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

July 18, 2016

UNITED STATES OF AMERICA, Complainant, v. FRIMMEL MANAGEMENT, LLC Respondent.	)	8 U.S.C. § 1324a Proceeding OCAHO Case No. 15A00073

ORDER GRANTING COMPLAINANT'S MOTION FOR A PROTECTIVE ORDER

I. BACKGROUND & POSITIONS OF THE PARTIES

This is an action pursuant to the employer sanctions provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a (2012). On August 11, 2015, complainant United States Department of Homeland Security, Immigration and Customs Enforcement (ICE, complainant, or the government) filed a four-count complaint, which has been amended, against respondent Frimmel Management, LLC (Frimmel Management, respondent, or the company) with the Office of the Chief Administrative Hearing Officer (OCAHO). The amended complaint alleges that respondent engaged in 383 violations of 8 U.S.C. § 1324a(a)(1)(B), in that it failed to comply with the employment eligibility verification requirements of 8 U.S.C. § 1324a(b). Frimmel Management filed an Answer, prehearing procedures were undertaken, and a schedule was set instructing discovery to close on May 10, 2016, dispositive motions to be filed on or before June 10, 2016, and responses to be filed on or before July 11, 2016.

On May 6, 2016, complainant filed a "Motion for In Camera Review and Protective Order" (Complainant's Motion), in which it included a single document for which it seeks *in camera* review. The document is a one-sentence email from a sergeant of Arizona's Maricopa County Sheriff's Office (MCSO) sent to approximately thirty recipients. According to the government, it provided this email to Frimmel Management during the course of discovery, but redacted the "email addresses and names of the recipients who are not a party to the instant litigation in the

interests of protecting their privacy." Complainant's Motion at 1-2. Complainant asserts that respondent has requested an unredacted copy.

ICE requests that pursuant to 28 C.F.R. § 68.42,[1] the undersigned conduct an *in camera* review of the document at issue and decide "whether disclosure of the unredacted [email] is warranted." *Id.* at 2. Complainant also requests a protective order of the email if the undersigned finds that disclosure is warranted. *Id.* Specifically, the government seeks that disclosure of the unredacted email be limited to respondent's counsel and staff who may need to view the document, to the undersigned's staff involved in the present matter, and to complainant's counsel and necessary non-attorney personnel who may need to view the document. The government also "requests that disclosure of the unredacted email shall be used only in connection with the adjudication of this action, including the trial and preparation for the trial of this action and shall not be used for the adjudication, trial or preparation of any other action." *Id.*

On May 20, 2016, Frimmel Management filed a "Response to Motion for in Camera Review and Protective Order." (Respondent's Response). Respondent states that it does not object to an *in camera* review of the email and states that it "expects that these names and email addresses are very similar (if not the same) to those on an email attached hereto as Exhibit 'R3,' which Frimmel Management obtained from [MCSO] and previously filed in this case." *See* Respondent's Response at 2. Frimmel Management contends that the email at issue was "openly sent" to numerous recipients and "[i]n all likelihood, it was sent to the same, or virtually the same recipients" as those in respondent's attachment, proposed Exhibit R3. *Id.* Respondent's attachment includes two emails from a detective and another employee of MCSO to several individuals. In addition, the attachment includes a July 17, 2013, "Shift Summary" from MCSO's Human Smuggling Division/C.E.S with respect to an incident of "Forgery/ID theft Search Warrant" involving Uncle Sam's restaurants in Arizona. *See id.*, Attachment R-3 at 2-3. Frimmel Management also contends that ICE did not meet its burden of demonstrating a specific harm or prejudice that would result if the protective order is denied, and therefore requests that ICE's Motion be denied. *Id.* at 2.

For the reasons provided below, the government is ordered to disclose an unredacted copy of the email to Frimmel Management. However, the undersigned will grant respondent's request for a protective order limiting the use of this email to the above-captioned proceeding and limiting disclosure of the unredacted email to certain individuals as outlined below.

II. LEGAL STANDARDS AND DISCUSSION

OCAHO rules provide that the scope of discovery encompasses any information that is not privileged and is relevant to the subject matter of the proceeding. 28 C.F.R. § 68.18(b). "In the

[1] OCAHO's Rules of Practice and Procedure are found at 28 C.F.R. pt. 68 (2014).

discovery context, relevancy 'has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, an issue that is or may be in the case.'" *United States v. Allen Holdings, Inc.*, 9 OCAHO no. 1059, 4 (2000) (quoting *United States v. Ro*, 1 OCAHO no. 265, 1700, 1702 (1990)).[2] Discovery, however, is not unlimited, as OCAHO's rules provide that upon motion by a party from whom discovery is sought and a showing of good cause, an Administrative Law Judge (ALJ) may "make any order that justice requires to protect a party or person from annoyance, harassment, embarrassment, oppression, or undue burden or expense." 28 C.F.R. § 68.18(c); *United States v. Durable, Inc.*, 11 OCAHO no. 1221, 3 (2014); *United States v. Agripac, Inc.*, 8 OCAHO no. 1017, 268, 272 (1998) ("Protective orders may be designed to protect any one of a variety of interests, such as trade secrets or other proprietary information, personal privacy, national security, internal financial information, state secrets, or other classified or sensitive matter, depending upon the facts and circumstances of the particular case.") (citing 8A Charles Alan Wright et al., *Federal Practice and Procedure* § 2043, at 554–72 (2d ed. 1994); 28 C.F.R. § 68.42(a)-(b)).[3]

Title 28 C.F.R. § 68.18(c) is modeled after Rule 26(c) of the Federal Rules of Civil Procedure and also relies upon the same good cause standard. *See In re Investigation of Conoco, Inc.*, 8 OCAHO no. 1049, 738, 743 (2000). OCAHO jurisprudence addressing discovery proceedings has therefore turned to federal cases[4] decided pursuant to Rule 26(c) for guidance where necessary in determining whether a protective order under 28 C.F.R. § 68.18(c) should be issued. *Id.* (citing *Agripac*, 8 OCAHO no. 1017 at 270; *United States v. Clark*, 5 OCAHO no. 771, 388, 389 (1995); *United States v. Guardsmark, Inc.*, 4 OCAHO no. 614, 249, 251 (1994)). "The burden is upon the party seeking the order to 'show good cause' by demonstrating harm or prejudice that will result from the discovery." *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1063 (9th Cir. 2004) (citing *Phillips ex rel. Estates of Byrd v. General Motors Corp.*, 307 F.3d 1206, 1210-11 (9th Cir. 2002)). "'If a court finds particularized harm will result from disclosure of

[2] 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 "FIM-OCAHO," or in the LexisNexis database "OCAHO," or on the website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders.

[3] ICE did not assert that the unredacted names constitute any kind of privilege or classified matter. *See* 28 C.F.R. § 68.42.

[4] The alleged violations occurred in Arizona and therefore the undersigned will turn to case law from the United States Court of Appeals for the Ninth Circuit for guidance.

information to the public, then it balances the public and private interests to decide whether a protective order is necessary.'" *Id.* at 1063-64 (quoting *Phillips*, 307 F.3d at 1211).

Privacy interests "have been recognized by the Supreme Court to be 'implicit in the broad purpose and language of Rule 26.'" *McCaffrey v. LSI Logic Corp.*, 6 OCAHO no. 883, 663, 666 (1996) (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35 n.21 (1984)); *Kamal-Griffin v. Cahill Gordon & Reindel*, 3 OCAHO no. 460, 647, 656 (1992) ("Federal courts have specifically held that individuals have a privacy interest in not having their names and addresses disclosed.") (citing *Breed v. U.S. Dist. Court for the Northern Dist. of Cal.*, 542 F.2d 1114, 1116 (9th Cir. 1976); *Heights Cmty. Cong. v. Veterans Admin.*, 732 F.2d 526, 529-30 (6th Cir. 1984)). I also note that the Constitution of Arizona protects an individual's right to privacy. Ariz. Const. art. 2, § 8; *see McCaffrey*, 6 OCAHO no. 883 at 667 ("While state law has no binding effect upon a federal agency, the views of a state nevertheless provide a useful perspective on the relative importance which the state assigns to the various interests to be balanced.").

In the instant matter, neither party identified which recipients of the email are non-parties to the proceeding. Several listed individuals have a notation following their name that suggests they are MCSO employees, and others do not. For purposes of adjudicating the motion, I presume that the non-party recipients to whom ICE refers in its Motion are those who have the notation indicating they are MCSO employees. MCSO is certainly not a party to this OCAHO proceeding.

The parties do not dispute the relevancy of this email, as ICE has provided it to Frimmel Management during discovery, with only the names of certain individuals being redacted.[5] After having conducted an *in camera* review of the document at issue, the relevancy of the names of the email's non-party recipients is negligible. This is so because ALJ Stacy Paddack, who previously presided over this matter, issued an interlocutory order that found MCSO's alleged unlawful criminal investigation of Uncle Sam's restaurants to be irrelevant to ICE's employer sanctions investigation that led to the current OCAHO proceeding. Frimmel Management had argued that ICE's evidence "'must be excluded under the fruit-of-the-poisonous-tree doctrine because [ICE] learned of the evidence that prompted its audit from the illegal [MCSO] raids on Uncle Sam's restaurants.'" *United States v. Frimmel Management, LLC*, 12 OCAHO no. 1271, 3 (2016) (internal citation omitted). Pursuant to precedent from the United States Supreme Court, Judge Paddack found that Frimmel Management's "identity" was not suppressible in the OCAHO proceeding and that whether respondent "may have come to the attention of ICE auditors as a result of an allegedly unlawful police action perpetrated by MCSO is irrelevant to the case filed with OCAHO." *Id.* at 6-7 (citing *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039-40 (1984)). Judge Paddack also found that Frimmel Management neither demonstrated any egregious actions by relevant ICE officials who performed the audit of respondent's paperwork,

[5] The record contains the affidavit of ICE Auditor Ryan Miller, who reviewed Frimmel Management's paperwork in this case, in which he makes a reference to the email at issue.

nor satisfied "the threshold exclusionary rule requirement that the suppression of evidence should 'provide a substantial and efficient deterrent' to the unlawful police action at issue in the case.'" *Id.* at 7 (quoting *Adamson v. Comm'r*, 745 F.2d 541, 546 (9th Cir. 1984)). Accordingly, Judge Paddack quashed Frimmel Management's Notices of Deposition for two MCSO agents.

Frimmel Management appealed and the Chief Administrative Hearing Officer (CAHO) declined to modify or vacate Judge Paddack's interlocutory order. *United States v. Frimmel Management, LLC*, 12 OCAHO no. 1271a (2016). Specifically, the CAHO found "no error in the ALJ's holding that 'respondent has failed to demonstrate that its identity can be suppressed pursuant to the exclusionary rule.'" *Id.* at 5 (citing *Frimmel Mgmt.*, 12 OCAHO no. 1271 at 8). The CAHO also noted that Frimmel Management made a reference on appeal to the fruit-of-the-poisonous-tree doctrine and the government's failure to show that one of the doctrine's exceptions applied, but declined to address the merits of this argument as it "was neither fully briefed by the parties in the proceedings below nor squarely addressed by the ALJ in her interlocutory order. Similarly, these arguments were not fully briefed on review." *Id.* at 6. However, the CAHO stated, "To the extent respondent's arguments on this point are not foreclosed by the ALJ's holding in the interlocutory order with respect to exclusion of respondent's identity under *INS v. Lopez-Mendoza*, respondent may raise and fully brief this issue at the appropriate time in the ongoing proceedings before the ALJ." *Id.*

It is therefore evident that the relevance of MCSO to this OCAHO proceeding at this juncture is minimal but has not been entirely foreclosed.[6] *See, e.g.*, *Hallett v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002) ("As we have explained, '[b]road discretion is vested in the trial court to permit or deny discovery, and its decision to deny discovery will not be disturbed except upon the clearest showing that denial of discovery results in actual and substantial prejudice to the complaining litigant.'") (quoting *Goehring v. Brophy,* 94 F.3d 1294, 1305 (9th Cir.1996)).

I further find that preserving the right of privacy of the non-party recipients satisfies the good cause requirement of 28 C.F.R. § 68.18(c). *See Wije v. Barton Springs/Edwards Aquifer C.D.*, 4 OCAHO no. 635, 403, 407 (1994); *Kamal-Griffin*, 3 OCAHO no. 460 at 656-57.

The competing interests at issue here are the non-party recipients' interests in not having their names revealed to Frimmel Management and the public's interest in disclosure of the names of the email's recipients. Based on the current record, both interests appear to be *de minimis*. The factors that weigh in favor of disclosure include the fact that the non-party recipients, who are presumably MCSO employees, are public employees, although, without any additional information to the contrary, they appear to be low-level public employees. In addition, MCSO's criminal investigation of Uncle Sam's restaurant, the relevance of which is tenuous to this

[6] On May 26, 2016, the government filed its Motion for Summary Decision, in which it argued in part that complainant's evidence should not be suppressed under the fruit-of-the-poisonous-tree doctrine.

OCAHO proceeding, was a public one. *See In re Roman Catholic Archbishop of Portland in Oregon*, 661 F.3d 417, 424 (9th Cir. 2011) (directing courts "doing this balancing to consider the factors identified by the Third Circuit in *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995)."). However, as mentioned above, Frimmel Management already has this email in its possession. Moreover, based on Judge Paddack's previous interlocutory order and the CAHO's order declining to modify or vacate Judge Paddack's order, the unredacted names of the non-party recipients do not appear to be "of such a character as to become critical to a final decision." *McCaffrey*, 6 OCAHO no. 883 at 668.

For all these reasons, ICE is ordered to provide to Frimmel Management an unredacted copy of the email no later than **two weeks** from the date of this order. In light of the minimal relevance of the unredacted names and the minimal benefit of disclosure to the public at this point, I will grant ICE's Motion for a Protective Order. The email at issue, unredacted in its entirety, is to be used solely for the purposes of these proceedings. In addition, access to the email shall be limited to respondent's counsel and non-legal personnel who are required to view this document, to complainant's counsel and staff who are required to view this document, and to the undersigned's staff. *See, e.g., Cook v. Yellow Freight Sys., Inc.*, 132 F.R.D. 548, 552 (E.D. Cal. 1990) ("'[E]ven where the balance weighs in favor of disclosure of private information, the scope of disclosure will be narrowly circumscribed; such an invasion of the right to privacy must be drawn with narrow specificity and is permitted only to the extent necessary for a fair resolution of the lawsuit.'") (internal citation omitted), *overruled on other grounds by Jaffee v. Redmond*, 518 U.S. 1 (1996)).

Frimmel Management recently filed its "Response to Complainant's Motion for Summary Decision" on July 8, 2016. In light of this Order, Frimmel Management may file a supplement to its Response, if necessary, on or before **August 15, 2016**, as the undersigned does not anticipate that the unredacted email will have a significant bearing on the company's arguments.

SO ORDERED.

Dated and entered on July 18, 2016.

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