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

June 10, 2016

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 12B00088
ROSE ACRE FARMS, INC., Respondent.	)	

ORDER RESOLVING MOTIONS TO COMPEL DISCOVERY
AND REQUESTS FOR *IN CAMERA* REVIEW OF DOCUMENTS

I. INTRODUCTION

This Order resolves pending motions to compel discovery and requests made by both parties for *in camera* review of documents.[1] Specifically, this Order resolves whether the attorney client privilege and attorney work product privilege apply to the documents listed in the privilege logs filed by Rose Acre Farms, Inc. This Order also resolves whether documents possessed by the United States (United States, the government, OSC, or complainant) and requested by Rose Acre Farms, Inc. (Rose Acre or respondent) are relevant evidence subject to protection from disclosure pursuant to the investigatory files privilege, the law enforcement privilege, and the attorney work product privilege asserted by complainant.

After considering all motions, requests, and arguments of the parties, an extensive *in camera* review of documents was conducted. As set forth in this Order, a limited number of Rose Acre Farms' documents were found to be protected by the attorney client privilege and/or the attorney

[1] *See* Complainant's Motion For In Camera Review And Determination of Respondent's Claim of Privilege, filed June 25, 2014; Respondent's Response to Complainant's Motion For In Camera Review And Determination Of Respondent's Claim of Privilege, filed July 10, 2014; Rose Acre Farms, Inc.'s Motion To Compel Discovery Concerning The Baseline And For In Camera Review; and United States' Response In Opposition To Respondent's Motion to Compel Discovery Concerning The Baseline And For In Camera Review, filed July 28, 2015.

work product privilege. Those documents found "not privileged" under the claimed attorney client privilege and/or attorney work product privilege are ordered to be released immediately to the United States pursuant to its pending discovery requests and delivered to the government by Rose Acre no later than June 24, 2016.

Additionally, after reviewing the motion and response related to production of the United States' "baseline" documents, the undersigned concludes the government has demonstrated that the "baseline" documents sought by Rose Acre are not relevant to the proceedings at this time and need not be disclosed. Therefore, the motion to compel production of these documents is denied, because these documents are not relevant evidence. However, if these documents are deemed relevant to the proceedings in the future, then an *in camera* review of the documents to determine whether they are protected from disclosure by the investigatory files privilege, law enforcement privilege, and attorney work product privilege might be appropriate at that time.

II. LEGAL STANDARDS AND ANALYSIS

A. OCAHO's Evidentiary Rules

Relevant rules of evidence governing this case found at 28 C.F.R. § 68.40 state, "All relevant material and reliable evidence is admissible but may be excluded if its probative value is substantially outweighed by unfair prejudice or confusion of the issues, or by considerations of undue delay, waste of time, immateriality, or needless presentation of cumulative evidence." 28 C.F.R. § 68.40(b). Moreover, 28 C.F.R. § 68.42(a) establishes that an Administrative Law Judge in proceedings before the Office of the Chief Administrative Hearing Officer (OCAHO) "may limit discovery or introduction of evidence or enter such protective or other orders as in the Judge's judgment may be consistent with the objective of protecting privileged communications and of protecting data and other material the disclosure of which would unreasonably prejudice a party, witness, or third party." In addition, portions of documents deemed "relevant and material" may be segregated and excluded from other immaterial or irrelevant parts of a document before being admitted into evidence. 28 C.F.R. § 68.45.

An OCAHO Administrative Law Judge also 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. 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. In addition, because OCAHO case law contains limited precedent relating to the *in camera* review of allegedly privileged documents, it is necessary to consider case precedent from the United States Court of Appeals for the Seventh Circuit, in which this action arises, and other courts that have addressed similar issues to those raised in the instant case related to privilege assertions and the

differing roles attorneys have with their clients that impact the assertion of the attorney-client privilege, such as an attorney's role as a business consultant, a business manager, or a legal advisor. Both mandatory and persuasive authority has been consulted and weighed in this analysis, in addition to relevant federal rules of procedure and evidence.

B. Attorney-Client Privilege

The attorney-client privilege "protects communications between attorney and client." *See United States v. R&C Tour (Guam), Inc.*, 2 OCAHO no. 393, 747, 753 (1989). The privilege does not protect facts and "should be narrowly construed." *Id.* (citing *Hoffman v. United Telecomms, Inc.*, 117 F.R.D. 436, 439 (D. Kan. 1987)); *see also Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981) ("The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney."). The Seventh Circuit has defined the attorney-client privilege as the following:

> (1) Where legal advice of any kind is sought, (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

See United States v. White, 950 F.2d 426, 430 (7th Cir. 1991) (citing *United States v. Lawless*, 709 F.2d 485, 487 (7th Cir. 1983)). In addition, the court has recognized that the privilege protects "'statements made by the lawyer to the client . . . in circumstances where those communications rest on confidential information obtained from the client or where those communications would reveal the substance of a confidential communication by the client.'" *Musa-Muaremi v. Florists' Transworld Delivery, Inc.*, 270 F.R.D. 312, 316 (N.D. Ill. 2010) (citing *Rehling v. City of Chicago*, 207 F.3d 1009, 1019 (7th Cir. 2000)).

Not all communications between an attorney and the client are privileged, and the privilege "adheres 'only if [the communications] constitute legal advice, or tend directly or indirectly to reveal the substance of a client confidence.'" *Heriot v. Byrne*, 257 F.R.D. 645, 656 (N.D. Ill. 2009) (citing *Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec*, 529 F.3d 371, 388 (7th Cir. 2008)). In addition, the United States District Court for the Eastern District of North Carolina has explained in *Santrade Ltd. v. Gen. Elec. Co.*, "Preliminary drafts of published data, including attorney notes necessary to the preparation of the documents, are discoverable." 150 F.R.D. 539, 544 (E.D.N.C. 1993) (citing *Republican Party of North Carolina v. Martin*, 136 F.R.D. 421, 427 (E.D.N.C. 1991)). Where a client communicates information to his attorney with the understanding that the information will be revealed to others, the information and the underlying details are not privileged. *Id.*; *United States v. (Under Seal)*, 748 F.2d 871, 875 (4th Cir. 1984). Similarly, the Seventh Circuit has stated, "When information is transmitted to an

attorney with the intent that the information will be transmitted to a third party (in this case on a tax return), such information is not confidential." *Lawless*, 709 F.2d at 487 (citing *Colton v. United States*, 306 F.2d 633, 638 (2d Cir.1962)). The privilege is waived when disclosed to a third party. *See United States v. Nu Look Cleaners of Pembroke Pines, Inc.*, 1 OCAHO no. 236, 1536, 1538 (1990) (finding "no such attorney-client privilege claim . . . available . . . [when] statements were made during a deportation hearing, in the presence of the immigration judge and the attorney representing the Department of Justice") (citations omitted).

The attorney-client privilege "is limited to situations in which the attorney is acting as a legal advisor. Business advice does not count and is not protected." *Steele v. Lincoln Financial Group*, 2007 WL 1052495 (N.D. Ill. 2007) (citing *Burden–Meeks v. Welch*, 319 F.3d 897, 899 (7th Cir. 2003)). In addition, other courts have determined that business communications with corporate counsel do not necessarily obtain the protection from disclosure afforded by the attorney-client privilege, which necessitates the careful consideration of all communications to ascertain whether they were created with the intent of being confidential and protected by the privilege and whether they were created for the sole purpose of obtaining legal advice, instead of business advice.

In *Stout v. Illinois Farmers Insurance Co.*, the United States District Court for the Southern District of Indiana explained that "if a document was pre-existing or otherwise not produced for the purpose of obtaining or communicating legal advice, it does not become privileged merely because it was passed on to, or through, an attorney in the course of representation." 150 F.R.D. 594, 610 (S.D. Ind. 1993). In addition, the United States District Court for the Eastern District of Pennsylvania addressed this issue, stating, "'What would otherwise be routine, non-privileged communications between corporate officers or employees transacting the general business of the company do not attain privileged status solely because in-house or outside counsel is "copied in" on correspondence or memoranda.'" *SmithKline Beecham Corp. v. Apotex Corp.*, 232 F.R.D. 467, 478 (E.D. Pa. 2005) (quoting *Andritz Sprout-Bauer, Inc. v. Beazer E., Inc.*, 174 F.R.D. 609, 633 (M.D. Pa. 1997)). "However, communications between counsel and company employees remain privileged 'so long as the information is relayed for the purpose of obtaining legal counsel.'" *SmithKline Beecham Corp.*, 232 F.R.D. at 478 (citing *Upjohn*, 449 U.S. at 394-95).

The burden is on the party claiming the privilege to demonstrate that the privilege applies in the particular circumstances of the case. *See 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) (citing *Lawless*, 709 F.2d at 487, and *Weil v. Investment/Indicators, Research and Mgmt.*, 647 F.2d 18, 25 (9th Cir. 1981)). A court "must review all of the documents claimed as privileged and cannot rely on a 'random sampling' of documents to determine privilege." *Heriot*, 257 F.R.D. at 656 (citing *Am. Nat'l Bank & Trust Co. of Chicago v. Equitable Life Assurance Soc'y of the U.S.*, 406 F.3d 867, 879-80 (7th Cir. 2005)).

C. Work Product Privilege

Federal Rule of Civil Procedure 26(b)(3)(A) provides, in relevant part:

> Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:
>
> (i) they are otherwise discoverable under Rule 26(b)(1); and
>
> (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

Federal Rule of Civil Procedure 26(b)(3)(B) protects the mental impressions, and related work, of attorneys from disclosure, even if the opposing party shows "undue hardship." The rule states:

> *Protection Against Disclosure*. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

Fed. R. Civ. P. 26(b)(3)(B).

Thus, Rule 26(b)(3) "distinguishes between materials 'prepared [by one's opponent] in anticipation of litigation' that contain 'the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation,' and those that do not contain such impressions, conclusions . . . ." *See Mattenson v. Baxter Healthcare Corp.*, 438 F.3d 763, 768 (7th Cir. 2006) (citing Fed. R. Civ. P. 26(b)(3)); *see also Logan v. Commercial Union Ins. Co.*, 96 F.3d 971, 976 (7th Cir. 1996). The work product privilege is broader than the attorney-client privilege. *See Stopka v. Am. Family Mut. Ins. Co.*, 816 F. Supp. 2d 516, 524 (N.D. Ill. 2011). The work product privilege does not require the involvement of an attorney and therefore, "whether a document is protected depends on the motivation behind its preparation, rather than on the person who prepares it." *See Boyer v. Gildea*, 257 F.R.D. 488, 491 (N.D. Ind. 2009) (citing *Caremark, Inc. v. Affiliated Computer Servs., Inc.*, 195 F.R.D. 610, 613-14 (N.D. Ill. 2000)).

The gravamen of this privilege is that the materials were created in anticipation of litigation. Litigation includes administrative proceedings. *See In re Apollo Grp., Inc. Securities Litigation*, 251 F.R.D. 12, 19 (D.D.C. 2008) (citing *Exxon Corp. v. Dep't of Energy*, 585 F.Supp. 690, 700 (D.D.C. 1983)). The Seventh Circuit has held that "'[t]he mere fact that litigation does eventually ensue does not, by itself, cloak materials . . . with the work product privilege; the privilege is not that broad.'" *Logan*, 96 F.3d at 976. The timing of the document's creation is thus not the decisive factor; rather, courts must look to "whether in light of the factual context 'the document can fairly be said to have been prepared or obtained *because* of the prospect of litigation.'" *Id.* at 976-77 (quoting *Binks Mfg. Co. v. Nat'l Presto Indus., Inc.*, 709 F.2d 1109, 1118-19 (7th Cir. 1983)). The party asserting the privilege has the burden of demonstrating that "'at the very least some articulable claim, likely to lead to litigation, [has] arisen.'" *Binks Mfg.*, 709 F.2d at 1119 (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 865 (D.C. Cir. 1980)). It must show "'the primary motivating purpose behind the creation of a document or investigative report must be to aid in possible future litigation.'" *Dawson v. New York Life Ins. Co.*, 901 F. Supp 1362, 1368 (N.D. Ill. 1995) (quoting *Janicker v. George Washington University*, 94 F.R.D. 648, 650 (D.D.C. 1982)). The privilege "does not extend to every communication by an attorney that may concern litigation in some way. The communication must be made as part of the adversary process." *Id.* (citing *Greer Properties, Inc. v. LaSalle Nat'l Bank*, 1990 WL 70424 at *2-3 (May 3, 1990)).

D. Rose Acre Farm's "Baseline" Motion & In Camera Review Request

In Rose Acre's "Motion To Compel Discovery Concerning The Baseline And For In Camera Review" (Baseline Motion), it argues that the government must disclose the statistical data relied upon to compile charts summarizing USCIS E-Verify data that allegedly indicates Rose Acre engaged in a pattern and practice of intentional discrimination in violation of 8 U.S.C. § 1324b.[2] Rose Acre claims that the government has denied it "any opportunity to conduct discovery into the statistical matters the government may intend to admit into evidence at the trial." Baseline Motion at 1. Therefore, Rose Acre argues that the "government should either be required to provide Rose Acre with the requested documents relating to statistical evidence, or it should be precluded altogether from offering statistical evidence at trial." Baseline Motion at 1.

Moreover, Rose Acre discusses the deposition of the government's expert, Bernard R. Siskin, Ph.D., who testified that "the government never asked him to determine the baseline, never gave

[2] In its Motion To Compel, Rose Acre seeks documentation showing how the government determined a "baseline statistic," which Rose Acre alleges the government used to charge Rose Acre with a pattern and practice of employment discrimination. Rose Acre defines "baseline" as "the expected percentage of List A [documents used when completing Forms I-9] among non-U.S. citizens in the absence of intentional discrimination." Baseline Motion at 1.

him materials relevant to the question, and instead he just made various assumptions about it." Baseline Motion at 3. Additionally, Rose Acre asks the undersigned Administrative Law Judge to:

> (1) enter an order compelling the government to completely respond to the subject discovery requests and to provide 30(b)(6) testimony pertaining to baseline issues, or alternatively, enter an order precluding the government's use of baseline evidence at trial, and
>
> (2) conduct a limited *in camera* review of the two entries on the government's privilege logs identified herein.

Baseline Motion at 16.

In its Response to Rose Acre's Motion (Baseline Response), the government explains that while it

> intends to introduce statistical information through expert testimony as part of its case-in-chief, neither the charts nor underlying USCIS data upon which the charts were based, were shared with or relied upon by the United States' statistical expert. Moreover, the United States does not plan to rely upon the charts or their underlying data to bolster the statistical inference of discriminatory documentary practices in this case. In fact, the United States does not plan to compare the List A production rate by Respondent's employees with those of any other company or group of companies.

Baseline Response at 3-4.

In addition, the government argues that an *in camera* review of two of its files is not necessary because, contrary to Rose Acre's assertions, the

> two privileged files do not contain the underlying data that corresponds to the summary comparator charts; nor do the privileged files compare Respondent's List A production rate to any other company's production rates. Plus, the United States has no plans to use the files in any way as evidence. Because Respondent's request for an *in camera* review is based on flawed assumptions about the connection between the privileged information and the summary comparator charts, Respondent's request for an *in camera* review should be denied.

Baseline Response at 9. Attached as Exhibit A to the Response is a Declaration from Alberto Ruisanchez, Deputy Special Counsel of the Office of Special Counsel for Unfair Immigration-Related Employment Practices, which argues for denial of the Motion To Compel and *In Camera* Review.

Based on the representations made by the government in its Baseline Response, the documentation sought by Rose Acre pursuant to its Motion To Compel are no longer relevant or material in this case. The government stated in its response that "neither the charts nor underlying USCIS data upon which the charts were based, were shared with or relied upon by the United States' statistical expert. Moreover, the United States does not plan to rely upon the charts or their underlying data to bolster the statistical inference of discriminatory documentary practices in this case." Therefore, the statistical data underlying the "baseline" calculation and comparator charts sought by Rose Acre will not be relied upon by an expert witness or the government and will not be part of the government's case-in-chief. Accordingly, the documentation sought pursuant to Rose Acre's Motion To Compel is not relevant or material evidence in this case and will be excluded from evidence.

The test for determining whether evidence is relevant is set forth in Federal Rule of Evidence 401. According to Rule 401, "[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401. Because the government has stated that the evidence sought by Rose Acre has not been relied upon by the expert witness and will not be used in any form to prove the government's case, the evidence is of no "consequence" in this action, would not make any determinative facts "more or less probable," and the evidence is not "relevant." Fed. R. Evid. 401.

Accordingly, because the baseline statistical evidence sought is not relevant, the evidence is not admissible and will be excluded. As such, the Motion To Compel is denied as the evidence sought is not relevant. Moreover, Rose Acre's request for an *in camera* review of the government's two files is also denied because the documents are not relevant evidence in this case. Finally, because the documents are not relevant, there is no need to adjudicate whether the documents would be protected from disclosure by any privilege.

E. Analysis of Rose Acre's Documents And Privilege Claims

This Order also resolves Complainant's Motion For In Camera Review And Determination Of Respondent's Claim of Privilege (*In Camera* Motion). In part, the government's Motion highlights particular documents that had been redacted by Rose Acre due to a claim of privilege, but were later provided to the government in an unredacted format thereby giving the

government the opportunity to assess Rose Acre Farms' privilege claim. In its *In Camera* Motion, the government argues that Rose Acre improperly asserted privilege claims to shield its documents from disclosure, citing in support for its contentions OCAHO case precedent, Seventh Circuit precedent, OCAHO rules and other federal rules of relevant procedure.

Rose Acre filed its Response To Complainant's Motion For In Camera Review And Determination Of Respondent's Claim Of Privilege (*In Camera* Response), which did not contest the government's motion for *in camera* review. Rose Acre explained that its *In Camera* Response was submitted "for the limited purpose of clarifying for the Court the circumstances under which it initially sought to maintain its claim of privilege with respect to certain emails that were inadvertently produced to Complainant and the steps taken by Respondent to investigate the inadvertent production of potentially privileged information." *In Camera* Response at 1. Rose Acre relies on Federal Rule of Civil Procedure 26(b)(5)(B) in support of its argument that it "may request the return of inadvertently produced information that is subject to a claim of privilege." *In Camera* Response at 4-5.

After conducting an extensive review of Rose Acre's documents contained in two large binders and cross-referencing the documents in the single consolidated privilege log more than fifty-pages in length, the undersigned finds that only twenty-three documents in total (including some duplicate documents) are privileged. At this time, the following documents are protected from disclosure pursuant to the attorney-client privilege and/or the work-product privilege:

> (1) 223525-223528; (2) 221706-221708; (3) 221709-221711; (4) 228195; (5) 235153; (6) 241564-241568; (7) 219859; (8) 234787; (9) 218787-218789; (10) 225829-225832; (11) 240674-240675; (12) 219020; (13) 326333; (14) 326334-326336; (15) 205289-205290; (16) 322559-322560; (17) 19026; (18) 318169-318170; (19) 178140; (20) 253864; (21) 240698-240700; (22) 181501-181502; and (23) 219443-219446.

In addition, Rose Acre should redact the portions of the document numbered "219342-219343" that would expose the individual employee's social security number and other personally identifiable information before releasing this document to the government.

The majority of documents submitted by Rose Acre for *in camera* review are not protected from disclosure by either the attorney-client or work-product privileges because they are business records used by human resources managers and employees in the normal course of their duties, despite an attorney sometimes being involved in some aspect of the business records' creation and dissemination. *See SmithKline*, 232 F.R.D. at 478; *Burden–Meeks*, 319 F.3d at 899. For example, many of the records for which a privilege was asserted include: employment and employee handbooks; emails related to updates, revisions and clarification of handbooks;

employee guidance on business practices and policies related to performance of routine duties that are unrelated to seeking legal advice, engaging in confidential communications, or preparing for litigation. *See Republican Party of North Carolina*, 136 F.R.D. at 427. Moreover, there are emails and correspondence related to ensuring that Rose Acre's managers do not discriminate against employees or prospective employees in the hiring process, employment eligibility verification process, and other business-related negotiations and dealings, which are not protected by any privilege as these too are routine business matters for which management is responsible for providing guidance, regardless of whether the guidance was approved or initiated by an attorney. *See Stout*, 150 F.R.D. at 610; *United States v. (Under Seal)*, 748 F.2d at 875.

III. CONCLUSION

This order resolves the outstanding discovery disputes between the parties. With the exception of the above-noted twenty-three documents subject to the attorney-client and work-product privileges, Rose Acre is ordered to release to the government all other documents identified in the single, consolidated (more than fifty-page) privilege log. Rose Acre should provide copies of the non-privileged documents to the government **on or before June 24, 2016**. Moreover, because the government's "baseline" statistical data sought by Rose Acre is not relevant to this case, the "baseline" statistical data will not be admitted as evidence nor relied upon by the government in its case-in-chief, and the baseline statistical data will not be released to Rose Acre. The *in camera* review of documents is complete. Any other pending motions to compel the production of documents or for *in camera* review are hereby denied as moot because this order should have resolved all such pending matters.

SO ORDERED.

Dated and entered on June 10, 2016.

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Stacy S. Paddack
Administrative Law Judge