

**UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES**

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

v.

Plaintiff,

GOOGLE, INC.,

Defendant.

OALJ Case No. 2017-OFC-00004
OFCCP No. R00197955

**PLAINTIFF'S REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY
JUDGMENT**

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

RECEIVED

MAR 06 2017

**Office of Administrative Law Judges
San Francisco, Ca**

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 3

I. Because the Court Has Sufficient Information to Resolve this Expedited Proceeding Based on the Undisputed Factual Record, as in *Convergys*, This Case is Ripe for Decision. 3

II. The Undisputed Evidence Shows Google Consented to Produce the Subject Items, Waiving Its Fourth Amendment Protections. 4

A. The Fourth Amendment Protecting Google in OFCCP Matters is the Same Fourth Amendment That Applies Generally and the Same Limiting Principles Apply 5

B. The Principle of Consent-by-Contract Is Applicable to These Proceedings. 7

C. Google Fails to Distinguish Consent-by-Contract Case Law. 9

III. Even under the Fourth Amendment Analysis Applicable to Administrative Subpoena Proceedings, the Undisputed Evidence Shows that the Subject Items Comply with the Fourth Amendment. 12

A. The Fourth Amendment’s Protections and Judicial Review Are Limited in Administrative Subpoena Proceedings, with Courts Giving Agencies Great Deference. 12

B. OFCCP’s Request for a 2014 Compensation Snapshot is Relevant to Evaluating Google’s Pay Practices, Is Limited to the Scope of Google’s AAP, and Google Has Not Proved That Producing the Snapshot is Unduly Burdensome. 16

C. Google Does Not Dispute the Requested Data on Factors Affecting Pay Are Relevant to the Compliance Review and Fails to Show Any Undue Burden in Producing Them. 20

D. OFCCP Has Requested Employee Contact Information to Obtain Information about Employees’ Pay and Limited that Request to Employees Encompassed in Google’s AAP 21

IV. OFCCP’s Regulations Do Not Support Google’s Refusal to Produce the Subject Items 23

A. Google’s Continued Misreading of 41 C.F.R. § 60-1.43 Ignores the Regulatory Context and Basic Tenets of Regulatory Interpretation..... 23

B. Although Google Waived Any Argument under 41 C.F.R. § 60-1.20(f), OFCCP’s Regional Director Found the Subject Items Relevant..... 26

V. OFCCP Will Not Provide Any Testimony Disclosing Its Preliminary Findings or Aspects of the Ongoing Investigation. 27

CONCLUSION..... 28

TABLE OF AUTHORITIES

Cases

Atl. Cleaners & Dyers v. United States,
286 U.S. 427 (1932)..... 25

Bhd. of R.R. Trainmen v. Baltimore & O. R. Co.,
331 U.S. 519 (1947)..... 24

California v. Ciraolo,
476 U.S. 207 (1986)..... 8

City of Seattle,
387 U.S. (citing *Morton Salt*)..... 13

Colonnade Catering Corp. v. United States,
410 F.2d 197 (2nd Cir. 1969)..... 8

Copar Pumice Co., Inc. v. Morris,
632 F. Supp. 2d 1055 (D.N.M. 2008) 11

Donovan v. A.A. Beiro Const. Co.,
746 F.2d 894 (D.C. Cir. 1984) 8

E.E.O.C. v. Maryland Cup Corp.,
785 F.2d 471 (4th Cir. 1986)..... 15

E.E.O.C. v. Randstad,
685 F.3d 433 (4th Cir. 2012)..... 13, 14

EEOC v. McLane Co.,
804 F.3d 1051 (9th Cir. 2015)..... 21, 22

EEOC v. Royal Caribbean, Ltd.,
771 F.3d 757 (11th Cir. 2014)..... 2, 14

Endicott Johnson v. Perkins,
317 U.S. 501 (1943)..... 13

| | |
|----------------------------------------------------------------------------------------------------------------|-----------|
| <i>F.T.C. v. Texaco, Inc.</i> , 555 F.2d 862 (D.C. Cir. 1977) | 2, 13, 15 |
| <i>First Alabama Bank of Montgomery v. Donovan</i> , 692 F.2d 714 (11th Cir. 1982)..... | 6, 15 |
| <i>Florida v. Bostick</i> , 501 U.S. 429 (1991) | 8 |
| <i>French v. Shoemaker</i> , 81 U.S. 314 (1871) | 7 |
| <i>Grand Canyon Trust v. Williams</i> , 98 F. Supp. 3d 1044 (D. Ariz. 2015)..... | 24 |
| <i>Hall v. EEOC</i> , 456 F. Supp. 695 (N.D. Cal. 1978) | 18 |
| <i>INS v. St. Cyr</i> , 533 U.S. 289 (2001) | 24 |
| <i>Kerns v. Chalfont-New Britain Twp. Joint Sewage Auth.</i> , 263 F.3d 61 (3rd Cir. 2001)..... | 8 |
| <i>Lead Indus. Ass'n, Inc. v. Occupational Safety & Health Admin.</i> , 610 F.2d 70 (2d Cir. 1979)..... | 27 |
| <i>Lone Steer v. Donovan</i> , 464 U.S. 408 (1984) | 2, 6, 13 |
| <i>Medlock v. Trustees of Indiana Univ.</i> , 738 F.3d 867 (7th Cir. 2013)..... | 8 |
| <i>N.L.R.B. v. Am. Med. Response</i> , 438 F.3d 188 (2d Cir. 2006)..... | 14 |
| <i>N.Y. v. Burger</i> , 482 U.S. 691 (1987) | 5 |

OFCCP v. Bank of Am., ARB No. 00-079, ALJ No.,
97-OFC-16 (ARB March 31, 2003) (ARB March 31, 2003)..... 18

OFCCP v. Convergys,
15-OFC-00002, 2015 WL 7258441 (Dep’t of Labor Oct. 23, 2015)..... 4

OFCCP v. Bank of Am.,
2003 WL 1736803 & n.19 (ARB 2003)..... 6

Okla. Press Publ’g Co. v. Walling,
327 U.S. 186 (1946) 13, 14

Reich v. Mont. Sulphur & Chem. Co.,
32 F.3d 440 (9th Cir. 1994)..... 13, 14, 17

Schneckloth v. Bustamonte,
412 U.S. 218 (1973) 7

See v. City of Seattle,
387 U.S. 541, 545 (1967) 12

Sullivan v. Stroop,
496 U.S. 478 (1990) 25

Sunbeam Appliance Co. v. EEOC,
532 F. Supp. 96 (N.D. Ill. 1982) 18

The Shinnecock Indian Nation v. Kempthorne,
652 F. Supp. 2d 345 (E.D.N.Y. 2009)..... 27

Dir., Ofc. of Thrift Supervision v. Vinson & Elkins, LLP,
124 F.3d 1304 (D.C. Cir. 1997) 14

Tri-State Steel Const., Inc. v. Occupational Safety & Health Review Comm’n,
26 F.3d 173 (D.C. Cir. 1994) 8

U.S. E.E.O.C. v. Aaron Bros., Inc.,
620 F. Supp. 2d 1102 (C.D. Cal. 2009)..... 15

| | |
|--------------------------------------------------------------------------------------------|--------------|
| <i>Uniroyal, Inc. v. Marshall</i> , 482 F. Supp. 364 (D.D.C. 1979) | 11 |
| <i>United Space Alliance, LLC v. Solis</i> , 824 F. Supp. 2d 68 (D.D.C. 2011) | 2, 6, 15, 17 |
| <i>United States v. Barnett</i> , 989 F.2d 546 (1st Cir. 1993) | 8 |
| <i>United States v. Brown</i> , 763 F.2d 984 (8th Cir. 1985)..... | 6, 8, 11 |
| <i>United States v. Craveiro</i> , 907 F.2d 260 (1st Cir. 1990) | 18 |
| <i>United States v. Golden Valley Elec. Ass'n</i> , 689 F.3d 1108 (9th Cir. 2012)..... | 1, 13, 17 |
| <i>United States v. Griffin</i> , 555 F.2d 1323 (5th Cir. 1977)..... | 8 |
| <i>United States v. Jennings</i> , 724 F.2d 436 (5th Cir. 1984)..... | 8, 10 |
| <i>United States v. Miss. Power & Light Co.</i> , 638 F.2d 899 (5th Cir. 1981)..... | 15 |
| <i>United States v. Morton Salt Co.</i> , 338 U.S. 632 (1950) | 13, 17 |
| <i>United States v. Rucinski</i> , 658 F.2d 741 (10th Cir. 1981)..... | 8 |
| <i>United States v. Schleining</i> , 181 F. Supp. 3d 531 (N.D. Ill. 2015) | 9 |
| <i>United States v. Seljan</i> , 328 F. Supp. 2d 1077 (C.D. Cal. 2004)..... | 8 |

| | |
|----------------------------------------------------------------------------|----------|
| <i>United States v. Smith</i> , 353 F. App'x 229 (11th Cir. 2009) | 8 |
| <i>United States v. Teeven</i> , 745 F. Supp. 220 (D. Del. 1990) | 10 |
| <i>United States v. Tipton</i> , 11 F.3d 602 (6th Cir. 1993)..... | 18 |
| <i>United States v. Yeary</i> , 740 F.3d 569 (11th Cir. 2014)..... | 9 |
| <i>Zap v. United States</i> , 328 U.S. 624 (1946) | 6, 7, 11 |

Statutes

| | |
|------------------------------------|----|
| 42 U.S.C. § 2000e-5(e)(3)(A) | 20 |
| 5 U.S.C. § 552(b)(7) | 22 |

Rules

| | |
|-----------------------------|---|
| Fed. R. Civ. P. 56(a) | 3 |
|-----------------------------|---|

Regulations

| | |
|------------------------------|------------|
| 29 C.F.R. § 71.51 | 22 |
| 34 C.F.R § 668.23 | 10 |
| 41 C.F.R. § 60 | 4 |
| 41 C.F.R. § 60-1.12..... | 23, 24, 25 |
| 41 C.F.R. § 60-1.12(a) | 23, 24 |
| 41 C.F.R. § 60-1.2..... | 25 |
| 41 C.F.R. § 60-1.20(f)..... | Passim |
| 41 C.F.R. § 60-1.20(g) | 22 |
| 41 C.F.R. § 60-1.43..... | 23, 24, 25 |
| 41 C.F.R. § 60-30.31 | 1 |

FAR § 52.222-26(c)(6) 3
FAR § 52.222-26(c)(8) 9
FAR § 52.222-35(b)(2) 3
FAR § 52.222-36(a)(2) 3
Government Contractors, Affirmative Action Requirements,
62 Fed. Reg. 44174 (Aug. 19, 1997) 24

INTRODUCTION

In opposing summary judgment, Google identifies *no* disputes of material facts because there are none. Tellingly, Google devotes virtually its entire lengthy brief to challenging OFCCP's legal position, demonstrating that the issues here are not factual in nature and that this case may be decided on the papers. In light of the commonly-agreed upon facts, no hearing is warranted, let alone one that extends over two days and features several witnesses as Google has repeatedly suggested. Like a routine administrative subpoena enforcement or motion to compel proceedings, neither of which typically involve multi-day evidentiary hearings, the issues here can be readily decided on the papers based primarily on two sets of undisputed material facts: (1) what OFCCP requested (*i.e.*, the Subject Items) and (2) in what investigatory context (*i.e.*, a compliance review to determine whether Google satisfied its equal opportunity obligations for all of its approximately 20,000 employees at its Mountain View headquarters).

The Fourth Amendment does not empower federal contractors, like Google, to refuse to produce items in a compliance evaluation unless OFCCP discloses its preliminary investigative findings and obtains a determination—either by a contractor or a tribunal—that those protected findings justify production. Quite the contrary, because the company consented to produce the Subject Items, it has no reasonable expectation of privacy in them and, thus, any Fourth Amendment basis to withhold them.

But even if the Fourth Amendment restrictions on administrative subpoenas apply here, as Google insists they do, the company still has no lawful reason to refuse production. Despite spanning over 33 pages, Google's opposition fails to explain its refusal in light of the fact that those "restrictions are limited;"¹ the Court's review of the Subject Items is narrow;² and, in

¹ *United States v. Golden Valley Elec. Ass'n*, 689 F.3d 1108, 1115 (9th Cir. 2012) (citation omitted).

conducting that review, the Court must grant OFCCP “great deference” with respect to the relevancy of the Subject Items. Nor does Google establish that producing the Subject Items “threatens to unduly disrupt or seriously hinder normal operations of [its] business,” the burden the Fourth Amendment requires to trigger protection. *F.T.C. v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977).

Google’s legal argument ultimately stands on only three cases, none of which support the company’s obstruction. Google first cites the “*Lone Steer/United Space Alliance* test,” referring to the factors to be considered in administrative subpoena enforcement proceedings that the Supreme Court reaffirmed in *Lone Steer v. Donovan*, 464 U.S. 408 (1984), which the district court in *United Space Alliance v. Solis, LLC*, 824 F. Supp. 2d 68 (D.D.C. 2011), recited but never applied. While Google repeatedly invokes those factors, it generally avoids showing how courts apply them, likely because the well-settled principles above weigh heavily against the company’s position. The only case Google cherry picks to show how the factors apply is *EEOC v. Royal Caribbean, Ltd.*, 771 F.3d 757 (11th Cir. 2014), which is largely inapplicable here. That case considered whether the EEOC’s request for information on *all* employees was relevant to *one* employee’s charge of disability discrimination. *Id.* at 762. No such incongruence exists here: OFCCP is evaluating whether Google fulfilled its equal opportunity obligations to all of its Mountain View employees and, accordingly, requested data on all of those employees.

OFCCP is entitled to summary judgment as there are no issues of material fact and Google’s legal positions are simply incorrect. Google does not dispute what OFCCP has requested, nor does it dispute that OFCCP is conducting a compliance review covering its pay

² See, *infra*, note 12 and accompanying text. Moreover, as explained in OFCCP’s Briefing Regarding the Authority of the ALJ to Modify OFCCP’s Requests, the Court has no authority to shape OFCCP’s compliance evaluation and alter the requests.

practices, which the agency is charged with performing. As there are no factual issues in play, this brief focuses primarily on the legal arguments raised by Google in its opposition.

ARGUMENT

I. Because the Court Has Sufficient Information to Resolve this Expedited Proceeding Based on the Undisputed Factual Record, as in *Convergys*, This Case is Ripe for Decision.

Summary judgment is appropriate when “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). Here, summary judgment is warranted because the only facts material to this expedited proceeding are not disputed:

- (1) Google had more than 50 employees during the relevant period;³
- (2) Google entered into the AIMS Contract on or about June 2, 2014, which was for \$100,000 or more;⁴
- (3) the AIMS Contract contractually obligated Google to (a) permit OFCCP to access materials that may be relevant to a compliance evaluation and (b) comply with Executive Order 11426 and its implementing regulations, which require the same;⁵
- (4) on or before June 1, 2016, OFCCP requested the Subject Items, which Google refused to produce, despite its contractual and regulatory obligations;⁶ and
- (5) the Subject Items were requested as part of an ongoing compliance evaluation, which OFCCP initiated on September 30, 2015.⁷

³ Def.’s Stmt. of Disputed Facts § A.6 (noting Google had “over 19,500 . . . employees . . . as of September 1, 2014” and “over 21,000 . . . employees . . . as of September 1, 2015”); Answer ¶ 3 (“Google admits that it has had 50 or more employees since at least September 30, 2015).

⁴ Answer ¶ 4; Def.’s Stmt. of Disputed Facts § A.2 (not disputing value of contract).

⁵ Def.’s Stmt. of Disputed Facts § A.3 (referring the Court to the contract documents); *see also* Pilotin Decl. in Support of Mot. for Summ J., 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)).

⁶ Def.’s Stmt. of Disputed Facts § A.6. While Google does not dispute what OFCCP requested, it seeks to put its own spin on the requests. *Id.*

⁷ Def.’s Stmt. of Disputed Facts § A.5; Answer ¶ 8.

In light of the Court's limited, narrow review and Google's failure to make any material showing on an undue burden, these are the only facts necessary to evaluate whether OFCCP is entitled as a matter of law to the Subject Items. There are no genuine issues of material fact.

Chief ALJ Henley's decision in *OFCCP v. Convergys*, Case No. 15-OFC-00002, 2015 WL 7258441 (Dep't of Labor Oct. 23, 2015), confirms no evidentiary hearing is necessary. Recognizing that "[t]his Tribunal's review of [OFCCP]'s request for documents is limited," Chief ALJ Henley issued his decision without a hearing. *Id.* To do so, Chief ALJ Henley looked only to what the agency requested and whether they were described in sufficient detail. *Id.* ("It is uncontested that Plaintiff's requests (i) seek only information relevant to the compliance evaluations of 41 C.F.R. § 60; and (ii) describe the information sought in detail.").

Google attempts to distinguish *Convergys* by noting the requests there were identified in the scheduling letter. Opp'n at 19. But where OFCCP made the requests was irrelevant to the *Convergys* decision. To determine OFCCP was entitled to the requested materials, Chief ALJ Henley evaluated the requests themselves, noting they sought "only information that is necessary to conduct desk audits, using documents that Respondents are required by law to maintain and furnish." *Convergys*, 2015 WL 7258441.

As in *Convergys*, the Court's inquiry is strictly limited to whether the Subject Items are within the scope of what Google agreed to provide OFCCP. Because there are no genuine issues of material fact, that inquiry is ripe for adjudication and can be resolved on the papers.

II. The Undisputed Evidence Shows Google Consented to Produce the Subject Items, Waiving Its Fourth Amendment Protections.

It is undisputed that Google agreed to produce the documents sought by OFCCP upon request in exchange for millions of taxpayers' dollars. As at least seventy years of jurisprudence teaches, this agreement constitutes a waiver of Google's Fourth Amendment rights with respect

to those documents. Ignoring this substantial body of law, Google incorrectly argues that (1) OFCCP has taken the position that the standard for administrative subpoenas in *Lone Steer/Oklahoma Press* are the *only* means for analyzing OFCCP's written requests and (2) only cases involving OFCCP may be considered in determining what rights Google has, even if those cases never squarely present the issue of contractual consent to a search. Opp'n at 6, 9.

Google's misstatements of the applicable case law do not undo its consent to provide documents upon request to OFCCP.

A. The Fourth Amendment Protecting Google in OFCCP Matters is the Same Fourth Amendment That Applies Generally and the Same Limiting Principles Apply.

Google incorrectly assumes that the scope of Fourth Amendment protections for businesses is wholly defined by cases involving OFCCP enforcement actions. However, the Fourth Amendment that applies to OFCCP is the very same Fourth Amendment that courts refer to and rely on in other contexts. Contrary to what Google suggests, there is not a separate Fourth Amendment that applies only to OFCCP matters, or to corporations that consent to searches by contract. While Google dismisses non-OFCCP cases out of hand, including a number of civil cases applied in strikingly similar contexts that establish without a doubt that Fourth Amendment protections can be waived by contract, this case law is plainly applicable to this matter.

The standards for actual entry into a private business by administrative agencies were developed by the Supreme Court in the 1960s and 1970s by the *Colonnade-Biswell* line of cases and *Barlow's Inc. v. Marshall*. See *N.Y. v. Burger*, 482 U.S. 691, 701 (1987) (*Colonnade-Biswell* doctrine removes privacy expectation for pervasively regulated industries, *Barlow's* applies when the entry into non-public areas of the business is attempted for a business that is not pervasively regulated). In 1984, the Supreme Court reaffirmed its holding that mere requests for

information, without non-consensual entry into private areas of a business, do not trigger the heightened requirements of *Barlow's Lone Steer*, 464 U.S. 408. At various points, courts have applied these doctrines to OFCCP's requests for information, arriving at the conclusion that such requests (when unaccompanied by non-consensual entry into private areas of the business) may be analyzed under *Lone Steer*. See, e.g., *United Space*, 824 F. Supp. 2d at 91-93.

While OFCCP has not affirmatively argued a consent-by-contract theory as an alternative to a *Lone Steer* analysis, both the ARB and a district court have expressly noted the issue and reserved ruling it, implicitly inviting OFCCP argue this position in future matters. See *OFCCP v. Bank of Am.*, 2003 WL 1736803, at *11-13 & n.19 (ARB 2003) (citing *United States v. Brown*, 763 F.2d 984, 987-88 (8th Cir. 1985) and *Zap v. United States*, 328 U.S. 624 (1946), but declining to rule on the matter since it was not raised); *United Space*, 824 F. Supp. 2d at 91 & n.8 (specifically reserving the issue).⁸ Google offers no law holding that an agency is forever estopped from asserting a viable and correct legal theory simply because it chose not to rely on other grounds in a prior case, nor can it. OFCCP neither augments nor detracts from the scope of Fourth Amendment search and seizure protections through its case-specific litigation positions.

As the courts developed the *Lone Steer* approach to administrative subpoenas in matters involving searches that were conducted without the consent of the searched, parallel Fourth Amendment jurisprudence largely eliminated Fourth Amendment protections for those who consent to a search or seizure. Whether or not OFCCP has vigorously relied on this jurisprudence in the past, under this available and appropriate legal theory, it is clear that Google

⁸ Similarly, in *First Alabama Bank of Montgomery v. Donovan*, 692 F.2d 714 (11th Cir. 1982), the government did not challenge the employer's characterization of the scope of its consent. See *id.* at 721 (noting government "does not controvert" employer's position "that its agreement in the contract did not include consent to searches that are unreasonable or otherwise unconstitutional").

has waived its Fourth Amendment rights to the extent it contracted to provide OFCCP access to its files.

B. The Principle of Consent-by-Contract Is Applicable to These Proceedings.

It is well established that Fourth Amendment protections are waived by non-coercive consent. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1973) (for consent to be valid, it must be that “consent was in fact voluntarily given, and not the result of duress or coercion, express or implied”). As a common-sense corollary, consent may be obtained through a valid contract, the result of a bargain “unattended by any act of violence, or threat of any kind, calculated in any degree to intimidate the party or to force the result, or to compel that consent which is the essence of every valid contract.” *French v. Shoemaker*, 81 U.S. 314, 333 (1871).

This is precisely what occurred in *Zap*, which Google misunderstands. Based on a contract mandating that “[t]he accounts and records of the contractor shall be open at all times to the Government and its representatives,” the Court concluded that the contractor “voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts.” 328 U.S. at 627-28. Even the dissenting justices recognized that “the Government had authority, as a result of its contract with the petitioner and the relevant statutes, to inspect the petitioner's books and records.” *Id.* at 632.⁹

Zap is no outlier. Courts generally recognize that the federal government may set the terms for those who wish to do business with it, and that those terms may include a requirement to waive Fourth Amendment rights within the scope of that agreement. For example, in the case

⁹ Google suggests that it was somehow the contemporaneous consent of the contractor that waived Fourth Amendment protections in *Zap*. Opp’n at 9. But Justice Douglas was clear: the right to be free from search and seizure “may be waived. And when petitioner, *in order to obtain the government's business, specifically agreed to permit inspection of his accounts and records*, he voluntarily waive[s] such claim to privacy which he otherwise might have had as respects business documents related to those contracts.” *Zap*, 328 U.S. at 628 (emphasis supplied).

of the Department of Labor’s investigation of a federal contractor under the Occupational Safety and Health Act, where the contract provided “Federal laws and . . . rules and regulations . . . must be observed by the Contractor, and the work shall be subject to the inspection of the appropriate Federal agency,” the D.C. Circuit held that “the contractual right of entry that [the contractor] afforded ‘appropriate federal inspectors’ . . . [is] incompatible with any expectation of privacy that [the contractor] may have . . .” and that OSHA was therefore not required to satisfy the Fourth Amendment before inspecting. *Tri-State Steel Const., Inc. v. Occupational Safety & Health Review Comm’n*, 26 F.3d 173,176-177 (D.C. Cir. 1994); *see also Donovan v. A.A. Beiro Const. Co.*, 746 F.2d 894, 900 (D.C. Cir. 1984) (same). The central tenant of *Zap*, that a federal contractor may waive Fourth Amendment protections through its contract with the federal government, has also been acknowledged in the Second, Third, Fifth, Seventh, Eighth and Ninth Circuits.¹⁰

Courts have even found that contracts with the government that agree to the search of a private home (a core protection of the Fourth Amendment, *California v. Ciraolo*, 476 U.S. 207, 219-220 (1986)) may provide consent¹¹ sufficient to waive the protections of the Fourth

¹⁰ *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); *Kerns v. Chalfont-New Britain Twp. Joint Sewage Auth.*, 263 F.3d 61, 66 (3rd Cir. 2001) (employee urinalysis); *United States v. Griffin*, 555 F.2d 1323, 1324 & n.1 (5th Cir. 1977) (welfare fraud); *United States v. Jennings*, 724 F.2d 436, 448 (5th Cir. 1984) (food stamps fraud); *Medlock v. Trustees of Indiana Univ.*, 738 F.3d 867, 872 (7th Cir. 2013) (search of a dorm room); *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. 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. Rucinski*, 658 F.2d 741, 745 (10th Cir. 1981) *cert. denied* 455 U.S. 939 (1982) (Forest Service inspection); *United States v. Smith*, 353 F. App’x 229, 231 (11th Cir. 2009) (storage unit contract).

¹¹ The Supreme Court’s threshold for un-coerced consent is low. Individuals have been held to give constitutionally sufficient consent outside the contractual context in highly coercive circumstances. *See Florida v. Bostick*, 501 U.S. 429, 439 (1991) (consent to a search of luggage waived Fourth Amendment protections where armed police officers boarded a Greyhound bus, cornered an individual and demanded to search his luggage); *see also United States v. Barnett*, 989 F.2d 546, 556 (1st Cir. 1993) *cert. denied* 510 U.S. 850 (1993) (consent to a search of a home waived Fourth Amendment protections even though individual had been confronted by seven or eight officers with guns drawn, arrested and a “protective sweep” search was already underway)

Amendment. *See Barnett*, 415 F.3d at 691-92 (probation agreement, a type of contract, contained valid consent to search of defendant's home in exchange for probation); *United States v. Yeary*, 740 F.3d 569, 583 (11th Cir. 2014).

C. Google Fails to Distinguish Consent-by-Contract Case Law.

Google unsuccessfully attempts to distinguish a single case applying this principle, *United States v. Schleining*, 181 F. Supp. 3d 531 (N.D. Ill. 2015). Opp'n at 10. It is true that *Schleining* did not involve OFCCP. However, the contract at issue in *Schleining* provided that the federal contractor "must maintain and make available at its office at all reasonable times the records, materials, and other evidence... [pertaining to incurred or anticipated costs] for examination, audit, or reproduction..." *Id.* at 535-536. This is strikingly similar to the agreement at issue here: "[t]he 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 rules and regulations that implement the Executive Order." FAR § 52.222-26(c)(8) (March 2007); *see also* Decl. of Marc Pilotin in Support of Pl.'s Resp. to Def.'s Mot. to Remove, Ex. D. Interpreting that provision, and applying *Zap* and its progeny (including precedent from outside the Seventh Circuit), the court concluded that the contractor "voluntarily consented to the searches and seizures" of its business records related to costs and so no Fourth Amendment issue was in play. *Schleining*, 181 F. Supp. 3d at 537. While it is not binding on this court, *Schleining* certainly presents a persuasive view of the law of consent by contract and the Supreme Court precedents underpinning the decision certainly are binding.

Similarly, in *United States v. Teeven*, the district court for the District of Delaware analyzed a Department of Education *subpoena duces tecum* served on a participant institution in

the Stafford and Pell grant programs that had agreed to “comply with the [program participation] agreement and the applicable regulations incorporated in the agreement.” *United States v. Teeven*, 745 F. Supp. 220, 223 (D. Del. 1990). Among those regulations are regulations requiring participating institutions “to maintain those materials pertinent to the federal student loan and grant programs in which they participate” and provide them to the Department of Education upon request. *Id.* at 228 & n.14 (citing, *inter alia*, 34 C.F.R § 668.23). The court held that this agreement permitted it to reject the institution’s argument that a subpoena seeking documents in the scope of the regulation constituted “undue burden.” *Id.* Further, the district court applied *Zap* to the participating institution’s objection to the request. Though it cited *First Alabama* in stating that it need not go so far as to determine that the institution has “waived its rights to be free from unconstitutional searches and seizures,” the court went on to hold that “the issue involved here is whether there is a sufficient basis to conclude from all the circumstances that the Academy had no reasonable expectation of privacy in the documents in question. The conclusion is, obviously, they did not.” *Id.* at 235. Ultimately, the court concluded that the agency “was entitled to access such information and had a basis to request such information as a result of contract and regulation” and the institution “certainly cannot seriously contend that the Department IG does not have a right to access to the federal programs information for IG Act purposes.” *Id.* at 236.

Google also expresses the concern that OFCCP is seeking “unfettered, non-reviewable discretion regarding the scope . . . of its requests.” Opp’n at 9. This concern is simply misplaced; it is clear that OFCCP’s requests do not raise Fourth Amendment concerns *only* where they fall within the scope of the agreement Google entered into in exchange for taxpayers’ funds. *See United States v. Jennings*, 724 F.2d 436, 448 (5th Cir. 1984) (“[b]y entering into this

agreement [(to provide all documents related to a food stamps program to the government at a reasonable time and place)], SPI voluntarily waived any claims to privacy that it might have had with respect to documents relating to this contract”) (citing *Zap* 328 U.S. at 628) As the Eighth Circuit held in *United States v. Brown*, the proper frame in dealing with the scope of consent with respect to administrative agency searches premised on regulation is the scope of the validly implemented regulations. In *Brown*, a pharmacy had entered into a contract with the United States to participate in the Medicare program. *Brown*, 763 F.2d 984. By the terms of the program, “[w]hen a pharmacy agrees to participate in the Medicaid Program, it agrees to be bound by all valid regulations and laws” *Id.* at 988 (emphasis supplied). The Eighth Circuit concluded that it could “see no constitutional infirmity in the government requiring a provider to agree to maintain records of Medicaid transactions and to permit periodic audits of those records as a condition for participation in the Medicaid Program.” *Id.*; see also *Copar Pumice Co., Inc. v. Morris*, 632 F. Supp. 2d 1055, 1079-1080 (D.N.M. 2008) (where a contractor agreed to the terms and conditions of an air-quality permit, it “consented to inspections conducted *in compliance with the permit and the terms of the state statute*” and therefore the Fourth Amendment did not apply to inspections that comported with the agreement) (emphasis supplied).

The natural limit on OFCCP’s authority is the scope of Google’s agreement to provide documents. By contract, Google agreed to produce records as defined by the Executive Order and its implementing regulations. There can be no serious dispute that the records sought fall within in those regulations, and those regulations have previously been found to be valid. See *Uniroyal, Inc. v. Marshall*, 482 F. Supp. 364, 371 (D.D.C. 1979). Google has plainly consented to provide precisely the records sought.

III. Even under the Fourth Amendment Analysis Applicable to Administrative Subpoena Proceedings, the Undisputed Evidence Shows that the Subject Items Comply with the Fourth Amendment.

Even if Fourth Amendment protections are not deemed waived by contract here, Google has failed to raise a disputed issue of fact that relates to its refusal to produce the Subject Items.

This case is about whether OFCCP can obtain documents directly related to compensation and pay in a review that is required by law to be a comprehensive evaluation of Google's compliance with non-discrimination laws including with respect to pay. Even though they are requests routinely made to determine whether discrimination infects pay practices, Google attempts to make OFCCP's requests sound absurd, mostly by adding the words "without limitation" to requests that have limitations clearly embedded in them. However, Google masks the crucial point that OFCCP is evaluating the company's pay practices for *all* of the employees at its Mountain View headquarters, necessitating data on *all* of those employees. In this context, Google's constitutional attack falls flat.

A. The Fourth Amendment's Protections and Judicial Review Are Limited in Administrative Subpoena Proceedings, with Courts Giving Agencies Great Deference.

Despite repeatedly invoking the Fourth Amendment, Google argues in a legal vacuum, offering little explanation as to how courts have applied the relevant standard to administrative subpoenas. *See* Opp'n at 6, 13. Google instead embarks on a legal argument largely unhinged from case law, complaining—without citing anything contrary—that OFCCP cites "language that incorrectly appears more deferential" to OFCCP. Opp'n at 13. However, that appearance is reality.

Contradicting Google's suggestions, the Supreme Court held long ago that the Fourth Amendment imposes "rather minimal limitations" on administrative subpoenas. *See v. City of*

Seattle, 387 U.S. 541, 545 (1967); see also *Golden Valley*, 689 F.3d at 1115 (“In the context of an administrative subpoena, the Fourth Amendment’s restrictions are limited.”) (quoting *Reich v. Mont. Sulphur & Chem. Co.*, 32 F.3d 440, 448 (9th Cir. 1994)). Although “neither minor nor ministerial,” consistent with such minimal limitations, “the Supreme Court has made it clear that the court’s role in a proceeding to enforce an administrative subpoena is a strictly limited one.” *F.T.C. v. Texaco, Inc.*, 555 F.2d 862, 871-72 (D.C. Cir. 1977) (explaining *Endicott Johnson v. Perkins*, 317 U.S. 501 (1943); *Okla. Press Publ’g Co. v. Walling*, 327 U.S. 186 (1946); and *United States v. Morton Salt Co.*, 338 U.S. 632 (1950)).¹² This is “because of the important governmental interest in the expeditious investigation of possible unlawful activity.” *Id.*

For Fourth Amendment purposes, “it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant.” *Morton Salt Co.*, 338 U.S. at 652; see also *Lone Steer*, 464 U.S. at 415 (“[T]he 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.”) (quoting *City of Seattle*).¹³ Based on its opposition, Google contests only whether the Subject Items satisfy the

¹² See also *E.E.O.C. v. Randstad*, 685 F.3d 433, 442 (4th Cir. 2012) (noting “court’s role in enforcing administrative subpoenas is sharply limited) (citation omitted); *N.L.R.B. v. Am. Med. Response*, 438 F.3d 188, 192 (2d Cir. 2006) (“[t]he courts’ role in a proceeding to enforce an administrative subpoena is extremely limited”) (citation omitted);

¹³ Google alleges OFCCP “completely ignor[es]” the scope element of this test, and then contradicts itself by quarreling with OFCCP’s explanation of that element, complaining that the agency relies on *Morton Salt*’s language that requests must be “not too indefinite” rather than *Lone Steer*’s articulation that requests must be “sufficiently limited.” Opp’n at 12-13; see also Pl.’s Mem. of P&A at 20 (explaining how scope element is met). These are two sides of the same coin: if a request is sufficiently limited, it is not too indefinite, and vice-versa based on Supreme Court precedent. In using the “sufficiently limited” language, *Lone Steer* quotes *City of Seattle*, which in turn cites *Morton Salt*’s “not too definite” standard. See *Lone Steer*, 464 U.S. at 415 (citing *City of Seattle*); *City of Seattle*, 387 U.S. at 544 (citing *Morton Salt*). Indeed, by the Supreme Court’s express terms, *Lone Steer* did not alter the *Morton Salt* test, making clear that *Lone Steer* held “only that the defenses available to an employer do not include the right to insist upon a judicial warrant as a condition precedent to a valid administrative subpoena.” *Lone Steer*, 464 U.S. at 415.

standard's elements concerning relevance, scope, and burden, conceding that OFCCP has legal authority to conduct the compliance review.

Although it contests each of these factors, Google largely fails to cite cases applying them, all of which favor OFCCP. *First*, with respect to relevance, a “court defers to the agency’s appraisal of relevancy, which must be accepted so long as it is not obviously wrong.” *N.L.R.B. v. Am. Med. Response*, 438 F.3d 188, 193 (2d Cir. 2006); *see also Dir., Ofc. of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1307 (D.C. Cir. 1997) (“If the dispute turns on the *relevance* of the information sought by a government agency, we have said that the district court should not reject the agency’s position unless it is ‘obviously wrong.’”) (emphasis in original); *Randstad*, 685 F.3d at 448 (noting “we largely defer to the EEOC’s expertise” with respect to relevance). As the D.C. Circuit has explained,

We give the agency a wide berth as to relevance because it need establish only that the information is relevant to its *investigation* not to a hypothetical adjudication, and as we have explained, the boundary of an investigation need only, indeed can only, be defined in general terms.

Vinson & Elkins, 124 F.3d at 1307 (citations omitted; emphasis in original). As a result, “the burden, as a practical matter, is on the defendant to” show that the agency’s position on relevance is obviously wrong. *Id.*¹⁴

Second, with respect to scope, the Supreme Court has stated that “the breadth of the subpoena” is a matter “variable in relation to the nature, purposes, and scope of the inquiry.”

¹⁴ This is not to say an agency’s assessment of relevance is unassailable, as shown in *Royal Caribbean*, which actually supports OFCCP. There, the EEOC requested “company-wide data regarding employees and applicants around the world with any medical condition” when investigating a particular individual’s charge that the company discriminated against him based on his diagnosis for particular medical conditions. *Royal Caribbean*, 771 F.3d at 759. The court held that the EEOC failed to show how data on all of the company’s employees was relevant to the charge of a single employee, noting that such company-wide data could have been relevant had there been a company-wide charge. *Id.* at 761-62 (noting charge of a pattern and practice of discrimination could support request). Here, OFCCP is charged by its regulations with conducting a facility-wide review, and as *Royal Caribbean* indicates, facility-wide data is relevant.

Okla. Press, 327 U.S. at 210 (citations omitted). Against that backdrop, courts have held that requests are sufficiently limited so long as they are within the scope of the investigation authorized. *See, e.g., Mont. Sulphur*, 32 F.3d at 445 (in OSHA case, holding “subpoena as appropriately narrow because the documents sought related to whether the employer” was satisfying its general duty to keep its employees safe). Indeed, in *First Alabama*, which Google cites, the court noted that, as a matter of law, “searches conducted pursuant to E.O. 11246 . . . are properly limited in scope.” 692 F.2d at 721 (citing *United States v. Miss. Power & Light Co.*, 638 F.2d 899, 908 (5th Cir. 1981) (“[B]ecause the searches are restricted to an inspection solely of business records to test compliance with the affirmative action program, they are properly limited in scope.”).¹⁵

Finally, with respect to burden, Google must prove that the Subject Items “threatens to unduly disrupt or seriously hinder normal operations of a business.” *Texaco, Inc.*, 555 F.2d at 882; *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)). In its opposition, Google did not address, let alone challenge, this standard. This is unsurprising given Alphabet Inc., Google’s parent company, has a market value of approximately \$500 billion¹⁶ and reported revenues of \$90 billion in 2016, the year of the

¹⁵ However, as *United Space* notes, *First Alabama* and *Mississippi Power* were decided before *Lone Steer* and incorrectly decided that the heightened Fourth Amendment standard applied to administrative warrants applies to administrative subpoenas. *United Space*, 824 F. Supp. 2d at 93. Given that *First Alabama* and *Mississippi Power* applied the stricter Fourth Amendment standard that *Lone Steer* held to be inapplicable, their holdings that requests pursuant to the Executive Order are, as a matter of law, “properly limited in scope” applies with greater force in the less stringent test applied to administrative subpoenas.

¹⁶ <https://www.forbes.com/companies/alphabet/>, last accessed on March 3, 2017.

compliance review.¹⁷ In addition to Google’s tremendous resources, Google acknowledges that “providing ways to access . . . information has been core to Google” since its founding, and that “[t]ransparency and open dialogue are central to how” Google deals with its employees.¹⁸

With each of these principles in mind, each of Google’s arguments regarding the relevance, scope, and burden of the Subject Items is refuted below.

B. OFCCP’s Request for a 2014 Compensation Snapshot is Relevant to Evaluating Google’s Pay Practices, Is Limited to the Scope of Google’s AAP, and Google Has Not Proved That Producing the Snapshot is Unduly Burdensome.

It is undisputed that OFCCP requested pay data as of September 1, 2014 for all of the employees Google identified in its Affirmative Action Plan (“AAP”) and that this request was made pursuant to the compliance review into Google’s pay practices. On its face, and as OFCCP has repeatedly explained,¹⁹ pay data regarding employees on Google’s AAP and within the scope of the regulatory review period is relevant and sufficiently limited. Google fails to show otherwise or meet its burden to show that this request is unduly burdensome.

Relevance. Google does not dispute that data on how it pays its employees are relevant to whether it pays those employees in a nondiscriminatory fashion or otherwise explain how these data are irrelevant. Rather, Google goes off on a tangent, making only two arguments concerning relevance: (1) the Fourth Amendment requires OFCCP to open up its investigation to Google and disclose its preliminary findings to establish relevance, *see* Opp’n at 18-19; and

¹⁷ https://abc.xyz/investor/pdf/20161231_alphabet_10K.pdf, last accessed on March 3, 2017.

¹⁸ *Id.*

¹⁹ Google maintains that OFCCP has never explained the relevance of any of the Subject Items. *See, e.g.*, Opp’n at 18. But the extensive conciliation record belies that point. First, OFCCP Regional Director Janette Wipper sent Google a letter explaining their relevance. *See* Pl.’s Br. re Authority, Ex. A. Further, as Google’s counsel’s December 6, 2016 letter to Regional Director Wipper recounts, OFCCP stated during the November 29, 2016 teleconference what it states here in this expedited proceeding: the Subject Items are relevant because OFCCP is conducting a compliance review of Google’s compensation practices. *See* Camardella Decl., Ex. J at 2.

(2) “the Agency already has more than enough information,” *id.* at 16. Neither argument shows that OFCCP’s determination that the data are relevant is “obviously wrong.”

Google did not contest, as OFCCP argued in its opening brief, that the company’s demand that OFCCP disclose its preliminary findings to support the agency’s request for additional pay data amounted to requiring the agency to show probable cause to request additional information. Indeed, throughout the conciliation process, Google never supported its demand for OFCCP’s preliminary findings with supporting case law, and it does not cite any now. Nor can it. The Supreme Court definitively rejected such a requirement long ago. *Morton Salt*, 338 U.S. at 642-43 (noting, so long as it is authorized to do so, an agency “can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not”); *see also Golden Valley*, 689 F.3d at 1116 (noting that the “Supreme Court has refused to require that an agency have probable cause to justify issuance of a subpoena”) (citations omitted).²⁰ As the Ninth Circuit explained in a case involving an Occupational Safety and Health Administration (“OSHA”) administrative subpoena, Google’s demand that OFCCP identify initial indicators of discrimination “reverses the investigatory process long since approved by the Supreme Court by requiring [OFCCP] to charge first and investigate later.” *Mont. Sulphur*, 32 F.3d at 444.

Google’s defense that OFCCP “has more than enough information” is likewise legally baseless. To make this cursory argument, Google relies on *Royal Caribbean*, which is inapplicable for the principle Google cites it, as explained above. *See, supra*, n.14. Google also cites its attorney’s bald assertion that the agency has sufficient information to “run robust

²⁰ Google cites *United Space* to argue that OFCCP must disclose its preliminary findings to support its requests. Opp’n at 19. While such findings were in the administrative record in *United Space*, the district court neither required OFCCP to disclose such statistics nor even relied on those statistics in ruling against the defendant on its Fourth Amendment challenge. *See United Space*, 824 F. Supp. 2d at 93.

multiple regression analyses.” *See* Opp’n at 16 (citing Camardella Decl. ¶ 26). Separate from the evidentiary problems raised by this assertion, Google identifies no case suggesting that a party can lawfully reject producing requested materials by citing what has been produced previously and unilaterally declaring “you have enough.”

Scope. As OFCCP explained in its opening brief, the September 1, 2014 compensation snapshot is also sufficiently limited in scope. Pl.’s Mem. of P&A at 20. The request is limited to all employees encompassed by Google’s AAP within the review period. Although Google maintains this request has no limits, OFCCP has not requested data on employees outside of the AAP (*i.e.*, any employees who work outside the Mountain View facility), nor has it requested data who did not work at the facility outside of the review period.

Google’s argument regarding the scope of the request for the second compensation snapshot appears limited to citing section 1C03 of OFCCP’s Federal Contractor Compliance Manual (“FCCM”).²¹ However, the FCCM “does not establish substantive agency policy” and “does not create new legal rights or requirements.” FCCM at 1. Thus, Google cannot enforce section 1C03.²²

Moreover, even if Google could, section 1C03 only confirms OFCCP’s entitlement to the second compensation snapshot, providing that “COs must evaluate the contractor’s for at least

²¹ Available at https://www.dol.gov/ofccp/regs/compliance/fccm/FCCM_FINAL_508c.pdf.

²² *See Sunbeam Appliance Co. v. EEOC*, 532 F. Supp. 96, 99 (N.D. Ill. 1982) (rejecting argument that EEOC had duty to follow the procedures in its Compliance Manual with respect to investigation because “procedures set forth in the EEOC Compliance Manual are internal guidelines for the use of the agency.”); *Hall v. EEOC*, 456 F. Supp. 695, 702-03 (N.D. Cal. 1978) (same); *see also United States v. Craveiro*, 907 F.2d 260, 264 (1st Cir. 1990) (“the internal guidelines of a federal agency, that are not mandated by statute or the constitution, do not confer substantive rights on any party” (citations omitted)) *United States v. Tipton*, 11 F.3d 602, 612 (6th Cir. 1993) (government’s alleged violation of “Petite” policy); *OFCCP v. Bank of Am.*, ARB No. 00-079, ALJ No. 97-OFC-16 (ARB March 31, 2003) (holding OFCCP internal guidance did not create private rights).

the last full AAP year.” FCCM § 1C03. Although Google omits it from its opposition in lieu of ellipses, the section explains, as particularly relevant here:

[I]f the AAP is established on a calendar year basis, and the compliance evaluation is scheduled in August, a CO would evaluate the contractor’s performance of the prior year from January through December under the prior AAP, and the preceding January through July under the current AAP.

Id. Here, it is undisputed that the compliance evaluation was scheduled in September 2015, meaning the review period encompassed 2014, the “last full AAP year.”²³

Burden. Finally, because Google ignores the applicable case law defining what constitutes an undue burden, Google fails to show how producing the September 1, 2014 compensation snapshot will unduly disrupt or seriously hinder its business operations. Google’s only arguments directed at the snapshot appear to be that (1) the company has already produced other materials, which it conclusorily deems sufficient for OFCCP to conduct its analysis; and (2) it previously stated it was burdensome in various letters, which state that producing the snapshot is burdensome because the data are irrelevant. *See* Opp’n at 23-25; *see also* Camardella Decl., Ex. I at 12 (“Absent any explanation regarding the issues it purports to have identified with the current year snapshot, OFCCP’s request for compensation data is not relevant to the Compliance Evaluation, is unreasonable and overly burdensome[.]”). Neither of these arguments, each of which simply repeats Google’s failed arguments concerning relevance, does nothing to show any disruption in Google’s business operations. Moreover, that Google produced a September 1, 2015 snapshot belies any argument regarding burden.

²³ Google also contends that OFCCP must disclose whether “special circumstances or exceptions” exist to obtain the September 1, 2014 snapshot, citing the second paragraph of FCCM section 1C03. Opp’n at 22-23. However, as explained above, the first paragraph of that section entitles OFCCP to 2014 data, which was the last full year prior to the September 2015 scheduling letter. Thus, OFCCP is not required to make any such disclosure in this case to obtain the Subject Items.

C. Google Does Not Dispute the Requested Data on Factors Affecting Pay Are Relevant to the Compliance Review and Fails to Show Any Undue Burden in Producing Them.

It is likewise undisputed that OFCCP requested data on factors related to pay, such as employee's job and salary histories, as part of a compliance review into Google's pay practices. Yet again, for all of its bluster, Google never argues that it does not use the factors on which OFCCP requested data in setting its employees' pay. Nevertheless, it insists that data on these factors are irrelevant, overbroad, and burdensome.

Relevance and Scope. With respect to the requested job and salary history data, Google makes the relevance arguments pertaining to the second compensation snapshot (*see* Opp'n at 16, 18-19), which are unavailing as explained above. Google makes only one independent argument regarding the relevance of the job and salary history data, which it also applies to its objection to this request's scope: because the historical data requested purportedly extends beyond the review period, it is irrelevant and overbroad. *See* Opp'n at 21.

This simplistic argument is unavailing given that Google does not dispute that its employees' job and salary histories are characteristics that the company considered *during the review period* when paying those employees. Because Google concededly relied on those characteristics during the review period, those factors are part of the review period,²⁴ much like any written policies Google may have had that were operative during the review period but adopted outside of it. Taken to its logical conclusion, if accepted, Google's argument would

²⁴ Indeed, as the Lilly Ledbetter Fair Pay Act of 2009 recognizes, discriminatory acts outside of Title VII's limitations period may be actionable insofar as they affect pay within that period. *See* 42 U.S.C. § 2000e-5(e)(3)(A) (providing that "an unlawful employment practice occurs . . . when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice").

absurdly mean that OFCCP could not request data on employees' ages because they were born outside of the review period.

Because OFCCP sought information on the pay-related characteristics of the employees in Google's AAP in 2014 and 2015, this request was not sufficiently limited. It is undisputed that OFCCP requested such data only on those employees who worked at Google's Mountain View facility as of September 1, 2014 and September 1, 2015. OFCCP did not request, as Google seems to suggest, pay-related data on any person who Google employed since 1998.

Burden. As with the second compensation snapshot, the burden arguments in Google's opposition are limited to (1) its claim that OFCCP has enough information, and (2) citing its counsel's prior letters claiming burden. *See* Opp'n at 23-25; *see also* Camardella Decl., Ex. E at 4-5 (burden claims regarding producing certain of the requested pay-related factors). However, as above, neither of these arguments satisfies Google's burden to show a threat of its business operations being disrupted.

D. OFCCP Has Requested Employee Contact Information to Obtain Information about Employees' Pay and Limited that Request to Employees Encompassed in Google's AAP.

Finally, it is undisputed that OFCCP requested employee contact information as part of the compliance review into Google's pay practices. Separate from the arguments refuted above, Google makes only two arguments specifically directed at OFCCP's request for contact information: (1) this request is irrelevant and insufficiently limited because it encompasses all employees within the AAP, Opp'n at 18; and (2) it would violate those employees' privacy rights, *id.* at 19-20.

Relevance and Scope. Although Google claims OFCCP's reliance on *EEOC v. McLane Co.*, 804 F.3d 1051 (9th Cir. 2015), is inapposite, Google does not challenge the principle for

which OFCCP cited the case. OFCCP cited *McLane* solely for the common sense principle that employee contact information is relevant because it permits an investigating agency “to learn more about [those employees’] experiences” as it pertains to an ongoing investigation. *Id.* at 19-20; *see also* Mem. of P&A at 19-20. Google does not object to this generic point regarding relevance.

Rather, Google’s relevance and scope objection is rooted in the fact that the EEOC’s information request in *McLane* pertained to employees who had taken a challenged test, which was the subject of an individual employee’s charge. *See McLane*, 804 F.3d at 1054-55. But, as with Google’s reliance on *Royal Caribbean* for the same point, this argument has no traction here. OFCCP, unlike the EEOC in *McLane* and *Royal Caribbean*, is not investigating a particular complaint, but is conducting a compliance review involving all employees at Google’s Mountain View facility. Thus, information on all of those employees is relevant and within the appropriate scope.

Finally, Google argues that the Privacy Act’s protections are insufficient because the law provides various exceptions that would permit disclosure of records maintained by the agency. Opp’n at 19-20. However, Google fails to show how any of these exceptions would apply to employee contact information collected as part of an ongoing investigation. Indeed, encompassing Google’s privacy concerns, the Privacy Act and the Freedom of Information Act (“FOIA”) prevent disclosure of “records . . . compiled for law enforcement purposes” the production of which “could reasonably be expected to constitute an unwarranted invasion of

personal privacy.” 5 U.S.C. § 552(b)(7).²⁵ Google’s claim that there are no protections for any employee contact information it would produce is unfounded.

IV. OFCCP’s Regulations Do Not Support Google’s Refusal to Produce the Subject Items.

Although the Subject Items are cabined to what is relevant to a compliance evaluation, Google argues that OFCCP seeks “unfettered discretion to adjudicate the relevancy of its requests[.]” Opp’n at 30. OFCCP, constrained by its regulations, seeks no such power. Google’s continued misreading of regulations and its tardy invocation of the process through which OFCCP adjudicates relevancy provide no support for withholding the Subject Items.

A. Google’s Continued Misreading of 41 C.F.R. § 60-1.43 Ignores the Regulatory Context and Basic Tenets of Regulatory Interpretation.

Even though it has never produced a case or regulation requiring OFCCP to disclose its preliminary findings, Google has repeatedly insisted that the phrase “may be relevant to the matter under investigation” in § 60-1.43 opens a window into OFCCP’s investigative files. Google argues that OFCCP’s reading ignores regulatory preamble text; claims that, because 41 C.F.R. § 60-1.12 is entitled “Record Retention,” it has no bearing on what is relevant to a compliance evaluation; and “relevant” in § 60-1.43 means something different from what “relevant” in § 60-1.12. All of these arguments fail basic regulatory interpretation.

Section 60-1.43 defines the agency’s access to records, providing,

Each contractor shall permit access during normal business hours to its premises **for the purpose of conducting on-site compliance evaluations and complaint investigations.** Each contractor shall permit the inspecting and copying of such

²⁵ See also *id.* § 552a(k)(1)-(2) (permitting regulations applying FOIA exemptions and exempting from disclosure “investigatory material compiled for law enforcement purposes”); 29 C.F.R. § 71.51 (DOL regulations exempting disclosure); 41 C.F.R. § 60-1.20(g) (providing that data disclosed in compliance evaluation will be treated “as confidential to the maximum extent the information is exempt from public disclosure under” FOIA and will be withheld if determined “the data are confidential and sensitive and that the release of data would subject the contractor to commercial harm”).

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 the Order**, and the rules and regulations promulgated pursuant thereto by the agency, or the Deputy Assistant Secretary.

Viewed in full context, which Google omits, the phrase “may be relevant to the matter under investigation” ties relevance back to whether the investigation is a compliance evaluation, which is a broader investigation, or a complaint investigation, which is narrower. If it is a compliance evaluation, as is the case here, “records pertaining to . . . rates of pay or other terms of compensation” are relevant. 41 C.F.R. § 60-1.12(a).

Rather than confront the regulatory language, Google instead offers a textbook circular argument resting on preamble text. Google cites a 1997 preamble, which states that § 60-1.43 does not permit “unfettered access”; contains the precise language from § 60-1.43; and cites 41 C.F.R. § 60-1.20(f), which vests ultimate authority in the OFCCP Regional Director to decide whether requested materials are relevant. Opp’n at 30 (quoting Government Contractors, Affirmative Action Requirements, 62 Fed. Reg. 44174, 44186 (Aug. 19, 1997)). Google then conclusorily argues,

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.

Opp’n at 31. But this argument is unpersuasive: pointing out that “A” says “A” says nothing of what “A” means. Nor does Google’s reference to “unfettered access” or the procedure under § 60-1.20(f) support the company’s interpretation that OFCCP must throw open its investigative files to support its requests. Section 60-1.43 does not permit “unfettered access”; rather, in the context of a compliance evaluation, it permits access only to the records identified in § 60-1.12(a).

Likewise unavailing is Google's reliance on the § 60-1.12's "Record Retention" title to dismiss § 60-1.12(a)'s unambiguous explanation of what is relevant in a compliance evaluation. As with many of the Fourth Amendment principles discussed above, the Supreme Court declared decades ago that "the title of a statute and the heading of a section cannot limit the plain meaning of the text." *Bhd. of R.R. Trainmen v. Baltimore & O. R. Co.*, 331 U.S. 519, 528-29 (1947); *INS v. St. Cyr*, 533 U.S. 289, 309 (2001) (same). "Text usually controls over titles in a statute or regulation." *Grand Canyon Trust v. Williams*, 98 F. Supp. 3d 1044, 1069 (D. Ariz. 2015) (citing *Trainmen*). Google makes no effort to show any language in the statutory scheme is ambiguous, let alone sufficiently ambiguous to resort to the section's title. *See Trainmen*, 331 U.S. at 529. The "Record Retention" title "cannot undo or limit that which the text makes plain." *Id.*

Finally, Google argues that, because "relevant" is not used in connection with the words "to the matter under investigation" in § 60-1.12 as it is in § 60-1.43, "relevant" means something different in each section. Opp'n at 32. But this too violates the "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (citations omitted). Other than cite § 60-1.12's title, which does not control, Google offers nothing to override this presumption and support its interpretation that "relevant" in § 60-1.12 refers to what is relevant for purposes "of the equivalent of a litigation hold." Opp'n at 32. Indeed, in § 60-1.12, "relevant" is in reference to a "compliance evaluation," which is precisely the same subject matter in § 60-1.43 when the "matter under investigation" is a "compliance evaluation" rather than a "complaint investigation." *See Atl. Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932) (noting definition may vary if "the subject-matter to which the words refer is not the same").

B. Although Google Waived Any Argument under 41 C.F.R. § 60-1.20(f), OFCCP's Regional Director Found the Subject Items Relevant.

As noted above, § 60-1.20(f) vests ultimate authority in the OFCCP Regional Director to determine in a compliance evaluation whether information requested is “relevant to compliance with the Executive Order.” This authority makes sense given the plenary authority the Secretary has delegated to OFCCP to “carry[] out the responsibilities assigned to the Secretary under the Executive order.” 41 C.F.R. § 60-1.2.

For the first time, Google invokes the procedure in § 60-1.20(f), which permits contractors to challenge a compliance officer's request to take material off-site by requesting a ruling from, ultimately, the OFCCP Regional Director on such materials' relevance. Under that procedure, “the information in question *must be made available* to the compliance officer off-site,” only to be “returned to the contractor immediately” if it is determined that the data are “not relevant to the investigation.” 41 C.F.R. § 60-1.20(f) (emphasis added).

This section offers no support for Google's insistence that OFCCP must provide its preliminary findings to obtain the Subject Items. As an initial matter, Google has failed to comply with § 60-1.20(f), precluding it from asserting any defense under it. First, prior to its opposition, Google never invoked the appeal procedure under § 60-1.20(f). Second, it is undisputed that Google has not made the Subject Items available to OFCCP, which the regulation requires.

Even if Google complied with § 60-1.20(f), OFCCP Regional Director Janette Wipper has already deemed the Subject Items relevant. During the November 29, 2016 teleconference, Regional Director Wipper explained the Subject Items' relevance, restating what she had written in her November 9, 2016 Letter. *See Camardella Decl., Ex. J at 2* (summarizing the 11/29/2016

teleconference); *see also* Pl.’s Briefing re Authority, Ex. A. Although Google has never satisfied its duty under § 60-1.20(f), OFCCP has complied with that regulation.

V. **OFCCP Will Not Provide Any Testimony Disclosing Its Preliminary Findings or Aspects of the Ongoing Investigation.**

Google clearly communicated its intent to force OFCCP to disclose its preliminary investigative findings in this compliance evaluation, which will compromise OFCCP’s current investigation and those in the future.²⁶ Having been denied twice in requesting disclosure of those findings, Google undoubtedly will try a third time if any evidentiary hearing is permitted. Google, through its vexatious conduct, should not be allowed to leverage any hearing to obtain the agency’s protected information and benefit from its obstruction.

To be clear, if any hearing is ordered, OFCCP witnesses will not offer any testimony regarding its internal deliberations concerning the ongoing compliance evaluation, including its preliminary findings. This testimony is wholly unnecessary to determining whether the Subject Items were properly requested. Moreover, as explained in OFCCP’s opening brief, such testimony would invade the agency’s deliberative process and investigatory files privileges and any work product protection. Pl.’s Mem. of P&A at 14-15.

Google concedes that OFCCP’s preliminary findings are protected by the investigatory files privilege and work product protection, challenging only OFCCP’s assertion of the deliberative process privilege. *See* Opp’n at 25-28. Google argues the privilege does not apply because OFCCP it demands only “the factual results of these analyses.” *Id.* at 27-28. However, simply labeling the results of OFCCP’s statistical analyses as “factual” does not eviscerate the deliberative process privilege. Setting aside whether “factual results” can be distinguished from

²⁶ *See generally* Mot. to Remove from Expedited Proceedings (requesting discovery on this topic); 2/16/17 Sween Ltr. (requesting the same); *see also* Opp’n at 27-28 (detailing request for indicators of discrimination).

other results in statistical analyses, those results would still be protected by the privilege because “the disclosure of factual portions may reveal the deliberative process of selection . . . where the factual segments’ function was not merely summary but analysis as well[.]” *The Shinnecock Indian Nation v. Kempthorne*, 652 F. Supp. 2d 345, 372 (E.D.N.Y. 2009) (quoting *Lead Indus. Ass’n, Inc. v. Occupational Safety & Health Admin.*, 610 F.2d 70, 83 (2d Cir. 1979)) (internal quotation and revision marks omitted). Whatever “factual results” Google suggests arises out of OFCCP’s statistical regressions are not mere summaries, but are intertwined with the analyses.

OFCCP’s internal deliberations concerning the ongoing compliance evaluation, including its preliminary findings, are protected by the deliberative process and investigative files privileges, at the least. Google has not offered good cause to invade those privileges.

CONCLUSION

Google’s obstruction of OFCCP’s compliance evaluation and its repeated attempts to bore a permanent peephole into OFCCP’s investigative file must come to an end. For the foregoing reasons, the Court should reject Google’s persistent attempt to invade OFCCP’s investigative files and grant OFCCP’s motion.

Date: March 6, 2017

UNITED STATES DEPARTMENT OF LABOR
Office of the Solicitor
90 7th Street, Suite 3-700
San Francisco, CA 94103
Telephone: (415) 625-7769
Fax: (415) 625-7772
E-Mail: Pilotin.Marc.A@dol.gov

Respectfully submitted,

NICHOLAS C. GEALE
Acting Solicitor of Labor

JANET M. HEROLD
Regional Solicitor

IAN ELIASOPH
Counsel for Civil Rights


MARC A. PILOTIN
Trial Attorney

CERTIFICATE OF SERVICE

I am a citizen of the United States of America. I am over eighteen years of age and am not a party to the within action. My business address is 90 7th Street, Suite 3-700, San Francisco, California 94103.

On March 6, 2017, I served the attached **PLAINTIFF'S REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** on Defendant Google Inc. through serving its attorneys below via electronic mail, pursuant to the parties' agreement:

Duff, Daniel V., III (Daniel.Duff@jacksonlewis.com);
Camardella, Matthew J. (CamardeM@jacksonlewis.com);
Sween, Lisa Barnett (Lisa.Sween@jacksonlewis.com);
Raimundo, Antonio (Antonio.Raimundo@jacksonlewis.com).

I declare under the penalty of perjury that the foregoing is true and correct and that this declaration was executed in San Francisco, California on March 6, 2017.

Date: March 6, 2017



MARC A. PILOTIN
Trial Attorney