

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

September 14, 2020

UNITED STATES OF AMERICA,)	
Complainant,)	
)	
v.)	8 U.S.C. § 1324a Proceeding
)	OCAHO Case No. 2020A00017
)	
CAPITAL FIREPROOF DOOR,)	
Respondent.)	
_____)	

DISCOVERY ORDER

On November 20, 2019, Complainant, the Department of Homeland Security, Immigration and Customs Enforcement (ICE), filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) against Respondent, Capital Fireproof Door, alleging violations of 8 U.S.C. § 1324a. Respondent filed a timely answer. On August 18, 2020, Respondent filed a Motion to Rule under 28 C.F.R. § 68.23 (Mot.). Complainant did not respond.

Respondent seeks an order compelling discovery responses by September 22, 2020 to permit it to respond to the Complainant’s anticipated motion for summary decision, the response to which is due October 2, 2020. The Court notes that discovery closed on August 18, 2020.

I. STANDARDS

The parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding. 28 C.F.R. § 68.18(b). An OCAHO Administrative Law Judge has the authority to “compel the production of documents” and to compel responses to discovery requests, pursuant to 28 C.F.R. § 68.23 and § 68.28. *United States v. Rose Acre Farms, Inc.*, 12 OCAHO no. 1285, 2 (2016). Although OCAHO’s Rules and the Administrative Procedure Act govern these proceedings, the “Federal Rules of Civil Procedure may be used as a general guideline in any situation not provided for or controlled” by OCAHO’s rules. 28 C.F.R. § 68.1; *Rose Acre Farms, Inc.*, 12 OCAHO no. 1285 at 2.

The burden is on the party claiming a privilege to demonstrate that the privilege applies in the particular circumstances of the case. *Id.* at 4 (citing *United States v. Durable, Inc.*, 11 OCAHO

no. 1221, 9 (2014); *United States v. Maria Elizondo Garza, d/b/a Garza Farm Labor*, 4 OCAHO no. 644, 4 (1994)).

Federal Rule of Civil Procedure 26(b)(5) sets forth the information that should be provided in a privilege claim. The rule requires that a party withholding information on grounds of privilege shall make the claim expressly and shall describe the nature of the documents, communications or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection. FED. R. CIV. P. 26(b)(5)(A).

II. DISCUSSION

Respondent sent Complainant a letter on August 11, 2020, after the deposition of Carl Straker, Complainant's auditor. Mot. Ex. 1. The letter requests a number of items that were mentioned in the deposition. Complainant responded by letter on August 12 objecting to each of the requests. Although Complainant did not include a certificate that the parties met and conferred, it is apparent from Complainant's letter that such a meeting would have been futile. The motion meets the requirements of OCAHO Rule § 68.23(b).

Respondent seeks the following:

1. Carl Straker's Notes. According to Respondent, during a deposition, Mr. Straker, indicated he took notes during the audit of Respondent's I-9 forms. Complainant stated that the notes were of conversations with Complainant's counsel, and therefore may be withheld from production based on attorney-client privilege. Mot., Ex. 2. Respondent argues that this explanation is not consistent with Mr. Straker's deposition testimony in which he stated they were made for his own use in completing the audit.

Complainant's assertions are not sufficiently detailed to provide this Court with a basis upon which to rule. Consistent with Federal Rule of Civil Procedure 26(b)(5), Complainant must either produce the documents, or complete a privilege log in which Complainant describes generally the subject matter, the persons participating, and the basis for asserting the privilege.

2. Tasking for the Audit. Respondent seeks the order Mr. Straker received to audit Complainant. Complainant objected to producing the documents in an email based upon a claim that the document is "law enforcement sensitive."

This Court is only aware of a privilege entitled the law enforcement privilege. As with all privileges, the party seeking to block the disclosure bears the burden to demonstrate that the failure to disclose is warranted. "To meet its burden, the party asserting the law enforcement privilege must show that the documents contain information that the law enforcement privilege is

intended to protect.” *Floyd v. City of New York*, 739 F. Supp. 2d 376, 380 (S.D.N.Y. 2010), (quoting *In re The City of New York*, 607 F.3d 923, 944 (2d Cir. 2010)). “Specifically, th[is] party ... must show that the documents in question contain (1) information pertaining to law enforcement techniques and procedures, (2) information that would undermine the confidentiality of sources, (3) information that would endanger witness and law enforcement personnel, (4) information that would undermine the privacy of individuals involved in an investigation, or (5) information that would seriously impair the ability of a law enforcement agency to conduct future investigations.” *Id.* A strong presumption exists against lifting the privilege, but it could be rebutted upon a showing of, among other things, a “compelling need.” *Id.* The court must then weigh the public interest in nondisclosure against the need of the litigant for access to the privileged information before ultimately deciding whether disclosure is required. *Id.* at 381.

In this case, as the Complainant has not responded to the motion to compel, it has not satisfied its preliminary obligation to demonstrate that the privilege applies. Consistent with Federal Rule of Civil Procedure 26(b)(5), Complainant must either produce the documents, or complete a privilege log in which the Complainant describes the basis for asserting the privilege.

3. Statement of Reasons for Audit. Respondent requests an explanation for the process, criteria, and factual information that led to its selection for audit. Respondent stated that he sought this at the deposition, but Complainant objected based upon relevance. Respondent subsequently requested the information in its letter to Complainant dated August 11, 2020, and suggested that the information could be either in writing in the nature of an interrogatory response, or by a very brief deposition of a witness with personal knowledge following a procedure similar to that used under Federal Rule of Civil Procedure 30(b)(6). As Respondent did not notice a deposition, this request is untimely. However, the Court will construe the request in the letter as an interrogatory.

In its response, Complainant again objects as “law enforcement sensitive.” To the extent Complainant is asserting a law enforcement privilege, it must either produce a response to the interrogatory, or complete a privilege log in which the Complainant describes the basis for asserting the privilege.

4. Respondent's Subpoena Response. Respondent seeks to review the materials Complainant received from Respondent pursuant to its administrative subpoena. Complainant objected that Respondent already has copies of the documents it produced. “Courts have stated that 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.” *Sharma 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)). As the objection is not proper, Complainant is ordered to produce for inspection the materials received from Respondent pursuant to the administrative subpoena.

5. Complainant's Color-Coded I-9s. According to Respondent, on October 8, 2019, Complainant permitted Respondent's counsel to inspect the I-9 Forms it collected from Respondent on July 17, 2018. The documents were purportedly color-coded to highlight alleged regulatory deficiencies. Apparently, Complainant's counsel sent the documents to Respondent electronically, but the color-coding did not appear on the scans. Complainant objects on the ground that the documents were sent, and the color-coded documents are protected by the attorney-work product and attorney-client privileges.

As noted by Respondent, privileges are waived when disclosed. *See United States v. Rose Acre Farms, Inc.*, 12 OCAHO no. 1285 at 4; *see also Fullerton v. Prudential Ins. Co.*, 194 F.R.D. 100, 103 (S.D.N.Y.2000) (quoting *Niagara Mohawk Power Corp. v. Stone & Webster Eng. Corp.*, 125 F.R.D. 578, 587 (S.D.N.Y.1989)). "Generally, the work product privilege is waived when protected materials are disclosed in a manner which is either inconsistent with maintaining secrecy against opponents or substantially increases the opportunity for a potential adversary to obtain the protected information." *Fullerton*, 194 F.R.D. at 103 (quoting *Niagara Mohawk Power Corp.*, 125 F.R.D. at 590).

As Complainant waived both privileges by showing the documents to Respondent in their color-coded format, Complainant must produce the color-coded Form I-9s.

III. CONCLUSION

Respondent's Motion to Rule under 28 C.F.R. § 68.23 is GRANTED IN PART. Complainant is compelled to produce Respondent's subpoena responses and the color-coded Form I-9s by September 22, 2020. To the extent that Complainant asserts privilege as regards the remaining documents, Complainant must complete a privilege log supporting the basis for the privilege and provide it to Respondent and this Court by September 22, 2020. To the extend Complainant does not continue to assert privilege for the remaining documents, Complainant must produce the documents by September 22, 2020.

SO ORDERED.

Dated and entered on September 14, 2020.

Jean C. King
Chief Administrative Law Judge