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

August 5, 1996

TERENCE McCAFFREY Complainant,	)	
v.	)	8 U.S.C. §1324b Proceeding
	)	OCAHO Case No. 95B00093
LSI LOGIC CORPORATION Respondent.	)	

NOTICE OF AND REQUEST FOR COMMENT ON PROPOSED PROTECTIVE ORDER

Mr. Terence McCaffrey (Complainant) initiated this action by filing a complaint with Office of the Chief Administrative Hearing Officer (OCAHO) alleging that LSI Logic Corporation (Respondent) engaged in knowing and intentional discrimination by failing to hire him as a product engineer on the basis of his citizenship status in violation of 8 U.S.C. §1324b. Discovery has been ongoing by both parties.

Presently pending are separate requests by each of the parties for protective orders with respect to certain materials to be provided to the other party in response to discovery requests. Each party seeks to restrict the other party's use of the materials for any purpose other than the subject litigation and/or to limit the number of individuals to whom disclosure can be made. Such purposes are often the bases for protective orders. *See, United States v. Clark*, 5 OCAHO 771 at 2 (1995)[1] and cases cited therein.

[1] Citations to OCAHO precedents reprinted in the bound Volume 1, *Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Practices Laws of the United States,* reflect consecutive pagination within that bound volume; pinpoint citations to Volume 1 are to the specific pages, seriatim, of the *entire* volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 1, however, are to pages within the original issuances.

Based on the parties' prior written submissions and on discussion during the last case management conference, I am satisfied that the parties have engaged in extended discussion and negotiation in a good faith attempt to agree upon a stipulated protective order but that they have been unable to do so. While certain disputes remain, the efforts of the parties have greatly reduced the scope of their differences and their efforts are to be commended.

At the conclusion of the last case management conference, I indicated my general unwillingness to enter a blanket (or umbrella) protective order and requested the submission *in camera* of the specific documents sought at this stage to be protected. While blanket protective orders have been widely approved in complex or multi-district litigation in the interests of expediting the judicial process, a more particularized showing of good cause is necessary where, as here, the extent of discovery is not so voluminous as to preclude a more specific showing. In *Zenith Radio Corp. v. Matsushita Elec. Indus. Co. Ltd.*, 529 F. Supp. 866, 873 (E.D. Pa. 1981), for example, the court would have been required to decide the confidentiality status of 3500 docket filings, 17,000 pages with cross-references to 250,000 documents in plaintiff's final pretrial statement, and millions of documents produced in discovery were it not for the umbrella order. Thomas C. Bradley, Comment, *Some Limits on Judicial Power to Restrict Dissemination of Discovery*, 44 Me. L. Rev. 417, 440–41 (1992). The instant submissions are more modest.

Complainant submitted *in camera* the following material:

1. Complainant's Second Answer to Respondent's First Set of Interrogatories, answer to Interrogatory 2a,
2. Complainant's Second Answer to Respondent's First Set of Interrogatories, answer to Interrogatory 3a, and
3. Complainant's Second Response to Respondent's First Request for Production of Documents: diaries, calendars, and similar documents produced in response to the request and identified as Exhibit 4B.[2]

[2] Complainant also transmitted Exhibit 7B, which is not mentioned in his letter of transmittal. The letter itself makes reference to "three small groups of disclosed information" and makes specific reference only to the documents listed *supra.* It is therefore my understanding that a protective order is *not* being sought for Exhibit 7B. If this understanding is incorrect, Complainant is requested to so advise.

The Complainant states that the interest which he seeks to protect is a privacy interest relating to personal activities and associations, characteristics of employment search methodology, personal finances and resources, and employability.

Respondent submitted *in camera* the following material:

> Documents marked LSI 211–219 consisting of documents from the personnel file of a particular current LSI employee, and including
>
> 1.a personnel action notice (LSI 211),
>
> 2.a letter from LSI to the employee dated May 12, 1993 (LSI 212),
>
> 3.a relocation summary (LSI 213–217),
>
> 4.a letter to LSI from the employee dated May 17, 1993 (LSI 218), and
>
> 5.a letter to LSI from the employee dated April 8, 1993 (LSI 219).

The interests Respondent identifies to be protected include the privacy interests of its employees and former employees, as well as its own competitive interests in business secrets and confidential commercial or proprietary information concerning its business and methods of operation.

Applicable Standards

OCAHO Rules of Practice and Procedure, 28 C.F.R. pt. 68 (1995), give an Administrative Law Judge (ALJ) broad authority to issue a protective order:

> Upon motion by a party or the person from whom discovery is sought, and for good cause shown, the Administrative Law Judge may make any order which 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).

Because of the liberality of pre-hearing discovery, the rule provides a means of protecting *inter alia,* the privacy rights of litigants and others. *See, Wije v. Barton Springs*, 4 OCAHO 635 at 4 (1994). A protective order is a useful tool to avoid the dissemination of potentially injurious information which might, even unintentionally, jeopardize a litigant's legitimate interests in non-disclosure. It serves the added purpose of encouraging the cooperation of litigants in providing sensitive information by ensuring some protection to those interests. The procedure of determining good cause seeks to accommodate competing interests and requires balancing the harm

to the party seeking protection with the importance of open proceedings. At the discovery stage, there is minimal public interest to be accommodated.

I have reviewed materials submitted by the parties *in camera* and note that while the specific details disclosed are both relevant and discoverable, they are unlikely to be of any general public interest, consisting principally of a record of Complainant's specific daily activities over a period of time and of specific personnel information relating to individual employees. None of the individuals involved is a public figure or public official, *cf., SEC v. Stratton Oakmont, Inc.,* 1996 WL 312194, at 4–6 (D.D.C. 1996), and no issues are raised which implicate public health or safety, *cf., Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1180–81 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).

While neither §68.18(c), nor Rule 26 of the Federal Rules of Civil Procedure (upon which it is based) makes any specific reference to privacy interests, those interests have been recognized by the Supreme Court to be "implicit in the broad purpose and language" of Rule 26. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35 n. 21 (1984). In *Seattle Times,* the lower court had restrained the defendant newspaper from using material gathered from the plaintiff in discovery despite a claim by the newspaper based upon First Amendment rights. In upholding the order, the Court noted particularly that discovery is not ordinarily conducted in public, *id.,* at 33 n. 19, and that frequently by local rules the fruits of discovery are not filed with the court at all, or are filed under seal. Accordingly, the court found no impairment of First Amendment rights where petitioners had gained the information they wished to disseminate only by virtue of the court's discovery processes, those procedures being solely a matter of legislative grace, not an independent right or entitlement. 467 U.S. at 32. (OCAHO Rules also provide specifically that absent a motion by a party or an order by the ALJ, requests for discovery and answers or responses thereto are *not* to be filed with the ALJ. 28 C.F.R. §68.6.)

As Professor Miller has observed,

> Litigants do not give up their privacy rights simply because they have walked, voluntarily or involuntarily, through the courthouse door.

Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv. L. Rev. 427, 464 (1991).

In balancing the interests here, I have also taken into account the views of the California courts, both federal and state. 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. *Cf. Kelly v. City of San Jose*, 114 F.R.D. 653, 656 (N.D. Cal. 1987). Because Article I, Section I of the California Constitution contains a specifically enumerated right to privacy, the California courts have addressed the issue of privacy in a litigation context at considerable length, *see, e.g., Harding Lawson Assocs. v. Superior Court,* 10 Cal. App. 4th 7, 12 Cal. Rptr. 2d 538 (1992), and have been especially solicitous of privacy concerns. Similarly, California courts have, in fact, charged custodians of private information, such as employers, not only with a right but also with the *duty* to assert the privacy rights of persons who are the subjects of their records, *see, e.g., Craig v. Municipal Court*, 100 Cal. App. 3d 69, 77, 161 Cal. Rptr. 19, 23 (1979).[3]

The attached proposed protective order is intended to address the articulated needs of the parties while limiting to the extent feasible the amount of material under seal. It is my intention when the protective order is finalized to return the *in camera* submissions to the parties so that I retain none of the material subject to the protective order as part of the record at this stage.

I would also advise the parties for their future guidance that use of material under a protective order in connection with a motion or brief or as an exhibit at a hearing necessarily requires the careful attention of the party submitting the motion, brief, or evidentiary matter to submit only so much of the document under seal as is reasonably necessary to accomplish the goal of protecting the information. To the extent the protected material is reasonably segregable from the remainder of the motion, brief, or exhibit, it should be segregated. In other words, the fact that a brief makes a reference to protected information will *not* suffice as good cause to submit the entire brief under seal. A good faith common sense approach is expected to this task. As is specified in the proposed order, parties are

[3] More recently the California Code of Civil Procedure Section 1985.6 has set forth new notification procedures which must be complied with effective January 1, 1996 when an employer responds to a subpoena for employment records of current or former employees.

expected to confer and seek agreement as to the specific matter to be placed under seal before filing such motion or exhibit with the ALJ.

A final consideration, however, is the role which the documents or information may later come to play in the final resolution of the controversy. The discretion to alter or modify a protective order is broad. *See, United States v. Power Generating Co., Inc.*, 3 OCAHO 561 at 3 (1993). At this stage, it does not appear to me that any of the material submitted is of such a character as to become critical to a final decision. The balancing of interests weighs in favor of confidentiality at this, the discovery stage, but the parties are cautioned that the balance may shift should any confidential document or matter become critical to a final judicial resolution. Appropriate public scrutiny of judicial decision-making can only be afforded when there is public access to the essential materials upon which a final decision is based.

In the event any of the confidential information is subsequently intended to be offered as evidence at hearing, appropriate portions of the protective order will be made a part of a final prehearing order, and will provide for the sealing of such evidence as has been or will be designated as confidential. However, to the extent that any such evidence may become critical to a final decision, the parties must understand that such documents may need to be further redacted or otherwise edited to ensure that any evidence critical to a final decision is not sealed.

I welcome the comments and suggestions of the parties as to whether the order as proposed will meet their needs, and, if not, what further concerns they have and how those concerns might best be addressed. Comments will be timely if received prior to August 26, 1996.

SO ORDERED:

Dated and entered this 5th day of August, 1996.

ELLEN K. THOMAS
Administrative Law Judge
Attachment

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Respondent.	)	
	)	

PROPOSED PROTECTIVE ORDER

1. This order applies only to information and/or documents requested, obtained, or otherwise produced or to be produced by any person or entity pursuant to the discovery process in this matter and designated as "confidential," after *in camera* review, and to such additional documents which may be so designated in the course of this litigation.

   Specifically, the order is for the protection of non-public confidential information or material produced by a party in response to the other party's Interrogatories, Requests for Admissions or for the Production of Documents, or Subpoenas or arising during the course of any deposition. The Protective Order places no restrictions or constraints on the use of other information or material not identified as "confidential."

2. The materials designated as "confidential" in this matter may be used only in conjunction with this litigation. Access shall be limited to the parties, their counsel, their agents and to court reporters or other independent agents employed to transcribe depositions or other proceedings. All documents designated as confidential shall be segregated from non-confidential material by the disclosing party prior to disclosure to the other, and shall be prominently labeled by the disclosing

party with the case name and the words "Confidential—Subject to Protective Order."

3. Any and all qualified persons above who are given access to confidential information shall be presented with a copy of this order by the attorney, party, or agent making the disclosure and shall agree to abide and, thus, be fully bound by its terms by executing a written confidentiality agreement in the form attached hereto and marked as Exhibit "A." Copies of the executed agreement are to be filed with the administrative law judge (ALJ) upon their execution.

4. Copies, extracts, notes, or summaries of the materials and the information contained in them may be made only for the use or distribution to the persons authorized in paragraph 2. The parties and their attorneys or agents shall not give, show, or otherwise directly or indirectly divulge, publish, or disseminate any confidential information as defined herein produced by the opposing party in this action, or the substance thereof, or any copies, descriptions, prints, negatives, or summaries thereof, and will not use or disclose any information contained therein to any entity, person, or the public in general except to those qualified persons identified in paragraph 2.

5. No party, individual, or entity given access to information protected by this protective order shall, for himself, herself, or itself make more copies of any confidential information or material than are reasonably necessary for the conduct of this litigation. Any party or other person or entity making copies of information subject to this protective order shall keep a record of the number of copies made, the date made, the particular document so copied, the identity of the person making the copies, and a list of the persons to whom the copies are distributed.

6. This order is intended to survive the litigation and to become a part of any final order entered in this matter, and shall be binding upon any future party to this litigation.

7. A party wishing to submit or use confidential material in connection with a motion, brief, or other matter to be filed with the ALJ shall first confer with the other party to seek agreement as to the portion(s) needing to be filed under seal. Portions submitted under seal shall be prominently labelled with the case name and the words "Confidential—Subject to Protective Order."

8. This order also includes material designated as "confidential" which may be an exhibit to a deposition or otherwise part of a deposition in this action. The use of such confidential information during depositions in this action does not waive the terms of this protective order, and all parties hereto agree to confer and to assist in whatever way necessary to maintain the confidentialities agreed to herein. Any deposition testimony or confidential data attached as an exhibit to any deposition shall be sealed and protected from disclosure by this order, and shall be prominently labelled with the case name the words "Confidential—Subject to Protective Order.".

9. This protective order also includes any appropriately designated material which may be admitted into evidence during the hearing on this matter. Such admissions into evidence do not waive the terms of this protective order. Any confidential testimony or document produced as an exhibit at trial shall be sealed and protected from disclosure by this protective order. However, in the event that any confidential matter becomes critical to the final judicial resolution of the controversy, such further redaction or editing of confidential matter may be required as is necessary to provide the appropriate public access to the essential material upon which a judicial decision is based. Should this occur, the parties will be given an opportunity to participate in the editing or redaction of documents.

10. Upon completion of the hearing and any appeals from this action and the satisfaction of any judgment, or upon the conclusion of any settlement, each attorney or party shall return to the other all documents or other materials which were designated with the case name and the words "Confidential—Subject to Protective Order," and shall also return any copies, prints, negatives, or summaries of those documents or other materials. At the same time, each attorney or party shall provide to the other attorney or party an affidavit stating that he has complied with the provisions of this protective order.

11. No protected material shall be made public in whole or in part other than by further judicial order after notice to the parties and an opportunity to be heard.

SO ORDERED.

Dated and entered this 8 day of August, 1996.

ELLEN K. THOMAS
Administrative Law Judge

Exhibit A

Confidentiality Agreement

I hereby certify that I have read, reviewed, and understand the Protective Order entered in the above-captioned matter and I agree to abide fully and, thus, be bound by its terms and to be bound thereby.

_____ _____

Signature Date