CITY OF NEW YORK
COMMISSION ON HUMAN RIGHTS

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In the Matter of the Complaint of

NEW YORK CITY COMMISSION ON HUMAN RIGHTS *ex rel.* ROSE VINCENT,

Petitioner,

-against-

WOODHULL HOSPITAL CENTER, CITY OF NEW YORK HEALTH & HOSPITALS CORP., and MARIA SCARAMUZZINO,

Respondents.

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Complaint No. M-E-D-11-1024635-D
Federal Charge No. 16F-2011-00088C
OATH Index No. 1260/17

ORDER ON REQUEST FOR INTERLOCUTORY REVIEW

The Law Enforcement Bureau ("Bureau") of the New York City Commission on Human Rights ("Commission") seeks interlocutory review of the May 4, 2017 memorandum decision ("Memorandum Decision") by Judge John B. Spooner of the Office of Administrative Trials and Hearings ("OATH"). (Bureau Notice of Mot. dated June 29, 2017.) The Memorandum Decision granted the motion of respondents Woodhull Hospital Center, City of New York Health and Hospitals, and Maria Scaramuzzino (collectively "Respondents") to compel production of certain medical records of complainant Rose Vincent ("Complainant") as well as compelling Complainant to execute new HIPAA-compliant releases that would authorize Respondents to obtain copies of Complainant's treatment records directly from her providers. (Mem. Dec. dated May 4, 2017 ("Mem. Dec.").) [1]

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[1] Aff. of Raymond V. Wayne, Esq. dated June 29, 2017 ("Wayne Aff.") at Ex. F, Aff. of Assistant Corp. Counsel Evan M. Piercey dated July 19, 2017 ("Piercey Aff.") at Ex. K.

The Bureau now requests that the Office of the Chair reverse the Memorandum Decision or, in the alternative, remand the matter to OATH for a new determination following *in camera* review of the disputed medical records. (*See* Bureau Mem. of Law dated June 29, 2017 ("Bureau Interloc. Mem.") at 10, 15.) In addition, the Bureau seeks guidance concerning the appropriate scope of discovery for health treatment records in cases where complainants are asserting "garden variety" emotional distress. (*Id.* at 11-15.)

As set forth in further detail below, the Office of the Chair grants interlocutory review on the Memorandum Decision, affirms Judge Spooner's determination, and returns the case to OATH for further action. The Office of the Chair declines to reach the question of the appropriate discovery standard for cases involving claims of garden variety emotional distress, which is not at issue in this case.

I. BACKGROUND

A. Factual Allegations

On January 14, 2011, Complainant filed a verified complaint with the Bureau, alleging that her employers, Respondents, discriminated against her and denied her a reasonable accommodation for her disabilities in violation of §§ 8-107(1)(a) and 8-107(15) of the New York City Human Rights Law ("NYCHRL"). (Compl. ¶ 11.)[2] Since approximately 2000 or 2001, Complainant worked as a patient care associate in the emergency room at Woodhull Hospital Center. (Compl. ¶ 5; Resp'ts' Position Statement dated July 19, 2017[3] at ¶ 4.) As alleged in the Complaint, she is "disabled due to cerebrovascular accident ('CVA'), hypertension, and chest pain." (Compl. ¶ 1.) In or about January 2010 and, again, in or about December 2010,

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2 Wayne Aff. Ex. A, Piercey Aff. Ex. B.

3 Piercey Aff. Ex. A.

Complainant allegedly submitted notes from her doctor to her supervisor, Respondent Scaramuzzino, recommending that she be assigned out of the trauma area of the emergency room because of her health condition. (*Id.* at ¶¶ 6, 8-9.)[4] Respondents allegedly did not respond to Complainant's requests for an accommodation for her disabilities. (*Id.* at ¶ 10.) Although not alleged in the Complaint, the Bureau asserted in subsequent briefing before OATH that,

> As a result of Respondents' failure to accommodate her, Complainant experienced [a] stroke in December of 2010 and has been unable to work since that time. Complainant was on medical leave following the stroke, then retired with disability benefits approximately ten months later. Complainant has also experienced significant emotional distress as a result of Respondents' discriminatory conduct, including anxiety, major depression, loss of appetite, and sleeplessness.

(Bureau Mem. in Opp'n to Mot. to Compel at 2.)[5]

B. The Parties' Discovery Dispute

As part of the discovery process, Respondents served the Bureau with a Request for Documents on January 26, 2017. The parties' current discovery dispute focuses on Respondents' Document Request No. 2, which seeks:

> [A]ll documents concerning any evaluation or treatment of Petitioner Vincent by any medical facility, physician or health care professional, including mental health professionals, from whom Petitioner Vincent has sought or received treatment or been evaluated by since January 1, 2008, including, but not limited to, any treatment or evaluation sought or received in connection with the allegations in the Petition. For each such medical facility, physician, and health care professional, execute a HIPAA-compliant medical release and include the release together with the responses to the instant request.

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[4] In contrast with the allegations in the Complaint, the Bureau asserts in response to Respondents' first set of interrogatories that "Complainant requested a reasonable accommodation in or around early February 2010, and again in or around late November 2010." (Bureau Responses to Resp'ts' 1st Set of Interrogs. dated Feb. 16, 2017, Interrog. No. 1, Wayne Aff. Ex. C, Piercey Aff. Ex. G.)

[5] Wayne Aff. Ex. E, Piercey Aff. Ex. I.

(Resp'ts' Request for Docs. dated Jan. 26, 2017 at 2.)[6]

The Bureau objected to Document Request No. 2 on the grounds that it is overly broad, unduly burdensome, seeks documents that are not relevant to the claims or defenses of any party, seeks documents that are privileged and private, and seeks information for the impermissible purpose of harassing Complainant. (Bureau Responses to Resp'ts' Request for Docs. dated Feb. 16, 2017, at 1-6.)[7] The Bureau premised its objection on the NYCHRL, the Commission's rules of practice, § 2-29 of OATH's rules of practice, and Civil Practice Law and Rules ("CPLR") §§ 3101 and 3122. (*Id.* at 1.) The Bureau withheld from its production 45 pages of medical records from Complainant's primary care physician that relate to medical conditions that the Bureau contends are not relevant to this case and also withheld HIPAA-compliant authorizations that would allow Respondents to obtain Complainant's treatment records directly from her providers. (Bureau Mem. in Opp'n to Mot. to Compel at 3.) The Bureau did not describe in any way the nature of the 45 pages that it withheld.

Notwithstanding its objections, the Bureau produced approximately 465 pages of Complainant's medical records in response to Document Request No. 2. (*Id.*; Bureau Responses to Resp'ts' Request for Docs. at 6). The Bureau asserts that the documents it produced include all records related to mental health treatment that Complainant received between 2008 and the present and all records related to Complainant's heart disease, stroke, hypertension, chest pain, or other cardiovascular disease. (Bureau Responses to Resp'ts' Request for Docs. at 6; Bureau Mem. in Opp'n to Mot. to Compel at 3; Bureau Interloc.

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6 Wayne Aff. Ex. A, Piercey Aff. Ex. E.

7 Wayne Aff. Ex. C, Piercey Aff. Ex. G.

Mem. at 9.) Moreover, the Bureau maintains that it produced all of Complainant's treatment records from her psychiatrist, social worker, cardiologists, and neurologist. (Bureau Mem. in Opp'n to Mot. to Compel at 3; Bureau Interloc. Mem. at 4.) The Bureau also produced copies of the HIPAA-compliant releases that Complainant executed on the Bureau's behalf, so that Respondents could assess the scope of the records that the Bureau had obtained directly from Complainant's providers. (Bureau Interloc. Mem. at 4.)

C. Respondents' Motion To Compel

In the face of the Bureau's objections and partial production, Respondents filed a motion with OATH on March 22, 2017, seeking to compel production of the documents that the Bureau had withheld. (Resp'ts' Mot. to Compel dated Mar. 22, 2017.)[8] Respondents argued that the Bureau had placed Complainant's medical history in question by alleging discrimination based on disability and by asserting in response to interrogatories that "[c]ontinuing to work in the Emergency Room exacerbated the effects of [Complainant's] disabilities, to the point that, on or about December 20, 2010, [Complainant] suffered a second [Cerebrovascular accident], and was unable to return to work thereafter." (*Id.* at 7-8.)

In opposition to Respondents' motion to compel, the Bureau acknowledged that it had "put a number of Complainant's medical conditions at issue in this litigation – her history of heart disease and stroke, as well as hypertension and chest pain." (Bureau Mem. in Opp'n to Mot. to Compel at 4.) The Bureau also conceded that it had "alleged that Complainant experienced severe emotional distress for which she sought treatment . . . thereby placing at issue Complainant's mental health diagnoses and treatment during the period immediately prior to and following the events in question in this case." (*Id.*) However, the Bureau argued that the

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8 Wayne Aff. Ex. D, Piercey Aff. Ex. H.

unproduced documents from Complainant's primary care physician are not relevant to the case and are therefore protected by the physician-patient privilege and Complainant's privacy interests. (Bureau Mem. in Opp'n to Mot. to Compel at 4-5.) The Bureau further argued that, to the extent that Judge Spooner believed that the unproduced documents might be relevant, he should conduct an *in camera* review of the documents before deciding whether to compel production. (*Id.* at 6.)

In reply, Respondents argued that the Bureau's "broad allegations of mental and physical trauma" are "inextricably intertwined with Complainant Vincent's mental and physical medical history." (Resp'ts' Reply on Mot. to Compel at 3, 4.)[9] They contended that Complainant's "ability to work and how that is affected by the undisclosed medical conditions is a central issue in this litigation" and opposed the Bureau's proposal for *in camera* review. (*Id.* at 4-5.)

On May 4, 2017, Judge Spooner issued the Memorandum Decision, granting Respondents' motion to compel in full. (*See generally* Mem. Dec.) Judge Spooner found that "by seeking to hold respondents liable for physical and emotional damages arising from their alleged failure to accommodate complainant's disability, petitioner has placed the entirety of complainant's recent medical history at controversy in this matter." (*Id.* at 5-6.) He opined that "[s]ince complainant's alleged damages in this case include her poor health in 2010 and her disability as of 2011, it is difficult to comprehend how any of her past medical records could be utterly 'unrelated' to the general health issues raised in the complaint, as argued by petitioner." (*Id.* at 7.) Judge Spooner rejected the Bureau's argument that discovery into Complainant's medical history should be limited on the grounds of relevancy, as had been done in *Gill v. Mancino*, 8 A.D.3d 340, 341 (2d Dep't 2004), a case cited by the Bureau. (*Id.*) Judge Spooner

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9 Piercey Aff. Ex. J.

noted that whereas *Gill* concerned "a medical malpractice action involving treatment for a specific medical condition," the allegations in this case raise broader questions about Complainant's overall mental and physical health during the relevant period. (*Id.*) Judge Spooner also rejected the Bureau's reliance on federal caselaw concerning the appropriate scope of discovery, concluding that such caselaw was not binding in this proceeding and, in any event, distinguishable from and not supportive of the Bureau's arguments for withholding the disputed documents. (*Id.* at 7-8.) Judge Spooner declined the Bureau's invitation to conduct an *in camera* review, directed Complainant to promptly provide Respondents with HIPAA-compliant authorizations for the release of medical records since 2008, and directed the Bureau to turn over all of the requested medical records that it had withheld or might receive pursuant to pending requests. (*Id.* at 8.)

D. Certification of Memorandum Decision for Interlocutory Review

On May 9, 2017, the Bureau filed a request with OATH seeking certification of the Memorandum Decision for interlocutory review. (Bureau Certification Req.)[10] The Bureau premised its request on two objections. First, the Bureau reiterated its argument that the disputed documents are not relevant and, at a minimum, should be subject to *in camera* review to balance the Complainant's privacy interests with the Respondents' right to a fair trial. (*Id.* at 1.) Second, the Bureau contested Judge Spooner's determination that federal caselaw should not guide discovery in Commission cases, arguing that the Restoration Act makes the federal discovery standard a floor below which the NYCHRL standard may not fall. (*Id.* at 1-2.) On May 16, 2017, Respondents filed an opposition to the Bureau's request for certification of the Memorandum

10 Wayne Aff. Ex.G, Piercey Aff. Ex. L.

Decision for interlocutory review, arguing that such review is not necessary and would result in undue delay. (Resp'ts' Opp'n to Certification Req.)[11]

Pursuant to § 2-30 of OATH's rules and § 1-74 of the Commission's rules, on May 30, 2017, Judge Spooner granted the Bureau's request to certify the full Memorandum Decision for interlocutory review. (Mem. Dec. dated May 30, 2017 ("Certification Dec.").)[12] Judge Spooner opined that the Bureau's "assertion that interlocutory review is necessary to protect complainant's privacy is suspect," but nonetheless concluded that review is warranted because the Bureau's "on-going refusal to provide requested HIPAA authorizations to respondents without OATH intervention is having a significant impact on the adjudication process" in a number of recent cases that have been litigated before OATH. (*Id.* at 3-4.) In particular, Judge Spooner cited *Commission on Human Rights ex rel. Lissade v. Baron*, OATH Index No. 188/16, and *Commission on Human Rights ex rel. Rubin v. Westbeth Corp. HDFC, Inc.*, OATH Index No. 1913/15, as examples of recent Commission cases in which LEB has resisted the production of HIPAA-compliant authorizations and/or medical records. (*Id.* at 4.) Judge Spooner stayed proceedings in this case pending completion of the interlocutory review process. (*Id.* at 5.)

On June 29, 2017, the Bureau filed its request for interlocutory review with the Office of the Chair. Respondents timely filed opposition papers on July 19, 2017, and the Bureau filed a timely reply on July 25, 2017.

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11 Wayne Aff. Ex. H, Piercey Aff. Ex. M.

12 Wayne Aff. Ex. I, Piercey Aff. Ex. N.

II. DISCUSSION

A. Standard of Review

Section 1-74 of the Commission's rules requires that the Chair "entertain an interlocutory challenge to a decision or order of an Administrative Law Judge where the presiding Administrative Law Judge certifies the question for review." 47 RCNY § 1-74. However, interlocutory review is generally limited to exceptional situations in which "'(a) vital public or private interests might otherwise be seriously impaired, and (b) the review[ing] authority has not had an opportunity to develop standards which the presiding officer can apply in determining whether interlocutory review is appropriate.'" *See In re McKenna v. N.Y.C. Police Dep't*, Compl. Nos. EM00472-04/06/87-DE & EM00259-06/10/88-DE (consolidated), Dec. & Order, 3 (Oct. 11, 1990) (quoting *N.Y.C. Comm'n on Human Rights v. The Union League Club*, Compl. No. 9095-PA, Dec. & Order (June 22, 1988)). Stated differently, interlocutory review is only appropriate for "issues of first impression raising questions of vital public or private interest." *Czechowicz v. Hamilton*, OATH Docket No. 90-247E, Dec. & Order (Jan. 25, 1991).

B. The Pending Motion for Interlocutory Review

In seeking interlocutory review, the Bureau states that it has been unable to locate any Commission decisions touching on the appropriate scope of discovery for complainant medical records or parties' obligation to provide HIPAA-compliant releases as part of discovery. (Bureau Interloc. Mem. at 6.) It further argues in general terms that disclosure of such records implicates important privacy concerns for Complainant, but doesn't articulate any specific issues. (*Id.* at 6-8.) As it argued before OATH, the Bureau argues without elaboration that the disputed records are not relevant to the aspects of

Complainant's health that she affirmatively placed at issue in the case. Accordingly, the Bureau insists that those records remain protected by the physician-patient privilege. (Bureau Interloc. Mem. at 8-9.) Although the Bureau concedes the relevance of Complainant's full mental health treatment records and alleges that she experienced "severe emotional distress" (*id.* at 9), it seeks an advisory opinion concerning the appropriate scope of treatment records for cases where complainants claim only garden variety emotional distress damages (*id.* at 11-15).

In opposition, Respondents argue that the Bureau failed to show that its request for interlocutory review implicates a vital public or private interest. (Resp'ts' Interloc. Opp'n at 7.) Respondents further argue that the Bureau has failed to demonstrate that Judge Spooner abused his discretion and that the Memorandum Decision is therefore entitled to deference from the Office of the Chair. (*Id.* at 8.) As they argued below, Respondents insist that Complainant waived her physician-patient privilege by asserting claims for broad allegations of harm and trauma that affirmatively place at issue the entirety of her physical and psychological health for the relevant period. (*Id.* at 10.) They also argue that Complainant waived her privilege by providing the Bureau with access to the treatment records that are being withheld from Respondents. (*Id.* at 15.) Aside from noting that this case does not involve claims for garden variety emotional distress, Respondents did not address the Bureau's argument concerning the appropriate scope of discovery in such cases. (*Id.* at 15-16.) However, Respondents argue against departing from discovery standards set forth in the CPLR and state caselaw and assert that fairness and due process militate in favor of production in this case. (*See id.* at 16-19.)

In reply, the Bureau argues that Complainant only placed certain aspects of her treatment history at issue and states in generalities that the unproduced records are irrelevant to the case and therefore still protected by privilege, but does not explain why. (Bureau Interloc. Reply at 3-5.) The Bureau further argues that Complainant did not waive her privilege by sharing her medical records with the Bureau, because Complainant and the Bureau enjoy a common interest privilege. (*Id.* at 3 n.1.) The Bureau contends that Respondents have provided no basis for their demand for HIPAA-compliant releases and insist that Respondents' overbroad demand is intended to harass Complainant. (*Id.* at 6-8.)

C. Analysis

As previously noted, interlocutory review is limited to "issues of first impression raising questions of vital public or private interest." *Czechowicz*, OATH Docket No. 90-247E. Ordinarily, a discovery dispute such as this, which concerns the relevance of particular documents or the application of the physician-patient privilege, would not rise to the level of warranting interlocutory review. *See, e.g., id.*; *In re Cohen v. Tower Fifty Four Assocs.*, Am. Compl. Nos. 10747-H, 10748-H, 10749-H, 10750-H, 10751-H, 10769-H, 10771-H (consolidated), Dec. (June 29, 1989). However, based on OATH's representation that confusion over the appropriate discovery standard has resulted in ongoing delays to the litigation process, the Office of the Chair concludes that interlocutory review is appropriate to clarify certain issues related to discovery of medical records in Commission cases.

1. Discovery in Commission Cases Is Guided by CPLR Article 31

As an initial matter, it appears that there is uncertainty as to the relevant legal standard governing discovery in Commission cases, particularly following passage of the

Restoration Act of 2005. The Bureau suggests that, consistent with the Restoration Act, the discovery standard for Commission cases now "requires the most limited view of this discovery issue in order to protect the rights of potential complainants." (*See* Bureau Interloc. Mem. at 13.) The Bureau also points to federal caselaw, arguing that federal standards should guide discovery in Commission cases if they are more liberal than state or city standards. (*Id.* at 14-15; *see* Bureau Certification Req. at 1-2.)

As the Bureau correctly notes, the NYCHRL must be liberally construed "for the accomplishment of the uniquely broad and remedial purposes thereof." N.Y.C. Admin. Code § 8-130(a); *see, e.g.*, *Williams v. N.Y.C. Hous. Auth.*, 61 A.D.3d 62, 66 (1st Dep't 2009). However, that well-established precept remains consistent with the Commission's and OATH's longstanding rules that provide that discovery in Commission cases is guided by article 31 of the CPLR, *see* 47 RCNY § 1-71 (incorporating OATH's rules of practice relating to hearing and pre-hearing procedures); 48 RCNY § 2-29(a) ("[a]lthough strict compliance with the provisions of article 31 of the Civil Practice Law and Rules is not required, the principles of that article may be applied to ensure orderly and expeditious preparation of cases for trial."), and the Bureau offers no compelling legal argument for departing from that standard in favor of federal or any other discovery rules. *See Williams*, 61 A.D.3d at 74 (observing that the Restoration Act provided a liberal rule of construction "as the means for obviating the need for wholesale textual revision of the myriad specific *substantive provisions* of the law." (emphasis added).).

Moreover, the task of discerning which procedural rules would be best suited to advancing the "uniquely broad and remedial purposes" of the NYCHRL is by no means straightforward and could conceivably differ from one case to another. For example, it is

possible that the same privilege argument that the Bureau asserts here may be employed by another party to withhold documents that would frustrate the Bureau's position. There is a danger that opening procedural rules up to debate in each case will introduce an unmanageable level of uncertainty and inefficiency into the litigation process. For these reasons, Judge Spooner was correct to reject the view that the Restoration Act allows for federal discovery standards to govern Commission cases.

2. Production of the Disputed Documents Is Appropriate in this Case

As for the records of Complainant's primary care physician that are at issue in this case, the Bureau fails to show that Judge Spooner abused his discretion by ordering their disclosure. State law remains somewhat ambiguous concerning when medical records are discoverable as "material and necessary," within the meaning of CPLR § 3101. *See, e.g.*, *Cianciullo-Birch v. Champlain Ctr. N. LLC*, 51 Misc. 3d 1230(A) (Sup. Ct. N.Y. Cnty. 2016) (collecting Appellate Division cases); *see also Gumbs v. Flushing Town Ctr. III, L.P.*, 114 A.D.3d 573, 574 (1st Dep't 2014); *Graziano v. Cagan*, 105 A.D.3d 701, 702 (2d Dep't 2013). However, the Bureau does not cite any case in which the discovery of medical records was restricted to the extent that the Bureau requests where, as here, the plaintiff or complainant alleged that the defendant's or respondent's conduct contributed to her disability. *See Rega v. Avon Prod., Inc.*, 49 A.D.3d 329, 330 (1st Dep't 2008) (holding that defendants were entitled to discovery concerning plaintiff's injuries both before and after an accident in order to determine the extent to which plaintiff's claimed injuries and damages were attributable to the accident); *Caplow v. Otis Elevator Co.*, 176 A.D.2d 199, 200 (1st Dep't 1991) (holding that discovery of records related to gout and cellulitis for which plaintiff received treatment following accident "might be useful in determining to

what extent his claim for lost wages is attributable thereto, and not to the lower back injury he attributes to the . . . accident"); *Stein v. Ten Eighty Apartment Corp.,* No. 158648/2014, 2016 WL 3272268, at *2 (Sup. Ct. N.Y. Cnty. June 14, 2016) (holding that defendants were entitled to entire medical history that would allow for discovery of preexisting conditions "[s]ince plaintiff claims she may be limited in her activities in her employment and her life"); *McLeod v. Metro. Transp. Auth.*, 47 Misc. 3d 1219(A), at *6 (Sup. Ct. N.Y. Cnty. 2015) ("virtually anything in plaintiff's entire medical history might be relevant, or reasonably calculated to lead to admissible evidence as to the plaintiff's overall health and work life expectancy").

Although disclosure is appropriate in this case, it is essential that when health treatment records are in dispute special care be taken to balance the public's interests in protecting individuals' privacy and ensuring that litigants are able to fairly argue their case. *See, e.g.*, *Dillenbeck v. Hess*, 73 N.Y.2d 278, 287 (1989). To that end, there are various means to ensure that privacy interests are adequately protected in the context of Commission cases.

In some cases, a party's alleged claims or defenses will not amount to a waiver of privilege and the disclosure of treatment records will not be appropriate. *See, e.g.*, *Gumbs*, 114 A.D.3d at 574; *Churchill v. Malek*, 84 A.D.3d 446, 446 (1st Dep't 2011). In other cases, *in camera* review may be appropriate to assess which specific treatment records are subject to disclosure as material and necessary.[13] *See, e.g.*, *Klipper v. Liberty Helicopters, Inc.*, 110 A.D.3d 579, 580 (1st Dep't 2013); *Sadicario v. Stylebuilt Accessories, Inc.*, 250 A.D.2d 830, 831 (2d Dep't 1998). However, when assessing whether *in camera* review is

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[13] The Office of the Chair affirms Judge Spooner's decision declining *in camera* review.

appropriate in a particular case, it is important to consider the potential strain that such review may place on OATH's resources. *See Mahoney v. Turner Const. Co.*, 61 A.D.3d 101, 106 (1st Dep't 2009) (recognizing "[s]trong public policy considerations . . . which . . . preserve scarce judicial resources" when assessing whether *in camera* review is appropriate); *see also Forman v. Henkin*, 134 A.D.3d 529, 538 (1st Dep't 2015).

Records that are produced during discovery may also be subject to additional protection in the form of a confidentiality order, *see, e.g., SNI/SI Networks LLC v. DIRECTV, LLC*, 132 A.D.3d 616, 617 (1st Dep't 2015); *Bernstein v. On-Line Software Int'l, Inc.*, 232 A.D.2d 336, 337 (1st Dep't 1996) (discussing order for attorneys' eyes only), or a motion *in limine*, *see, e.g., Togut v. Riverbay Corp.*, 114 A.D.3d 535, 535 (1st Dep't 2014); *Woodie v. Azteca Int'l Corp.*, 60 A.D.3d 535, 536 (1st Dep't 2009). Due to the important privacy interests that generally attach to treatment records, OATH is encouraged to entertain applications for confidentiality orders, where appropriate.

3. The Office of the Chair Declines To Reach the Issue of Garden Variety Emotional Distress, Which Is Not at Issue in This Case

In addition to seeking interlocutory review of the Memorandum Decision, the Bureau requests an advisory opinion concerning the appropriate scope of discovery in cases involving claims of garden variety emotional distress. (Bureau Interloc. Mem. at 11-15.) The Bureau concedes, however, that such claims are not at issue in this case. (*See id.* at 3-4; Bureau Mem. in Opp'n to Mot. to Compel at 4.) Because the issue was not discussed in Judge Spooner's Memorandum Decision or in Respondents' opposition to the pending motion, nor is it relevant to the pending case, and because the Office of the Chair's authority to engage in interlocutory review is limited, *see In re McKenna*, Compl. Nos.

EM00472-04/06/87-DE & EM00259-06/10/88-DE; *Czechowicz*, OATH Docket No. 90-247E, the Office of the Chair declines to reach the issue at this time.

CONCLUSION

In light of the foregoing, the Office of the Chair affirms the Memorandum Decision and hereby orders that the case be returned to OATH for further action.

Dated: New York, New York
December 12, 2017

SO ORDERED
NEW YORK CITY COMMISSION
ON HUMAN RIGHTS

CARMELYN P. MALALIS
Commissioner/Chair

[redacted]