested information because, given the nature of the complaints against Parkinson and Wirtz, disclosure of those documents "could be expected to lead to intimidation or harassment of the witnesses."[28] She further found that the Respondent's confidentiality interest in the requested information outweighs the Union's need for that information because the Union is aware of Hurwitz' findings in both investigations and could have tried to contact the witnesses in those investigations on its own. The judge separately found, as part of her attorney-client-privilege analysis, that the Respondent offered the Union an accommodation by providing it with the Parkinson and Wirtz investigation summaries. The Union excepts, asserting that the Respondent failed to establish a legitimate and substantial confidentiality interest in the requested information; that even if the Respondent made that showing, the Union's need for the requested information outweighs the Respondent's interest; and that the Respondent did not offer an accommodation. The General Counsel cross-excepts, asserting that the Union's need for the requested information outweighs any confidentiality interest established by the Respondent and that the Respondent did not offer an accommodation. I agree with these exceptions.

As discussed above, under the *Detroit Edison* balancing test, the Respondent has the burden to establish a legitimate and substantial confidentiality interest in the requested information based on the assurances of confidentiality that it provided to interviewees and that this confidentiality interest outweighs the Union's need for that information. See *Piedmont Gardens*, 362 NLRB 1135, 1139 (2015). Even if the Respondent meets that burden, it must also show that it sought an accommodation that would allow the Union to obtain the information it needs while also protecting the Respondent's confidentiality interest. See id. at 1137.

As a general matter, the Board has held that "[e]stablishing a legitimate and substantial confidentiality interest requires more than a generalized desire to protect the integrity of employment investigations." Ibid. While "a promise of confidentiality [to interviewees] is relevant to the issue of whether [requested] information will be considered confidential," *NIPSCO*, 347 NLRB at 212, such a promise, whether made through express oral statements to interviewees or an employer policy, is not, on its own, sufficient to establish a legitimate and substantial confidentiality interest in the requested information, see *Piedmont Gardens*, 362 NLRB at 1140 (finding that "an employer's policy of keeping names [of witnesses] confidential does not by itself establish a legitimate and substantial confidentiality interest").

In *NIPSCO*, the Board found that an employer established a legitimate and substantial confidentiality interest in interview notes that were created under an express promise of confidentiality during an investigation into a unit employee's complaint of alleged threats of workplace violence by his supervisor. See 347 NLRB at 211–212. The Board determined that treating the interview notes as confidential in the specific circumstances of that case served the following two purposes: "(1) encouraging witnesses to participate in investigations of workplace misconduct and (2) protecting these witnesses from retaliation because of their participation." Id. at 212. In support of the first purpose, the Board cited the testimony of two out of the three interviewees in the investigation that "they would have provided less information if they had not been assured of confidentiality." Ibid. In support of the second purpose, the Board noted that an individual's participation in an investigation that "pertained to allegations of serious misconduct by a supervisor toward employees, including an alleged threat of violence and bodily injury or even death," could have "subject[ed] the individual to intimidation and harassment by coworkers and/or supervisors" and would have caused the individual to be reasonably concerned about retaliation. Ibid.

Initially, I note that the rationale of *NIPSCO* would, at most, apply to Hurwitz' interview notes and any portions of the Parkinson and Wirtz investigation reports that attribute information to specific interviewees.[29] The Respondent has not shown that it would need to prevent the disclosure of any other portions of the investigation re-

[27] Because I would find that the Respondent has failed to establish that the work-product doctrine applies here, I would find it unnecessary to pass on whether the *Detroit Edison* balancing test applies to employer claims of work-product protection.

[28] I note that this was the only point in the judge's decision where she suggested that her analysis applied to any requested documents other than the investigation reports from the investigations of the complaints against Utica Education Association President Parkinson and unit executive director Wirtz and the interview notes of the Respondent's outside attorney/investigator, Hurwitz. The Respondent has not excepted to the judge's failure to find that the attorney-client privilege and the work-product doctrine apply to any requested documents besides the investigation reports and the interview notes.

[29] Hurwitz testified that an investigation report would not contain "any transcribed statement of anyone," but may contain "[s]ome witness summaries, which are summaries of the notes I [had] taken previously."

ports or any other documents created as part of the investigations of the complaints against Parkinson and Wirtz in order to maintain the confidentiality of the information that specific interviewees provided to Hurwitz during those investigations.

As discussed above, the assurances of confidentiality provided to the interviewees through the confidentiality provision in the Discrimination and Harassment Policy and Hurwitz' statements during the interviews are not, on their own, sufficient for the Respondent to establish a legitimate and substantial confidentiality interest in Hurwitz' interview notes and any portions of the Parkinson and Wirtz investigation reports that attribute information to specific interviewees.[30] Thus, the specific circumstances of this case must be examined to determine if the Respondent made that required showing.

Unlike the employer in *NIPSCO*, the Respondent has failed to make a particularized showing that its interest in maintaining confidentiality is based on more than a generalized desire to keep its employment investigations confidential. None of the interviewees from either investigation testified that they would not have participated in the investigation or would have provided less information in the absence of the assurances of confidentiality.[31] Moreover, the Discrimination and Harassment Policy requires that all employees cooperate in investigations conducted pursuant to that policy. See *Piedmont Gardens*, 362 NLRB at 1139 fn. 19 (explaining that "employers continue to have more than adequate tools to conduct effective workplace investigations, notwithstanding the need to comply with federal labor law" and specifically citing the "ability to *require* an employee to participate in a workplace investigation") (emphasis in original). Thus, the Respondent has failed to show that disclosure of Hurwitz' interview notes would meaningfully discourage employees from participating in its workplace investigations.

As to the risk of retaliation for participating in the Parkinson and Wirtz investigations, there is no evidence that the Union has ever previously retaliated against, harassed, or threatened to retaliate against or harass individuals who participated in an investigation, or that the Union sought Hurwitz' interview notes for any of those purposes. See *Alcoa Corp.*, 370 NLRB No. 107, slip op. at 1 fn. 3 (2021) (finding that an employer failed to establish a legitimate and substantial confidentiality interest in witness names that outweighed a union's need for that requested information where the employer "did not have any basis for believing that the [u]nion was retaliating against employees cooperating with the investigation when it denied the [u]nion's request for the information"); *American Medical Response West*, 366 NLRB No. 146, slip op. at 3 (2018) (finding that an employer failed to establish that its interest in maintaining the confidentiality of the names of the witnesses in an investigation of sexual harassment outweighed a union's need for that requested information where there was no evidence that "any union official had a history of threatening, intimidating, or retaliating against employees for serving as a witness in a disciplinary investigation or that the [u]nion sought the witnesses' names [there] to do so"); *Piedmont Gardens*, 362 NLRB at 1140 (rejecting an employer's concern that "revealing the names of witnesses could lead to the harassment of those witnesses" where the employer "fail[ed] to establish any factual basis" for this purported concern); *Transport of New Jersey*, 233 NLRB 694, 695 (1977) (finding that an employer's concerns that disclosing the names of the passenger witnesses in the investigation of a bus accident "-would expose them to unnecessary harassment and 'improper contact'" were "at most speculative" and therefore unpersuasive).[32] Further, unlike in *NIPSCO*, the complaints against Parkinson and Wirtz, while serious, did not

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Thus, it is not clear from the record whether the investigation reports attribute information to specific interviewees.

[30] For brevity, I will refer to Hurwitz' interview notes throughout the rest of this subsection when referring to information potentially covered by the *NIPSCO* rationale.

[31] I recognize that Executive Director Shoudy testified that the Respondent's Mideastern Zone Director, Kevin Marvin, told him after the Parkinson investigation was concluded that he would not have felt comfortable participating if he had known that what he was discussing would become public or be shared with the Union, and that Hurwitz testified that an unidentified witness in the Parkinson investigation expressed strong concerns about participating in the investigation, which required Hurwitz to reiterate the confidential nature of the investigation. I do not find this hearsay testimony as compelling as the direct testimony in *NIPSCO* that two interviewees would have provided less information in the absence of assurances of confidentiality. Without having Marvin and the unidentified interviewee testify, the parties were unable to explore whether their purported apprehensions were reasonable. Additionally, there is no evidence that any interviewees from the Wirtz investigation expressed hesitance to participate in that investigation in the absence of the assurances of confidentiality.

[32] The Respondent asserts that its interest in maintaining the confidentiality of Hurwitz' interview notes is supported by the fact that concerns about retaliation were raised during both investigations. During the Parkinson investigation, unit executive director Zitzelberger did raise a concern about retaliation, but that concern was directed at Parkinson, not anyone associated with the Union, which had filed the complaint against Parkinson on Zitzelberger's behalf. The other evidence on which the Respondent relies is Hurwitz' testimony that an unidentified interviewee "raised some concerns about retaliation once the [Wirtz] investigation had begun." Hurwitz did not provide any further explanation. This limited testimony is insufficient to establish that there was a likelihood of retaliation if the Respondent had provided Hurwitz' notes to the Union. See *American Medical Response West*, 366 NLRB No. 146, slip op. at 3 ("[A]lthough according to [the investigator] one witness apparently feared that [the investigated employee] would retaliate against him on the job, the [employer] presented no evidence that such retaliatory con-

involve "an alleged threat of violence and bodily injury or even death." 347 NLRB at 212.

For all of these reasons, I would find that the Respondent has failed to establish a legitimate and substantial confidentiality interest in Hurwitz' interview notes based on the assurances of confidentiality that were provided to interviewees. As a result, the Respondent has necessarily failed to show that its interest in maintaining the confidentiality of Hurwitz' interview notes outweighs the Union's need for that information. See *Public Service Co. of New Mexico*, 364 NLRB at 1019 ("When a party is unable to establish confidentiality, no balancing of interests is required . . . . "); *Detroit Newspaper Agency*, 317 NLRB at 1074 (finding that "[t]o invoke a balancing test . . . an employer must first prove its confidentiality claim" and that where an employer "has failed to establish its confidentiality claim, a balancing test is neither necessary nor proper").[33]

Even assuming that the Respondent has established a legitimate and substantial confidentiality interest in Hurwitz' interview notes based on the assurances of confidentiality that it provided to the interviewees, I would find that the Respondent has not shown that its confidentiality interest outweighs the Union's need for that information. For the reasons discussed above, any interest that the Respondent has in maintaining the confidentiality of Hurwitz' interview notes is weaker than the interest of the employer in *NIPSCO*. Moreover, unlike in *NIPSCO*, Hurwitz' interview notes "go to the heart" of the Union's purpose for requesting the information. 347 NLRB at 213. In *NIPSCO*, the Board gave less weight to the union's need for the requested interview notes because it found that the union already "ha[d] at its disposal, if only by virtue of [the complaining employee's] account, the substance of what it [needed to] show to process" the grievance. Ibid. As discussed in Section II.A above, the Union explained in its June 4 email to the Respondent that it needs Hurwitz' interview notes and the other requested information to assess whether the investigations of the complaints against Parkinson and Wirtz complied with the requirements of the Discrimination and Harassment Policy in the parties' CBA and whether Wirtz, a unit executive director, was treated disparately as compared to Parkinson, the president of a Local of the Respondent and a member of the Respondent's Board of Directors, because of her status as a unit employee.[34] Thus, the Union is seeking to understand the manner in which the Respondent conducted the investigations in order to police the parties' CBA and assess whether further action, such as filing a grievance, is warranted. Hurwitz' interview notes will help the Union attain that understanding, and the Union is not otherwise already in possession of information that would provide that understanding.[35]

The fact that the Union has not filed a grievance regarding how the Parkinson and Wirtz investigations were conducted or shown that it is aware of a basis for such a grievance does not establish that it has no need for the requested information. Indeed, the Board has long held that "there

duct was a likelihood or real risk." (internal quotations omitted; alterations added)).

[33] The Respondent argues that because the Union and the General Counsel have not specifically excepted to the judge's finding that the Respondent established a legitimate and substantial confidentiality interest based on the assurances of confidentiality but instead have excepted only to the judge's finding that the Respondent's confidentiality interest outweighed the Union's need for the requested information, the question of whether the Respondent established a legitimate and substantial confidentiality interest is not before the Board. However, in order to conduct the balancing analysis required by *Detroit Edison*, the Board must assess the Respondent's asserted confidentiality interest, and, as discussed above, if that confidentiality interest is not legitimate and substantial, it necessarily cannot outweigh the Union's need for the requested information. Accordingly, a finding that the Respondent failed to establish a legitimate and substantial confidentiality interest in Hurwitz' interview notes is appropriate given the issues raised in the exceptions. In any event, as discussed below, even assuming that the Respondent has established a legitimate and substantial confidentiality interest based on the assurances of confidentiality provided to interviewees, it has not shown that its confidentiality interest outweighs the Union's need for the requested information.

[34] I disagree with the judge's finding—with which the Respondent agrees—that the Union's asserted bases for needing the requested information "are merely speculative." Even a cursory review of the investigation summaries raises questions regarding whether the investigations were conducted in accordance with the detailed Discrimination and Harassment Policy to which the Respondent and the Union have both assented. The Parkinson investigation summary failed to explain specifically why Parkinson did not violate the Discrimination and Harassment Policy or to address Zitzelberger's retaliation claim, as required by the policy. The Wirtz investigation summary did not indicate who was interviewed as part of the investigation. Further, it stated that certain staff members (which, based on the record before the Board, amounted only to Wirtz) would be counseled regarding future expectations, despite the Discrimination and Harassment Policy's instructions that the Respondent not take action specifically or solely directed at the respondent to a complaint if no violation has occurred, and that documentation regarding the investigation will not be placed in an employee's personnel file unless disciplinary or corrective action results from the investigation. Additionally, the Union's suspicion of discriminatory treatment of unit members, which, as discussed above, is prohibited by the parties' CBA, is not merely speculative here. Hurwitz found that both complaints raised concerns about "strained and problematic working relationship[s]" that the Respondent should address, but the Respondent placed a letter outlining new professional expectations only in Wirtz' personnel file.

[35] The judge's reliance on the fact that the Union could have attempted to contact witnesses on its own is misplaced, as it is well established that "a union's ability to obtain requested information elsewhere does not excuse an employer's obligation to provide the requested information." *King Soopers, Inc.*, 344 NLRB 842, 845 (2005), enfd. 476 F.3d 843 (10th Cir. 2007).

is no requirement that there be a pending grievance before information may be considered relevant to a union's statutory duties" because "[t]he union is entitled to information to assess whether it should exercise its representative function and whether the information will warrant further action, such as filing a grievance or bargaining about a disputed matter." *Public Service Co. of New Mexico*, 360 NLRB at 574 (citing *Ohio Power Co.*, 216 NLRB 987, 991 (1975), enfd. mem. 531 F.2d 1381 (6th Cir. 1976)). Moreover, "the union need not demonstrate that the contract has been violated in order to obtain the desired information." *Island Creek Coal Co.*, 292 NLRB 480, 487 (1989), enfd. mem. per curiam 899 F.2d 1222 (6th Cir. 1990); see also ibid. ("Indeed, if the [u]nion had sufficient information to prove contractual violations, it would not need to request information from [r]espondent[s]." (internal quotations omitted; final alteration in original)). The Union made it clear to the Respondent that it requested the information to police the contract and determine if it should take any action with regard to how those investigations were conducted, such as filing a grievance. Therefore, consistent with longstanding Board precedent, the Union needs, and is entitled to receive, the requested information to perform its duties as the unit employees' exclusive collective-bargaining representative. See id. at 488 (finding that the judge "erroneously reasoned that, because the [u]nion filed no suit or grievance, the [r]espondents had not violated the contract, even though the [u]nion made clear that it was seeking the information *in order to determine* whether a contract violation had occurred" (alterations added; emphasis in original)).

In sum, the Respondent has failed to establish that it has a legitimate and substantial confidentiality interest in the requested information that outweighs the Union's need for that information.[36]

E. Conclusion

For the reasons discussed above, I would find that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to furnish the Union with the information that it requested on May 15, 2020, other than the portions of the Parkinson and Wirtz investigation reports that contain specific legal advice. Therefore, I would order the Respondent to provide that information to the Union—i.e., the investigation reports produced during the investigations of the complaints against Parkinson and Wirtz, other than the portions of those reports that contain specific legal advice, and any and all other supporting documents developed during, and as a result of, those investigations, including the interview notes produced by outside attorney/investigator Hurwitz.

Accordingly, I respectfully dissent.

Dated, Washington, D.C. September 23, 2026

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David M. Prouty, Member

NATIONAL LABOR RELATIONS BOARD

Matthew Ritzman, Esq. and *Patricia Fedewa, Esq.,* for the General Counsel.
Helen Mills, Esq. and *Chad Karsten, Esq.,* for the Respondent.

DECISION

STATEMENT OF THE CASE

MELISSA M. OLIVERO, Administrative Law Judge. This case was tried using Zoom Government videoconferencing on September 13, 2021. Michigan Executive Directors Association (MEDA or Union) filed the charge on June 8, 2020. (GC Exh.

[36] Although it is not necessary to determine whether the Respondent sought an accommodation of its confidentiality concerns and the Union's need for the requested information, I note that the judge erred by finding that the Respondent offered an accommodation by providing investigation summaries to the Union. The Respondent provided the Parkinson and Wirtz investigation summaries to the Union immediately following the conclusion of each investigation—i.e., 3 months and 1 month, respectively, before the Union made its May 15 information request—and therefore did not provide them to the Union in response to its information request. Furthermore, the Respondent's June 1 response to the Union's May 15 information request asserted that the Respondent had fulfilled its obligation under the parties' CBA to provide interview summaries but did not indicate that it viewed those summaries as an accommodation to the Union's May 15 information request or that it was otherwise open to providing an accommodation. To the contrary, the Respondent's response to the Union's information request was a flat refusal to provide the requested information without even the slightest suggestion that the Respondent was open to accommodating the Union.

BP Exploration does not support the judge's finding that the Respondent sufficiently accommodated the Union's May 15 information request by having previously provided the Parkinson and Wirtz investigation summaries to the Union. In *BP Exploration*, the employer both provided an oral summary of the requested reports and offered to provide a written summary *after* the union made the information request at issue. See 337 NLRB at 888, 889–890. Thus, *BP Exploration* does not support the proposition that an employer's flat refusal to provide relevant but assertedly confidential information requested by a union can satisfy the employer's obligation to seek to accommodate the union's request if the employer provided related information to the union at some point in the past. This unsupported proposition is irrational and absurd. An employer cannot flatly refuse to provide relevant but assertedly confidential information requested by a union and then turn around and argue that it had already satisfied its obligation to accommodate the union's request prior to the union even making the request. See generally *American Medical Response West*, 366 NLRB No. 146, slip op. at 3 fn. 10 ("When an employer demonstrates a substantial confidentiality interest, it cannot simply ignore the [u]nion's request for information. It must still seek an accommodation of its concerns and the [u]nion's need for the requested information.").

1(a); Jt. Exh. 1.) The General Counsel issued a complaint and notice of hearing on April 6, 2021, alleging that Respondent failed and refused to provide certain requested information to the Union. (GC Exh. 1(c).) Michigan Education Association (Respondent) timely filed its answer on April 20, 2021, and a first amended answer to complaint on September 3, 2021, denying the relevant allegations. (GC Exh. 1(e) and (i).) After considering all of the evidence and testimony presented, as well as the briefs of the parties, I find that the General Counsel has not established that Respondent violated the National Labor Relations Act (the Act) as alleged in the complaint.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, including my own observation of the demeanor of the witnesses,[1] and after carefully considering the briefs filed by the parties, I make the following

Findings of Fact

I. Jurisdiction

Michigan Education Association (Respondent), a nonprofit corporation and labor organization, is an affiliate of the National Education Association with a facility in East Lansing, Michigan, where it collected and received dues and initiation fees in excess of $1,000,000 and remitted from its East Lansing facility to the Washington, D.C., facility of the National Education Association dues and initiation fees in excess of $50,000. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (Jt. Exh. 1; GC Exh. 1(e) and (i).)

II. Alleged Unfair Labor Practices

A. Respondent's Business and Labor Relations

Respondent is a labor organization. (Jt. Exh. 1.) Respondent represents approximately 120,000 active and retired members throughout the State of Michigan. (Tr. 87.) In K-12 education, Respondent represents teachers, school psychologists, social workers, guidance counselors, and education support professionals. (Tr. 87–88.) In higher education, Respondent represents faculty and education support professionals. (Tr. 88.)

Mike Shoudy serves as Respondent's executive director. (GC Exh. 1(i); Tr. 86–87.) As such, he holds Respondent's chief staff position and is responsible for supervising staff and implementing the policies and initiatives of Respondent's board and representative assembly. (Tr. 88.) Tracey Stablein is Respondent's human resources director. (GC Exh. 1(i).) Respondent admits, and I find, that Shoudy and Stablein are supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act. (GC Exh. 1(i); Jt. Exh. 1.) Marcia Kamienecki serves as Respondent's associate executive director and Helen Mills is an attorney retained by Respondent. (Jt. Exh. 1.) Respondent admits, and I find, that Kamienecki and Mills are agents of Respondent within the meaning of Section 2(13) of the Act. (Jt. Exh. 1.)

Respondent further admits, and I find, that Michigan Executive Directors Association (MEDA or Union) is a labor organization within the meaning of Section 2(5) of the Act and has represented the following appropriate unit of its employees since 1984:

> All local option Executive Directors and Field Organizers employed by Respondent and its local option coordinating councils, but excluding station option UniServe Directors, interns, office clerical employees, guards and supervisors as defined in the Act and all other employees.

(GC Exh. 1(e) and (i).)

The Union is the bargaining agent for Respondent's executive directors, who are jointly employed by Respondent and local coordinating councils. (Tr. 23–24.) There are about 60 coordinating councils, which are a conglomeration of locals, throughout Michigan. (Tr. 89.) Respondent is a parent organization. (Tr 89–90.) Executive directors in MEDA hold different positions from the one held by Shoudy. (Tr. 89.) Respondent has no role in selecting who serves as the executive director of a coordinating council. (Tr. 89.) Respondent and the Union are joint employers. (Tr. 91.)

MEDA represents 20 executive directors and one executive director/organizer. (Tr. 23.) Troy Scott is a member of the Union and serves as its president. (Tr. 23.) As MEDA's president, he advocates for members, attends grievance hearings, arbitration hearings, and mediation sessions, files unfair labor practice charges when necessary, and negotiates contracts. (Tr. 23.) Scott is also an employee of Respondent. (Tr. 22.) As an executive director, Scott negotiates contracts, administers contracts, engages in mediation, and presents arbitration cases on behalf of 15 units in 8 school districts. (Tr. 23.)

Respondent and the Union have been parties to a series of collective-bargaining agreements over the years, the most recent of which was effective January 1, 2019, through December 31, 2021. (Jt. Exh. 2.) Section 19 of the collective-bargaining agreement contains the parties' grievance-arbitration procedure. (Jt. Exh. 2, pp. 39–41.) Time limits set forth in the agreement are measured in calendar days. (Jt. Exh. 2, p. 39.) Whenever a unit member or the Union has a grievance, the aggrieved must present the grievance in writing within 45 days following the date of the alleged occurrence or within 45 days following the date that the aggrieved became aware of the alleged occurrence. (Jt. Exh. 2, p. 40.) Within 14 days of receipt of the grievance, the party receiving the grievance must hold a meeting with the aggrieved member. (Jt. Exh 1, pp. 40.) Within 7 days of the Step One meeting, the party receiving the grievance must submit a written answer to the aggrieved unit member or MEDA. (Jt. Exh. 2, p. 40.) If the grievance is not settled at Step One, the grievant may present the grievance in writing to the appropriate Human Resources Director or designee within 10 days of the decision at Step One. (Jt. Exh. 2, p. 41.) A meeting is held within 14 days of the presentation of the grievance at Step Two. (Id.)

[1] Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case. My findings of fact encompass the credible testimony and evidence presented at trial, as well as logical inferences drawn therefrom.

Within 14 days of the Step Two meeting, the human resources director or designee submits a written answer to MEDA. (Id.) If the grievance is not settled at Step Two, MEDA may file for binding arbitration. (Id.)

Appendix K to the collective-bargaining agreement contains the employee discrimination and harassment policy. (Jt. Exh. 2, pp. 58–68.) At the outset of Appendix K, the parties agree to maintaining a workplace that is free of discrimination and harassment. (Jt. Exh. 2, p. 58.) Furthermore, the parties agree that all complaints of discrimination and harassment will be taken seriously and investigated thoroughly. (Jt. Exh. 2, p. 58.)

Employees are encouraged to report instances of discrimination or harassment before they become pervasive. (Jt. Exh. 2, p. 59.) Employees may seek to resolve the matter without a formal investigation, but either the accused or employer may elect to proceed with a formal investigation. (Jt. Exh. 2, p. 60.)

The policy states

> **Confidentiality.** Discrimination and harassment complaints will be handled in a confidential manner to the extent possible and consistent with principles of due process. Information obtained during the investigation will only be shared on a need-to-know basis and as provided for by the policy and applicable Federal and State law. The complainant, respondent and witnesses will be asked to maintain confidentiality. Failure to do so may affect the rights of the respondent and affect the accuracy of witness testimony.[2]

(Emphasis in original.) (Jt. Exh. 2, p. 60.)

The policy goes on to state that allegations of discrimination and harassment shall be fully investigated. (Jt. Exh. 2, p. 60.) The procedure for such investigations is also set forth in Appendix K. (Jt. Exh. 2, pp. 60–61.) Under the procedure, the investigator must interview the complainant, the respondent, unless the respondent admits to the complained of conduct, and any pertinent witnesses to the incident or incidents. (Jt. Exh. 2, p. 61.) The investigator must also gather all relevant facts and supporting documents, determine the merit of the complaint, and recommend appropriate disciplinary and/or corrective action. (Id.) The investigation must be conducted expeditiously and concluded as soon as reasonably possible. (Id.)

Following the investigation, the investigator prepares a written report, which is provided to Respondent's human resources department and, "other pertinent individuals as necessary to ensure proper resolution and follow-up regarding [the] matter." (Id.) The investigator or employer also provides a written summary of the complaint, response, investigation findings, and whether any corrective action was taken to the complainant and respondent. (Id.) If witnesses identified by either the complainant or respondent are not interviewed, the report and summary must explain the reasons for not interviewing them. (Id.)

If the result of the investigation is a finding of no violation, the employer shall provide the results of the investigation and the reasons for the finding of no violation to the complainant and the respondent. (Jt. Exh. 2, p. 62.) The employer may also take action not specifically directed at the respondent, such as republishing of a policy or in-house training. (Id.) At that point, the investigation will be closed. (Id.)

A. Employee Complaints of Harassment and Investigation of Complaints

On November 4, 2019, MEDA filed a harassment complaint on behalf of unit employee Amy Zitzelberger. (GC Exh. 3.) The complaint alleged an ongoing harassment against Zitzelberger by Liza Parkinson, a coordinating council chair and president of the Utica Education Association. (Id.) The alleged harassment included: failure to timely provide Zitzelberger with a performance evaluation; failure to negotiate a local contract with Zitzelberger; failure to maintain local conditions of employment, including advocating on behalf of members, delegating duties to field assistants, and negotiating successor collective-bargaining agreements; removal of certain duties from Zitzelberger and the addition of other duties; failure to regularly meet with and provide guidance to Zitzelberger regarding job performance expectations; berating Zitzelberger; advising Zitzelberger not to engage in certain duties and later questioning why those duties were not complete; requiring Zitzelberger to perform menial and demeaning tasks; demanding to know details about Zitzelberger's personal appointments; berating Zitzelberger and holding her responsible for Parkinson's failure to sign a contract with a climate survey company; and sending false and misleading emails to Zone Director Kevin Marvin. (GC Exh. 3.)

When he received the complaint brought by Zitzelberger, Shoudy, in consultation with Stablein, decided to retain outside counsel to investigate the complaint. (Tr. 95–96.) This complaint was considered serious, as the respondent, Parkinson, was a local union president and a member of Respondent's board. (Tr. 96.) Shoudy was not obligated to retain outside counsel to conduct this investigation. (Tr. 140.)

On February 11, 2020, then-MEA board member Cathy Murray filed a harassment complaint against unit member Mara Wirtz. (GC Exh. 5.) MEDA represented Wirtz during the investigation of the complaint. (Tr. 46–47.) The complaint alleged that Wirtz continuously yelled, attacked, belittled, and terrorized individuals at Local 1 and listed 3 alleged recipients of this behavior. (GC Exh. 5.) In addition, Murray listed 4 other witnesses to this alleged behavior. (Id.) Scott testified that he received the complaint against Wirtz. (Tr. 46–47.)

Shoudy also decided to retain outside counsel in the Wirtz matter, as it involved a coordinating council president and past MEA board member. (Tr. 97–98.) In addition, Shoudy found the work environment in the Wirtz matter very concerning and fractured. (Tr. 98.) Stablein was not consulted in the Wirtz matter, as she had a personal relationship with Wirtz. (Tr. 98.) Shoudy obtained outside counsel knowing that the potential for litigation existed under both state and federal law.[3] (Tr. 103.)

Attorney Sheralee Hurwitz of the law firm Fahey Schultz Burzych Rhodes was retained to investigate the Zitzelberger and Wirtz matters. (Tr. 144, 105–151, 152.) Hurwitz has practiced

[2] The lawfulness of this policy is not before me and was not raised in the complaint.

[3] Shoudy is an attorney, having previously served as Respondent's general counsel. (Tr. 87.) He spent over a decade practicing as a labor attorney. (Tr. 87.)

law for over 20 years and is licensed to practice in Michigan and New York. (Tr. 145.) She has conducted six to eight workplace investigations for Respondent. (Tr. 145.) Hurwitz reviews employers' policies for guidance at the outset of her investigations. (Tr. 146.) Specifically, in this case, she reviewed Appendix K of the parties' collective-bargaining agreement at the outset of the investigations. (Tr. 147.) She also reviewed the complaint and researched pertinent law and the proofs required to sustain an allegation of discrimination in each particular matter. (Tr. 150.)

In order to contact the witnesses in these investigations, Hurwitz contacted Respondent's human resources department to get their contact information. (Tr. 152.) She sent each witness an email, with an attached letter, explaining that they had been identified as a witness and asking them to contact her. (Tr. 152–153.) Hurwitz' letter also told witnesses that their interview would be kept confidential. (Tr. 153.) Hurwitz wanted to ensure that witnesses' testimony would be kept confidential to try to obtain their cooperation and to ensure that potential witnesses did not talk to one another. (Tr. 153.)

Hurwitz made assurances of confidentiality to witnesses in the Zitzelberger and Wirtz matters. (Tr. 152–153, 154–155.) One of the witnesses in the Zitzelberger matter was very reluctant to participate and required reiteration that the investigation was confidential. (Tr. 157.) Neither of Hurwitz' reports contained any transcribed statements, but instead contained her notes of the interviews as she took them. (Tr. 158.) Her notes included her impressions of each witness, including her observations of their behavior and their candor. (Tr. 172.) Hurwitz did not record any of the interviews. (Tr. 159.) Instead, she had an outline of questions on her computer and would type in the witness' answers to each question. (Tr. 159.) She did not allow the witnesses to review their statements or sign them.[4] (Tr. 160.) At the conclusions of her interviews, she asked the witnesses if there was anyone else she should speak to about the matter under investigation. (Tr. 163.) Hurwitz told the witnesses to contact her if they received any sort of harassment or retaliation. (Tr. 165.) At the conclusion of the investigation, she went back though her outlines and digested the information to determine the facts. (Tr. 163.)

In both the Zitzelberger and Wirtz matters, Hurwitz had to address retaliation. (Tr. 165.) Zitzelberger had concerns about retaliation. (Tr. 166.) Hurwitz investigated these concerns. (Tr. 166.) She also investigated concerns regarding alleged retaliation brought by the employee who brought the complaint against Wirtz. (Tr. 166–167.)

Hurwitz reviewed documents provided by the Union and Zitzelberger as part of her investigation of the Zitzelberger matter. (Tr. 177.) She did not provide these documents to Respondent and Respondent did not ask for the documents. (Tr. 178.)

Hurwitz did not supply her interview outlines to Respondent, instead providing written reports. (Tr. 164.) Each report contained a summary of the complaint, a reiteration of relevant policies, a summary of the investigative process, her findings of fact, her application of the law to the facts, her conclusions, her findings and recommendations, and any pertinent exhibits.[5] (Tr. 164.)

Hurwitz' reports contained legal advice. (Tr. 167.) Hurwitz advised Respondent in each report whether or not she believed unlawful discrimination had occurred and whether a court reviewing the situation would find that unlawful discrimination had occurred. (Tr. 167.) Hurwitz testified that her investigation was independent, even though Respondent was her client. (Tr 170–171.)

Hurwitz did not find that unlawful discrimination had occurred in either of the Zitzelberger or Wirtz investigations. (Tr. 181.) She noted that neither allegation of harassment involved harassment made on the basis of the recipient being a member of a protected class. (Tr. 181.)

However, just because Hurwitz did not find that unlawful discrimination had occurred, she still believed that either matter could result in litigation. (Tr. 184–185.) She testified that the potential for litigation always exists when an employee files and internal complaint. (Tr. 168.) Hurwitz testified that an aggrieved employee could go to the EEOC or a state department of human rights with such complaints. (Tr. 168.) As an attorney, she has responded to many such complaints. (Tr. 168.) In her opinion, the realistic potential for the filing of grievances and for litigation existed. (Tr. 168.)

The only employer representatives who viewed the full Wirtz report were Shoudy, Lisa Harrison, Respondent's general counsel, and Marcy Kamienecki, Respondent's associate director. (Tr. 122.) Stablein was not allowed the view the Wirtz report because she was close friends with Wirtz. (Tr. 98.) The full Zitzelberger report was viewed by Shoudy, Harrison, Kamienecki, and Tracy Stablein, Respondent's human resources director. (Tr. 122.)

On February 10, 2020, Tracy Stablein provided a three-page summary of Hurwitz' investigation to Zitzelberger. (GC Exh. 4.) Copies of the summary were sent to Scott, Shoudy, and Lisa Harrison, Respondent's general counsel. (GC Exh. 4.) The investigative summary indicated that based upon the information gathered during the investigation, including witness interviews and other evidence, Hurwitz determined that Respondent's discrimination and harassment policy was not violated and that no corrective action would be taken. (Id.) The summary identified three witnesses who were interviewed with regard to the complaint. (Id.) The investigative summary stated that the relationship between Zitzelberger and Parkinson was strained and problematic and needed to be addressed. (GC Exh. 4.)

On April 13, 2020, Mike Shoudy provided a three-page summary of Hurwitz' investigation to Wirtz. (GC Exh. 6.) Copies of the summary were sent to Kim Edwards, Respondent's Mid-Eastern Zone Director, Lisa Harrison, MEA General Counsel, Marcy Kamienecki, MEA Associate Executive Director, John Duffy, MEDA Local President, and Wirtz. (GC Exh. 6.) Hurwitz concluded that the complaint failed to state a claim under

[4] Scott testified that he accompanied Zitzelberger when she made her statement to Hurwitz. (Tr. 36.) Consistent with Hurwitz' testimony, Zitzelberger was not allowed to review her statement and was not provided a copy of her statement. (Tr. 26.)

[5] Shoudy confirmed that Respondent did not have access to Hurwitz' notes that she used to prepare her report. (Tr. 112.) Similarly, he confirmed that Respondent did not have access to any documents that were provided to Hurwitz. (Tr. 112.)

Respondent's discrimination policy as none of the alleged victims were members of a protected classification. (GC Exh. 6.) Additionally, no findings were made regarding possible retaliation or violations of Respondent's Safe Workplace Policy, and no corrective action was issued. (GC Exh. 6.) However, Hurwitz noted that strained and problematic working relationships needed to be addressed to alleviate the ongoing interpersonal and operational difficulties in that office. (GC Exh. 6.) The summary stated that specific staff members would be counseled regarding future expectations and failure to meet those expectations would result in corrective action.[6] (GC Exh. 6.)

On April 15, 2020, Marcia Kamienecki sent an email entitled "Expectations summary" to Wirtz, copying Scott, Karpinski, Edwards, Harrison, and Shoudy. (GC Exh. 9.) The email served as a follow-up with the professional expectations that Kamienecki shared with Wirtz during their investigation summary meeting. (GC Exh. 9.) Kamienecki set forth a number of professional expectations for Wirtz. (Id.) Kamienecki further stated that failure to meet the expectations would result in discipline up to and including discharge. (Id.) The Union objected to this email. (Tr. 61.)

Later, on May 8, 2020, Kamienecki sent another email entitled "Expectations" to Wirtz, Edwards, Scott, and Karpinski. (GC Exh. 10.) The second email indicated that Wirtz was to begin meeting several professional expectations immediately. (GC Exh. 10.) However, the email went on to state that the expectations were not to be considered corrective action or discipline. (GC Exh. 10.) This version of the letter was agreed upon after several drafts were exchanged and a copy of this version of the email was placed in Ms. Wirtz' personnel file.[7] (Tr. 60, 76.) The email was subsequently removed from Wirtz' personnel after Respondent and the Union bargained over its removal. (Tr. 76.)

B. Information Request

On May 15, 2020, Troy Scott sent an email to Tracy Stablein and Marcia Kamienecki regarding the investigations into the Zitzelberger and Wirtz matters. (GC Exh. 2.) The email was copied to Zitzelberger, Wirtz, and Tonya Karpinski. (GC Exh. 2.) The email stated

> Both investigations have been completed and closed. As such, pursuant to well established NLRB case law, the Union is requesting both investigatory reports and any and all other supporting documents developed during, and as a result of, the investigation. This request is made pursuant to the National Labor Relations Act.

(GC Exh. 2.)

On June 1, 2020, Attorney Helen Mills responded to Scott's information request by way of an email.[8] (GC Exh. 7.) In the email, Mills explained that Respondent denied Scott's request. (GC Exh. 7.) Mills stated that the Union had no basis to assert that the information requested was related to the processing of a grievance or the administration of the collective-bargaining agreement. (GC Exh. 7.) Mills further asserted that the requested materials were protected from disclosure by attorney-client privilege between the investigator and Respondent and by the work-product doctrine. (GC Exh. 7.)

Mills went on to explain that Respondent fulfilled its obligations under the parties' collective-bargaining agreement by providing the complainants and the Union with a written summary of the complaint, response, investigation findings, and any corrective action. (GC Exh. 7.) Mills further stated that witness statements were protected by the harassment policy's confidentiality requirements. (GC Exh. 7.) Mills stated

> Further, the MEA's ability to conduct important investigations into potential wrongdoing would be seriously hamstrung if the investigator were unable to make assurances to witnesses that their testimony would be protected as confidential to the fullest extent possible. Witnesses in both the [Zitzelberger] and Wirtz investigations were given such assurances. If witnesses are aware or have the impression that their testimony will be widely disseminated, even if that comes after the investigation has concluded, many will outright refuse to provide testimony and others will, either intentionally or otherwise, self-censor in their interview with the investigator and information critical to the investigation will never come to light.

(GC Exh. 7.)

Mills cited the Board's decision in *Apogee Retail LLC,* 368 NLRB No. 144, slip op. at 13 (2019), as a basis for not providing the requested information.[9] Mills also stated that the Union failed to articulate a legitimate basis for requesting the information. (GC Exh. 7.)

On June 4, 2020, Scott responded to Mills' May 15 email, reiterating the Union's request for information. (GC Exh. 8.) Scott asserted that, as a party to the collective-bargaining agreement, the Union needed to know if the investigations were properly conducted. (GC Exh. 8.) Furthermore, Scott cited the section of the confidentiality provision of the harassment policy, which states, "to the extent possible and consistent with principles of due process." (GC Exh. 8.) Scott asserted that the Union needed the information in order to ascertain that Wirtz and Zitzelberger were afforded due process. (GC Exh. 8.)

Scott further cited the following section of the Board's *Apogee Retail* decision

> Unlike investigative confidentiality rules limited to open investigations, which we find are lawful to maintain as a general matter under Boeing category 1(b), we find that investigative confidentiality rules that are not limited on their face to open

[6] Wirtz' investigative summary did not identify any witnesses.

[7] Scott testified on direct examination that both emails in the record as GC Exhs. 9 and 10 were placed in Wirtz' personnel file. (Tr. 59, 63.) However, on cross-examination, Scott admitted that only the email in the record as GC Exh. 10 was placed in Wirtz' personnel file. (Tr. 76.) This contradiction provides a further basis for my finding that he did not provide credible testimony.

[8] The parties stipulated that since at least May 15, 2020, Attorney Helen Mills has been retained by Respondent in part to respond to the Union's May 15, 2020, information request on behalf of Respondent and has served as Respondent's agent within the meaning of Sec. 2(13) of the Act for this purpose. (Jt. Exh. 1.)

[9] *Apogee Retail* dealt with the lawfulness of an employer's confidentiality rule during a pending investigation, not a union's request for information. 368 NLRB No. 144, slip op. at 17.

> investigations fall into Boeing Category 2, **requiring individualized scrutiny in each case as to whether any post-investigation adverse impact on NLRA-protected conduct is outweighed by legitimate justifications** . . .

(Emphasis in original.) (GC Exh. 8.)

Scott went on to make several other arguments as to why the Union was entitled to the full investigative reports: (1) Respondent had a duty to furnish information independent of any agreement between the parties; (2) Certain information is presumptively relevant and no explanation is necessary, however, the Union has articulated an adequate basis for the requested information; (3) Respondent has a general obligation to provide the Union with information required to properly perform its duties and cannot make a blanket denial and the particular circumstances of the particular case must be determined, and; (4) information requested by the Union is considered relevant if it will be of legitimate use to the Union in carrying out its duties and responsibilities. (GC Exh. 8.) The Union submitted that individualized scrutiny of the cases was necessary and stated that it would be filing an unfair labor practice charge. (GC Exh. 8.) The Union further alleged that Wirtz was subjected to ongoing harassment as a result of the complaint made against her. (GC Exh. 8.)

The Union cited Section E of the harassment policy, which states that, "The final written report will be provided to Human Resources and other pertinent individuals as necessary to ensure proper resolution and follow-up regarding this matter." (Emphasis in original) (GC Exh. 8.) The Union stated that it is a pertinent party, and that proper resolution and follow-up did not occur in this case. (Id.)

Scott went on to assert that Respondent was required to provide the requested information because the Harassment Policy stated that, "*Information obtained **during the investigation** . . . will only be shared on a need-to-know basis.* (GC Exh. 8.) (Emphasis in original.) Scott stated that as a party to the contract, the Union had a need to know that due process was adhered to and that there was proper resolution and follow up. (GC Exh. 8.)

Respondent did not respond to the Union's June 4, 2020, letter. (Tr. 57.) Respondent has never provided the full investigative reports or any supporting documents to the Union. (Tr. 40.)

DISCUSSION AND ANALYSIS

A. Witness Credibility

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group,* 339 NLRB 303, 305 (2003); *Daikichi Sushi,* 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group,* 321 NLRB 586, 589 (1996)), enfd. 56 Fed.Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi,* 335 NLRB at 622. Some of my credibility findings are incorporated into the findings of fact set forth above.

I did not find Troy Scott's testimony credible. He tended to testify in the narrative. He also gave a lengthy answer while reading from the parties' collective-bargaining agreement. When asked why he made his May 15, 2020, information request, he testified

> This document was sent in order to obtain the closed investigations pursuant to Appendix K and what was collectively bargained between the parties so that I could police the contract, and to that end Appendix K of the contract is very clear. The union has to ensure complaints of discrimination and harassment are taken seriously and investigated thoroughly. The union must ensure a false report was not filed. The union must ensure there was no retaliation or discrimination as a result of filing a complaint. The union must ensure there was no coercion, intimidation, threats, or interference as a result of filing a complaint to ensure MEA's commitment to stopping harassment and discrimination from occurring in the workplace; to ensure due process was adhered to; to ensure the union is entitled—I'm sorry—because the union is entitled to the information as a party to the contract and based upon applicable federal law in this case the NLRA; to ensure any action taken is consistent with the contract and generally accepted standards of due process and just cause; to ensure no documentation becomes a part of the employee's personnel record if no action is taken; to ensure all employees cooperated during the investigation; to ensure no threat or warning of discipline is made to a complainant regarding discipline for a false complaint unless evidence of such is received; to ensure negotiated procedure was adhered to; to ensure the complainant [and] respondent were interviewed, determine whether respondent admitted to the conduct, all pertinent witnesses were interviewed, all supporting documents were obtained, and whether determination of merit was [sic] and discipline recommended to ensure proper resolution and follow-up regarding any complaint; to ensure remedies are consistent with the investigation; to ensure Part B of the complaint record has been completed.
>
> (Tr. 26–28.) At this point I interrupted Scott and asked if he was looking at something because he kept looking down. (Tr. 28.) Scott admitted he was looking at the parties' contract and I admonished him to stop using any documents unless referred to them by counsel. (Tr. 28.) As he was reading from the contract, and not testifying to his actual reasons for making his information request, I completely discount this testimony and did not consider it in reaching my decision in this case.
>
> Even after being admonished not to refer to documents unless instructed to do so, Scott asked if he could refer to the General Counsel's exhibits while giving his testimony. He indicated that he had the exhibits in front of him. I again admonished him to testify from his memory. (Tr. 33.) However, a few minutes later, Scott testified that he requested these documents
>
> . . . to police the contract, specifically Appendix K, to ensure that an adequate, fair, thorough, and impartial investigation was done, to ensure that everybody cooperated in the investigation, to ensure that all respondents, complainants and all others were interviewed properly, all evidence was considered, and

> everything was investigated as the policy indicates it would be. In addition, I still to this day, there is a potential, not knowing what is in those reports, that a grievance exists based upon the policy.

(Tr. 42.) I believe he was again testifying with the aid of a document that I could not see. As such, I do not credit this testimony.

Scott also gave testimony in a hedging manner while under cross-examination. For example, he engaged in the following exchange with Respondent's Counsel

> Q. At any time did you tell the employer you knew there was not a protected class basis and you were just filing it to see what would happen?
> A. I did not say that, no.
> Q. Did you say that specific thing or nothing like it at all?
> A. I did not say that specific thing.
> Q. What did you say?
> A. I can't recall what would have been said . . .

(Tr. 69–70.) Based upon Scott's reliance on documents to aid his memory and his hedging testimony, I decline to credit his testimony except where it is uncontroverted, corroborated by another, more credible, witness or documentary evidence, or where it is inherently probable.

I found Michael Shoudy to be a credible witness. He testified in a frank and forthright manner. His testimony did not falter on cross examination. His testimony was not contradicted by other witnesses or exhibits. He candidly admitted that the parties' contract allows access to an investigative report on a "need-to-know" basis. (Tr. 99.) He also admitted that Respondent has not offered to provide Hurwitz' redacted reports to the Union in redacted form. (Tr. 113.) His admission of things that, at first blush, would seem to favor the Union's position lend credence to his testimony. As such, I credit his testimony.

I also found Sheralee Hurwitz to be a credible witness. She testified in a direct and clear manner. Her testimony did not waver on cross-examination and was not contradicted by other witnesses or testimony. She is no longer employed by Respondent's outside law firm. (Tr. 144.) Her testimony that she did not allow witnesses to review or sign their statements was corroborated by Scott. She also candidly acknowledged that Respondent was her client when she was conducting the investigations at issue. As such, I credit her testimony.

B. Legal Standards Regarding Information Requests

In dealing with its employees' collective-bargaining representative, one of the things which employers must do, on request, is to provide information that is needed by a bargaining representative for the proper performance of its duties. *NLRB v. Acme Industrial Co*., 385 U.S. 432 (1967). Following an appropriate request, and limited only by considerations of relevancy, the obligation arises from the operation of the Act itself. *Ellsworth Sheet Metal*, 224 NLRB 1506 (1976). Information concerning the wages, hours, and terms and conditions of employment of bargaining unit employees is presumptively relevant and must be furnished upon request. *North Star Steel Co*., 347 NLRB 1364 (2006); *Bryant & Stratton Business Institute*, 323 NLRB 410 (1997). Information sought by a union relating to the union's investigation of a potential grievance, or to the policing and/or proper application of the terms of a collective-bargaining agreement, relates to employees in the bargaining unit and is presumptively relevant. *Yeshiva University*, 315 NLRB 1245, 1248 (1994). It is the employer's burden to rebut the presumption. *A-1 Door & Building Solutions*, 356 NLRB 499, 500 (2011); *Southern California Gas Co*., 344 NLRB 231, 235 (2005); *Miller Processing Services*, 308 NLRB 929 (1992). In each case, the inquiry is whether or not both parties meet their duty to deal in good faith under the particular facts of the case. *NLRB v. Truitt Mfg. Co*., 351 U.S. 149 (1956).

C. Claims of Confidentiality

Section 8(a)(5) of the Act establishes that an employer has a "general obligation . . . to provide information that is needed by the bargaining representative for the proper performance of its duties." *NLRB v. Acme Industrial Co*., 385 U.S. at 435–436. In *American Baptist Homes of the West*, the Board held that when an employer asserts a confidentiality interest in protecting witness statements from disclosure, the appropriate standard is the *Detroit Edison v. NLRB*[10] balancing test. 362 NLRB 1135, 1139–1140 (2015). Under that standard, the Board balances a union's need for requested relevant information against an employer's established legitimate and substantial confidentiality interests. Id. However, establishing a legitimate and substantial confidentiality interest requires more than a generalized desire to protect the integrity of employment investigations. Id. at 1137. Rather, an employer must "determine whether in any give[n] investigation witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, [or] there is a need to prevent a cover up." Id. (quoting *Hyundai America Shipping Agency*, 357 NLRB 860, 873–874 (2011), enfd. in relevant part 805 F.3d 309 (D.C. Cir. 2015)). Assuming that an employer establishes a legitimate and substantial confidentiality interest that outweighs a requesting union's need for the information, the employer cannot simply refuse to provide the information, but must seek an accommodation that would allow the requester to obtain the information it needs while protecting the party's interest in confidentiality. Id. (citing *Borgess Medical Center*, 342 NLRB 1105, 1106 (2004)). The employer is only obligated to offer an accommodation. Id. at 1137 fn. 7. Offering to provide information on an alternative timeline may be seen as an offer of an accommodation. *FCA US, LLC,* 371 NLRB No. 32, slip op. at 5 (2021). If the union is dissatisfied with the offer, it is then required to respond and explain why the proffered accommodation is insufficient." Id. at 1137 fn. 7 (citation omitted).

D. Attorney-Client Privilege and the Work Product Doctrine

The attorney-client privilege protects confidential communications between an attorney and client if the communication is made in confidence for the purpose of obtaining or providing legal advice. *Smithfield Packing Co.,* 344 NLRB 1, 13 (2004), enfd. 447 F.3d 821 (D.C. Cir. 2006). Communications between a corporation and its outside counsel are presumed to be made

[10] 440 U.S. 301, 315–320 (1979).

for the purpose of seeking legal advice. *U.S. v. ChevronTexaco Corp.,* 241 F.Supp.2d 1065, 1076 (N.D.Cal. 2002).

Factual investigations performed by attorneys acting as attorneys fall within the protection of the attorney-client privilege. *Sandra T.E. v. Berwyn School District 100,* 600 F.3d 612, 619 (7th Cir. 2010), citing *Upjohn v. U.S.*, 449 U.S. 383, 401 (1981). Courts have also concluded that when an attorney conducts a factual investigation in connection with the provision of legal services, any notes or memoranda documenting client interviews or other client communications in the course of the investigation are fully protected by the attorney-client privilege. *Sandra T.E.,* 600 F.3d at 619. See, e.g., *In re Allen*, 106 F.3d 582, 603 (4th Cir. 1997) ("The relevant question is not whether [the attorney] was retained to conduct an investigation, but rather, whether this investigation was related to the rendition of legal services." (Internal quotation marks omitted)); *United States v. Rowe*, 96 F.3d 1294, 1297 (9th Cir.1996) (emphasizing that *Upjohn* made "clear that fact-finding which pertains to legal advice counts as 'professional legal services'").

The Board has applied the balancing test set forth in *Detroit Edison* to information protected by the attorney-client privilege. *BP Exploration (Alaska),* 337 NLRB 887, 888 (2002), citing *Detroit Edison Co.,* 440 U.S. 301 (1979).[11] As the Board explained in *BP Exploration (Alaska)*, an employer has a statutory duty to provide requested information that is potentially relevant and will be of use to a union in fulfilling its responsibilities. 337 NLRB at 888, citing *GTE California, Inc.,* 324 NLRB 424, 426 (1997). However, a union's need for relevant and necessary information does not predominate over other legitimate interests. Id. Thus, the Board will balance a union's need for the information against any legitimate and substantial confidentiality interest established by the employer. Id.

The work product privilege, first recognized by the Supreme Court in *Hickman v. Taylor,* 329 U.S. 495 (1947), protects written material prepared by a party or its representative in anticipation of litigation or for trial from disclosure. *Sprint Communications,* 343 NLRB 987 (2004). The Board in *Sprint Communications* recognized the strong public policy underlying the work product doctrine: aiding the adversarial process by providing a certain degree of privacy to a lawyer in preparing for litigation. 343 NLRB at 988.

The work product doctrine is different from and broader than the attorney-client privilege. *Miller v. Federal Express Corp.,* 186 FRD 376 (W.D. Tenn. 1999), citing *In re Antitrust Grand Jury*, 805 F.2d 155, 163 (6th Cir. 1986) (quoting *United States v. Nobles*, 422 U.S. 225, 238 n. 11 (1975)). This protection, as codified in Fed.R.Civ.P. 26(b)(3), is not a privilege but a qualified immunity protecting documents and tangible things prepared by a party or his representative in anticipation of litigation from discovery. Id., citing *In re Perrigo Co*., 128 F.3d 430, 437 (6th Cir. 1997). The work product doctrine protects the integrity of the adversarial process by creating a zone of privacy and protection for an attorney's preliminary work on a case. See *Hickman*, 329 U.S. at 510–11.

However, like the attorney-client privilege, the work product privilege against disclosure is not absolute. *Sprint Communications,* 343 NLRB at 988. Fed.R.Civ.P. 26(b)(3) provides that a party may obtain an otherwise protected document by showing that it has a substantial need of the materials in the preparation of its case and that it is unable without undue hardship to obtain the substantial equivalent of the materials by other means. Id. Even with such a showing, however, courts protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney. Id., citing *In re Sealed Case,* 146 F.3d 881, 884 (D.C. Cir. 1998).

E. Respondent Did Not Violate the Act as Alleged

On February 10, 2020, Respondent provided a three-page summary of the Zitzelberger investigation to Zitzelberger and the Union. (GC Exh. 4.) On April 13, 2020, Respondent provided a three-page summary of the Wirtz investigation to Wirtz and the Union. (GC Exh. 6.) Both investigations were closed at the time that Respondent provided the investigative summaries. Thereafter, on May 15, 2020, the Union sent an information request to Respondent seeking, "both investigatory reports and any and all other supporting documents developed during, and as a result of, the investigation."[12] (GC Exh. 2.) This request was made 3 months after Zitzelberger and the Union were provided Zitzelberger's investigative summary and 1 month after Wirtz and the Union received Wirtz'. Hurwitz did not find that unlawful discrimination had taken place in either case.

Respondent hired outside counsel to investigate both the Wirtz and the Zitzelberger matters. A matter that is committed to a professional legal adviser is prima facie so committed for the sake of legal advice. *Patrick Cudahy, Inc.,* 288 NLRB 968, 970 (1988). As noted by the Board, the vast array of regulatory legislation confronting the modern corporation, corporations constantly go to lawyers to find out how to obey the law. Id., citing *Upjohn Co. v. U.S.,* 449 U.S. 383, 392 (1981). Attorney Sheralee Hurwitz conducted these investigations. Hurwitz' reports contain both legal advice and her mental impressions. In addition, the witness statements taken by Hurwitz were not verbatim statements. Instead, Hurwitz wrote notes of what the witnesses said and intertwined this with her own mental impressions.[13] Therefore, I find that Hurwitz' reports and the witness statements they contained are privileged from disclosure under the attorney-client privilege.

An employer has a strong confidentiality interest with respect to a communication that is subject to the attorney-client priv-

[11] The Board did not reach whether the *Detroit Edison* balancing test was to be applied to attorney-client communications in all circumstances. 337 NLRB at 887. Instead, the Board assumed arguendo that the test applied. Id. The Board noted that, "It may be that such communications hold a special place in the laws and values of our society and are thus not subject to the balancing test of *Detroit Edison.*" Id.

[12] It is worth noting that the Union's request was for investigative reports and supporting documents *developed during, and as a result of, the investigation*. (GC Exh. 2.) The Union did not ask for the identities of any witnesses. The Union further did not ask for the documents collected by Hurwitz as part of her investigation. Instead, it asked for documents developed by her. Therefore, based on the plain language of its request, the Union seeks Hurwitz' full investigative reports, witness statement summaries, and any other documents created by her.

[13] Hurwitz testified that witnesses needed to be given assurances of confidentiality in order to obtain their cooperation.

ilege. *BP Exploration (Alaska),* 337 NLRB at 889, citing *Patrick Cudahy, Inc.,* 288 NLRB at 969. Hurwitz' reports contained her analysis of whether any laws were broken. As such, they are privileged under the attorney-client privilege. The Union has not proffered a legitimate reason why it required the privileged information.

In *BP Exploration (Alaska),* a state inspector advised the respondent that it had violated several safety laws. 337 NLRB at 887. The respondent in that case assigned a "need-to-know" group of managers and supervisors to formulate a response to the potential citations. Id. The respondent in that case participated in the investigation to provide legal advice. Id. An engineering consulting group was hired to conduct an investigation, as requested by respondent's attorney. 337 NLRB at 888. A report was generated by the consulting firm and one copy was given to the leader of the need-to-know group and a second copy was given to the respondent's attorney. Id. Further reports were also commissioned to respond to various citations issued by the state. Id. Copies of the reports were presented to the state in defense against the citations. Id. The union in that case requested copies of the reports, but the respondent refused to provide them, citing the attorney-client privilege and work product doctrine as defenses. Id. The respondent offered to provide summaries of the reports to the union. Id.

The Board in *BP Exploration (Alaska)* found that the reports were protected by the attorney-client privilege. 337 NLRB at 888. The Board noted that the union demonstrated need for the reports because they contained information on workplace safety. 337 NLRB at 889. However, the Board concluded that the Union's need for the information did not outweigh the respondent's interest in preserving the attorney-client privilege. Id. The Board stated that the reports were subject to the attorney-client privilege and that the prospect of disclosing the reports raised a substantial concern that the privilege would be waived and that the union did not demonstrate its need for the actual reports. Id.

Similarly, in the instant case, the Hurwitz' investigative reports are protected by the attorney-client privilege. The reports in this case were prepared by an attorney, as opposed to a consultant acting at the behest of an attorney. The reports were transmitted only to a small group of top-level agents and managers of Respondent. Respondent has stated on numerous occasions that it will not disclose the reports or witness statement summaries because they are protected by the attorney-client privilege, thus demonstrating that it does not wish to waive the privilege. Like the union in *BP Exploration (Alaska),* the Union here does not want anything short of the full investigative reports.

I do not find that the Union has demonstrated need for Hurwitz' investigative reports that outweighs Respondent's interest in preserving the attorney-client privilege. The Union asserted a number of bases for requiring the information in its request, including policing the contract, ensuring due process, and that the Union had a need to know. None of these reasons are specific. I find that the Union's asserted bases for needing Hurwitz' full investigative reports are merely speculative and do not outweigh Respondent's interest in maintaining the attorney-client privilege.

Even if I were to find that the Union set forth a legitimate reason for needing the full investigative reports and witness statement summaries, I find that Respondent offered an accommodation in the form of the investigative summaries. As in *BP Exploration (Alaska)*, Respondent here has made an accommodation to the Union by providing it with lengthy investigative reports detailing the investigative process and specific findings of fact and conclusions.[14] The Union did not adequately explain how these summaries were an insufficient accommodation. Although the Union may not have liked this accommodation, I find that it was an accommodation, nonetheless.

In addition, Hurwitz' reports are protected from disclosure by the work-product doctrine. Hurwitz testified that, in her opinion, litigation might arise from the incidents that were the subject of her investigations. The Union also admitted that it was seeking the reports in order to determine whether either matter might be grieved. A grievance is, simply put, a form of litigation.[15]

In interpreting the work product doctrine, it is not necessary that a specific claim have been filed at the time of the document's creation, as long as the document was prepared in anticipation of foreseeable litigation. *Sprint Communications,* 343 NLRB 987, 989 (2004), citing *In re Sealed Case,* 146 F.3d at 884. In *Sprint Communications,* an investigation was undertaken in order to decide whether to terminate the employment of four union officials. 343 NLRB at 990. The Board found that such a business decision would require weighing the risks of litigation. Id. Similarly, in the instant case, Respondent needed to evaluate the claims in the Wirtz and Zitzelberger matters and hired outside counsel to do so. Part of the work undertaken in the investigation was to determine whether any laws had been violated and weigh the risks of litigation. Therefore, I find that Hurwitz' investigative reports and notes are shielded from disclosure by the work-product doctrine.

In order to overcome the work-product privilege, the Union would have to demonstrate a substantial need for the documents and that it could not obtain equivalent information without undue hardship. See e.g. *Sprint Communications,* 343 NLRB at 990. Like in that case, the Union here did not explain why the provided investigative summaries did not meet its need.

In *Sprint Communications,* the employer investigated an allegation of timecard improprieties on the part of four union officials. 343 NLRB at 987. When the respondent's director of employee relations became aware of the improprieties, he alerted the respondent's in-house counsel. Id. The attorney advised a human resources specialist to interview the four union officials,

[14] In *BP Exploration (Alaska),* the respondent offered to provide the union with a summary of a report. 337 NLRB at 889–890. In this case, Respondent actually provided lengthy summaries of Hurwitz' reports.

[15] I do not find merit in the General Counsel's argument that the Union could file grievances over the sufficiency of the investigations in the Zitzelberger and Wirtz matters. The Union did not make its request for the report in the Zitzelberger matter for three months after it received the investigative summary, well beyond the 45-day time limit for filing a grievance as spelled out in the parties' contract. The Union represented Wirtz during the investigation of the complaint against her and could have filed a grievance over any perceived deficiency in her interview by Hurwitz after it took place, but it did not. In any event, I do not find the Union's vague assertions for its need for both reports overcome Respondent's legitimate confidentiality interest in both reports.

which she did. Id. at 987. The human resources specialist prepared statements for the four union officials based upon her own notes and those of another human resources employee present for the interviews. Id. She also prepared a summary report which she provided to the attorney. Id. The witness statements and her report contained her mental impressions. Id. Based upon the report, the four union officials were discharged by the respondent. Id. The union in that case requested a copy of the human resources specialist's investigative notes in order to prepare for arbitration. 343 NLRB at 988.

The Board stated that the essential question in determining whether a document qualifies as work-product is whether, in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained because of the prospect of litigation. *Sprint Communications,* 343 NLRB at 988, citing *Senate of Puerto Rico v. U.S. Dep't of Justice,* 823 F.2d 574, 586 fn. 42 (D.C. Cir. 1987). The prospect of litigation need not be actual or imminent; it need only be fairly foreseeable. Id., citing *Coastal States Gas Corp. v. Dept. or Energy,* 617 F.2d 854, 865 (D.C. Cir. 1980). It is not necessary for a specific claim to have been threatened or filed at the time of the document's creation, as long as the document was prepared in anticipation of foreseeable litigation. Id. at 989, citing *In re Sealed Case,* 146 F.3d at 884. See also, e.g., *EEOC v. Lutheran Social Services,* 186 F.3d 959, 968-969 (D.C. Cir. 1996) (finding that an attorney's investigation report prepared in response to two anonymous reports accusing the organization's president of creating a sexually hostile work environment was protected work product even though no lawsuit had been filed at the time of its creation).

In *Sprint Communication,* the Board found that the investigation notes of the human resources specialist were protected work product prepared in anticipation of litigation. 343 NLRB at 989. The Board noted that contacting respondent's attorney immediately upon discovering the alleged serious misconduct supported the contention that the respondent subjectively anticipated litigation. Id. The Board further noted that the discharge of four union officers would likely lead to the union pursuing arbitration or filing an unfair labor practice charge. Id. The Board also stated that the investigation was undertaken at the direction of the in-house attorney and that the business decision to terminate the four union officials required weighing the risk of litigation. 343 NLRB at 990. The Board went on to note that, "[v]oluntary compliance with the law often depends on sound legal advice; sound legal advice in turn often depends on the attorney-client and work product privileges." 343 NLRB at 990, quoting *EEOC v. Lutheran Social Services,* 186 F.3d at 966.

Similarly, in the instant case, Hurwitz' investigative reports and witness interview summaries were prepared in anticipation of litigation. Hurwitz, who has substantial experience in employment law, testified that litigation was foreseeable in both investigations. The Zitzelberger matter involved allegations of creating a hostile work environment, berating Zitzelberger, and spreading false information. The Wirtz matter involved threats and alleged workplace violence. As such, I find that litigation was foreseeable in both cases. Furthermore, unlike the investigation in *Sprint Communications,* which was initiated at the request of an attorney, the investigation in this case was actually conducted by Respondent's outside counsel. The Union further threatened to file an unfair labor practice charge in its letter of letter of June 4. (GC Exh. 8.) Therefore, I find that Hurwitz reports and witness statement summaries were protected from disclosure by the work product doctrine.

In order to overcome the work product protection, the requesting party bears the burden of showing that it had a substantial need for the documents and that it could not obtain equivalent information without undue hardship. *Sprint Communications,* 343 NLRB at 990. The Board stated that the union in that case failed to show that it could not pursue additional information by conducting its own witness interviews. In this case, the Union had the names of the witnesses in the Zitzelberger matter. The Union also attended Wirtz' interview with Hurwitz and had access to the complaint against Wirtz, which listed several witnesses to her alleged unlawful behavior. The Union could have gathered further information by talking to Zitzelberger or Wirtz or the identified witnesses. In addition, the Union had a lengthy investigative summary at its disposal in both matters. Therefore, I do not find that the Union had demonstrated any undue hardship in obtaining equivalent information.

Even if I were to analyze this case under the Board's framework for confidential information, I still would not find that Respondent had a duty to provide Hurwitz' complete investigation report and witness statement summaries or other documents created by her. In *Northern Indiana Public Service Co.,* 347 NLRB 210 (2006), the Board stated the following with regard to confidential information

> Under Board law, a party may refuse to furnish confidential information to the other party in a collective-bargaining relationship under certain conditions. Initially the party must show that it has a legitimate and substantial confidentiality interest in the information sought. *Pennsylvania Power Co.,* 301 NLRB 1104, 1105 (1991). If this showing is made, the Board must weigh the party's interest in confidentiality against the requester's need for the information, and the balance must favor the party asserting confidentiality. *Detroit Edison Co. v. NLRB,* 440 U.S. 301 (1979); *Detroit Newspaper Agency,* 317 NLRB 1071, 1074 (1995); *Pennsylvania Power,* supra at 1105. Finally, even if these conditions are met, the party may not simply refuse to provide the requested information, but must seek an accommodation that would allow the requester to obtain the information it needs while protecting the party's interest in confidentiality. *Borgess Medical Center,* 342 NLRB 1105, 1106 (2004).

347 NLRB at 211. In the cases cited by the Board in *Northern Indiana Public Service Co.,* the consideration was whether the information was sensitive or confidential within the facts of each case. Id. at 212. In *Northern Indiana Public Service Co.*, the Board identified several types of information that would give rise to a legitimate and substantial confidentiality interest, including information that could give rise to harassment or retaliation and that which is traditionally privileged. 347 NLRB at 211. Specifically, the Board noted that an investigation of threats of workplace violence, in which witnesses were given assurances of confidentiality, gave rise to a legitimate and substantial confidentiality interest. Id. The information in this case is, as I have

already found, protected under both the attorney-client privilege and the work product doctrine. In addition, the witness statement summaries could be expected to lead to intimidation or harassment of the witnesses. Given the nature of the complaints themselves, implicating a hostile work environment and serious threats, Respondent would have a confidentiality interest in the requested documents. Thus, I find that Respondent asserted a legitimate and substantial confidentiality interest in Hurwitz' reports and her witness statement summaries.

The Board also found in *Northern Indiana Public Service Co.* that the balance between the union's asserted need for the information and the employer's interest in confidentiality favored the employer. 347 NLRB at 213. In that case, an article of the parties' contract required the respondent to provide a safe working environment. Id. However, the Board found that the union already knew the substance of the complaint and the identities of some witnesses. Id. Thus, the Board stated that the witness statements sought in that case would merely provide corroboration, denials, or assertions of mitigation regarding what was said. Id. The same is true in this case. The parties contract calls for the maintenance of a workplace free of discrimination and harassment. The Union was made aware of Hurwitz' findings in both investigations. The Union received the names of the witnesses in the Zitzelberger matter. The Union also had access to the complaint in the Wirtz matter which identified several witnesses to Wirtz' alleged misbehavior. (GC Exh. 5; Tr. 46.) The Union could have tried to contact these witnesses on its own but did not do so. Therefore, I find that Respondent did not violate the Act in refusing to provide the requested documents to the Union.

Clearly, Respondent had an interest in keeping the full investigative reports and the witness statement summaries confidential. The Union's asserted speculative need for these documents does not outweigh Respondent's interest in keeping them confidential. Thus, I find that the General Counsel has not established that Respondent violated Section 8(a)(5) and (1) of the Act, as alleged in the complaint.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Michigan Executive Directors Association (MEDA) is a labor organization within the meaning of Section 2(5) of the Act.

3. The General Counsel has not established by a preponderance of the evidence that Respondent violated the Act in its refusal to provide requested information to the Union, as alleged.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. April 13, 2022

[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.