

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

September 30, 2021

A.S.,)	
Complainant,)	
)	
v.)	8 U.S.C. § 1324b Proceeding
)	OCAHO Case No. 2020B00073
)	
AMAZON WEBSERVICES INC.,)	
Respondent.)	
_____)	

ORDER ON RESPONDENT’S MOTION TO COMPEL

I. BACKGROUND

On April 7, 2021, the Court issued an Order Reframing Scope of Complaint and Partially Granting Motion to Dismiss (Order Reframing Complaint) in which it provided “the closed universe of allegations properly before the Court.” *A.S. v. Amazon Web Servs. Inc.*, 14 OCAHO no. 1381d, 17–18 (2021).¹

Pursuant to the Court’s Order Granting Joint Motion for Extension of Discovery Period, discovery-related motions were due on or before August 28, 2021.

On August 27, 2021, Respondent filed a Motion to Compel Complainant’s Response to Respondent’s Discovery Request and Interrogatory (Motion to Compel). On September 1, 2021, Complainant filed Complainant’s Response to “Respondent’s Motion to Compel Complainant’s Response to Respondent’s Discovery Request and Interrogatory (Opposition).

¹ 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 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 “FIM-OCAHO,” or in the LexisNexis database “OCAHO,” or on the website at <http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders>.

II. PARTIES' POSITIONS

A. Respondent's Motion to Compel

Respondent seeks to compel responses to one request for production and one interrogatory propounded upon Complainant on May 24, 2021. Mot. Compel 2, 4. The two requests are as follows:

[1.] Please provide complete digital copies of any recordings that you have made, or are in your possession, of any conversations, whether telephonic, in person, or via a social media or other messaging platform with any of the following:

- a. [P.L.];
- b. [V.Y.];
- c. [T.R.];
- d. [V.V.];
- e. [P.S.];
- f. [J.R.]; or
- g. any other person you allege was responsible for any of the alleged acts of retaliation identified in the Judge's order.

[2.] Any recordings that you have made of conversations with [Respondent] employee may be pertinent to whether or not any conduct you alleged to be retaliatory was in fact retaliatory, and may also be pertinent to [Respondent's] defense that any actions taken with respect to your employment were based on legitimate non-discriminatory reasons. As to any recordings that you made of conversations with one or more [Respondent] employees, whether telephonic, live or via an electronic meeting platform, please provide, for the period beginning on June 14, 2019 and any time thereafter, please provide the following information:

- a. date, time, and duration of recording;
- b. names of parties in any conversation recorded;
- c. subject matter;
- d. whether you have deleted the recording or currently possess it; and
- e. if you have deleted the recording, the date of such deletion.

Mot. Compel 2.

Respondent asserts that Complainant provided neither the audio recordings nor specific objections to the discovery requests. *Id.* at 4. Further, Respondent argues its requests are

relevant to potential defenses. Respondent also attests that it met and conferred with Complainant to resolve discovery disputes. *Id.* at 5.

B. Complainant's Opposition

Complainant opposes the Motion to Compel because the request for production and the interrogatory are “overbroad, burdensome, unclear, and irrelevant.” Opp’n 6. Complainant asserts that Respondent has the burden to identify “the exact date, timestamp and meeting context/background” because the present requests “are overly burdensome in their sheer volume.” Opp’n 6–7. Further, Complainant states that only after he is reinstated to his position will he produce the recordings. Opp’n, Ex. A, at 6.

Separately, Complainant objects to Respondent’s request for audio recordings of conversations held prior to June 14, 2019 because the Court’s Order Reframing Complaint limited the allegations to events occurring after June 14, 2019. Opp’n 3–4. Complainant notes that he has already provided transcripts of the following five events: April 4, 2019 call with V.Y.; May 13, 2018 AWS town hall; May 14, 2019 meeting with V.V.; September 5, 2019 meeting with V.V., P.L., and P.S.; and September 17, 2019 meeting with P.L. Opp’n 4.

Complainant also alleges, for the first time, that the audio recordings “are qualified as attorney-client privilege” related to matters before the Equal Employment Opportunity Commission (EEOC) lawsuit, with no further explanation or rationale for such an assertion. Opp’n 5. “Complainant strongly believe[s] that request, from the Respondent attorneys, has other intentions like to somehow get all the audio recording in order to support the Respondent in other cases[.]” *Id.* As further explained below, Complainant failed to timely assert these objections, thus they have been waived and need not be addressed.²

² While the Court will not fully analyze the untimely objection, it is worth noting that it is unclear, based on the content of the discovery sought, how the information could qualify as attorney client privilege. 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 attorney-client privilege protects (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 (quoting *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).

Finally, “Complainant ask[s] the Court to consider whether Respondent’s abuse of the discovery process rises to a level warranting granting the entire relief to Complainant under OCAHO precedent.” Opp’n 3.

III. LEGAL 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).

A. Procedural Requirements of Motion to Compel

The Court “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). Parties may file motions to compel responses to discovery if the responding party fails to adequately respond or objects to the request. 28 C.F.R. § 68.23(a). Pursuant to 28 C.F.R. § 68.23(b), a motion to compel must set forth:

- (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.

B. Relevance and Objections

The scope of discovery extends to “any matter, not privileged, which is relevant to the subject matter involved in the proceeding.” 28 C.F.R. § 68.18(b). 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.’” *United States v. Autobuses Ejecutivos, LLC*, 11 OCAHO no. 1220, 3 (2014) (quoting *United States v. Select Temps., Inc.*, 9 OCAHO no. 1078, 2 (2002)).

“Federal Rule of Civil Procedure 26(b)(5) sets forth the information that should be provided in a privilege claim.”² *United States v. Capital Fireproof Door*, 14 OCAHO no. 1372, 2 (2020). Rule 26(b)(5) requires the party withholding information on the basis of privilege to make the claim expressly and “describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.”

“Unless the objecting party sustains his or her burden of showing that the objection is justified, the Administrative Law Judge may order that an answer be served.” 28 C.F.R. § 68.23(a). The party refusing to respond “must articulate its objections in specific terms and has the burden to demonstrate that its objections are justified.” *United States v. Employer Sols. Staffing 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 adequately state the reason 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 (citing *McLeod, Alexander, Powel & Appfel, P.C. v. Quarles*, 894 F.2d 1482, 1485 (5th Cir. 1990)).

IV. DISCUSSION

As a preliminary matter, the Court DENIES Complainant’s request to “grant[] the entire relief to Complainant” as a sanction for Respondent’s alleged abuse of the discovery process. The Court has previously held, in this case, that requests for relief should not be submitted in a response or opposition to a motion because “requesting new relief in a response to a motion strips the original moving party from an opportunity to respond as replies are generally not permitted in OCAHO proceedings.” *A.S. v. Amazon Web Servs., Inc.*, 14 OCAHO no. 1381f, 3, (2021) (citing 28 C.F.R. § 68.11(b)).

A. Respondent Satisfied Procedural Requirements of Motion to Compel

Respondent complied with 28 C.F.R. § 68.23(b)(1) as it provided, with sufficient specificity, the nature of the request.

Respondent satisfied 28 C.F.R. § 68.23(b)(2) because it provided an email from Complainant dated June 17, 2021 in which Complainant objects to the discovery request “as it is overbroad and involves search criteria that are unworkable and overly burdensome.” Mot. Compel, Ex. A.

Respondent complied with 28 C.F.R. § 68.23(b)(3) and provided sufficient argument in favor of compelling production, namely a sufficient showing of relevance and relation to a defense of legitimate, non-discriminatory rationale for a personnel action. Opp’n 4.

Finally, Respondent met the requirement of 28 C.F.R. § 68.23(b)(4) as the record supports the proposition that the parties have met and conferred about discovery issues on several occasions. Opp’n 5.

Noting Respondent’s compliance with the procedural requirements of a motion to compel, the Court now turns to the substance of Respondent’s motion.

B. Substance of Motion to Compel

i. Discovery Requested

Respondent's request for production and interrogatory are both relevant as they relate to Respondent's potential defenses as articulated in the motion and summarized above. Bearing in mind that relevance in this forum "has been construed broadly to encompass 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," it is clear that Respondent has demonstrated that the verbatim, recorded, statements of implicated employees are relevant to its ability to mount a defense.

In examining the request for production, Respondent does not provide a time frame for the recordings it seeks in its discovery request. OCAHO case law permits limitations on the temporal scope of discovery. *United States v. Durable, Inc.*, 11 OCAHO no. 1221, 10 (2014) (citations omitted). As such, the Court limits the discovery request such that Complainant must only provide recordings of conversations that occurred after the start of Complainant's employment with Respondent, November 12, 2018. Answer 6. *See Durable, Inc.*, 11 OCAHO no. 1221, at 10–11 (limiting scope of discovery requests from a twenty-five year period to a five year period).

Conversely, the interrogatory does not present similar concerns as Respondent provides a time frame for which it seeks information on; specifically, Respondent seeks details about conversations relating to the retaliation claim and defenses "for the period beginning on June 14, 2019." Mot. Compel 2.

ii. Complainant's Objections

Because the Court has determined that the requested information meets the legal standards of the forum, it now turns its analysis to the viability of any objections timely raised.

Contrary to Respondent's assertions, Complainant did in fact provide some objections in response to the discovery requests. *See* Mot. Compel, Ex. A, at 6. Complainant argued that the request was "overbroad and involves search criteria that are unworkable and overly burdensome." *Id.* The Court notes, however, that Complainant now raises new objections in response to the Motion, including relevance and attorney-client privilege. Opp'n 5.

Those untimely raised objections are waived. *See Employer Sols. Staffing Grp. II, LLC*, 11 OCAHO no. 1234, at 3 (failure to make a timely objection constitutes a waiver). The Court will not "consider any matters raised for the first time in response to the motion to compel because a party is not at liberty to withhold its objections until it is required to respond to a motion to compel." *Id.* at 5 (citing *Autobuses Ejecutivos, LLC*, 11 OCAHO no. 1220, at 4). Therefore, the Court will only address the objections that Complainant preserved by timely raising them.

Turning to the timely objections, Complainant's conclusory objections are not sufficiently articulated objections. *See Allen Holdings, Inc.*, 9 OCAHO no. 1059, at 5 (citations omitted).

As to Respondent's request for material predating June 15, 2019, specifically material dating back to December 27, 2018, the Court finds the entire requested time-frame to be relevant as it "may contain evidence of hostile, insubordinate and combative conduct by the Complainant, evidence which would be supportive of Respondent's position that Complainant's termination was the result of ongoing conduct of that nature by the Complainant." Mot. Compel 4. Regarding temporal scope of discovery, "information both before and after the liability period within a Title VII lawsuit may be relevant and/or reasonably calculated to lead to the discovery of admissible evidence and courts commonly extend the scope of discovery to a reasonable number of years both prior to and following such period." *Owens v. Sprint/United Mgmt. Co.*, 221 F.R.D. 649, 655 (D. Kan. 2004) (citing case law from several circuits).³ Thus, the recordings are relevant to Respondent's defense that Complainant was not fired in retaliation but because of his ongoing behavior, behavior which may have occurred prior to June 15, 2019.

While Complainant provided Respondent five transcripts of meetings, those transcripts are not responsive to the discovery requests.⁴ Respondent seeks digital copies of the recordings, not transcripts created by Complainant. Mot. Compel 2.

Complainant asserts it is Respondent's burden to identify the dates and times of meetings that Complainant recorded. Case law and regulation do not support such an assertion. Further, it is unclear how Respondent could identify the dates and times of recorded meetings that Respondent did not record.

³ "In interpreting § 1324b, OCAHO jurisprudence looks for general guidance to cases arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and other federal remedial statutes prohibiting employment discrimination." *Chellouf v. Inter Am. Univ. of P.R.*, 12 OCAHO no. 1269, 5 (2016).

⁴ Complainant notes that Respondent recorded the September 30, 2019 termination meeting and had provided it as part of document production. This is not relevant to the instant motion to compel because the discovery requests are directed towards Complainant; thus, Complainant must be the one to provide the responses. It should be noted "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." *A.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)).

Finally, Complainant claims the requests “are overly burdensome in their sheer volume” and provides a list of reasons why he is “busy.” Opp’n 7. As the party opposing the discovery requests, Complainant has the burden to provide facts justifying his objection “by demonstrating that the time or expense involved in responding to requested discovery is unduly burdensome,” and the Complainant’s burden “imposes an obligation to provide sufficient detail and explanation about the nature of the burden in terms of time, money and procedure required to produce the requested documents.” *Horizon Holdings v. Genmar Holdings*, 209 F.R.D. 208, 213 (D. Kan. 2002) (citing *Snowden v. Connaught Lab., Inc.*, 137 F.R.D. 325, 332 (D. Kan. 1991)). Complainant has not provided sufficient detail explaining why the request for production or interrogatory is overly burdensome. Therefore, Complainant’s objections are overruled and Complainant shall be ordered to produce the requested discovery as follows:

Complainant is ORDERED to produce audio recordings responsive to the discovery request of conversations held on or after November 12, 2018 that Complainant possesses.⁵

Complainant is also ORDERED to respond to Respondent’s interrogatory with the information requested based upon the information that is available to him.⁶

V. CONCLUSION

The Court GRANTS in part Respondent’s Motion to Compel insofar as Complainant is ordered to respond to the interrogatory and discovery request as explained above.⁷

Complainant shall produce this discoverable material **on or before October 30, 2021**. *See Capital Fireproof Door*, 14 OCAHO no. 1372, at 4.

“The parties should note that failure to comply with this Order may result in sanctions pursuant to 28 C.F.R. § 68.23(c).” *Ogunrinu v. Law Resources*, 13 OCAHO no. 1332e, 10 (2020).

⁵ 28 C.F.R. § 68.20 limits production in discovery to matters “in the possession, custody, or control of the party upon whom the request is served[.]”

⁶ 28 C.F.R. § 68.19(a) requires responses to written interrogatories to be made on “such information as is available to the party.”

⁷ Audio recordings are proper subjects of discovery. *See In re Investigation of Carolina Emps. Ass’n, Inc.*, 3 OCAHO no. 455, 605, 608, 611 (1992).

SO ORDERED.

Dated and entered on September 30, 2021.

Honorable Andrea Carroll-Tipton
Administrative Law Judge