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February 23, 2017

VIA HAND DELIVERY

Honorable Steven B. Berlin
U.S. Department of Labor
Office of Administrative Law Judges
90 Seventh Street, Suite 4-800
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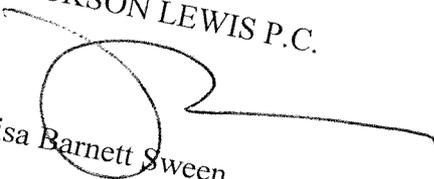
Re: **Office of Federal Contract Compliance Programs,
United States Department of Labor v. Google, Inc.
Case No.: 2017-OFC-00004**

Dear Judge Berlin:

Enclosed please find Defendant Google Inc.'s Opposition to Plaintiff OFCCP's Motion for Summary Judgment in this matter. Also enclosed are Defendant's Statement of Disputed Facts and the Declaration of Matthew Camardella.

Very truly yours,

JACKSON LEWIS P.C.


Lisa Barnett Sween

LBS/mds

cc: Matthew J. Camardella, Esq. (via email)
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**UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES**

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

Plaintiff,

v.

GOOGLE INC.,

Defendant.

Case No.: 2017-OFC-00004

**DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN
OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

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Office of Administrative Law Judges
San Francisco, Ca

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STANDARD OF REVIEW

Summary judgment is proper only where “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.” Fed. R. Civ. P. 56(a). Where, as is the case here, “the moving party will have the burden of proof on an issue at [the hearing], the movant must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party.” *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007) (also stating that “[i]n judging evidence at the summary judgment stage, the court does not make credibility determinations or weigh conflicting evidence. Rather, it draws all inferences in the light most favorable to the nonmoving party.”); *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986) (“If the movant bears the burden of proof on an issue . . . he must establish beyond peradventure *all* of the essential elements of the claim . . . to warrant judgment in his favor.”) (emphasis in original); *McInteer v. Ashley Distrib. Servs.*, 40 F. Supp. 3d 1269, 1274 (C.D. Cal. 2014) (“The party who has the burden of proof on a dispositive issue cannot attain summary judgment unless *the evidence* that he provides on that issue is conclusive.”) (internal quotation marks omitted) (emphasis added). In making this determination, the evidence presented by the non-moving party is to be believed and all reasonable inferences from the record are to be drawn in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). “Conclusory, speculative testimony in affidavits and moving papers” is insufficient to support a grant of summary judgment. *Thrifty Payless, Inc.*, 509 F.3d at 984. Indeed, only admissible evidence may be considered by the court, and speculation or conclusory statements cannot be the basis of summary judgment. Fed. R. Civ. P. 56(c) (mandating that evidence must be admissible, and that an “affidavit or declaration used to

support . . . a motion must be made on personal knowledge” and “set out facts that would be admissible”).

PRELIMINARY STATEMENT

This case involves the Office of Federal Contract Compliance Programs' ("OFCCP," the "Agency" or the "Plaintiff") unsupported and erroneous positions that: (1) the *Fourth Amendment* to the United States Constitution (hereinafter "*Fourth Amendment*") does not apply to Google Inc. ("Google" or the "Company") or any other federal government contractor, notwithstanding OFCCP's own citation in its brief to two cases holding the exact opposite; (2) OFCCP's regulations somehow trump the United States Constitution by bestowing upon OFCCP the sole, unfettered, and unreviewable discretion to determine what is and what is not relevant in a compliance review; (3) the Agency is entitled to job and salary history data for *all* (over 21,000) employees within Google's corporate headquarters affirmative action plan ("AAP") covering the period from 1998 to the present, notwithstanding OFCCP's own citation in its brief to the well-settled precedent that the Agency is limited to a maximum look back of two years (and only one year absent potential indicators of compensation discrimination, which OFCCP essentially admits in its brief it does not have, or alternatively, refuses to state that it possesses); and (4) OFCCP need not disclose to Google or this Court any basis for its grossly overbroad requests, notwithstanding the well-settled case law requiring the Agency to satisfy its burden of proving that its requests are "sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome."

The facts of this case are unlike any of the cases cited to by Plaintiff in support of its position. In an effort to obscure the overbroad and unconstitutional nature of its demands, OFCCP downplays the unlimited nature of its demands, including referring to them as mere requests for some pay data and employee contact information, and portrays this entire case as "uncontroversial" and "run of the mill." Therefore, it is imperative that the Court fully

understand from the outset the exact nature of OFCCP's demands at issue in this case (hereinafter the "Subject Demands"). Having already received from Google in excess of 1,310,000 items of compensation data regarding all 21,144 employees in Google's corporate headquarters AAP as of September 1, 2015, including all data required to be disclosed under Item 19 of OFCCP's Scheduling Letter, in addition to 36 additional compensation factors OFCCP requested after conducting a two-day onsite of Google's premises, OFCCP's Subject Demands seek the following additional data and information:

- The name, home telephone number, home address, personal e-mail and all other contact information for all 21,144 Google employees in its corporate headquarters AAP as of September 1, 2015, *without any limitation*;
- The complete job and salary history from the founding of Google in 1998 to the present for all 21,144 Google employees in its corporate headquarters AAP as of September 1, 2015, *without any limitation*;
- The name, home telephone number, home address, personal e-mail and all other contact information for all 19,539 Google employees in its corporate headquarters AAP as of September 1, 2014, *without any limitation*;
- The complete job and salary history from the founding of Google in 1998 to the present for all 19,539 Google employees in its corporate headquarters AAP as of September 1, 2014, *without any limitation*; and
- A second compensation snapshot, including the over 65 compensation data points previously requested, including OFCCP's overbroad and ill-defined request for "any other factors related to compensation," for all 19,539 Google employees as of September 1, 2014, *without any limitation*.

Not only are the Subject Demands not sufficiently limited as required by the *Fourth Amendment* administrative subpoena standard – they are not limited at all and violate the administrative subpoena standard requiring OFCCP to "sufficiently limit" the Subject Demands. *Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 415 (1984).

In addition, OFCCP has and continues to refuse to offer to Google and/or this Court any legitimate explanation for the relevance of the Subject Demands. The compensation data Google already has provided to OFCCP is more than sufficient for the Agency to run robust multiple regression analyses. Absent a legitimate explanation for the additional disclosures required by the Subject Demands, OFCCP cannot satisfy the administrative subpoena standard described in detail herein.

OFCCP persists in its unexplained pursuit of its overbroad Subject Demands notwithstanding that Google has in good faith: (1) offered to provide the name and contact information for any employee OFCCP wishes to interview if there is a necessary rationale for such information that overrides Google's privacy concerns and that cannot be accomplished without all such information; and (2) informed the Agency that it will produce, consistent with the standards applicable to the limitations of OFCCP's review period, the complete job and salary history, in addition to a second snapshot as of September 1, 2014, for any employee or groups of employees for whom OFCCP has identified potential compensation issues.

Rather than accept these reasonable compromises, OFCCP engages in legal sleight of hand in its premature request that this Court grant summary judgment in its favor. In its Memorandum of Points and Authorities in Support of Motion for Summary Judgment ("Memorandum in Support"), OFCCP improperly: (1) asks this Court to rule that the well settled administrative subpoena standard articulated in *Donovan v. Lone Steer, Inc.*, 464 U.S. 408 (1984), and *United Space Alliance, LLC v. Solis*, 824 F. Supp. 2d 68 (D.D.C. 2011), does not apply to this matter, and that government contractors waive their *Fourth Amendment* rights when they execute government contracts incorporating Executive Order 11246 and OFCCP's regulations; (2) fails to inform this Court that OFCCP explicitly conceded the exact opposite

positions in the *United Space Alliance* case when it unequivocally recognized both that the *Fourth Amendment* applies to OFCCP access cases, and that government contractors do *not* waive their *Fourth Amendment* rights when they execute government contracts; (3) fails to address the “sufficiently limited in scope” prong of the administrative subpoena standard; (4) omits or selectively refers to its own regulations in a misplaced attempt to establish that OFCCP has unfettered and unreviewable discretion to determine relevancy in compliance evaluations; and (5) attempts to rush the Court to judgment in this matter even prior to the scheduling of an initial conference.

Google submits that these actions are designed to mask both the critical *Fourth Amendment* issues at stake in this case and OFCCP’s failure to satisfy its heavy burden on this motion. The Agency is attempting to violate Google’s constitutional rights, while at the same time urging this Court to grant it unfettered discretion with respect to the scope and relevancy of its demands in compliance reviews generally. A ruling in favor of OFCCP on this motion would prejudice not only Google, but all federal contractors. In contrast, OFCCP’s conclusory allegations that it will be prejudiced if its motion is denied are meritless. OFCCP brought this matter upon itself by crafting the overbroad Subject Demands and refusing any compromise with respect to them. In addition, the compliance evaluation has not been delayed, as Google already has produced and continues to produce to OFCCP information and data unrelated to the Subject Demands during the course of this proceeding. Furthermore, since OFCCP has not alleged any form of discriminatory actions against Google, OFCCP cannot claim that Google’s employees’ rights have been or are being violated.

Since OFCCP has failed to satisfy its heavy burden on this motion to establish that there is no genuine issue of material fact and/or establish that each element of the administrative

subpoena standard has be met beyond uncertainty or doubt, Google respectfully submits that Plaintiff's motion for summary judgment should be denied in its entirety.

ARGUMENT

- I. AS OFCCP CONCEDED IN *UNITED SPACE ALLIANCE*, THE OVERWHELMING WEIGHT OF LEGAL AUTHORITY ESTABLISHES THAT: (1) THE *FOURTH AMENDMENT* MUST BE APPLIED IN THIS PROCEEDING; AND (2) GOOGLE DID NOT WAIVE ITS CONSTITUTIONAL RIGHTS BY ENTERING INTO A FEDERAL GOVERNMENT CONTRACT.

Plaintiff erroneously asserts in its Memorandum in Support that the *Fourth Amendment* does not apply to the issues to be adjudicated in this proceeding, while at the same time citing to the very cases establishing conclusively that it does. Similarly, OFCCP argues that Google waived its *Fourth Amendment* rights by executing a federal contract, but fails to inform this Court that it conceded that the exact opposite was the case in *United Space Alliance*.

A. The Administrative Subpoena Standard Established in *Lone Steer/United Space Alliance* Applies to OFCCP Access Cases.

OFCCP's Subject Demands must satisfy all of the *Fourth Amendment* constitutional standards for administrative subpoenas set forth by the United States Supreme Court in *Oklahoma Press Publishing v. Walling*, 327 U.S. 186 (1946), and its progeny. In *United Space Alliance* and *OFCCP v. Convergys Customer Mgmt. Grp.*, 15-OFC-00002, ALJ's Recommended Decision, 2015 OFCCP LEXIS 2 (Dep't of Labor Oct. 23, 2015), cited by Plaintiff on pages 4, 11 and 17 of its Memorandum in Support, the Department of Labor Administrative Law Judge ("ALJ") and the federal district court established that the *Fourth Amendment's* administrative subpoena standard must be applied when adjudicating OFCCP access cases. Citing to United States Supreme Court precedent, *United Space Alliance* held that "when an administrative agency subpoenas corporate books or records, the *Fourth Amendment* requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome." 824 F. Supp. 2d at 91 (quoting *Lone Steer*, 464 U.S. at 415). "The gist of the protection is in the requirement, expressed

in terms, that the disclosure sought shall not be unreasonable. *Id.* at 91 (citing *Oklahoma Press*, 327 U.S. at 208) (other citations omitted).

Accordingly, in order to prevail on its motion for summary judgment, Plaintiff must establish beyond uncertainty and doubt that all prongs of the *Lone Steer/United Space Alliance* constitutionally-mandated and fact-specific safeguards have been satisfied such that no reasonable trier of fact could determine otherwise. As set forth in Point II of this brief, OFCCP has not even come close to making a sufficient showing capable of meeting this heavy burden.

Absent from Plaintiff's Memorandum of Support is any acknowledgement whatsoever that in *United Space Alliance*, OFCCP conceded that this constitutional standard is applicable to denial of access cases brought by OFCCP. *Id.* at 90 n.8. Yet, OFCCP now urges this Court to hold that the *Fourth Amendment* does *not* apply to this case.

B. Google Has Not Waived Its *Fourth Amendment* Rights by Contracting with the Federal Government.

OFCCP dedicates a significant portion of its brief urging this Court to find that Google waived its *Fourth Amendment* rights by entering into a federal government contract that incorporates by reference Executive Order 11246 and its implementing regulations at 41 C.F.R. Chapter 60. *See* Memorandum in Support at 11-17. Yet, OFCCP conceded the exact opposite position in *United Space Alliance*. The district court in *United Space Alliance* stated as follows:

[a]lthough OFCCP made the request at issue in this case in an attempt to enforce the contractual provisions mandated by Executive Order 11246, the agency does *not contest* United Space's claim that the *Fourth Amendment* rather than ordinary contract principles governs the Court's analysis. *The agency suggests that the weight of judicial authority supports a presumption that United Space contractually consented "only to searches that comport with constitutional standards of reasonableness. United States v. Harris Methodist Fort Worth*, 970 F.2d 94, 100 (5th Cir. 1992) (evaluation of compliance with Title VI); *see also First Ala. Bank v. Donovan*, 692 F.2d 714, 720 (11th Cir. 1982) (holding that, by signing a contract incorporating the relevant portions of Executive Order 11246, a federal contractor consented "only to those [compliance] reviews which employ reasonable

searches as that term is defined under the *Fourth Amendment*.”). Because the parties do not contest the question, the Court assumes their view without deciding the issue.

824 F. Supp. 2d at 90 n.8 (emphasis added).

Taking the exact opposite position against Google, and failing to inform this Court of its prior concession that the weight of judicial authority favors Google’s position, OFCCP now asks this Court to rule that a federal contractor waives all of its *Fourth Amendment* rights by merely executing a federal contract. Such a ruling would, of course, apply to tens if not hundreds of thousands of federal contractors, since in order to enter a procurement contract with a federal government agency exceeding \$10,000, all contractors must execute an agreement (“covered contract”) incorporating Executive Order 11246 and its implementing regulations, unless expressly exempted. Executive Order 11246, § 202; 41 C.F.R. § 60-1.4; *United Space Alliance*, 824 F. Supp. 2d at 74.¹

OFCCP does not, and cannot, argue that Google’s status as a government contractor is somehow distinguishable from those of the contractors in *United Space Alliance* or *Convergys*. Like Google’s contract, both of the covered contracts in these cases explicitly incorporated Executive Order 11246 and its implementing regulations. See *United Space Alliance*, 824 F. Supp. 2d at 74; *Convergys*, 2015 OFCCP LEXIS 2 at *13-14. Therefore, all three of these companies are subject to the very same regulatory framework OFCCP now asserts, contrary to its concession in *United Space Alliance*, is somehow outside the *Fourth Amendment*’s protections.

¹ OFCCP’s statement that the inclusion of the requirements of Executive Order 11246 and its implementing regulations “reflect[ed] the outcome of negotiations between Google and the General Services Administration” is erroneous since federal regulations mandate their inclusion in all “Government contracts (and modifications thereof if not included in the original contract)”, unless explicitly exempted under 41 CFR § 60-1.5. Executive Order 11246, § 202; 41 C.F.R. §§ 60-1.4 and 1.5.

In nonetheless arguing that the *Fourth Amendment* administrative subpoena standard does not apply to Google, OFCCP urges this Court to create a new standard for OFCCP access issues. OFCCP's current disregard for clear-cut precedent, its own prior concessions, not to mention its ambivalence for the United States Bill of Rights, is concerning. Indeed, Plaintiff's dismissal of the fundamental protections the *Fourth Amendment* guarantees against unlawful searches and seizures highlights the critical need for this Court to halt the Agency's unconstitutional quest for unfettered, non-reviewable discretion regarding the scope and relevancy of its requests. To be clear, Google does not argue that it has no obligation to provide documents and information to OFCCP under any circumstances. Google only maintains that its agreement to provide records does not include consent to searches that do not meet the administrative subpoena standard articulated in *United Space Alliance*. Instead, Google's agreement was made with the understanding that OFCCP is subject to the *Fourth Amendment*, Department of Labor regulations and case law that limit the Agency's power to request documents.

Ignoring the Supreme Court's decision in *Lone Steer*, in addition to the *United Space Alliance* decision, OFCCP cites to case law *not* involving the OFCCP, Executive Order 11246 or its implementing regulations to assert that Google has waived its constitutional rights. OFCCP erroneously relies on *Zap v. United States*, 328 U.S. 624 (1973) in favor of its waiver argument. Memorandum in Support at 16. *Zap* involved the Federal Bureau of Investigation's ("FBI") search of a contractor's books and records. *Id.* at 627-28. The Court stated that "the inspection was made during regular hours at the place of business." *Id.* "No force or threat of force was employed. Indeed, the inspection was made with the full cooperation of petitioner's staff." *Id.* The Court, therefore, held that the contractor consented to the search actually conducted, which

the Court specifically explained was reasonable. *Id.* at 628-29. The Court also recognized that the government's "power of inspection" had "limits," and only held that the FBI's audit, under the facts of the case, did not "transcend[]" those limits. *Id.* at 628. Accordingly, *Zap* does not support OFCCP's argument that the mere execution of a government contract waives all *Fourth Amendment* protections.

OFCCP's reliance on *United States v. Schleining*, 181 F. Supp. 3d 531 (N.D. Ill. 2015), is similarly misplaced. First, as a district court case, *Schleining*, cannot override the Supreme Court's decision in *Lone Steer*. Moreover, *Schleining* is factually distinguishable. The case did not involve OFCCP or the regulations at issue here. Instead, *Schleining* involved a trucking company with US Postal Service contracts, which was under investigation for government fund theft – a context wholly unrelated to employment and administrative subpoena case law. *Id.* at 533-34. Aside from its factual dissimilarity to the present matter, *Schleining* is a legal outlier. Indeed, the court in *Schleining* recognized that a federal court of appeals outside the Seventh Circuit has held that a contractor's consent to permit inspection of its records does not wipe away the company's *Fourth Amendment* rights. *Id.* at 536-37.²

As confirmed by OFCCP and the district court in *United Space Alliance*, the weight of judicial authority supports a presumption that Google contractually consented only to searches that comport with constitutional standards of reasonableness. 824 F. Supp. 2d at 90 n.8 (emphasis added). In support of its non-waiver concession in that case, OFCCP cited to *First Alabama Bank, N.A. v. Donovan*, 692 F.2d 714 (11th Cir. 1982), where the Department of Labor ("DOL") sought to conduct a compliance review to ensure a bank with federal contracts was

² Google notes that, like *Zap* and *Schleining*, none of the cases OFCCP cites in footnote 9 of its Memorandum in Support involve OFCCP, Executive Order 11246, or its implementing regulations at 41 C.F.R. § 60-1.1 *et seq.* Memorandum in Support at pg. 16 n.9.

complying with the antidiscrimination provisions of Executive Order 11246. *Id.* at 716-17. The bank refused to comply with the DOL's requests for documents, and the district court ruled that certain aspects of the DOL's conduct violated the *Fourth Amendment*. *Id.* at 717-18. On appeal, the government erroneously relied on *Zap* to argue "that, by signing contracts with the government in which it agreed to accept the obligations imposed by E.O. 11246, [the bank] waived any Fourth Amendment right to object to a compliance review," just as OFCCP argues against Google. *Id.* at 718. The Eleventh Circuit rejected that argument and OFCCP's reliance on *Zap*, noting that the bank's consent to provide documents did "not include consent to searches that are unreasonable or otherwise unconstitutional." *Id.* at 719-20. Instead, it held that the contractor "consented . . . only to those [DOL] reviews which employ reasonable searches as that term is defined under the Fourth Amendment." *Id.* at 720; *see also United States v. Harris Methodist Fort Worth*, 970 F.2d 94, 100 (5th Cir. 1992) ("We reject the government's assertion that Fourth Amendment reasonableness standards do not apply when an administrative search is conducted pursuant to consent.").

OFCCP does not cite to *First Alabama Bank* in its Memorandum in Support, notwithstanding its citation in the *United Space Alliance* case. However, as addressed in detail in Point II below, the *Fourth Amendment* administrative subpoena standard requires a fact-specific evaluation of whether OFCCP sufficiently limited the scope of the Subject Demands, which given the facts at issue in this case, unambiguously creates genuine issues of material fact precluding summary judgment at this premature stage of the proceeding.

In sum, an award of summary judgment is impermissible because OFCCP has failed to establish that there is no dispute on the question of whether Google waived its Fourth Amendment rights.

II. OFCCP FAILS TO SATISFY ITS BURDEN OF PROVING THAT NO GENUINE ISSUES OF MATERIAL FACT EXIST REGARDING WHETHER THE SUBJECT DEMANDS ARE “SUFFICIENTLY LIMITED IN SCOPE,” “RELEVANT IN PURPOSE” AND/OR “NOT UNREASONABLY BURDENSOME.”

After dedicating several pages of its Memorandum in Support to the erroneous assertion that the *Fourth Amendment* does not apply to this Court’s evaluation of the propriety of OFCCP’s Subject Demands, OFCCP briefly mentions the “sufficiently limited in scope” and “relevant in purpose” prongs of the administrative subpoena standard for the first time on page 17 of its 23-page brief. OFCCP then goes a step further by completely ignoring the very first prong of the standard – that the Subject Demands must be “sufficiently limited in scope.” *See* Memorandum in Support at 18-20.

As explained below, OFCCP understands it cannot establish that no genuine issues of material fact exist with respect to whether it can satisfy all of the requirements of the administrative subpoena standard since: (1) unlike the Agency’s requests for applicant and hire data, OFCCP has made no attempt whatsoever to sufficiently limit the scope of the Subject Demands; (2) the Subject Demands seek data related to the period prior to the two-year period before the issuance of the Scheduling Letter in this case, and it is undisputed that data prior to this two-year period are beyond OFCCP’s scope of review; and (3) OFCCP has failed to make any showing that its demand for a second compensation snapshot as of September 1, 2014 resulted from the Agency’s finding of “special circumstances or exceptions,” as required by the Agency’s procedures in order to permit OFCCP to extend the period under review from one to two years.

A. The *Lone Steer/United Space Alliance* Test Requires OFCCP's Demands to Be Sufficiently Limited in Scope.

OFCCP correctly cites to the *Lone Steer/United Space Alliance* test, which requires OFCCP's document demands to be: (1) "sufficiently limited in scope;" (2) "relevant in purpose;" and (3) "specific in directive so that compliance will not be unreasonably burdensome." *United Space Alliance*, 824 F. Supp. 2d at 91 (quoting *Lone Steer*, 464 U.S. at 415). Memorandum in Support at 17. However, OFCCP attempts to reframe the test using language that incorrectly appears more deferential to OFCCP. *Id.* (citing *United States v. Morton Salt Co.*, 338 U.S. 632 (1950), and *United States v. Golden Valley Elec. Ass'n*, 689 F.3d 1108 (9th Cir. 2012)).

According to OFCCP, the relevant factors are whether: (1) "the inquiry is within the authority of the agency," (2) "the demand is not too indefinite," and (3) "the information sought is reasonably relevant." *Id.* Though this at first glance may seem similar to the *Lone Steer/United Space Alliance* test, OFCCP cannot gloss over the first prong of the *Lone Steer/United Space Alliance* standard requiring administrative subpoenas to be "sufficiently limited in scope." *Lone Steer*, 464 U.S. at 415; *United Space Alliance*, 824 F. Supp. 2d at 91. Accordingly, it is imperative that, in addition to the "relevant in purpose" and "unreasonably burdensome" prongs of this standard, this Court assess whether OFCCP sufficiently limited the scope of the Subject Demands. As set forth below, OFCCP seeks to avoid the "sufficiently limited" prong because the Agency cannot satisfy it.

B. OFCCP Fails to Make Any Attempt to Limit the Scope of the Subject Demands, Much Less Sufficiently Limit Them, Notwithstanding Google's Good Faith Requests That the Agency Do So.

OFCCP's overbroad Subject Demands seek the following: (1) the name, home telephone number, home address, personal e-mail and all other contact information for all 21,144 Google employees in its corporate headquarters AAP as of September 1, 2015, *without any limitation*;

(2) the complete job and salary history from the founding of Google in 1998 to the present for all 21,144 Google employees in its corporate headquarters AAP as of September 1, 2015, *without any limitation*; (3) the name, home telephone number, home address, personal e-mail and all other contact information for all 19,539 Google employees in its corporate headquarters AAP as of September 1, 2014, *without any limitation*; (4) the complete job and salary history from the founding of Google in 1998 to the present for all 19,539 Google employees in its corporate headquarters AAP as of September 1, 2014, *without any limitation*; and (5) a second compensation snapshot, including the over 65 compensation data points previously requested, including OFCCP's unmoored request for "any other factors related to compensation," for all 19,539 Google employees in its corporate headquarters AAP as of September 1, 2014, *without any limitation*. Disp. Facts, Sect. A at ¶ 6; Camardella Decl. at ¶ 28.³

Far from being sufficiently limited in scope, the Subject Demands are *not* limited at all. They require the disclosure, without the voluntary consent of any Google employee, of the complete personal contact information, in addition to the complete job and salary history from 1998 to present, for in excess of 21,000 employees in Google's corporate headquarters AAP. These unlimited demands require the provision of massive amounts of additional items of data related to compensation from the President and CEO to the lowest paid non-exempt staff employee. Camardella Decl. at ¶ 29. Clearly, OFCCP has made no attempt whatsoever to sufficiently limit its requests.

Faced with these overbroad Subject Demands, Google reasonably offered in its October 19, 2016 correspondence to OFCCP at pages 11-12 to provide the Agency with the personal

³ "Disp. Facts" refers to Defendant's February 23, 2017 Statement of Disputed Facts. "Camardella Decl." refers to the February 23, 2017 Declaration of Matthew J. Camardella, Esq. in Support of Defendant's Opposition to Plaintiff's Motion for Summary Judgment.

contact information of any employee OFCCP wished to question if there were a necessary rationale for such information that overrides Google's privacy concerns and that cannot be accomplished without such information, as well as the complete salary and job history, within the scope of OFCCP's limitations on the period of review, of any employees or groups of employees for whom the Agency identified potential compensation issues. Disp. Facts, Sect. A at ¶¶ 7-10 and exhibits/documents cited therein; Camardella Decl. at ¶ 30, Exhibit I. OFCCP rejected Google's reasonable efforts. Disp. Facts, Sect. A at ¶ 11 and exhibits/documents cited therein; Camardella Decl. at ¶ 31, Exhibits C to J; February 1, 2017 Decl. of Agnes Huang.⁴

OFCCP incorrectly asserts that it is unable to sufficiently limit its requests since it is bound to conduct a "comprehensive" compliance evaluation. Memorandum in Support at 5-6, and 12, *citing* 41 C.F.R. § 60-1.20(a)(1). First, OFCCP's reference to conducting a "comprehensive" compliance evaluation cannot alleviate the Agency's failure to comply with its *Fourth Amendment* obligation to sufficiently limit the Subject Requests. Second, Google already has provided OFCCP with over 65 items of compensation data and other factors for its 21,119 corporate headquarters employees as of September 1, 2015, in addition to all compensation policies and procedures related to such compensation. Camardella Decl. at ¶ 24. In addition, Google provided OFCCP with full access to its facilities to conduct a two-day onsite during which Google permitted OFCCP to interview Google's compensation and hiring managers without limitation. *Id.* at ¶¶ 7-8. Google has fully complied with all of its required

⁴ OFCCP's failure to sufficiently limit the Subject Demands stands in sharp contrast to OFCCP's enforcement approach relating to Google's applicant and hire data for the prior year under review. Camardella Decl. at ¶ 32. OFCCP initially asked Google to provide the applicant and hire logs for all 54 job groups in Google's corporate headquarters AAP from September 1, 2014 to August 31, 2015. Camardella Decl. at ¶ 33, Exhibit K. Google requested that the Agency limit its requests further. *Id.* at ¶ 34, Exhibit K. OFCCP agreed to do so by limiting, for the time being, its applicant/hire data request to only 25 job groups. *Id.* at ¶ 35, Exhibit L. OFCCP's refusal to take a similar approach with respect to compensation data raises serious disputed genuine issues of material fact regarding the propriety of the Agency's motivations as well as whether it is complying with its own policies and procedures (*see* Point II, Sections C and D below).

disclosures pursuant to Item 19 of the Scheduling Letter. *Id.* at ¶¶ 2-6. In sum, Google already has produced in excess of 1,310,000 items of compensation data for its 21,119 employees as of September 1, 2015. *Id.* at 25. This enormous volume of data represents far more than is necessary for the Agency to run robust multiple regression analyses for this population. *Id.* at 26.

Google's provision of massive amounts of employee data and information to OFCCP serves as another basis to deny OFCCP's motion since the Agency already has more than enough information. *E.E.O.C. v. Royal Caribbean Cruises, Ltd.*, 771 F.3d 757 (11th Cir. 2014), is instructive. There, the court invalidated an EEOC subpoena because it asked for "company-wide data regarding employees and applicants around the world" even though the company had already provided sufficient information to resolve the agency's investigation. *Id.* at 761. The EEOC had subpoenaed several categories of documents after learning of allegations of disability discrimination. *Id.* at 759-60. The company fully complied with some categories, but argued that others were irrelevant to the allegations, and overly burdensome to produce. *Id.* at 759 n.2, 759-60. In concluding that the agency failed to "make the necessary showing of relevancy," *Royal Caribbean* reasoned that information that the company did produce was enough to resolve the case, and "the broad company-wide information sought by the EEOC here has not been demonstrated to be relevant." *Id.* at 761-62. The court also relied on the fact that "the burden on [the company] in complying with the subpoena would be significant," because its staff would have been required to review and cross reference information on thousands of employees and applicants. *Id.* at 762. Just as in *Royal Caribbean*, Google here has fully complied with much of OFCCP's requests. It is also willing to conciliate with respect to the remaining Agency requests. OFCCP's refusal to provide a meaningful explanation for its additional requests shows

there is a genuine issue of material fact as to whether the Agency has established the relevancy of the documents requested. And, just as in *Royal Caribbean*, OFCCP's additional requests would impose significant burdens on Google without any meaningful showing of why the additional documents are relevant.

OFCCP also argues that it cannot limit its request for the names and personal contact information for all of Google's corporate headquarters' employees due to the Agency's purely speculative and unsupported fears that Google will take adverse action against the employees OFCCP identifies. This position is contrary to well established law. The mere assertion of potential retaliation or harm, without evidence of actual harm showing that fears of such harm are reasonable, is insufficient for plaintiffs to proceed anonymously. *See Doe v. Kamehameha Sch.*, 596 F.3d 1036, 1042 (9th Cir. 2010); *see also Does I Thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1068-70 (9th Cir. 2000) (allowing anonymity based on such evidence presented by the plaintiffs). Moreover, Google produced several employees for interview during OFCCP's onsite, and OFCCP has articulated no evidence that such employees were retaliated against in any manner, nor is Google aware of any such actions. Disp. Facts, Sect. B at ¶¶ 3-4; Camardella Decl. at ¶¶ 8, 36, 39.

OFCCP's reliance on *Camp v. Alexander*, 300 F.R.D. 617 (N.D. Cal. 2014), and *Mevorah v. Wells Fargo Home Mortgage, Inc.*, Case No. C 05-1175 MHP, 2005 U.S. Dist. LEXIS 28615 (N.D. Cal. Nov. 17, 2005), also is misplaced. Both of these cases involved private class actions in which the employers sent allegedly coercive communications to employees, urging them not to cooperate with counsel for a putative class. *Camp*, 300 F.R.D. at 621; *Mevorah*, 2005 U.S. Dist. LEXIS 28615 at *11-16. No facts evidencing any form of coercion by Google exist in this matter.

Moreover, the cases cited by Plaintiff in support of the disclosure of contact information are inapposite. In *E.E.O.C. v. McLane Co.*, 804 F.3d 1051 (9th Cir. 2015), the U.S. Equal Employment Opportunity Commission (“EEOC”) investigated whether an employer discriminated against an employee by forcing her and others to take a strength test after returning from leave. *Id.* at 1053-54. The EEOC’s administrative subpoena requested production of the name, social security number, last known address and telephone number for *only* those employees who took the test. *Id.* at 1054. Accordingly, the court found the EEOC’s administrative subpoena was sufficiently limited and relevant in purpose under the *Fourth Amendment*. *Id.* at 1056-58. In contrast, OFCCP’s request seeks the name and personal contact information for *all* 21,000 plus employees in Google’s corporate headquarters AAP without any limitation or any allegation of alleged wrongdoing.

Indeed, OFCCP’s refusal to provide any meaningful explanation for why it needs this information prevents both Google and the Court from even assessing whether the requested information is relevant.⁵ The record demonstrates that during the course of the compliance evaluation and in this proceeding, OFCCP has never provided Google or this Court with any legitimate basis upon which it contends the Subject Demands are relevant. Disp. Facts, Sect. A at ¶ 11 and exhibits/documents cited therein; Camardella Decl. at ¶¶ 11-15, 20, 22, Exhibits C to J; Plaintiff’s Complaint; February 1, 2017 Decl. of Agnes Huang; the February 3, 2017 Decl. of Marc Pilotin; and February 7, 2017 Decl. of Marc Pilotin. This absence of a legitimate explanation, which itself constitutes a genuine issue of material fact, is what distinguishes the

⁵ The cases Plaintiff cites in footnote 11 on page 19 of its Memorandum in Support are misplaced for similar reasons. In addition, all of them relate to disclosure of the names and personal contact information of similarly-situated employees for the purposes of class notification procedures in the class action context, in contrast to OFCCP’s unlimited request for the disclosure of names and personal contact information of every single employee within Google’s corporate headquarters AAP in connection with a compliance evaluation.

present matter from the outcome in *United Space Alliance* and *Convergys* (however, as noted above, these cases articulated the correct *Fourth Amendment* standard for analyzing OFCCP's Subject Demands). See *United Space Alliance*, 824 F. Supp. 2d at 76 (OFCCP informed the parties and the court that its "calculations revealed that 75.7% of the women in the United Space workforce worked in job groups in which women earned, on average, less than men, while only 17.7% of men worked in job groups in which women earned, on average, more."). *Convergys* also is easily distinguishable since the employer argued that OFCCP's Scheduling Letter itself was overbroad, which is not at issue here as Google has fully complied with its requirements to respond to OFCCP's Scheduling Letter. *Convergys*, 2015 OFCCP LEXIS 2 at *32 (in finding for OFCCP, the ALJ noted that "[t]he scheduling letters request only information that is necessary to conduct desk audits, using documents that Respondents are required by law to maintain and furnish."). Here, OFCCP's complete unwillingness to explain why it needs millions of data points far beyond the scope of the Scheduling Letter demonstrates that summary judgment is unwarranted.⁶

Furthermore, OFCCP's conclusory dismissal of Google's confidentiality and privacy concerns in connection with the disclosure of the contact information of over 21,000 of its employees also lacks merit. Its reliance on *McLane* is once again misplaced since disclosure of contact information in that case was limited only to those employees who took the test at issue, and not an entire corporate headquarters' workforce. *McLane*, 804 F.3d at 1054-55. The court in *McLane* ruled that the privacy rights of this subset of employees were protected, because there

⁶ The Itemized Listing of OFCCP's Scheduling Letter is an Office of Management & Budget approved form setting forth the limit of what OFCCP is authorized to request at the commencement of a compliance evaluation. The Itemized Listing does not require Google to disclose all of its employee names and contact information, or the job and salary histories for all of its employees. In addition, Item 19 of the Scheduling Letter only requires that Google provide certain compensation data to OFCCP as of September 1, 2015 (the current year snapshot), not any compensation data for the prior year snapshot date of September 1, 2014, which is at issue here. Camardella Decl. at ¶¶ 2-4.

are “strict limitations on the public disclosure of information produced during the course of an EEOC investigation” under 42 U.S.C. § 2000e-8(e). *Id.* at 1058. Here, no such strict limitations on information collected by OFCCP exist. OFCCP asserts that 5 U.S.C. § 552a would protect the disclosure of the personal information belonging to more than 21,000 Google employees that the Agency requests. Memorandum in Support at 22. But, 5 U.S.C. § 552a is much less protective of privacy rights than 42 U.S.C. § 2000e-8(e). The latter, which *McLane* relied on, specifically provides that the EEOC may not disclose any information collected as part of an investigation until it institutes a proceeding. 42 U.S.C. § 2000e-8(e). The statute provides only one exception – the EEOC may share the information it collects with “[s]tate or local agenc[ies] charged with the administration of a fair employment practice law,” provided the state or local agencies do not make it public until they institute a proceeding. 42 U.S.C. § 2000e-8(d).

In contrast, 5 U.S.C. § 552a is a general provision applying to a wide range of federal agencies, and not a specific provision for OFCCP. *See* 5 U.S.C. § 552a(a)(1). This statute allows the disclosure of the government’s records on an individual, without his or her consent, to *twelve* categories of recipients, including consumer reporting agencies, the Bureau of Census, Congress, the courts, and more. 5 U.S.C. § 552a(b). Thus, this statute does not provide the “strict limitations” on public disclosure that were present in *McLane*. Furthermore, *McLane* also noted an emerging issue very much relevant to the privacy concerns raised here: “the United States government’s dismal performance in protecting even its own employees’ sensitive data.” 804 F.3d at 1059 (Smith, J., concurring) (noting a “rash of ‘data breach’ incidents,” including “the theft from the Office of Personnel Management of 21.5 million Social Security Numbers, an undisclosed number of interview records, 5.6 million fingerprints, and an undisclosed number of usernames and passwords”). OFCCP’s overbroad request for irrelevant employee contact

data, including home addresses and personal e-mail addresses, would place more than 21,000 people's personal contact information into OFCCP's record system.

In sum, an award of summary judgment is impermissible because OFCCP has failed to establish that there are no genuine issues of material fact with respect to the required showing that the Subject Demands are sufficiently limited in scope.

C. Plaintiff's Request for Pay Data Prior to OFCCP's Maximum Two-Year Review Period Is Insufficiently Limited in Scope and Not Relevant in Purpose.

Plaintiff appropriately concedes on page 6 of its Memorandum in Support that OFCCP is limited to a two-year period of review looking back from the date of the issuance of the Scheduling Letter. OFCCP states in the 1997 revisions to its regulations ("Overview of the Final Rule") as follows:

Reviews of contractors' compliance with the Executive Order and regulations cover a two-year period. The policy and practice are to examine the contractor's personnel policies and activities for the two years preceding the initiation of the review, and to assess liability for discriminatory practices dating back two years. The two-year record retention period provides greater assurance that relevant records will be available during OFCCP compliance evaluations.

62 Fed. Reg. 44174 at 44178. Since OFCCP's Scheduling Letter to Google is dated September 30, 2015, OFCCP's review period is limited to September 30, 2015 to October 1, 2013 pursuant to this two-year look back. *Id.* Similarly, Google is only required to maintain personnel records for a period of two years prior to the making of the record or the personnel action involved, whichever is later, and such records must continue to be maintained until the final disposition of the compliance evaluation. 41 C.F.R. § 60-1.12(a). Therefore, Google is required only to maintain records either created or related to personnel actions occurring on or after October 1, 2013. Accordingly, OFCCP's demand seeking the job and salary history of all of Google's employees is not sufficiently limited in scope as a matter of law, since it seeks the production of

information and documentation from Google's formation in 1998 to September 30, 2013, a period outside of OFCCP's scope of review.

Accordingly, an award of summary judgment is impermissible because OFCCP has failed to establish that there are no genuine issues of material fact with respect to the required showing that the Subject Demands for pay data prior to OFCCP's maximum two-year review period are sufficiently limited in scope and/or relevant in purpose.

D. Since OFCCP's Own Procedures Authorize the Extension of the Standard or One-Year Review Period Only Under "Special Circumstances or Exceptions," and OFCCP Has Refused to Articulate Any Facts in Support Thereof and/or Admitted That It Does Not Possess Such Facts, Plaintiff's Motion for Summary Judgment Should Be Denied.

According to OFCCP's Federal Contractor Compliance Manual ("FCCM"), a compliance officer ("CO") must evaluate a contractor's performance for at least the last full AAP year, but can only extend this one year look back to two years when "[s]pecial circumstances or exceptions . . . exist." FCCM at Section 1C03, pgs. 19-20. Section 1C03 ("Evaluation Period") provides, in pertinent part, as follows.

COs must evaluate the contractor's performance for at least the last full AAP year. Contractor performance, includes, for example, goals progress, good faith efforts, and personnel activity . . . Special circumstances or exceptions can exist that warrant a CO extending the analysis of a contractor's AAP(s), personnel activity, policy implementation and supporting documentation to cover a period beginning two years prior to the date the contractor received the Scheduling Letter. The appearance of potential discrimination is a special circumstance or exception.⁷

Id. OFCCP has failed to set forth any evidence showing that "special circumstances or exceptions" exist permitting such an extension of the review period from one to two years. OFCCP only states on page 19 of its Memorandum in Support that it needs the additional

⁷ Similarly, Section 1G of the FCCM states that "[i]f there are indicators of a violation, the evaluation period will extend to cover the two years prior to the contractor's receipt of the Scheduling Letter." FCCM at Section 1G ("Review of Executive Order Support Data for Acceptability – Evaluation Period Covered"), pgs. 31-33.

compensation snapshot to run regression analyses “to help it determine if Google’s pay practices are non-discriminatory,” essentially admitting that it has not yet identified potential discrimination issues. To the extent OFCCP does have such facts, it has failed to state as such.

OFCCP cannot establish that there is no genuine issue of material fact regarding whether the Subject Demand for an additional compensation snapshot is sufficiently limited in scope and/or relevant in purpose when its own procedures require that “special circumstances or exceptions” or other standards have been satisfied before it can request such information, and OFCCP has either admitted that its own standards have not been satisfied or has failed to articulate the basis on which they have been satisfied.

E. OFCCP Cannot Meet Its Burden of Showing That No Genuine Issue of Material Fact Exists Regarding the Unreasonably Burdensome Nature of the Subject Demands.

OFCCP erroneously contends that by purportedly “limiting” the Subject Demands to *all* of the over 21,000 employees in Google’s corporate headquarters AAP and the “standard two-year investigation period,” its requests are not unreasonably burdensome. Memorandum in Support at 21. First, by requesting compensation and job histories back to 1998, OFCCP has failed to limit its requests to the two-year investigation period. Second, even if OFCCP had limited its requests to the two-year period, which it did not, OFCCP did not voluntarily “limit” its requests in this manner. The regulations mandate that OFCCP’s compliance reviews be conducted by individual establishment and that the review period is limited to a maximum of two years. 41 C.F.R. § 60-1.20(a)(1); 62 Fed. Reg. 44174 at 44178. Accordingly, this scope sets the absolute ceiling, not the floor, for an unreasonably burdensome analysis. OFCCP already has reached the ceiling, and is in fact standing on the roof, because it has failed to limit

the Subject Requests in any manner whatsoever in violation of its own policies. This fact alone should defeat Plaintiff's motion for summary judgment.

In addition, Google's complete responses to well in excess of 90% of OFCCP's administrative subpoena requests weighs heavily in favor of a finding that OFCCP's requests are unreasonably burdensome. Camardella Decl. at ¶ 27. Google already has produced in excess of 1,310,000 items of compensation data related to its 21,119 employees as of September 1, 2015 to OFCCP. *Id.* at ¶ 25. *See Royal Caribbean Cruises, Ltd.*, 771 F.3d at 761-63 (finding an administrative subpoena unreasonably burdensome where the government already had received sufficient information in connection with its investigation, and the agency failed to show the additional requested information was relevant).

OFCCP cites to *E.E.O.C. v. McLane Co.*, No. CV-12-615-PHX-GMS, 2012 U.S. Dist. LEXIS 47443 (D. Ariz. Apr. 4, 2012), in support of its argument that the Subject Demands are not overly burdensome. However, *McLane* actually supports Google's position. There, the district court significantly limited the government demands for employee information, including employee contact information, even where the government, unlike here, had already limited its requests to employees who had taken a test. *Id.* at *17-18. The court made these additional limitations on the basis of the relevancy and unduly burdensome prongs of the administrative subpoena standard.

Finally, in claiming that the Subject Demands are not unreasonably burdensome, OFCCP erroneously states that "Google never maintained that the Subject Items would be unreasonably burdensome to compile." *See* Memorandum in Support at 22. The record reflects that Google repeatedly informed OFCCP in writing regarding the "unduly burdensome" nature of "the massive amount of data" sought by the Subject Demands related to unlimited job and salary

history data and the second compensation data snapshot. Disp. Facts, Sect. B at ¶ 5; Camardella Decl. at ¶ 40, Exhibits C, E, F, I and J.

Accordingly, an award of summary judgment is impermissible because there are genuine issues of material fact with respect to the required showing that the Subject Demands are not unreasonably burdensome.

F. OFCCP Cannot Hide Behind the Deliberative Process Privilege As a Basis for Failing to Satisfy the *Lone Steer/United Space Alliance* Standards.

Plaintiff contends in its Memorandum in Support that it cannot comply with the *Lone Steer/United Space Alliance* standards and/or the standards set forth in 41 C.F.R. § 60-1.43 without waiving the deliberative process privilege. Memorandum in Support at 14-15. This contention strains all logic and serves only OFCCP's desire to hide from this Court the extreme nature of its positions in this case. First, Plaintiff bears the burden of proof as to these vital *First Amendment* standards, and, therefore, must determine for itself how to satisfy them – whether it involves privileged information or not. OFCCP could have appropriately limited the scope of the Subject Demands from the outset without forcing Google to protect its *Fourth Amendment* rights, but the Agency chose not to do so and flatly refused Google's good faith compromises, either of which would have avoided this proceeding altogether.

Second, the “deliberative process privilege” only protects against disclosure of “pre-decisional advisory opinions, recommendations or deliberations.” *Arizona ex rel. Goddard v. Frito-Lay, Inc.*, 273 F.R.D. 545, 552 (D. Ariz. 2011); *see also S.E.C. v. Yorkville Advisors, LLC*, 300 F.R.D. 152, 160 (S.D.N.Y. 2014) (“In order for a document to be protected by the deliberative process privilege, it must be: (1) an interagency or intra-agency document; (2) ‘predecisional’, and (3) deliberative.”). The purpose of the privilege is to permit officials to have open and free-flowing communication regarding impending decisions without having to be

concerned that the communication may be disclosed. *See Parke, Davis & Co. v. Califano*, 623 F.2d 1, 5 (6th Cir. 1980). The privilege does not protect purely factual or objective material. *See E.E.O.C. v. Peoplemark, Inc.*, No. 1:08-CV-907, 2010 U.S. Dist. LEXIS 17526, at *7 (W.D. Mich. Feb. 26, 2010) (“The following would be examples of material that is not protected: who the EEOC interviewed during its investigations; who conducted the investigations; the facts on which the EEOC based its cause determinations; the documents or testimony on which the EEOC based its finding of fact included in the determinations; the actions taken during the investigation by the EEOC; the communications between the EEOC and witnesses (both from plaintiffs' side and defendant's side); and the dates on which the investigations were started and finished. This information would not be shielded by the deliberative process privilege because the privilege does not protect purely factual or objective material.”).

For information to fall within the confines of the deliberative process privilege, the government must prove that the information is both “predecisional” and “deliberative.” *See Assembly of California v. Dep't of Commerce*, 968 F.2d 916, 921 (9th Cir. 1992), amended in rehearing, 1992 U.S. App. LEXIS 22081 (9th Cir. 1992) (information is predecisional only if it was “prepared in order to assist an agency decision maker in arriving at his decision.”) (internal quotation marks omitted). To determine whether information is “deliberative,” the Ninth Circuit considers whether the information is factual or if it would “divulge [] the reasoning process” by which decisions are made. *Id.* at 922.⁸

⁸ For example, in *Assembly of California v. Department of Commerce*, 968 F.2d 916, 922-23 (9th Cir. 1992), the Ninth Circuit affirmed the decision of the district court, finding that numerical census data, which listed people broken down by race was factual and, therefore, did not fall within the deliberative process privilege. The court noted that since the adjusted data, alone, would not be sufficient to derive the formulas or the process that created the formulas, the “bare numbers reveal[ed] nothing about the process informing [the] judgment.” *Id.* This is in contrast with “recommendations, drafts documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer,” which would fall within the purview of the deliberative process privilege. *Id.* at 920 (internal quotation marks omitted).

Even when asserted to protect deliberative material, the privilege may be overridden where necessary to promote “the paramount interest of the Government in having justice done between litigants,” *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 407 (D.C. Cir. 1984) (quoting *Westinghouse Elec. Corp. v. City of Burlington*, 351 F.2d 762, 767 (D.C. Cir. 1965) (internal quotation marks omitted)); or to “shed light on alleged government malfeasance,” *In re Franklin Nat’l Bank Sec. Litig.*, 478 F. Supp. 577, 582 (E.D.N.Y. 1979); or in other circumstances “when the public’s interest in effective government would be furthered by disclosure,” *id.* When the privilege is overridden for good cause, it is appropriate for a court to consider the possibilities of redaction and a protective order to minimize any harm that might otherwise result from compelling disclosure. *In re Subpoena served upon Controller of Currency*, 967 F.2d 630, 634 (D.C. Cir. 1992). The deliberative process privilege is a qualified one. *Frito-Lay, Inc.*, 273 F.R.D. at 552. A litigant may obtain deliberative materials if his or her need for the materials and the need for accurate fact-finding override the government’s interest in non-disclosure. *Id.* (citations omitted). Among the factors to be considered in making the determination of whether the deliberative process privilege applies to prevent inquiry into an agency’s deliberative processes are: (1) the relevance of the evidence; (2) the availability of other evidence; (3) the government’s role in the litigation; and (4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions. *Id.*

Here, if Plaintiff has evidence of indicators of discrimination that would somehow justify the unlimited Subject Demands, it merely has to disclose the results of its findings or the job groups, job titles or other groupings where it has made such findings, not the process undertaken to develop those findings or its underlying analyses. Such disclosures would not hinder frank and independent discussion regarding contemplated policies and decisions. The mere factual

results of these analyses, if they even exist, are not covered by the deliberative process privilege. In addition, the evidence is highly relevant to this proceeding, in which OFCCP is the Plaintiff, and in which it bears the burden of proving that the requests are sufficiently limited and relevant in purpose. OFCCP has failed to produce any evidence regarding the relevancy of the Subject Demands. Moreover, OFCCP's extreme position that any form of disclosure Defendant seeks would implicate the deliberative process privilege is premature as the Court can make rulings as to privilege as the need arises in this case.

G. OFCCP Cannot Rely Upon Conclusory Assertions of Prejudice or Delay to Avoid Satisfying the Administrative Subpoena Standard.

In its Memorandum in Support, OFCCP makes a series of conclusory and speculative statements that OFCCP's compliance evaluation is being unnecessarily delayed and that Google employee rights have been prejudiced by this proceeding. The compliance evaluation has not been delayed, as Google already has produced and continues to produce to OFCCP information and data unrelated to the Subject Demands during the course of this proceeding. Disp. Facts, Sect. B at ¶ 6; Camardella Decl. at ¶ 41. In addition, since OFCCP has not alleged any form of discriminatory actions against Google, OFCCP cannot claim that any of Google's employees' rights are somehow being prejudiced by the Court's thoughtful examination of this case. Moreover, OFCCP's actions, not Google's, has necessitated this proceeding. Had OFCCP issued data requests in compliance with the administrative subpoena standard, or accepted Google's reasonable good faith compromises described herein, this proceeding would not have been necessary. In reality, only Google has been prejudiced by this proceeding. Due to OFCCP's actions, Google has been forced to expend considerable costs and resources to protect both its and all other federal contractors' *Fourth Amendment* rights to be free from the type of governmental overreach OFCCP has exhibited in this case.

Since OFCCP fails to establish any undisputed issues of material fact with respect to its obligation to satisfy beyond uncertainty or doubt that it has satisfied each of the elements of the *Lone Steer/United Space Alliance* standard, Defendant respectfully submits that Plaintiff's motion for summary judgment be denied in its entirety.

III. OFCCP IMPROPERLY ASKS THIS COURT TO APPROVE ITS POSITION THAT THE AGENCY HOLDS UNFETTERED DISCRETION TO ADJUDICATE THE RELEVANCY OF THE SUBJECT REQUESTS UNDER ITS OWN REGULATIONS.

Even if somehow Plaintiff's assertion that the *Fourth Amendment* does not apply in this matter were correct, which it is not, Plaintiff still could not prevail on its motion for summary judgment since OFCCP's own regulations and the Preamble to those regulations preclude OFCCP's self-serving interpretation of its own standards. As described in detail below, Plaintiff argues in favor of its unfettered discretion to adjudicate the relevancy of its requests by setting forth misleading and circular assertions and omitting critical citations to contrary provisions of law. Adoption of such a position would deprive not only Google, but the entire federal contractor community, of due process under the law. For these reasons, Defendant respectfully requests that this Court deny Plaintiff's motion for summary judgment in its entirety.

A. OFCCP's Interpretation of the Regulations Contradicts a Plain Reading of those Regulations and its Preamble.

41 C.F.R. § 60-1.43 of OFCCP's regulations, entitled "Access to Records and Site of Employment," requires that "[e]ach contractor shall permit the inspecting and copying of such books and accounts and records, including computerized records, and other material as may be relevant to the matter under investigation *and* pertinent to compliance with [Executive Order 11246]." In the Preamble to the 1997 revisions to OFCCP's regulations set forth at 41 C.F.R. Chapter 60, OFCCP cited to this very section to explain why its authority to access records was not unfettered, but subject to appropriate limitations:

The concern that the provision would permit, if not encourage, unfettered access to confidential commercial proprietary data or irrelevant information is unjustified in OFCCP's view. Under the proposed rule, as under the current regulation, access is limited to records that may be relevant to the matter under investigation and pertinent to compliance with [Executive Order 11246] . . . Moreover, requests to take computerized records off-site for further analysis would be subject to the

relevancy determinations prescribed by § 60-1.20(f) of the final rule. The regulation is adopted in the final rule as proposed in the NPRM.

62 Fed. Reg. 44174, 44186.

As the language above demonstrates, 41 C.F.R. § 60-1.43 provides that OFCCP's access is limited to material that is relevant to the matter under investigation and pertinent to compliance with Executive Order 11246. The statements in the Preamble reassures contractors, as well as the courts, that the Agency's regulations contain appropriate limits on OFCCP's authority to access records consistent with the *Fourth Amendment*.

Plaintiff's brief does not reference the Preamble or 41 C.F.R. § 60-1.20(f). Critically, 41 C.F.R. § 60-1.20(f) expressly provides federal contractors with an avenue of recourse if they believe that information OFCCP seeks to take offsite is confidential or irrelevant under 41 C.F.R. § 60-1.43. This provision, found in the Section entitled "Confidentiality and Relevancy of Information," provides in pertinent part as follows:

If the contractor believes that particular information which is to be taken offsite is not relevant to compliance with the Executive Order, the contractor may request a ruling by the OFCCP District/Area Director.

41 C.F.R. § 60-1.20(f).

Ignoring the pertinent provisions set forth in the sections "Access to Records and Site of Employment," 41 C.F.R. § 60-1.43, and "Confidentiality and Relevancy of Information," 41 C.F.R. § 60-1.20(f), OFCCP erroneously cites to the mere "*Record Retention*" provision of 41 C.F.R. § 60-1.12 in support of its circular and unconstitutional contention that OFCCP is entitled to unfettered access to all records which a contractor is required to merely retain under 41 C.F.R. § 60-1.12. Significantly, however, in citing the AIMS Contract in support of its motion for summary judgment, OFCCP notes that Google agreed "to permit the Government to inspect and copy . . . material that may be relevant to the matter under investigation and pertinent to

compliance with Executive Order 11246,” using the access standard of 41 C.F.R. § 60-1.43 and *not* the record retention standard of 41 C.F.R. § 60-1.12. *See* OFCCP’s Statement of Undisputed Facts at ¶ 3.

OFCCP’s argument is a false equivalency. 41 C.F.R. § 60-1.12 does not address OFCCP’s ability to access records, but merely lists the types of records that government contractors must maintain for periods of at least one or two years, and concludes with the statement that “[w]here a compliance evaluation has been initiated, all personnel and employment records described above are relevant until OFCCP makes a final disposition of the evaluation.” 41 C.F.R. § 60-1.12(a). The record retention provision of 41 C.F.R. § 60-1.12(a) uses the term “relevant,” not the words “relevant to the matter under investigation and pertinent to compliance with [Executive Order 11246]” set forth in the “Access to Records” provision of 41 C.F.R. § 60-1.43. Since OFCCP chose not to use the same terminology in both sections, basic tenets of statutory and regulatory interpretation confirm that OFCCP did not attribute the same meaning to the recordkeeping and the access to records sections. Far from the equivalent of the access standard set forth in 41 C.F.R. § 60-1.43, 41 C.F.R. § 60-1.12 merely informs contractors that they are obligated to maintain the listed records throughout the pendency of a compliance evaluation, even if the period from the making of the record or the personnel action involved has expired due to the pendency of the compliance evaluation. It is the equivalent of a litigation hold. Any other interpretation would render the different standard set forth in the “Access to Records and Site of Employment” of 41 C.F.R. § 60-1.43 superfluous. Indeed, OFCCP does not cite or even mention the record retention provisions of 41 C.F.R. § 60-1.12 when addressing the contractor community’s concerns in the Preamble that OFCCP would have unfettered access to irrelevant data during compliance evaluations, but properly refers to the

significant checks to unfettered access to records prescribed by 41 C.F.R. § 60-1.43, in addition to the contractor's right to appeal access issues as set forth in 41 C.F.R. § 60-1.20(f). *See* 62 Fed. Reg. 44174, 44186. OFCCP's misplaced reliance on mere record-retention provisions in support of its circular supposition that anything that must be maintained as a record under 41 C.F.R. § 60-1.12 meets the *access standard* set forth in 41 C.F.R. § 60-1.43 would render the access and appeal provisions of 41 C.F.R. § 60-1.43 and 60-1.20(f) nullities. Under this false paradigm, all records described in 41 C.F.R. § 60-1.12 would automatically be deemed "relevant to the matter under investigation and pertinent to compliance with Executive Order 11246." In addition, such an interpretation cannot be reconciled with the *Fourth Amendment* administrative subpoena standards described above that require that OFCCP's requests must be sufficiently limited in scope, relevant in purpose and specific in directive so that compliance will not be unreasonably burdensome.

B. OFCCP Cannot Meet Its Burden of Establishing That No Genuine Issue of Material Fact Exists As to Whether the Subject Demands Satisfy 41 C.F.R. § 60-1.43.

Once OFCCP's misplaced reliance on the language of 41 C.F.R. § 60-1.12 is laid bare, OFCCP's failure to establish that no genuine issue of material fact exists regarding whether the Agency has satisfied the access to records standards of 41 C.F.R. § 60-1.43 becomes immediately transparent. For the same reasons set forth in detail in Point II above, OFCCP has failed to articulate any basis for why the Subject Demands are "relevant to the matter under investigation and pertinent to compliance with [Executive Order 11246]," other than to state in conclusory fashion that the requests are relevant to its investigation. Such speculative and conclusory statements cannot support Plaintiff's motion for summary judgment as a matter of law.

CONCLUSION

Plaintiff's premature motion for summary judgment in this case must fail as a matter of law since, as described in detail herein, OFCCP utterly has failed to meet its heavy burden with respect to several mixed questions of fact and law. Accordingly, Defendant Google Inc. respectfully requests that the Court enter an Order denying Plaintiff's motion for summary judgment in its entirety, or should the Court deem appropriate, granting summary judgment to Defendant.

Respectfully submitted,

Dated: February 23, 2017

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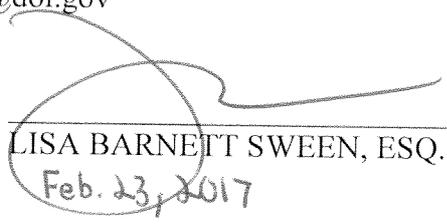
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CERTIFICATE OF SERVICE

I hereby certify that on this ___ day of February, 2017, I caused a true and correct copy of the foregoing Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Summary Judgment to be served by sending a copy of same via U.S. Mail and e-mail to:

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