UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

April 1, 2025

| | | |
|---|---|---|
| UNITED STATES OF AMERICA,<br>Complainant,<br><br>v.<br><br>TERRAPOWER, LLC,<br>Respondent. | ) | 8 U.S.C. § 1324a Proceeding<br>OCAHO Case No. 2024A00094 |

Appearances: Margaret LaDow, Esq., and Lawrence J. Van Daley, Esq., for Complainant[1]
Diane M. Butler, Esq., and Rebecca R. Schach, Esq., for Respondent

# AMENDED[2] ORDER GRANTING IN PART MOTION TO COMPEL

## I. PROCEDURAL HISTORY

This case arises under the employer sanctions provisions of the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1324a.

On October 22, 2024, the Court held a prehearing conference to discuss the case status following receipt of Respondent's motion to compel[3] and Complainant's motion for summary decision. The

[1] On March 6, 2025, Mr. Van Daley submitted a Notice of Appearance as Complainant's counsel. Mr. Van Daley is now counsel of record for Complainant along with Ms. LaDow.

[2] The Court issued an Order Granting in Part Motion to Compel in the above-captioned case on March 13, 2025. This Amended Order amends that Order solely to correct a typographical error.

[3] On September 25, 2024, Respondent filed "Respondent Terrapower, LLC's Motion to Compel Discovery and Certification of Meeting to Confer." Respondent "seeks an order to compel Complainant to produce documents in response to Terrapower's discovery requests." First Mot. Compel 2-3. Respondent states the parties conferred on September 3, 2024, and "Complainant refused to produce any additional information or documents." *Id.* at 1. Respondent argues the discovery sought is "relevant" and "[t]he responding party is required to conduct a reasonable

Court had a lengthy discussion with the parties on how to conduct discovery. The Respondent's first Motion to Compel placed at issue ten of its requests for production. This motion drove the discussion about production of documents and the scheduling of depositions (i.e. that Respondent would be permitted to wait to depose Complainant employees following resolution of the document-related discovery issues).

Following that discussion, the Court provided a Discovery Schedule to assist the parties in resolving any disputes surrounding the requests for production:

| | |
|---|---|
| Complainant to produce requested documents: | November 6, 2024 |
| Meet and confer over remaining issues by: | November 20, 2024 |
| Respondent to file update/ revised motion: | December 4, 2024 |
| Complainant's response to Respondent's revised filing: | December 18, 2024 |

On December 10, 2024, Respondent filed a revised motion to compel.

On December 30, 2024, the Court issued an order providing Complainant with an additional 30 days to respond to the revised motion to compel (making a response due by January 29, 2025). The Court explained Complainant's response should:

> [I]ndicate, with specificity, whether Respondent's characterization of Complainant's position is accurate, and identify what, if anything, Complainant did provide. To the extent Complainant did not provide documents to Respondent, it may explain its rationale in its response. Complainant should not rely on or cite to Freedom of Information Act (FOIA) exemptions as the FOIA is a statute covering release of information to the public.

Initially, Complainant did file separate motions related to depositions; however, as the Court made clear in its October 2024 prehearing conference, it would first resolve issues related to documents, and then discovery would shift to deposition-related issues.

On January 22, 2025, Respondent filed a Motion for Leave to File Reply in Support of Amended Motion to Compel Discovery. That motion is DENIED (Respondent appears to have been seeking an opportunity to respond to emails sent by Complainant, which were not accepted as a filing).

---

search of information in its control, custody, and possession before denying the inquiry." *Id.* at 4 (citing 8 C.F.R. § 68.21(c) and Fed. R. Civ. P. 36(a)(4).

Complainant did not file a response.

On March 6, 2025, Complainant filed its "Complainant's Response to Respondent's Amended Motion to Compel Discovery." Complainant's filing arrives 87 days after it received Respondent's Motion, and 37 days after the expiration of the deadline provided in the Court's order providing them additional time to respond. Complainant offers no good cause as to why this late filing should be accepted or considered. The Court's deadlines are not aspirational suggestions to parties, rather deadlines set by the Court are a critical component of effective docket and case management. This filing is untimely and will not be considered.

## II. MOTION(S) TO COMPEL – LEGAL STANDARDS & ANALYSIS

First, the Court must review the Motion(s) to Compel to consider whether they are procedurally compliant with OCAHO's regulations. If so, it is then appropriate to turn to an analysis of the substance of the filings.

### A. Respondent's Motion to Compel & Amended Motion to Compel

On December 10, 2024, Respondent's filed Respondent's Amended Motion to Compel Discovery and Certification of Good Faith Conferment with Exhibits. According to Respondent, "Complainant supplemented its discovery responses and document production [after the prehearing conference]" but "did not provide a privilege log with its document production." Amended Mot. Compel 3. The parties met and conferred on November 19, 2024, and Complainant "stated that a privilege log may be forthcoming… [and] would be mailed no later than Friday, November 22, 2024." *Id.* "On November 25, 2024 Complainant further supplemented" with additional documents. *Id*.

In its Amended Motion to Compel, Respondent specifically seeks to compel Requests for Production 3, 4, 5, 6, 7, 8, and 10. Respondent includes in its filing the objections it received from Complainant. Respondent also provides argument as to why it is entitled to the production of documents in each instance.

### B. Motion to Compel – Regulatory Requirements Met

Under OCAHO's Rules of Practice and Procedure, a party "may move the Administrative Law Judge for an order compelling a response or inspection in accordance with the request" when "a party upon whom a discovery request is made . . . fails to response adequately or objects to the requests or to any part thereof." 28 C.F.R. § 68.23(a).

A motion to compel must include:

> (1) The nature of the questions or request;

> (2) The response or objections of the party upon whom the request was served;
> (3) Arguments in support of the motion; and
> (4) A certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure information or material without action by the Administrative Law Judge.

28 C.F.R. § 68.23(b).

Respondent's Amended Motion to Compel complies with the regulatory requirements of 28 C.F.R. § 68.23(b). It outlines the requests with sufficient specificity; provides Complainant's objections; contains arguments in support of its position; and provides evidence the parties met and conferred.

C. Motion to Compel – Relevance and Objections

Litigants "may obtain discovery regarding any matter, not privileged,[4] which is relevant to the subject matter involved in the proceeding" unless the presiding Administrative Law Judge (ALJ) limits discovery by order. 28 C.F.R. 68.18(b).[5] "Relevance 'broadly encompass[es] any matter that bears on, or that could reasonably lead to other matter that could bear on, an issue that is or may be in the case.'" *A.S. v. Amazon Webservices Inc.*, 14 OCAHO no. 1381j, 4-5 (2022) (internal citations omitted).

The motion is unopposed, which matters because it is the "objecting party" which must "sustain[] [its] burden of showing the objection is justified." 28 C.F.R. § 68.23(a).

Here, the Complainant's "justification" will be gleaned from the written objections it lodged directly with Respondent (which Respondent attached to the motion). These responses will be evaluated against the regulation and standards outlined in precedential case law, notably:

> The party objecting to the discovery "must articulate its objections in specific terms and has the burden to demonstrate that its objections are justified." *United States v. Employer Sols. Staffing*

[4] OCAHO Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2024), do not define privilege. The Court may look to the Federal Rules of Civil Procedure at Federal Rule 26(b) and case law interpreting that rule. *See* 28 C.F.R. § 68.1 (allowing the Court to use the Federal Rules as a "general guideline[.]"); 28 C.F.R. § 68.56.

[5] OCAHO Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2024). The rules are also available through OCAHO's webpage on the United States Department of Justice's website. *See* https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer-regulations.

> *Grp. II, LLC*, 11 OCAHO no. 1234, 3 (2014) (citing *United States v. Allen Holdings, Inc*., 9 OCAHO no. 1059, 5 (2000)). A party who fails to timely object or provide adequate rationale for the objection waives said objection. Id. (first citing *United States v. Westheimer Wash Corp*., 7 OCAHO no. 989, 1042, 1045 (1998); then citing *In re United States,* 864 F.2d 1153, 1156 (5th Cir. 1989); and then citing Fed. R. Civ. P. 33(b)(4)). "Generalized or conclusory assertions of irrelevance, overbreadth, or undue burden are not sufficient to constitute objections." *Allen Holdings, Inc*., 9 OCAHO no. 1059, at 5 (citations omitted).

*Ravines de Schur v. Easter Seals-Goodwill N. Rocky Mountain, Inc*., 15 OCAHO no. 1388d, 3 (2021).[6]

## III. REQUESTS FOR PRODUCTION AT ISSUE & PARTIES' POSITION

### A. Request for Production No. 3

According to Respondent, this request seeks "your administrative file and all related documents, including all documents and records reviewed, compiled, or created in preparing the Notice of Intent to Fine, including any notice of technical and procedural failures documentation, notice of discrepancy, or notice of suspect documents prepared for TerraPower, whether served on TerraPower or not." Amended Mot. Compel 5.

Complainant initially took the position, (implicitly) that responsive documents exist; however, these documents "would be considered work product and therefore will not be disclosed." Amended Mot. Compel 57.[7] Complainant also acknowledges it did not issue a Notice of Technical or Procedural Failures, Notice of Suspect Documents, nor a Notice of Discrepancies. *Id.*

---

[6] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database "FIMOCAHO," or in the LexisNexis database "OCAHO," or on the website at https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer-decisions.

[7] Although Respondent refers to the attached exhibits by label in both its motion and the included declaration from Respondent's counsel, Respondent did not include an exhibit list or include exhibit labels within the filing. The Court will use the PDF pagination for the entire filing when

In Complainant's second amended response (in November 2024), Complainant provides a two-page document. Specifically, it is the auditor's "Application for Notice of Intent to Fine (ICE Form I-761)." Amended Mot. Compel 169. The following are noteworthy:

1. At the designated place in the form for "factual allegations," it states "see attached addendum to application and exhibits." *Id*. No attached addendum was provided.
2. At the designated place for "supporting evidence," it states "see exhibits." *Id*. No exhibits are provided in discovery.
3. At the designated place for "other factors" and "rationale for amount of fine assessed," the form states "see memorandum to case file, determination of civil monetary penalty." *Id*. No such memorandum is provided in discovery.
4. At the designated place for signature of Chief Counsel (for concurrence), no such signature is present. *Id*. The lack of signature may indicate this is either not the final version of the form, or the form was never reviewed by the Chief Counsel.

Respondent argues Complainant's production is incomplete, and Respondent takes issue with Complainant's assertion that citing "work product" relieves them of their obligations in discovery. Amended Mot. Compel 9, 11-12.

B. Request for Production No. 4

This request seeks "All your publicly available fact sheets regarding I-9 inspections and compliance requirements from January 1, 2019 to the present." Amended Mot. Compel.5.

Complainant took the position that this request was that "[p]ublicly available information regarding Form I-9 inspections can be found at [USCIS website] and the [ICE website]." Amended Mot. Compel 58.

In its October 2024 Amended Response to Respondent's Request for Production of Documents, Complainant provided a copy of an "I-9 Fact Sheet" also available on the ICE website. Amended Mot. Compel 84, 121-24.

Respondent argues Complainant's production is insufficient because it does not cover the entire requested timeframe, and specifically the time during which the audit transpired. Amended Mot. Compel 7. The documents provided are dated after the audit, and "archival information is no longer available through the public USCIS website." *Id*. at 8.

---

citing to the attached exhibits. Foreseeably, this results in delays when adjudicating motions. Parties should endeavor to label exhibits and include exhibit list or table of contents when submitted a voluminous motion.

C. Request for Production No. 5

According to Respondent, this request seeks "All your publicly available fact sheets describing Form I-9 signature requirements and expectations from January 1, 2019 to the present." Amended Mot. Compel 6.

Complainant took the position that "[p]ublicly available information regarding Form I-9 signature requirements can be found at the USCIS website… as well as 8 CFR 274a(2)." Amended Mot. Compel 59.

Respondent argues Complainant's production is insufficient because it does not cover the entire requested timeframe, and specifically the time during which the audit transpired. Amended Mot. Compel 7. Specifically, the documents provided are dated after the audit, and "archival information is no longer available through the public USCIS website." Amended Mot. Compel 8.

D. Request for Production No. 6

According to Respondent, this request seeks "All your handbooks on I-9 signature requirements and expectations on I-9 documents from January 1, 2019 to the present." Amended Mot. Compel 6.

Complainant took the position that "the requested information is publicly available information and can be found at the USCIS website… the ICE website… and 8 CFR 274a(2)." Amended Mot. Compel 60.

Respondent argues Complainant's production is insufficient because it does not cover the entire requested timeframe, and specifically the time during which the audit transpired. Amended Mot. Compel 7. Specifically, the documents provided are dated after the audit, and "archival information is no longer available through the public USCIS website." *Id.* at 8.

E. Request for Production No. 7

According to Respondent, this request seeks "All your internal guidance on Form I-9 signature requirements on I-9 documents from January 1, 2019 to the present." Amended Mot. Compel 6.

Complainant initially took the position the "requested information is publicly available information and can be found at the USCIS website… the ICE website… and 8 CFR 274a(2)." Amended Mot. Compel 61.

In its October 2024 Amended Response to Respondent's Request for Production of Documents, Complainant produced four responsive items: 1) March 6, 1997, Interim Guidelines: Section 274A(b)(6) – "Virtue Memo."; 2) August 22, 2012 Guidance on the Collection and Audit Trail Requirements for Electronically Generated Forms I-9 – "Dinkins Memo"; 3) April 1, 2023, ICE Fact Sheet on Worksite Enforcement. Amended Mot. Compel 85, 125-158. Although Complainant listed a fourth item, 8 CFR Part 274a.2 with relevant portions highlighted, i.e., 274a.2(e) through (i), that exhibit was not included. *Id*. at 85.

Respondent argues Complainant's production is incomplete because it does not cover "relevant agency guidance and communications." Amended Mot. Compel 7.

F. Request for Production No. 8

According to Respondent, this request seeks "All your auditor notes related to the I-9 Audit." Amended Mot. Compel 6.

Complainant took the position that "[a]uditor notes are considered work product and, therefore, will not be disclosed." Amended Mot. Compel 62.

Respondent argues Complainant's production is incomplete because it does not cover "relevant agency guidance and communications." Amended Mot. Compel 7. Respondent also argues Complainant's arguments concerning privilege lack merit. *Id*.

G. Request for Production No. 10

According to Respondent, this request seeks "To the extent not produced in response to RFP No. 9, all your documents of any communication from any of your employees related to the I-9 Audit." Amended Mot. Compel 6.

Complainant initially took the position that "requested documentation and communication are considered work product, and therefore, will not be disclosed." Amended Mot. Compel 64. In Complainant's second response (November 2024), Complainant produced an email from the auditor to another employee (possibly her supervisor) (no other direct or cc recipients). Amended Mot. 172. This email is a one-page document, and is dated August 25, 2023, with a subject of "For The Weekly." *Id.* The content of the email appears to be a summary of auditor activity, likely for a routine report. The content of the email notes that on August 23, 2023 a "NIF package" for this case was sent to "ICE Office of Chief Counsel for legal sufficiency review." *Id*.

Respondent argues Complainant's production is incomplete because it does not cover "relevant agency guidance and communications." Amended Mot. Compel 7. Respondent also argues Complainant's arguments concerning work product lack merit. *Id*.

## IV. LAW & ANALYSIS

### A. Request for Production 3

This request seeks Complainant's "administrative file and all related documents [with description of term "related"]." Amended Mot. Compel 5. In response, Complainant provides only the auditor's ICE Form 761 where she applies for a Notice of Intent to Fine. It is clear from the contents of the form that other documents exist, and are (or should be) in the possession of Complainant; further, it is also clear that Complainant declined to provide them.

Respondent's arguments pertaining to relevance are convincing. The administrative file and associated documents should shed light on what Complainant did, or did not do, during the investigation and audit which gave rise to the case (presumably underpinning Complainant's assessment of liability in the first place).

Complainant's only explanation for its decision to omit the remainder of the file and all related documents from the production is a reference to those additional documents as "work product." Amended Mot. Compel 57. While "work product" is likely an accurate description of where or how the documents were generated (but oddly, in this instance, not who generated the documents/ for whom they were generated), the label does little to assist Complainant in meeting its burden to demonstrate why these "work product" documents are either privileged and/or irrelevant.[8]

[8] It is possible that, in casually tossing the term "work product" into a one-line discovery response, Complainant hoped to fall backwards into the protections of Federal Rule of Civil Procedure 26(b)(3)(A) and/or Federal Rule of Civil Procedure 26(b)(3)(B), which relate to documents prepared by a party or its representative in anticipation of litigation, and the characterization of those documents as either opinion/ mental impression documents or fact documents. Federal Rule 26(b)(3)(A) states that "a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by another party or its representative" except subject to particular exceptions. Federal Rule 26(b)(3)(B) clarifies that if discovery is ordered, the court "must protect against disclosure of mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation." Such protection is often accomplished by way of a protective order.

While a full discussion of the mechanics of how to assert a privilege and what is required when asserting a privilege (relative to burden) is contained in a later section of this Order, it is worth noting that in the Ninth Circuit, Courts may apply a "because of" test when determining the purpose of document creation (and thus applicability of a trial preparation or work product privilege when a document may have more than one purpose). *See Am. Civil Liberties Union of N. California v. United States Dep't of Justice*, 880 F.3d 473, 485 (9th Cir. 2018). Other circuits which employ the same standard provide helpful guidance, noting "[w]here a document would

Indeed, Complainant at no time asserts these documents are irrelevant (via a timely raised objection), and so the Court is left to infer Complainant concedes relevance. With no privilege properly asserted, and no other objection timely lodged, these documents are discoverable, and should have been produced as responsive to the request. They will be produced now.

**Complainant is ORDERED to produce "administrative file and all related documents, including all documents and records reviewed, compiled, or created in preparing the Notice of Intent to Fine, including any notice of technical and procedure failures documentation, notice of discrepancy, or notice of suspect documents prepared for TerraPower, whether served on Terrapower or not"[9] directly to Respondent per the schedule at the conclusion of this Order.[10]**

**Complainant is further ORDERED to provide a filing to the Court in which it certifies compliance with this Order, and outlines a detailed list of documents provided to Respondent.**

B. Requests For Production 4, 5, 6 and 7

---

have been created 'in substantially similar form' regardless of litigation, work product protection is not available." *FTC v. Boehringer*, 778 F.3d 142, 149 (D.C. Cir. 2015) (citing *United States v. Deloitte LLP*, 610 F.3d 129, 138 (D.C. Cir. 2010)).

Additionally, Courts analyze "fact" work product and "opinion" work product in distinct ways, with "opinion" work product receiving heightened protections via a properly asserted privilege. *See* Fed. R. Civ. P. 26(b)(3)(B); *see also FTC v. Boehringer*, 778 F.3d at 152.

Again, to the extent Complainant were to ask the Court to find a work product privilege applies, as the party with the burden (i.e., the one asserting the privilege), Complainant must supply sufficient facts to demonstrate who generated the documents (or for whom they were generated), along with the causal link between the documents and trial preparation. Ideally Complainant would also provide at least some evidence as to whether the work product contains "fact" documents or "opinion" documents. Even if the Court were to take on the mantle of Complainant's burden (which it declines to do), an administrative file is, in all likelihood, not created by or exclusively for an attorney, and would have been created regardless of whether an audited business requests a hearing or not (as its creation presumably precedes a request for hearing).

[9] To the extent they are not exempted from production based on the discussion of the Privilege Log documents later in this Order.

[10] Additional dates and deadlines are provided at the conclusion of this Order.

For at least some of the requests at issue, Complainant takes the position that the information or documents sought are publicly available[11] and provides website links to that publicly available information. However, as it relates to the actual request, Complainant unilaterally narrowed, at times, the temporal scope[12] of the request to just the Agency's most recent versions of documents or fact sheets (or those versions in use at the time of the discovery request). Ultimately, this is not responsive to the request as Respondent requested both the current versions ("to present") and prior versions (i.e. those not presently in use), dating as far back as 2019. Respondent notes in its Motion that prior versions are not publicly available – an assertion Complainant does not contradict.

Documents and information are considered discoverable when relevant under the more expansive relevance standard available in discovery.[13] Respondent argues, convincingly, the prior versions of the documents, fact sheets, etc. are relevant as they cover the time period of the inspection and audit, and are, ostensibly, what Complainant would have referenced at that time. To the extent Respondent seeks documents or information to evaluate Complainant's conformity with its own guidance or policy during an audit or investigation, such information (or documents) would bear on an issue in this case.
Again, like the prior request for production, Complainant at no time argues the requested documents are irrelevant (either in a response to the discovery request or in a response to the Motion), allowing the Court to reasonably presume Complainant concedes relevance as it relates to discoverable information.

**Complainant is ORDERED to "produce and permit [Respondent] to inspect and copy any… documents… in the possession, custody, or control of [Complainant]"[14] which are responsive to Requests For Production 4, 5, 6, 7 directly to Respondent per the schedule at the conclusion of this Order.**

---

[11] Separately, "objecting to a discovery request because the information sought is equally available to the propounding parties from their own records or from records equally available to them is insufficient." *R.S. v. Lattice Semiconductor*, 14 OCAHO no. 1362a, 3 (2020) (citing *Nat'l Acad. of Recording Arts & Scis., Inc. v. On Point Events, LP*, 256 F.R.D. 678, 682 (C.D. Cal. 2009)).

[12] In evaluating discovery requests and party responses, the Court must carefully evaluate the temporal scope of the request. *See generally Ravines de Schur*, 15 OCAHO no. 1388d at 7; *see also United States v. Durable, Inc.,* 11 OCAHO no. 1221, 10 (2014).

[13] *Compare Amazon Webservices Inc.*, 14 OCAHO no. 1381j, at 4-5 (describing relevance standard in discovery) *with United States v. R&SL Inc.*, 13 OCAHO no. 1333b, 26 (discussing relevance and probative value for hearing in relation to Federal Rule of Evidence 401).

[14] 28 C.F.R. § 68.20(a)(1).

**Complainant is further ORDERED to provide a filing to the Court in which it certifies compliance with this Order, and outlines a detailed list of documents provided to Respondent.**

C. Requests for Production 8 and 10

As an initial matter, these requests relate to documents in the possession of the Complainant. In general, the documents at issue appear to be email correspondence between Complainant employees (auditor(s), attorney(s), and others) and different versions of the Report of Investigation (ROI) generated by the investigation and audit in this case.

Based on the written responses to the requests for production at issue, Complainant first takes the position that the contents (and volume (i.e. number of pages)) of these documents cannot be provided to Respondent because they are "work product," and then later takes the position the documents contain "privileged" information (according to an undated and one-page threadbare "privilege log"[15] provided in the second round of Complainant responses to discovery.) Amended Mot. Compel 174.

[15] A properly completed privilege log is more than just an academic exercise.

Complainant was placed on notice at the October 22, 2024 prehearing conference when the Court informed its counsel that "if a party in discovery seeks to assert a privilege over otherwise discoverable information or documents, the party should be prepared to produce a privilege log." *United States v. Terrapower, LLC*, 19 OCAHO no. 1548c, 2 (2024). Additionally, in its December 30, 2024 Notice – Revised Deadlines & Guidance, the Court made clear that "Complainant should not rely on or cite to Freedom of Information Act (FOIA) exemptions as the FOIA is a statute covering release of information to the public." *United States v. Terrapower, LLC*, 19 OCAHO no. 1548d, 2 (2024).

The point of the log is to create a sufficiently detailed record of the specific document at issue, including, but not limited to: date of creation/dissemination, author, recipient(s) (and if a recipient is a "cc" or "to" recipient), a summary of the document's content, and sufficient information to show all elements of the privilege or protection.

A properly crafted privilege log has the potential to resolve disputes without Court intervention (i.e. it helps the opposing side evaluate whether it should even file a motion to compel). When Court intervention is required, that same privilege log (along with supporting evidence), allows the Court to understand the propriety of the party's position on privileges. "An initial response may lack details that the responding party should add if the other side challenges a privilege designation. More information may still be necessary if the matter is presented to the judge for

The privilege log only addresses requests for production 8 and 10. Separately, it raises, for the first time, additional privileges not provided in Complainant's initial response to the discovery request.

1. Asserting a Privilege in Discovery (Burdens) Legal Standards

A party may claim a privilege but "has the burden to demonstrate the privilege applies in the particular circumstances of the case." *United States v. Garza*, 4 OCAHO no. 644, 472, 477 (1994).

Under Federal Rule of Civil Procedure 26(b)(5), a party claiming a privilege must "expressly make the claim" of the privilege and "describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing itself information privileged or protected, will enable other parties to assess the claim."

Further, "[a] party asserting a privilege has the burden of demonstrating its applicability." *Tingling v. City of Richmond*, 13 OCAHO no. 1324b, 3 (2021) (quoting *NLRB v. Interbake Foods, LLC*, 637 F.3d 492, 502 (4th Cir. 2011)); accord *De Leon v. Longoria Farms*, 13 OCAHO no. 1320, 2 (2019) (quoting *EEOC v. BDO USA, LLP*, 876 F.3d. 690, 695 (5th Cir. 2017)). "The initial burden of showing privilege applies is on the government." *Redlands Soccer Club v. Dep't of the Army,* 55 F.3d 827, 854 (3d Cir. 1995) (*citing Schreiber v. Society for Savings Bancorp*., 11 F.3d 217, 221 (D.C. Cir. 1993)).

For the party asserting the privilege to meet its burden, it "must present more than a bare conclusion or statement that the documents sought are privileged. Otherwise, the agency, not the court, would have the power to determine the availability of the privilege." *Id*.

2. Attorney – Client Privilege (Privilege Log Entry 12 and 14)

Attorney – Client Privilege has been previously addressed in the forum. It may be asserted to protect (1) confidential communications made (2) to a lawyer (3) "for the primary purpose of security either legal opinion or legal services, or assistance in some legal proceeding." *De Leon*, 13 OCAHO no. 1320, at 2 (*citing BDO USA, LLP*, 876 F.3d. at 695)). "Further, the attorney client privilege protects the substance of communications between a client and counsel, not the mere fact that the communications occurred." *Id*. (citations omitted).

For ease of reference, request for production 10 is a catch-all request "all your documents of any communication from any of your employees related to the I-9 Audit." Amended Mot. Compel 6. The two emails at issue (i.e., citing attorney-client privilege) are from the "auditor" and to two

---

resolution." 8 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2026.1 (3d ed) (June 2024 Update).

separate named individuals. It is unknown from the privilege log whether these individuals are attorneys (but as a courtesy to Complainant, the Court will assume they are), and the contents are not summarized in a way that would allow the Court to understand, with confidence, that a privilege should apply**.** Those caveats notwithstanding, the log does indicate the contents of the emails relate to "consultation with attorney," which is barely sufficient to trigger exclusion from production based on privilege.

**The Court will exclude the emails referenced at entries 12 and 14 of the privilege log from production because the contents, in all likelihood, contain counsel from attorney to client.**

3. Deliberative Process Privilege (Privilege Log Entry 2 and 16)

These entries are described as emails. One email is from the auditor to an unknown entity ("SGS Alert"), and the other email is from a named individual (role unknown) to the auditor. Both emails are otherwise responsive to request for production 10.

Deliberative process privilege is a form of executive privilege "which protects from disclosure documents generated during an agency's deliberations about a policy [or decision]… and shields documents that reflect an agency's preliminary thinking about a problem." *United States Fish and Wildlife Serv. v. Sierra Club*, 592 U.S. 261, 263, 266 (2021). It is a privilege available to government agencies in civil litigation (when properly asserted). *Id*. at 263.

> The privilege… distinguishes between pre-decisional, deliberative documents, which are exempt from disclosure, and documents reflecting a final agency decision and the reasons supporting it, which are not. See *Renegotiation Bd.* v. *Grumman Aircraft Engineering Corp.*, 421 U. S. 168, 186, (1975). Documents are "predecisional" if they were generated before the agency's final decision on the matter, and they are "deliberative" if they were prepared to help the agency formulate its position. See *Sears*, 421 U. S., at 150-152, 95 S. Ct. 1504, 44 L. Ed. 2d 29; *Grumman*, 421 U. S., at 184-186, 190, 95 S. Ct. 1491, 44 L. Ed. 2d 57.

*Id*. at 268.

In order to evaluate whether this privilege applies, the party asserting that privilege must clearly identify the decision at issue, and provide a timeline to assist in evaluating whether documents were produced before or after a decision was made. Further, not all pre-decisional documents are deliberative; consequently, the agency would also need sufficient proffer of the deliberative nature of the document.

Here, Complainant cannot meet its burden due to the lack of information and evidence provided. Complainant provides the date these emails were sent, but does not disclose the role of the senders or recipients in the decision making process. Complainant also does not identify the agency decision or policy to which these emails pertain. Complainant does not identify who is asserting the privilege on the agency's behalf. Finally, Complainant does not provide any explanation as to the rationale for the creation of the documents (i.e. that they were created as part of the agency's decision-making or policy-making process).

Complainant has not met its burden to establish the privilege covers these documents.

**Complainant is ORDERED to produce the documents identified in the Privilege Log at entries 2 and 16 directly to Respondent by per the schedule at the conclusion of this Order.**

**Complainant is further ORDERED to provide a filing to the Court in which it certifies compliance with this Order, and affirms the documents were provided to Respondent.**

4. Law Enforcement Privilege (Privilege Log Entries 1, 3, 6, 7, 8, 9, 10, 13, 15)

These entries are comprised of emails (to or from the auditor to an individual whose identity is "redacted") and four Reports of Investigation (ROIs) authored by the auditor (with date of document ranging from January 20, 2023 through August 23, 2023). As to the ROIs, it is unknown whether it is the same ROI but simply successive drafts, or if they are four separate investigations.

In the Ninth Circuit, there is no clear guidance as to whether a "law enforcement" privilege has or has not been formally recognized.[16] With no further guidance from the circuit, it is incumbent on the party asserting the privilege to articulate, with heightened clarity, why specific information should be excluded from production in discovery based on such a privilege.

Again, and similar to the other deficiencies outlined, the Complainant provides no argument or evidence to assist the Court in understanding this proposed privilege.[17] Complainant's own

[16] In a decision pertaining to an Administrative Procedures Act challenge, the Ninth Circuit opined, "Though several other circuits have adopted such a privilege . . . the U.S. Supreme Court and the Ninth Circuit," in which this case arises, "have yet to recognize or reject a 'law enforcement privilege.'" *Shah v. Dep't of Just*., 714 Fed. Appx. 657, 659 n. 1 (9th Cir. 2017).

[17] For context, Courts have recognized a legitimate government interest in protecting the identities of informants; however, Complainant provides no evidence or argument that this is at issue in this case. *See Roviaro v. United States*, (1957); *see also Walsh v. United States District Court (In re Walsh)*, 15 F.4th 1005 (9th Cir. 2021). Additionally, Courts have recognized (in other kinds of cases) the need to protect the integrity of ongoing investigations and protect the integrity of the investigative process (i.e. protection of law enforcement tradecraft etc.); again, Complainant raises

inaction is fatal to it successful assertion of this privilege. *See generally United States v. Capitol Fireproof*, 14 OCAHO 1372 (citing *Floyd v. City of New York*, 739 F. Supp. 2d 376, 380 (S.D.N.Y. 2010)).

**Complainant is ORDERED to produce the documents identified in the Privilege Log at entries 1, 3, 6, 7, 8, 9, 10, 13, 15 and 16 directly to Respondent by per the schedule at the conclusion of this Order.**

**Complainant is further ORDERED to provide a filing to the Court in which it certifies compliance with this Order, and affirms the documents were provided to Respondent.**

## V. REVISED DISCOVERY SCHEDULE

The Court now provides the following deadlines to facilitate discovery.

Parties may move the Court to revise this schedule as appropriate, but must do so via a written motion, and ideally a jointly filed one. The moving party should articulate good cause (i.e. if an intervening event outside its control precludes it from gathering and producing documents etc.) in any motion seeking a revision of the schedule.

Further, parties should be aware that the motions pertaining to depositions will be addressed after all issues related to production of documents have been resolved. Stated a different way, Complainant's Amended Motion to Quash Notice of Deposition[18] remains in a pending status, and will remain in such status until after the scheduled prehearing conference.

The schedule for document production is as follows:

| | |
|---|---|
| Motions for Protective Order[19] | April 18, 2025 |

---

no such argument here. *See generally Coughlin v. Lee*, 946 F.2d 1152 (5th Cir. 1991); *see also Murchison-Allman v. City of New York*, 115 F. Supp. 3d 447 (S.D.N.Y. 2015).

[18] Complainant filed both a Motion to Quash Notices of Deposition and an Amended Motion to Quash Notices of Deposition on December 23, 2024. Because these motions are functionally held in abeyance until after the document-related issues have been resolved, Respondent can anticipate a discussion of these motions (to include a response deadline) at the prehearing conference outlined in the revised schedule.

[19] Complainant may file a motion seeking a protective order pursuant to 28 C.F.R. § 68.18(c) by using as a guiding principle Federal Rule of Civil Procedure 26(c)(1)(G). Complainant should be aware that protective orders are usually discussed or negotiated between parties first, and while it

| | |
|---|---|
| Production of Documents Complete | April 25, 2025 OR 30 days after issuance/ declination of issuance of Protective Order (whichever is later) |
| Complainant Discovery Status Filing | April 25, 2025 OR 30 days after issuance/ declination of issuance of Protective Order (whichever is later) |
| Prehearing Conference | May 16, 2025 OR 60 days after issuance/ declination of issuance of Protective Order (whichever is later) |

Separately, Complainant should note that failure to comply with this order may result in sanctions pursuant to 28 C.F.R. § 68.23(c).

As a final note, Complainant may redact personally identifiable information (PII), and such redaction will not be in contravention of this Order. To the extent those redactions have been applied, parties may discuss any issues arising from redactions with the Court at the prehearing conference.

SO ORDERED.

Dated and entered on April 1, 2025.

_____

Honorable Andrea R. Carroll-Tipton
Administrative Law Judge

is not always possible, it is typically a best practice for parties to jointly move the Court to issue a protective order, or at least jointly propose a draft of a proposed protective order even where one party unilaterally moves for such an order. *See generally United States v. Facebook, Inc.*, 14 OCAHO no. 1386d (2021); *Talebinejad v. Mass. Inst. of Tech.*, 17 OCAHO no. 1464b (2023).