

MIKE DE LEON, et al.,)
Complainants,)
) 8 U.S.C. § 1324b Proceeding
v.) OCAHO Case No. 18B00056
)
LONGORIA FARMS, et al.,)
Respondents.)
)

Under the Office of the Chief Administrative Hearing Officer rules, “the scope of discovery encompasses any information that is not privileged and is relevant to the subject matter of the proceeding.” *U.S. v. Frimmel Management, LLC*, 12 OCAHO no. 1271b, 2 (2016) (citing 28 C.F.R. § 68.18(b)). OCAHO Administrative Law Judges have “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.” *U.S. v. Rose Acre Farms, Inc.*, 12 OCAHO no. 1285, 2 (2016) (quotation marks omitted). While OCAHO rules govern this proceeding, 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.” *Id.* (quoting 28 C.F.R. § 68.1).

II. DISCUSSION

Complainants argue that the common interest doctrine, as an extension of the attorney-client privilege, protects the four Facebook messages at issue. Respondents contend that Complainants have failed to establish that these documents are privileged under the attorney-client privilege. “The attorney-client privilege ‘protects communications between attorney and client.’” *Rose Acre Farms*, 12 OCAHO no. 1285 at 3 (quoting *U.S. v. R&C Tour (Guam), Inc.*, 2 OCAHO no. 393, 747, 753 (1989)). However, the privilege “does not protect facts and should be narrowly construed.” *Id.* (quotation marks and citation omitted). In the Fifth Circuit, “[f]or a communication to be protected under the privilege, the proponent ‘must prove: (1) that he made a confidential communication; (2) to a lawyer . . . ; (3) for the primary purpose of security either legal opinion or legal services, or assistance in some legal proceeding.’” *E.E.O.C. v. BDO USA, LLP*, 876 F.3d 690, 695 (5th Cir. 2017) (emphasis omitted) (quoting *SmithKline Beecham Corp. v. Apotex Corp.*, 232 F.R.D. 467, 472 (E.D. Pa. 2005)).

Further, the attorney client privilege protects the substance of communications between a client and counsel, not the mere fact that the communications occurred. *In re Grand Jury Proceedings*, 689 F.2d 1351, 1352 (11th Cir. 1982); *Ramseur v. Chase Manhattan Bank*, 865 F.2d 460, 467 (2d Cir. 1989) (“[T]he statements made to the attorney for the purpose of seeking legal advice and the advice given by the attorney are normally protected by the privilege, the fact and date of the consultation would not be privileged.”); *U.S. v. Kendrick*, 331 F.2d 110, 113 (4th Cir. 1964). “[I]nformation concerning the factual circumstances surrounding the attorney-client relationship has no privilege at least so long as disclosure does not threaten to reveal the substance of any confidential communications.” *In re LTV Securities Litigation*, 89 F.R.D. 595, 603 (N.D. Tex. 1981).

The common interest privilege is an extension of the attorney-client privilege; thus, to invoke the common interest privilege, the proponent must first establish that the attorney-client privilege applies. *In re Grand Jury Subpoenas*, 89-3 & 89-4, 902 F.2d 244, 249 (4th Cir. 1990); see *In re Santa Fe Intern. Corp.*, 272 F.3d 705, 711 (5th Cir. 2001). Generally, a party waives attorney-client privilege if it discloses the communications to a third party; however, the privilege is not necessarily waived if the party and the third party have a common legal interest regarding the subject matter of the communications. *Hodges, Grant & Kaufmann v. U.S.*, 768 F.2d 719, 720–21 (5th Cir. 1985); *In re Santa Fe Corp.*, 272 F.3d at 711.

After reviewing the four documents in camera, the Court finds that the documents do not reveal the substance of communications with counsel. As such, the documents are not protected under the attorney-client privilege. Since the attorney-client privilege does not apply, the common interest privilege does not apply.

Complainants shall immediately provide the four documents at issue to Respondents.

SO ORDERED.

Dated and entered on May 23, 2019.

Thomas P. McCarthy
Administrative Law Judge