

UNITED STATES DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES

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OFFICE OF FEDERAL CONTRACT  
COMPLIANCE PROGRAMS, UNITED  
STATES DEPARTMENT OF LABOR,

Plaintiff,

v.

GOOGLE, INC.,

Defendant.

Office of Administrative Law Judges  
OALJ Case No. 2017-06-00004, Ca

OFCCP No. R00197955

**PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
MOTION FOR SUMMARY JUDGMENT**

*Case Subject to Expedited Proceedings under 41 C.F.R. § 60-30.31*

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## INTRODUCTION

This case involves Google's extraordinary claim that basic information related to its pay practices—including pay data itself—is irrelevant to determining whether those practices comply with laws prohibiting discrimination in pay. As Google's arguments for refusing to supply this information—which goes to the very core of what OFCCP is charged by law and permitted by contract to review—are wholly unsupported, OFCCP is entitled to summary judgment.

In exchange for taxpayer funds, like other federal contractors, Google agreed not to discriminate unlawfully, to maintain personnel and employment records, to permit the government to review those records, and to comply with regulations that require all of the same. *See, infra*, Stmt. of Facts ¶ 3. To determine whether Google complied with its non-discrimination obligations, OFCCP reasonably asked the company to produce a basic set of records, which—on their face—relate to how Google pays its employees:

- data on employee pay from September 2014;
- data on factors related to pay, such as employee's job and salary histories, to conduct regressions and determine whether lawful factors drive Google employees' pay;
- and employees' names and contact information so OFCCP could have candid conversations with those employees about the company's pay practices.

These uncontroversial records are foundational to any competent, common-sense assessment of whether unlawful discrimination infects an employer's pay practices.

Nonetheless, Google refused to produce the records and thwarted the agency from completing its analysis, remarkably arguing that records concerning *pay* and necessary to conduct candid employee interviews regarding *pay* are wholly irrelevant to a *pay*-related investigation. Effectively putting the fox in charge of the investigative henhouse, Google insists

that relevance in OFCCP investigations can be established only if the agency first discloses its preliminary findings and persuades an investigated entity those findings justify those requests.

Aside from compromising the integrity of any law enforcement inquiry, Google's overly narrow view of relevance, which gives the subject of an investigation both a peek into *and* control over an ongoing investigation, ignores long-established standards on relevance. OFCCP regulations define "[a]ny personnel or employment record" a company maintains to be "relevant until OFCCP makes a final disposition of the evaluation." 41 C.F.R. § 1.12(a). The Fourth Amendment defines relevance even more broadly, defining it simply as any information that "might assist in determining whether any person is violating or has violated any provision" of the law being enforced. *Donovan v. Nat'l Bank of Alaska*, 696 F.2d 678, 684 (9th Cir. 1983). Because OFCCP requested employment records that will help it evaluate whether Google satisfied its non-discrimination obligations, both the regulatory and constitutional definitions of relevance are readily met.

This expedited proceeding, like any run-of-the-mill discovery dispute, presents a straightforward legal question: whether Google has any basis to withhold the items OFCCP requests. A quick ruling by the Court in OFCCP's favor does nothing but allow the agency to obtain records clearly relevant to its compliance review. Such a ruling does not prejudice Google, which retains the right to contest OFCCP's findings on the merits, should OFCCP ultimately make adverse findings against the company. By contrast, a ruling against OFCCP would stunt the agency's investigation, requiring it to make a determination based on partial and incomplete information and would invite significant mischief by upsetting established law and emboldening contractors seeking to limit artificially the scope of the reviews they agreed to in exchange for lucrative federal contracts.

## REGULATORY BACKGROUND

OFCCP “is charged with conducting periodic reviews of entities that have contracted with the government to ensure that the contractors have complied with their non-discrimination and affirmative action obligations.” *Bd. of Governors of Univ. of N. Carolina v. U.S. Dep’t of Labor*, 917 F.2d 812, 815 (4th Cir. 1990). Summarized below are those obligations and the regulatory framework under which OFCCP operates.<sup>1</sup>

### **I. Federal Contractors Agree to Maintain Records and Provide Access to the Secretary in Exchange for Doing Business with the Federal Government**

Since at least 1965, the federal government has prohibited using taxpayer dollars to fund employers that unlawfully discriminate. *See* Executive Order 11246 § 202, 30 Fed. Reg. 12319 (Sept. 24, 1965). To promote this important policy, in exchange for the privilege of obtaining federal business, federal contractors must agree contractually to non-discrimination obligations similar to those set forth in Title VII and the Rehabilitation Act, which apply to most private employers, and additional requirements that apply only to federal contractors. *See id.*; *see also E.E.O.C. v. Sears, Roebuck & Co.*, 628 F. Supp. 1264, 1292 (N.D. Ill. 1986) (noting that, in becoming federal contractor, company “submit[ed] itself to the stringent affirmative action and recordkeeping requirements of the Office of Federal Contract Compliance Programs”).

Among other things, these additional obligations require a contractor like Google to keep certain records regarding its workforce. Specifically, contractors must maintain “[a]ny personnel or employment record made or kept by the contractor . . . for a period of not less than two years

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<sup>1</sup> OFCCP enforces Executive Order 11246, Vietnam Era Veterans’ Readjustment Assistance Act (“VEVRAA”), and Section 503 of the Rehabilitation Act. For this case’s purposes, the recordkeeping and access requirements of each of these statutes and the regulations promulgated under each are substantially identical. *Compare* 41 C.F.R. § 1.12(a) (recordkeeping under Executive Order) and *id.* § 1.43 (access under Executive Order) *with id.* § 60-300.80 (recordkeeping under VEVRAA) and *id.* § 60-300.81 *with id.* § 60-741.80 (recordkeeping under Rehabilitation Act) and *id.* § 60-741.81 (access under Rehabilitation Act). As such, for brevity’s sake, this brief relies on citations only to Executive Order 11246 and its implementing regulations.

from the date of the making of the record or the personnel action involved, whichever occurs later.” 41 C.F.R. § 60-1.12(a). The regulations explain that personnel and employment records include, but are not limited to,

records pertaining to hiring, assignment, promotion, demotion, transfer, lay off or termination, *rates of pay or other terms of compensation*, . . . applications, resumes, and any and all expressions of interest as to which the contractor considered the individual for a particular position . . . , and interview notes.

*Id.* (emphasis added).

As a condition of contracting with the government, contractors further agree to provide OFCCP with access to these records. Executive Order 11246 unambiguously provides:

The contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and *will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.*

Executive Order 11246 § 202(6) (emphasis added). The Executive Order’s implementing regulations (“Implementing Regulations”) repeatedly articulate this access requirement in great detail, stating unambiguously that a contractor “must make available to [OFCCP], upon request,” the records identified above. 41 C.F.R. § 60-2.32.<sup>2</sup>

To eliminate any doubt about contractors’ obligations, federal contracts—like Google’s federal contract—expressly provide that contractors must comply with the Implementing

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<sup>2</sup> See also 41 C.F.R. § 60-1.12(c)(2) (requiring contractor to “supply information [related to gender, race, and ethnicity of employees and applicants] to the Office of Federal Contract Compliance Programs upon request”); *id.* § 1.20(a)(2) (as part of compliance evaluation, OFCCP may conduct “[a]n analysis and evaluation of . . . documents related to the contractor’s personnel policies and employment actions that may be relevant to a determination of whether the contractor has complied with the requirements of the Executive Order and regulations”); *id.* § 60-1.43 (generally requiring access to “material as may be relevant to the matter under investigation and pertinent to compliance with the Order, and the rules and regulations promulgated” thereunder); *OFCCP v. Convergys Customer Mgmt. Grp., Inc.*, 15-OFC-00002, 2015 WL 7258441 (Dept. of Labor Oct. 23, 2015) (same).

Regulations and, specifically, permit the contracting agency and OFCCP to access its personnel and employment records. *See, e.g.*, Decl. of Marc A. Pilotin (“Pilotin Decl.”), Ex. A-3 (regulations incorporated in June 2014 Google contract) at 47 (FAR § 52.222-26(c)(6)-(8)); *see also, infra*, n.4. Thus, in addition to having regulatory obligations to maintain records and provide access, contractors like Google expressly agree in their contracts to provide such information, thus obligating them contractually to do so as well.

**II. OFCCP Conducts Compliance Evaluations to Determine Compliance with a Contractor’s Non-Discrimination and Affirmative Action Obligations.**

OFCCP is authorized to conduct two types of investigations of contractors: compliance evaluations and investigations into complaints. *See* 41 C.F.R. § 60-1.20 (compliance evaluations); *id.* § 60-1.24(b) (complaint investigations). Here, OFCCP is conducting a compliance evaluation of Google.

OFCCP conducts compliance evaluations

to determine if the contractor maintains nondiscriminatory hiring and employment practices and is taking affirmative action to ensure that applicants are employed and that employees are placed, trained, upgraded, promoted, and otherwise treated during employment without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin.

41 C.F.R. § 60-1.20(a). While the Implementing Regulations authorize several types of evaluations, OFCCP’s investigation of Google here concerns a compliance review, which is a “*comprehensive* analysis and evaluation of the hiring and employment practices of the contractor, the written affirmative action program, and the results of the affirmative action efforts undertaken by the contractor.” *Id.* § 60-1.20(a)(1) (emphasis added).

Compliance reviews focus on the segment of a contractor’s workforce covered by the contractor’s Affirmative Action Program (“AAP”). AAPs are required for each of the

contractor's establishments and may cover less than the contractor's total employee population across facilities. 41 C.F.R. § 60-2.1(d). As such, the size of the review depends on how the contractor organizes its workforce for AAP purposes.<sup>3</sup> See 41 C.F.R. § 60-2.1(d). In reviewing compliance, OFCCP "examine[s] the contractor's personnel policies and activities for the two years preceding the initiation of the review." Government Contractors, Affirmative Action Requirements, 62 Fed. Reg. 44174, 44178 (Aug. 19, 1997).

As particularly relevant here, the Implementing Regulations specify how the personnel and employment records a contractor must keep (as specified in 41 C.F.R. § 1.12(a)) are used in compliance evaluations, providing that OFCCP is entitled to review "documents related to the contractor's personnel policies and employment actions that may be relevant to a determination of whether the contractor has complied with the requirements of the Executive Order and regulations." 41 C.F.R. § 60-1.20(a)(2). Crucially, specifically in the context of compliance evaluations, the regulations declare that the records "*are relevant* until OFCCP makes a final disposition of the evaluation." *Id.* § 60-1.12(a) (emphasis added).

#### **STATEMENT OF UNCONTESTED FACTS**

1. Google is a wholly-owned subsidiary of Alphabet, Inc. It offers, among other things, Internet advertising services. It is located at 1600 Amphitheatre Parkway in Mountain View, CA. Complaint ¶ 2; Answer ¶ 2.

2. At all times relevant hereto, Google has had 50 or more employees and has had at least one contract with the federal government of \$100,000 or more, including Contract No.

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<sup>3</sup> Typically, AAPs cover a single establishment of a covered-contractor that has 50 employees or more. 41 C.F.R. § 60-2.1(d). However, contractors may request that OFCCP permit it to organize its AAPs based on functional or business units, known as a Functional Affirmative Action Program ("FAAP"). See *id.* § 60-2.1(e); OFCCP Directive 2013-01. In the instant matter, Google has not requested a FAAP and as such, OFCCP appropriately is reviewing compliance with the Executive Order for the entire establishment selected for review.

GS07F227BA for “Advertising and Integrated Marketing Solutions,” which the General Services Administration awarded Google on June 2, 2014 (“AIMS Contract”). Complaint ¶¶ 3-4; Answer ¶¶ 3-4.

3. The AIMS Contract contains provisions requiring Google to comply with the Executive Order, VEVRAA, and the Rehabilitation Act and the implementing regulations promulgated pursuant to each. Pilotin Decl., Ex. A-2 at 16-17 (regulations incorporated into AIMS Contract); *id.*, Ex. A-3 (text of regulations) at 48 (FAR § 52.222-26(c)(6)), 51 (FAR § 52.222-35(b)(2)), 53 (FAR § 52.222-36(a)(2)).<sup>4</sup> Under the AIMS Contract, Google specifically agreed to, among other things, to “comply with Executive Order 11246, as amended, and the rules, regulations, and orders of the Secretary of Labor” and

permit the Government to inspect and copy any books, accounts, records (including computerized records), and other material that may be relevant to the matter under investigation and pertinent to compliance with Executive Order 11246, as amended, and rules and regulations that implement the Executive Order.

Pilotin Decl., Ex. A-3 at 48 (FAR § 52.22-26(c)(6), (8)). Google projected the contract would generate \$5 million in annual sales. *Id.*, Ex. A-4 at 3.

4. When it agreed to the AIMS Contract, Google “affirm[ed] that no exceptions are being taken to the terms and conditions related to” the contract, which contained the provisions in paragraph 3 above. Complaint ¶ 6 (citing language); Answer ¶ 6 (referring Court to document); Pilotin Decl., Ex. A-5 (April 23, 2014 Google letter containing language) at 1.

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<sup>4</sup> The AIMS Contract consists of four sets of documents: (1) the Government’s solicitation; (2) Google’s offer, dated July 2, 2013; (3) Google’s Final Proposal Revision, dated April 23, 2014 and submitted May 6, 2014; and (4) the relevant Standard Form 1449 and its continuing pages. *See* Ex. A-1 at 1B. Because Google’s Answer directs the Court to the AIMS Contract itself, OFCCP submits the relevant portions of the contract as Exhibits A-1, A-2, A-3, and A-4 to the Pilotin Declaration. Complaint ¶ 5 (discussing AIMS Contract); Answer ¶ 5 (referring “the Court to the full contents of the referenced document in response to the Complaint’s specific averments therein”).

Google also affirmed that its agreement “reflect[ed] the outcome of negotiations between Google and” the General Services Administration. Pilotin Decl., Ex. A-5 at 1.

5. On or about September 30, 2015, Google received a scheduling letter from OFCCP, notifying the company that its Mountain View facility had been “selected . . . for a compliance evaluation” in the form of a “compliance review.” Complaint ¶ 8; Answer ¶ 8; Aff’n of Daniel V. Duff III, Esq. in Support of Defs.’ Mot. to Remove (“Duff Aff’n”) ¶ 2, Ex. A at 1.

6. On or before June 1, 2016, as part of the compliance evaluation, OFCCP requested that Google produce

- a. a database containing information on the company’s compensation of its employees (*i.e.*, “compensation snapshot”), as of September 1, 2014;
- b. job and salary history for employees in a September 1, 2015 compensation snapshot that Google had produced and the requested September 1, 2014 snapshot, including starting salary, starting position, starting “compa-ratio,” starting job code, starting job family, starting job level, starting organization, and changes to the foregoing; and
- c. the names and contact information for employees in the previously-produced September 1, 2015 snapshot and the requested September 1, 2014 snapshot.

Complaint ¶ 9; Answer ¶ 9 (referring Court “to the items requested by OFCCP”); Duff Aff’n, Ex. B (June 1, 2016 OFCCP requests to Google).

7. On June 17, 2016, Google refused to produce the items requested in paragraph 6 (“Subject Items”), unless OFCCP first disclosed preliminary findings in its investigation.

Complaint ¶ 10; Duff Aff’n, Ex. C (6/17/2016 Camardella Ltr.) at 3-4. Google conditioned its production of the requested items on the agency disclosing its preliminary findings, namely

- (1) the nature and extent of the purported issues, if any, OFCCP has found in the data/information already provided to the Agency, and
- (2) each specific area where these potential issues are found

(e.g., a list of the specific job groups, job titles, or other groupings where OFCCP purportedly has identified issues).

Duff Aff'n, Ex. C at 3-4; *see also* Pilotin Decl., Ex. B (10/19/16 Camardella Ltr.) at 4 (to obtain the Subject Items, OFCCP must “provide a brief, *but specific*, description of the potential issues it had observed in the data already provided”) (emphasis added);

8. On or around September 16, 2016, OFCCP served a notice to show cause why enforcement proceedings should not be initiated based on the company’s refusal to produce the Subject Items (“Show Cause Notice”). Complaint ¶ 11; Answer ¶ 11.

9. On October 19, 2016, Google responded to the Show Cause Notice, stating that the parties were at an “[i]mpasse” regarding the Subject Items and reiterated its position that it would not produce them unless OFCCP established their relevance by disclosing its preliminary findings regarding discrimination. Pilotin Decl., Ex. B (Oct. 19, 2016 Camardella Ltr.) at 4 (declaring “[i]mpasse”); *id.* at 12 (“Absent any explanation regarding the issues it purports to have identified with the current year snapshot data, OFCCP’s request for compensation data for a second snapshot date is not relevant . . .”).

10. On November 29, 2016, the parties had a teleconference regarding the Show Cause Notice. Pilotin Decl., Ex. C (Dec. 6, 2016 Camardella Ltr.) at 1. While the parties narrowed their disputes, Google maintained its position that it would not produce the Subject Items unless OFCCP disclosed its preliminary findings. *Id.* at 2 (maintaining that Subject Items’ relevance must be tied “to any preliminary findings made by OFCCP concerning compensation”); *id.* (arguing that OFCCP’s refusal to provide “information regarding the preliminary compensation findings the Agency has made” violates Google’s Fourth Amendment rights).

11. Since OFCCP requested the Subject Items in June 2016, the parties have exchanged multiple communications and held several teleconferences in an attempt to resolve Google's objections. Decl. of Agnes Huang in Support of Pl.'s Response to Def.'s Mot. to Remove from Admin. Compl. ¶¶ 4-5.

### ARGUMENT

Google has stalled OFCCP's investigation into whether the company's employment practices are non-discriminatory, refusing to produce basic data until OFCCP first shares its initial observations with the company. Nothing in Google's federal contract, OFCCP's regulations, or the Fourth Amendment requires the radical tit-for-tat investigative process Google proposes, which is contrary to law, contrary to the promises Google made when entering into the AIMS Contract, invades long established privileges, and, if accepted, would seriously hobble the agency's ability to assess whether contractors are meeting their obligations.

OFCCP has requested an essential set of pay-related records necessary to complete its compliance evaluation. Because Google's obligation to produce these records as a federal contractor<sup>5</sup> presents a clear-cut legal issue, the Court should enter judgment as a matter of law in OFCCP's favor and direct Google to produce the Subject Items promptly.

**I. This Expedited Proceeding Presents a Pure Question of Law, Entitling OFCCP to Summary Judgment.**

Expedited proceedings are appropriate when a contractor, like Google, has "refused to give access to or to supply records or other information as required by the equal opportunity

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<sup>5</sup> Businesses with federal contracts of \$50,000 or more and 50 employees or more are subject to the recordkeeping and access requirements related to Executive 11246 and Section 503 of the Rehabilitation Act. *See, e.g.*, 41 C.F.R. § 60-2.1(b) (requiring AAP under the Executive Order); 41 C.F.R. § 60-741.40(a) (same, Rehabilitation Act). Before October 2015, businesses with contracts of \$100,000 or more and 50 employees are more were subject to requirements of VEVRAA. 41 C.F.R. § 60-300.40(a). In October 2015, the VEVRAA dollar-amount threshold was raised to \$150,000. 80 Fed. Reg. 38293 (July 2, 2015). Based on the size of its workforce and the AIMS Contract (Stmt. of Facts ¶ 2), Google is a covered contractor subject to these requirements.

clause.” 41 CFR § 60-30.31. Such proceedings are appropriate because “a tribunal’s review of [OFCCP’s] request for documents is limited.”<sup>6</sup> *Convergys*, 2015 WL 7258441. As a California district court summarized in the administrative subpoena context:

A proceeding brought to enforce an administrative subpoena is summary in nature. See *E.E.O.C. v. Karuk Tribe Housing Authority*, 260 F.3d 1071, 1078 (9th Cir. 2001) (describing subpoena enforcement actions as “summary procedure[s]”). This is because “the very backbone of an administrative agency’s effectiveness in carrying out the congressionally mandated duties of industry regulation is the *rapid exercise* of the power to investigate the activities of the entities over which it has jurisdiction.” *Fed. Maritime Commission v. Port of Seattle*, 521 F.2d 431, 433 (9th Cir. 1975) (emphasis added).

*Solis v. Forever 21, Inc.*, Case No. CV 12-09188 MMM (MRWx), op. at 5-6 (C.D. Cal. Mar. 7, 2013).<sup>7</sup>

In expedited proceedings, summary judgment may be granted, applying the standards used in Federal Rule of Civil Procedure 56. See 41 C.F.R. § 60-30.23 (summary judgment procedure in OFCCP proceedings); *Convergys*, 2015 WL 7258441 (applying FRCP 56 standards to OFCCP expedited proceeding). Under those standards, when a case, as here, poses only a pure question of law, summary judgment is appropriate. *Convergys*, 2015 WL 7258441; Fed. R. Civ. P. 56(a) (“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”).

## **II. The Subject Items Fall Within the Scope of Materials Google Unambiguously Agreed to Make Available to OFCCP When Agreeing to the AIMS Contract.**

As noted above, federal contract provisions duplicate language from the Implementing Regulations, thereby creating both a contractual *and* a regulatory obligation for contractors to

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<sup>6</sup> As explained further in OFCCP’s opposition to Google’s request to take remove this case from expedited proceedings, filed February 3, 2017, discovery in this expedited proceeding is wholly unnecessary.

<sup>7</sup> Available at <https://www.dol.gov/opa/media/press/whd/WHD20130447-fs.pdf>, last accessed February 2, 2017.

maintain records and grant access. Google's AIMS Contract is no different, containing a provision—materially identical to 41 C.F.R. § 1.43—requiring the company to

permit access to its premises, during normal business hours, by the contracting agency or the OFCCP for the purpose of conducting on-site compliance evaluations and complaint investigations. The Contractor shall permit the Government to inspect and copy any books, accounts, records (including computerized records), and other material that may be relevant to the matter under investigation and pertinent to compliance with Executive Order 11246, as amended, and [the Implementing Regulations].

Stmt. of Facts ¶ 3. The Implementing Regulations define what is relevant in a compliance evaluation: “[a]ny personnel or employment record made or kept by the contractor,” including “records pertaining to . . . rates of pay or other terms of compensation,” “are relevant until OFCCP makes a final disposition of the evaluation.” 41 C.F.R. § 1.12(a).

The Subject Items fall well within the scope of what Google agreed to provide to OFCCP. Through its compliance review, OFCCP is conducting a “comprehensive analysis and evaluation” of Google’s “hiring and employment practices” (41 C.F.R. § 1.20(a)(1)) to determine whether it has complied with its equal opportunity obligations, including the obligation not to discriminate against its employees “because of race, color, religion, sex, sexual orientation, gender identity, or national origin” with respect to “rates of pay or other forms of compensation.” Executive Order 11246 § 202 (as amended).

To conduct the required comprehensive analysis, OFCCP, after receiving an initial set of data, followed up with requests for (1) compensation data from another point in the two-year review period; (2) data on additional factors that relate to compensation, so that the agency can perform a regression analysis to assess what may be driving any disparities in compensation; and (3) employee names and contact information, so that the agency may interview employees about Google’s compensation practices. Stmt. of Facts ¶ 6. As “personnel and employment records”

(specifically, as records “pertaining to . . . rates of pay or other terms of compensation”), these records are plainly relevant under the Implementing Regulations. 41 C.F.R. § 1.12(a).

Despite this clear contractual and regulatory language, Google insisted throughout the conciliation process that relevance, in a compliance evaluation, morphs as the investigation proceeds. Google argues that relevance should depend on when a request has been made and what preliminary findings OFCCP has at that moment in time. To support its dynamic, ever-shifting definition of relevance, Google points to a general regulation requiring it to produce items that “may be relevant to the *matter under investigation*,” interpreting “matter under investigation” to refer to OFCCP’s current, but preliminary, impressions of the evaluation. *See generally* 41 C.F.R. § 60-1.43.

This interpretation is as unwarranted as it is unfounded. *First*, in the specific context of compliance evaluations, the Implementing Regulations define relevance unambiguously: Google’s personnel and employment records, including its “records pertaining to . . . rates of pay or other terms of compensation,” are relevant in a compliance evaluation. 41 C.F.R. § 60-1.12(a); *see also id.* § 60-1.20(a)(2) (authorizing “analysis and evaluation of . . . documents related to the contractor’s personnel policies and employment actions that may be relevant to a determination of whether the contractor has complied with the requirements of the Executive Order and regulations”). These documents lie at the core of what OFCCP needs to conduct such an evaluation.

*Second*, the contract and regulatory language do not support Google’s decontextualized interpretation. Google cites language that applies to any type of investigation OFCCP is authorized to perform. The language provides that contractors must provide OFCCP access to facilities to “conduct[] on-site compliance evaluations and complaint investigations,” going onto

say that Google “shall permit the Government to inspect and copy any books, accounts, records (including computerized records), and other material that may be relevant to the matter under investigation and pertinent to compliance with Executive Order[.]” Stmt. of Facts ¶ 3; *see also* 41 C.F.R. § 60-1.43. Read in context, because this language applies to any investigation OFCCP may undertake, the phrase “matter under investigation” relates to whether the investigation is a compliance evaluation or a complaint investigation, and constrains relevance accordingly. For example, if OFCCP were investigating a complaint specifically regarding a contractor’s failure to hire an applicant, OFCCP likely may not seek records pertaining to the contractor’s compensation practices, except to the extent those compensation practices bore some relation to the hiring practices being investigated. By contrast, in a compliance evaluation where OFCCP must “determine if the contractor maintains nondiscriminatory hiring and employment practices,” *id.* § 60-1.20(a), it makes sense that all of the contractor’s personnel and employment records are relevant, *id.* § 60-1.12. Because OFCCP is conducting a global review here, all of Google’s personnel and employment are relevant and necessary to OFCCP’s ability to discharge its required duty of conducting a comprehensive, fair, and thorough review.

*Finally*, Google’s attempt to tether relevance to OFCCP’s current impressions of an investigation would cripple OFCCP’s ability to conduct its comprehensive analysis. As Google would have it, to obtain additional information from a contractor, OFCCP would be under pain of disclosing its preliminary findings and having to persuade the contractor that those findings justify a follow-up request. Google cites no authority supporting such a requirement, which would effectively allow the investigated party to oversee the investigation. Indeed, Google’s proposed investigatory scheme would eviscerate the agency’s deliberative process and

investigatory files privileges and any work product protection,<sup>8</sup> enabling a contractor to obtain, *through a pending investigation against it*, information it could not obtain through litigation or FOIA. Moreover, Google's proposed arrangement would undermine the integrity of compliance evaluations, permitting a contractor to tailor its further responses based on what it understands OFCCP's opinions to be.

OFCCP has not asked Google for its search algorithm. Rather, to evaluate the company's compensation practices, the agency has asked for compensation-related data and information so that it may interview employees about their pay. The Subject Items are within the scope of what Google agreed to produce as a federal contractor and must be produced.

**III. Although Constitutional Protections Do Not Apply Because Google Consented in the AIMS Contract to Produce the Subject Items, OFCCP's Request Comports with the Fourth Amendment.**

Google has also argued that OFCCP's request for the Subject Items violates the Fourth Amendment. As explained further below, because Google consented in the AIMS Contract to produce the Subject Items as part of a compliance evaluation, it lacked a reasonable expectation of privacy as to the Items with respect to OFCCP, eliminating any Fourth Amendment protections. In any event, even if Fourth Amendment protections applied, OFCCP's request for the Subject Items was proper.

**A. Google contractually consented to disclosure of its employment data and records in a compliance evaluation, waiving any Fourth Amendment protections.**

The "touchstone of [the Fourth] Amendment analysis has been the question whether a person has a constitutionally protected reasonable expectation of privacy." *Oliver v. United*

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<sup>8</sup> See, e.g., *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1161 (D.C. Cir. 1987) (holding deliberative process privilege to protect OFCCP expert's analysis and recommendations); *Solis v. Seafood Peddler of San Rafael, Inc.*, Case No. 12-cv-0116 PJH (NC), 2012 WL 12547592, at \*6 (N.D. Cal. Oct. 16, 2012) (noting investigatory files privilege "applies to informal investigatory material and *preliminary determinations*") (emphasis added).

*States*, 466 U.S. 170, 177 (1984). No such expectation exists when a person gives consent to a search that is “not the result of duress or coercion, express or implied.” *Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1973). It is long-settled that a business may give this consent and bargain away its Fourth Amendment rights in exchange for a government contract. *See, e.g., Zap v. United States*, 328 U.S. 624, 628 (1946) (“[W]hen petitioner, in order to obtain the government's business, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts.”), *vacated on other grounds*, 330 U.S. 800 (1947); *see also United States v. Schleining*, 181 F. Supp. 3d 531, 537 (N.D. Ill. 2015) (holding government contractor “to the terms of a contract in which it voluntarily relinquished Fourth Amendment rights in exchange for a valuable business opportunity”).<sup>9</sup>

Here, in consideration for the benefits of the AIMS Contract, Google freely contracted away its Fourth Amendment rights with respect to the OFCCP’s request for the Subject Items. As already established, the AIMS Contract contains an express provision requiring Google to subject itself to, in the context of a compliance evaluation, searches of records and materials

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<sup>9</sup> The doctrine of consent-by-contract has been consistently applied in numerous contexts. *See United States v. Yeary*, 740 F.3d 569, 583 (11th Cir. 2014) *cert. denied*, 135 S. Ct. 1153 (2015) (house arrest agreement); *United States v. Scott*, 450 F.3d 863, 867 (9th Cir. 2006) (pre-trial release conditions); *United States v. Barnett*, 415 F.3d 690, 692 (7th Cir. 2005) (probation); *Kerns v. Chalfont-New Britain Twp. Joint Sewage Auth.*, 263 F.3d 61, 66 (3rd Cir. 2001) (employee urinalysis); *Yin v. State of Cal.*, 95 F.3d 864, 872 (9th Cir. 1996) (independent medical evaluation pre-employment); *Tri-State Steel Const., Inc. v. Occupational Safety & Health Review Comm'n*, 26 F.3d 173 (D.C. Cir. 1994) *cert. denied* 510 U.S. 1015 (1995) (OSHA inspection); *Donovan v. A.A. Beiro Const. Co.*, 746 F.2d 894, 900 (D.C. Cir. 1984) (OSHA inspection); *United States v. Brown*, 763 F.2d 984, 987-88 (8th Cir. 1985) *cert. denied* 474 U.S. 905 (1985) (medicaid records); *United States v. Jennings*, 724 F.2d 436, 448 (5th Cir. 1984) (food stamps fraud); *United States v. Rucinski*, 658 F.2d 741, 745 (10th Cir. 1981) *cert. denied* 455 U.S. 939 (1982) (Forest Service inspection); *United States v. Griffin*, 555 F.2d 1323, 1324 & n.1 (5th Cir. 1977) (welfare fraud); *Colonnade Catering Corp. v. United States*, 410 F.2d 197, 203 (2nd Cir. 1969) *rev'd on other grounds*, 397 U.S. 72 (1970) (IRS seizing alcohol); *United States v. Smith*, 353 F. App'x 229, 231 (11th Cir. 2009) (storage unit contract); *Copar Pumice Co., Inc. v. Morris*, 632 F. Supp. 2d 1055 (D.N.M. 2008) (environmental protection inspection); *United States v. Seljan*, 328 F. Supp. 2d 1077, 1085 (C.D. Cal. 2004) *aff'd*, 497 F.3d 1035 (9th Cir. 2007) *aff'd en banc*, 547 F.3d 993 (9th Cir. 2008) *cert. denied* 555 U.S. 1195 (2009) (customs seizing pornography); *United States v. Teeven*, 745 F. Supp. 220 (D. Del. 1990) (subpoena duces tecum issued by Department of Education).

“that may be relevant to the matter under investigation and pertinent to compliance with Executive Order 11246.” Stmt. of Facts ¶ 3. Google affirmed that it accepted this provision voluntarily, noting that the Contract “reflect[ed] the outcome of negotiations between Google and” the General Services Administration. Stmt. of Facts ¶ 4.

Google agreed contractually to give OFCCP access to the Subject Items, eliminating any reasonable expectation of privacy that would trigger Fourth Amendment protections.

**B. The Fourth Amendment does not shield Google from OFCCP’s request for the Subject Items because OFCCP has the authority to request them, they are reasonably specified, and they are relevant to determining whether Oracle complied with its equal opportunity obligations.**

Even if Google had not waived its right to object under the Fourth Amendment with respect to the Subject Items, OFCCP’s request for them is constitutionally sound.

OFCCP’s requests for documents during compliance evaluations are analogous to administrative subpoenas. *See United Space Alliance, LLC v. Solis*, 824 F. Supp. 2d 68 (D.D.C. 2011). “In the context of an administrative subpoena, the Fourth Amendment’s restrictions are limited.” *United States v. Golden Valley Elec. Ass’n*, 689 F.3d 1108, 1115 (9th Cir. 2012).

The Fourth Amendment requires an administrative subpoena to “be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.” *Donovan v. Lone Steer, Inc.*, 464 U.S. 408 (1984) (citation omitted); *see also United Space Alliance, LLC*, 824 F. Supp. 2d. at 92. An administrative subpoena satisfies these requirements “if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant.” *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *see also Golden Valley*, 689 F.3d at 1113 (same).

Here, OFCCP’s request for the Subject Items satisfies the three requirements for an administrative subpoena. As to OFCCP’s authority, the Subject Items pertain to a compliance

evaluation into Google's employment practices, which OFCCP is authorized to conduct. 41 C.F.R. § 60-1.20(a). The relevance and specificity of the request for the Specific Items are addressed separately below.

1. **Each of the Subject Items is reasonably relevant to a determination of whether Google complied with its equal opportunity obligations.**

For Fourth Amendment purposes, requested information must be "reasonably relevant." *Morton Salt Co.*, 338 U.S. at 652. This "requirement is not especially constraining." *Golden Valley*, 689 F.3d at 1113. All that is required is that the information subpoenaed "be relevant to an agency investigation." *Id.* at 1114; *see also Nat'l Bank of Alaska*, 696 F.2d at 684 ("the appropriate inquiry is whether the information sought might assist in determining whether any person is violating or has violated any provision" of the law being enforced); *Forever 21, Inc.*, op. at 5-6. An agency's request must be upheld "unless the evidence sought . . . is plainly incompetent or irrelevant to any lawful purpose of the agency." *Golden Valley*, 689 F.3d at 1113 (citation omitted); *see also Morton Salt Co.*, 338 U.S. at 652 (subpoena is improper if it is "so unrelated to the matter properly under inquiry").

Consistent with the Subject Items being relevant as defined by the Implementing Regulations, as set forth above, they are also relevant under the Fourth Amendment's broader definition of relevance.<sup>10</sup> *First*, OFCCP has requested a snapshot capturing its employees' pay for September 1, 2014. Such data are patently relevant to determining whether Google fulfilled

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<sup>10</sup> To the extent it is Google's contention that the Fourth Amendment provides a more limited definition of relevancy than that provided by the regulations, this court is bound to follow the regulations. *See, e.g., OFCCP v. Goya De Puerto Rico, Inc.*, Case No. 98-OFC-00008, 1999 WL 33992439 (Dep't of Labor June 22, 1999) ("[A]dministrative law judges are bound by Executive Order 11246 and its implementing regulations; they have no jurisdiction to pass on their validity.") (citation omitted). However, since there is no discrepancy between the regulatory standards and the Fourth Amendment, as described herein, this issue need not be addressed.

its equal opportunity obligations in the two years before initiating the compliance evaluation in September 2015. *See* Stmt. of Facts ¶ 5.

*Second*, OFCCP has requested data on factors that may relate to an employee's compensation, which will permit it to conduct regression analyses to help it determine whether Google's pay practices are non-discriminatory. Regression models are used to evaluate the relationship among various factors potentially impacting compensation. *See, e.g.*, Fed. Judicial Ctr., Reference Manual on Scientific Evidence at 260, 305 (2011); *Ottaviani v. State Univ. of N.Y. at New Paltz*, 875 F.2d 365, 367 (2d Cir. 1989) ("In disparate treatment cases involving claims of gender discrimination, plaintiffs typically use multiple regression analysis to isolate the influence of gender on employment decisions relating to a particular job or job benefit, such as salary."). For instance, "[i]n a case alleging sex discrimination in salaries, . . . a multiple regression analysis would examine not only sex, but also other explanatory variables of interest, such as education and experience." Fed. Judicial Ctr., Reference Manual on Scientific Evidence at 305. OFCCP here requested information on various variables relating to compensation, including starting salary and job titles, to conduct its regressions. Having such information will assist the agency in determining whether compensation at Google is driven by lawful factors, such as education and experience, or unlawful discrimination.

*Finally*, OFCCP requested employee contact information so that it could interview Google employees about the company's pay practices, which would yield information relevant to assessing Google's compliance. As the Ninth Circuit recently held, such contact information is relevant when evaluating whether discrimination has occurred.<sup>11</sup> In *E.E.O.C. v. McLane Co.*,

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<sup>11</sup> Notably, employee contact information is routinely produced in private employment cases. *See, e.g., Benedict v. Hewlett-Packard Co.*, Case No. C 13-0119 LHK, 2013 WL 3215186, at \*2 (N.D. Cal. June 25, 2013); *Holman v. Experian Info Solutions, Inc.*, Case No. No. C 11-0180 CW, 2012 WL 1496203 (N.D. Cal. Apr. 27, 2012) (allowing

*Inc.*, the court rejected an employer’s relevance objection to the EEOC’s request for employees’ names, their last known address, and their telephone numbers. 804 F.3d 1051, 1056 (9th Cir. 2015). The court noted that the EEOC, similar to OFCCP here, wanted to “contact other McLane employees and applicants for employment who have taken the test to learn more about their experiences,” who “might cast light on the allegations against McLane-whether positively or negatively.” *Id.* at 1056-57. Here, like the EEOC, OFCCP seeks to speak with Google employees to learn about their experiences working at the company.

Fourth Amendment case law definitively rejects Google’s assertion that OFCCP must disclose its preliminary findings to establish relevance. Google’s argument effectively grafts a probable cause requirement onto the administrative subpoena framework, requiring OFCCP to justify its additional requests with initial indicators of a violation. However, the “Supreme Court has refused to require that an agency have probable cause to justify issuance of a subpoena.” *Golden Valley*, 689 F.3d at 1116 (citations omitted). An agency’s “power of inquisition” broadly permits the agency to obtain materials “merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.” *Morton Salt Co.*, 338 U.S. at 642.

**2. OFCCP’s Request for the Subject Items is Sufficiently Specific and Not Unduly Burdensome.**

The Subject Items focus specifically on the workforce Google defined in its AAP and on the two-year time period under investigation. By limiting the requests to the scope of Google’s AAP and the standard two-year investigation period, OFCCP’s requests thereby satisfy the Fourth Amendment requirement that an agency’s requests be “not too indefinite.” *Morton Salt Co.*, 338 U.S. at 652; *Golden Valley*, 689 F.3d at 1115.

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“discovery of putative class members’ confidential information subject to a protective order, without requiring prior notice”) (citing cases); *Artis v. Deere & Co.*, 276 F.R.D. 348, 352 (N.D. Cal. 2011) (ordering production “of names, addresses, and telephone numbers”, which “is a common practice in the class action context”).

Despite the specificity of OFCCP's requests, Google nevertheless objects that the requests are unreasonably burdensome. For a burden objection to be sustained, Google must prove that producing the Subject Items "threatens to unduly disrupt or seriously hinder normal operations of a business." *F.T.C. v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977); *see also U.S. E.E.O.C. v. Aaron Bros., Inc.*, 620 F. Supp. 2d 1102, 1106 (C.D. Cal. 2009) ("Compliance with a subpoena is excused if it 'threatens to unduly disrupt or seriously hinder normal operations of a business.'") (quoting *E.E.O.C. v. Maryland Cup Corp.*, 785 F.2d 471, 479 (4th Cir. 1986)). "Broadness alone is not sufficient justification to refuse enforcement of a subpoena." *Texaco, Inc.*, 555 F.2d at 882. Where an agency's request, as here, "is pursuant to a lawful purpose and the requested documents are relevant to that purpose," the burden of demonstrating an unreasonable request "is not easily met." *Id.*

Google fails to meet its heavy burden. During the conciliation process, Google primarily argued that producing the Subject Items would be unreasonably burdensome because they pertain to the workforce identified in the company's AAP, which consisted of 21,114 employees as of September 1, 2015 and 19,539 employees as of September 1, 2014. *See, e.g.*, Pilotin Decl., Ex. B at 10-12. But these numbers alone are not enough to demonstrate an unreasonable burden. The scope of OFCCP's compliance review is defined by the AAP Google submitted, which Google crafted to encompass the workforce at the Mountain View facility. While that workforce numbers in excess of 19,000, Google has never contended during conciliation that—as a multi-national Internet company part of a larger corporate family—it lacks the personnel or financial resources to produce these data sets. *See, e.g., E.E.O.C. v. McLane Co., Inc.*, No. CV-12-615-PHX-GMS, 2012 WL 1132758, at \*2 (D. Ariz. Apr. 4, 2012) (noting courts must consider

request in light of employer's resources). Indeed, unlike with other requests, Google has never maintained that the Subject Items would be unreasonably burdensome to compile.

Google has also suggested that producing its employee's names and contact information would be unreasonably burdensome because of "privacy and confidentiality concerns." Pilotin Decl., Ex. B at 11. Tellingly, Google has not asserted a legal basis for withholding on these grounds and did not include this in its Motion to Remove from Expedited Proceedings. Nevertheless, privacy considerations do not provide a basis for withholding information from OFCCP, particularly where there are sufficient limitations on the disclosure of that information. *See, e.g., McLane*, 804 F.3d at 1058 (rejecting objection to EEOC request based on "privacy interests" where there were sufficient "limitations on the public disclosure of information"). Here, the Privacy Act guards against the public disclosure of employee contact information. *See generally* 5 U.S.C. § 552a. More importantly, OFCCP's purpose in part is to ensure that Google's employees are treated in a manner that protects them (*i.e.*, that they are not subject to unlawful discrimination). In this light, Google's claim to be protecting employee privacy by ensuring that employees cannot talk directly to OFCCP without being under its watchful eye puts the fox in the investigative henhouse. Indeed, it is well established in the employment context that employees may be deterred from providing full and frank information if their employer is involved. *See, e.g., Camp v. Alexander*, 300 F.R.D. 617, 622 (N.D. Cal. 2014) (noting "potential for coercion" where employer communicates with employees regarding litigation) (citing various cases); *Mevorah v. Wells Fargo Home Mortg., Inc.*, Case No. No. C 05-1175 MHP, 2005 WL 4813532, at \*4 (N.D. Cal. Nov. 17, 2005) ("[I]t is . . . reasonable to assume that an employee would feel a strong obligation to cooperate with his or her employer in defending against a lawsuit.").

Thus, even under the Fourth Amendment administrative subpoena framework, which Google has sought to apply, Google's refusal to produce the Subject Items is meritless. Google is required by contract and regulation to produce the Subject Items, and OFCCP's request does not run afoul of the Fourth Amendment. Google must disclose the Subject Items promptly.

### CONCLUSION

For the foregoing reasons, the Court should grant summary judgment in OFCCP's favor and issue an order directing Google to produce within 14 days:

- a. a database containing information on the company's compensation of its employees (*i.e.*, "compensation snapshot"), as of September 1, 2014;
- b. as identified in the Show Cause Notice, job and salary history for employees in a September 1, 2015 compensation snapshot that Google had produced and the requested September 1, 2014 snapshot, including starting salary, starting position, starting "compa-ratio," starting job code, starting job family, starting job level, starting organization, and changes to the foregoing; and
- c. the names and contact information for employees in the previously-produced September 1, 2015 snapshot and the requested September 1, 2014 snapshot.

Respectfully submitted,

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