

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

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Office of Administrative Law Judges  
San Francisco, Ca

**GOOGLE'S MOTION FOR PROTECTIVE ORDER AND TO SEAL EXHIBITS**

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To this Court and all Parties, Defendant Google Inc. ("Google" or "the Company") hereby submits its Motion for Protective Order and to Seal Exhibits.

**1. Introduction**

The Office of Federal Contract Compliance Programs ("OFCCP") conducts compliance evaluations in which Compliance Officers are required to treat information obtained during the evaluation as "confidential to the maximum extent possible," which applies to "confidential information as well as personnel records, medical information and salary data." (Federal Contract Compliance Manual, 1A06 "CONFIDENTIALITY OF INFORMATION.") During the course of the OFCCP's compliance evaluation of Google, Google has been operating under the assumption that the OFCCP would abide by this rule and prevent the disclosure of thousands of pages of sensitive and confidential information.

The OFCCP has refused to enter into a protective order to seal these documents that have, up to this point, been deemed confidential. The Federal Contract Compliance Manual as well as federal law serve to protect Google's confidential and sensitive information from public disclosure. As such, Google requests that this Court apply a protective order to the information specified below, and per that protective order, agree to seal the specified documents to prevent the disclosure Google's proprietary, confidential information.

## **2. Statement of Facts**

This case involves the OFCCP's Compliance Evaluation of Google's Affirmative Action Plan for the Company's Mountain View, California facility. As part of this Compliance Evaluation, Google has been asked to provide and has provided hundreds if not thousands of documents containing sensitive information regarding its internal compensation structures and policies. As an example, on August 1, 2016, Google provided a supplemental production of documents per OFCCP request, containing policies concerning compensation levels, structures of compensation and other benefits, trainings on employee evaluations, bonus structures, trainings on reviews for managers that deal with compensation, and other sensitive material. In the correspondence accompanying this production, Google made the following statement:

"The information and documentation referenced in and transmitted with letter are submitted pursuant to the conditions of confidentiality that have attached to the Company's previous submissions and only are on loan to the OFCCP. If a request for disclosure is made by any person or entity pursuant to the Freedom of Information Act or otherwise, the Company must be advised in sufficient time to consider and challenge such disclosure. By accepting this information, the OFCCP agrees to these conditions. By providing the enclosed information to the OFCCP, the Company does not waive and expressly reserves any and all objections relating to the disclosure of information."

(Exhibit 110, Google's August 1, 2016 Letter to the OFCCP.) The OFCCP did not object to this characterization at any point during the compliance evaluation. This information is contained in

Google's Exhibit 110. Similarly, Plaintiff's Exhibits 216, 218, 219, 220, 221, 222, and 224<sup>1</sup> consist of documents that Google has maintained confidential, which are documents relating to employee compensation, evaluation similar to those in Defendant's Exhibit 110.

Google makes concerted efforts as a company to shield this type of information from disclosure. (Declaration of Frank Wagner, ¶ 7.) There are safeguards in place at Google to make sure the information is not disclosed publicly. (*Id.*) This includes requiring employees to sign confidentiality and non-disclosure agreements, password protecting documents, and maintaining secure document management systems. (*Id.*) Google takes pains to protect its information from disclosure, as competitors would derive value from knowing Google's systems and thought processes with regard to the evaluation and compensation of its employees. (*Id.*)

Google attempted to meet and confer to reach an agreement regarding a protective order with the OFCCP on April 5, 2017. (Declaration of Antonino Raimundo, ¶ 3.) Google contacted the OFCCP again on April 6, 2017 to determine whether it would join or oppose the motion. (*Id.*) The OFCCP has not indicated whether it would agree to a protective order which would seal Exhibit 110 and Plaintiff's Exhibits 216, 218, 219, 220, 221 and 222 from public record. (*Id.* ¶ 4.)

### 3. Legal Standard

The OFCCP Federal Contract Compliance Manual provides as follows:

**1A06 CONFIDENTIALITY OF INFORMATION** Under the regulations at 41 CFR 60-1.20(g), Public Access to Information, COs must treat information obtained during the compliance evaluation as confidential to the maximum extent the information is exempt from public disclosure under the Freedom of Information Act, 5 U.S.C. 552. This applies to confidential

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<sup>1</sup> OFCCP advised Google of its intention to include a new exhibit, Exhibit 224, at the hearing. OFCCP stated in correspondence with Google that Exhibit 224 consists of "Google's 2015 Affirmative Action Plan." (Raimundo Decl. ¶ 5.) As of the time of filing the instant motion, OFCCP has not sent Google a copy of this Exhibit. However, if it is the 2015 Affirmative Action Plan, Google seeks to have it sealed by way of this Motion.

information as well as sensitive information such as personnel records, medical information and salary data.

*See also* 41 C.F.R. § 60-1.20(g) (“It is the practice of OFCCP not to release data where the contractor is still in business” and if the contractor indicates that “the data are confidential and sensitive and that the release of data would subject the contractor to commercial harm.”). The Federal Compliance Manual addresses Administrative Enforcement Proceedings, such as the instant one, at 8M00. It states that “an ALJ conducts an administrative hearing on the Complaint under the procedures set forth in 41 C.F.R. Part 60-30.” Not surprisingly, the Manual does not state that a Contractor’s right to maintain the confidentiality of information provided during the compliance evaluation changes in any way for purposes of the Enforcement Proceeding. However, 41 C.F.R. § 30.4 provides that “[u]nless otherwise ordered for good cause by the Administrative Law Judge regarding specific papers and pleadings in a specific case, all such papers and pleadings are public documents.”

Therefore, the Administrative Law Judge (“ALJ”) is given the power to issue a protective order or seal records so that confidential information is not disclosed publicly. As set forth above, 41 C.F.R. § 60-30 governs OFCCP administrative proceedings. 41 C.F.R. § 60-30.4 provides that the ALJ presiding over the administrative proceeding may order protection of any material for good cause. 29 C.F.R. § 18 *et seq.* provides the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges. 29 C.F.R. § 18.31(e), which governs filings and exhibits, states that “[f]or good cause, the judge may order protection of material pursuant to §§ 18.85 and 18.52.” 29 C.F.R. § 18.85 states the following:

“On motion of any interested person or the judge’s own, the judge may limit the introduction of material into the record or issue orders to protect against undue

disclosure of privileged communications, or sensitive or classified matters. The judge may admit into the record a summary or extract that omits the privileged, sensitive or classified material.”

Thus, upon showing of good cause, the ALJ has the power to issue a protective order and to seal documents that are designated as “confidential” under the order.

**4. Good Cause Exists for the Protection of Google’s Proprietary Information by way of a Protective Order and Sealing the Documents from the Record.**

29 C.F.R. § 18.31 mirrors Federal Rules of Civil Procedure Rule 26(c) in requiring that a party must show “good cause” in order to protect its confidential information from disclosure. For good cause to exist, the party seeking protection bears the burden of showing specific prejudice or harm will result if no protective order is granted. *Phillips v. GMC*, 307 F.3d 1206, 1210-11 (9th Cir. 2002); *see also Beckman Indus., Inc. v. International Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992) (holding that broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test). If a court finds particularized harm will result from disclosure of information to the public, it then balances the public and private interests to decide whether a protective order is necessary. *See Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995).

In this case, Google has identified a narrow set of documents to be protected from public disclosure: documents consisting of Google’s policies, trainings and manuals regarding employee evaluation and compensation. Google will inevitably suffer harm, or at least the risk of harm, if these documents are disclosed to the public. (Declaration of Frank Wagner ¶¶ 8-9.) Google is an extremely multifaceted company, which is dedicated to recruiting and retaining top talent across an expansive set of fields. It is able to recruit and retain top talent due to its compensation and benefits structure. (*Id.*) Google employs hundreds of professionals who put

time and care into formulating these internal compensation structures that are unique to Google and make Google an attractive employer. (*Id.*) Moreover, Google has expended significant efforts towards preventing the disclosure of these documents. (*Id.* at ¶¶ 7-8.) The documents are only accessible through Google servers, and are password protected. (*Id.*) Employees are required to sign non-disclosure and confidentiality agreements regarding documents like the ones in question. (*Id.*)

Lastly, the information should be protected from disclosure from a policy perspective. The OFCCP is required per its own Manual to keep information gleaned in the compliance evaluation process confidential. Due to this, the OFCCP is provided more leeway in terms of obtaining documents containing private or otherwise confidential information. Contractors have a reasonable expectation that the documents will stay confidential. To negate that expectation simply for purposes of an administrative hearing would make what is otherwise a collaborative and non-combative process no different than litigation stemming from a civil lawsuit.

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**5. Conclusion**

Based on the foregoing, Google requests that the Court issue a Protective Order sealing Exhibits 110, 216, 218, 219, 220, 221, and 222 from public record.

Respectfully submitted,

Dated: April 6, 2017

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