

SBB  
4-7-17  
ML

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.

OALJ Case No. 2017-OFC-00004

OFCCP No. R00197955

RECEIVED

APR 13 2017

Office of Administrative Law Judges  
San Francisco, Ca

**PLAINTIFF'S OPPOSITION TO GOOGLE'S MOTION TO SEAL EXHIBITS**  
*Case Subject to Expedited Proceedings under 41 C.F.R. § 60-30.31*

In recent years, issues concerning pay equity within the tech industry have been at the forefront of the public's interest, both nationally and locally. Here, that significant public interest is compounded by the facts that Google has received millions in taxpayer funds and the government is a party. *See, e.g., EEOC v. Nat'l Children's Ctr.*, 98 F.3d 1406, 1410 (D.C. Cir. 1996) (noting the "public should be able to learn how the money it has contributed to a[n] . . . organization is being spent" and finding that "the fact that the government is a party to the case" weighed in favor of denying motion to seal). Given this strong public interest, not surprisingly, this case has garnered the attention of various legal and general media outlets.

Google's request to deny access to various exhibits in their entirety fails to override the public's significant interest. *First*, both controlling case law and OFCCP regulations governing enforcement proceedings presume that judicial records will be open to the public. *See, e.g., Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1096 (9th Cir. 2016) (noting that courts "start with a strong presumption in favor of access to court records") (citation omitted); 41

C.F.R. § 60-30.4 (providing that documents in OFCCP enforcement case “are public documents” unless good cause supports the contrary). Here, Google has failed to rebut this presumption and show with the requisite document-by-document specificity that good cause justifies its broad, untailed sealing requests.

*Second*, Google Vice President of Compensation Frank Wagner devoted virtually all of his time on the witness stand testifying in open court—in response to questions from Google’s counsel—about information contained in those exhibits. Understandably, courts routinely deny motions to seal where the information sought to be hidden from public view has already been disclosed publicly in open court. *See, e.g., CreAgri, Inc. v. Pinnaclife Inc.*, Case No.: 5:11–CV–06635–LHK, 2014 WL 27028, at \*2 (N.D. Cal. Jan. 2, 2014) (denying motion to seal where “terms of the agreement were discussed on the record in open court”); *Abaxis, Inc. v. Cepheid*, Case No. 10–CV–2840–LHK, 2012 WL 3255600, at \*3 (N.D. Cal. Aug. 8, 2012) (denying motion to seal with prejudice where “the purportedly confidential material has since been discussed in open court”); *Confederated Tribes of Siletz Indians of Or. v. Weyerhaeuser Co.*, 340 F. Supp. 2d 1118, 1124 (D. Or. 2003) (finding “little reason to seal” materials discussed in open court). For instance, consistent with what he told OFCCP investigators and in line with OFCCP’s pending requests, Mr. Wagner testified that:

- when setting pay, Google distinguishes between college and experienced hires;
- Google considers applicants’ existing salaries when setting starting pay and, depending on the circumstances, offers a higher starting salary at Google based on that applicant’s prior salary; and

- Google uses market reference points to set pay, and that it attempts to set starting salaries at 80% of that market target.<sup>1</sup>

Google cannot now, after opening the metaphorical barn door and letting its own horse out, protect information contained in the subject exhibits that Mr. Wagner testified to publicly.

*Finally* and relatedly, the Court's procedural rules require Google to "propose the fewest redactions possible that will protect the interest offered as the basis for the motion." 29 C.F.R. § 18.85(b)(1). Google has made no such proposal, let alone one that accounts for the information it has already disclosed (and, at the time it filed its motion last Thursday, undoubtedly had planned to disclose) to the public.

Google has failed to override the public's right to access, which is all the stronger based on Google's receipt of tax dollars. Particularly in light of Mr. Wagner's testimony, Google has failed to meet its burden to show—with the requisite particularity—good cause to seal the requested exhibits in their entirety. Google's overbroad motion to seal should be denied.

### ARGUMENT

As the Court is aware, Google filed and served its motion to seal Exhibits 110, 216, and 218-222 the night before the hearing. Having reviewed the materials, in good faith and in an effort to minimize the Court's burden in evaluating Google's sealing request, OFCCP withdraws Exhibits 221 and 222 and limits its proffer of Exhibit 218 to pages 15-17, 145-151, 158-160, 170-172, 196-222, and 236-247 of that document.<sup>2</sup> Thus, below, OFCCP addresses only Exhibits 110, 216, the relevant pages of 218, and Exhibits 219 and 220.

---

<sup>1</sup> OFCCP requested the transcript from Friday's hearing, but has been advised that it will not be available until Friday, April 14. So the Court can determine whether sealing is necessary in light of Mr. Wagner's public testimony, once OFCCP receives the transcript, the agency will file the relevant excerpts of Mr. Wagner's testimony promptly with the Court.

<sup>2</sup> At the next day of the hearing, OFCCP will submit a revised version of Exhibit 218, limited to these pages. Further, to assist the Court's review of documents, OFCCP will provide a paginated version of Exhibit 216.

Because Google fails to justify sealing the entirety of these voluminous documents, Google's request to seal them should be denied. As noted above, in front of the general public and members of the press, Google elicited from its Vice President of Compensation lengthy testimony about Google's compensation setting practices, including the "principles" Google purportedly applies through those practices. The same information is contained in Exhibits 110 and 216. For instance, the first three pages of Exhibit 216, which Google notes is also contained in Exhibit 110, address the principles Mr. Wagner discussed. Further, other portions of Exhibits 110 and 216 discuss market reference points that Mr. Wagner discussed at length in his testimony. Based on its own examination of Mr. Wagner at Friday's hearing, Google cannot now seek to protect this information. *See Bic*, 851 F.2d at 680-81.

Moreover, since last Friday's hearing, Google has made public statements regarding its pay practices, further diminishing any good cause to seal Exhibits 110 and 216 in their entirety. In an April 11, 2017 blog post referring to a "late 2016" analysis, which does not appear to concern the historical September 2015 salary data Google produced to OFCCP, Google comments that it considers "role, job level, job location" in setting pay and notes that "job family" is relevant to determining whether it pays its employees equitably. *See Ex. A* at 2-3. In addition to confirming the relevance of these factors to the ongoing compliance evaluation, the blog post further demonstrates that the entirety of Exhibits 110 and 216 should not be sealed.

Google's request to seal Exhibits 110 and 216 should be denied. At a minimum, Google should tailor its request narrowly and propose specific redactions, particularly in light of Mr. Wagner's public testimony and its public statements.

**B. OFCCP's Exhibit 218**

OFCCP's Exhibit 218 is a 55-page excerpt from a user guide for one of Google's human resources systems, which shows that much of what OFCCP requested is stored electronically. The system is third-party software, not proprietary to Google. *See* Ex. 218 at 247.

Google has not established good cause to seal the entirety of Exhibit 218, which simply explains how to use the human resources system, what information is contained in it, and which reports can be run from it. Indeed, Mr. Wagner's declaration never addresses Exhibit 218 specifically, lumping it with the other exhibits Google seeks to seal entirely. It is unapparent how the information contained in Exhibit 218, if disclosed, would cause Google to "lose some of its competitive edge with respect to peer employers," as Mr. Wagner claims. Wagner Decl. ¶ 9.

**C. OFCCP Exhibits 219 and 220**

OFCCP Exhibit 219 is a 15-page user guide for an employee-facing system Google uses to disclose compensation changes. OFCCP Exhibit 220 is a 34-page user guide for a manager-facing tool Google uses to make compensation decisions that contains employees' compensation history.

As with Google Exhibit 110 and OFCCP Exhibit 216, much of the information discussed contained in Exhibits 219 and 220 have already been the subject of Mr. Wagner's public testimony. Google, at the least, should narrowly tailor its sealing request of Exhibits 219 and 220 to be consistent with what was already presented publicly.

**III. OFCCP Regulations Providing That Materials Must Be Protected to the Fullest Extent Allowed under FOIA Do Not Govern Sealing Requests.**

Google selectively quotes 41 C.F.R. § 60-1.20(g),<sup>5</sup> suggesting it somehow controls the Court’s analysis as to whether Google has justified sealing by meeting its burden to show good cause and tailor its sealing request narrowly.<sup>6</sup> However, § 60-1.20(g) is plainly inapplicable. Under 41 C.F.R. § 60-1.26(b)(1), OFCCP is authorized to file an administrative complaint where, as here, access is denied, and 41 C.F.R. § 60-1.26(b)(2) expressly provides that in such proceedings, the procedural rules contained in 41 C.F.R. § 60-30 apply.

As such, this Court’s analysis is governed by the good cause analysis detailed above. As Google itself notes, the regulations governing OFCCP enforcement proceedings make clear that there is a presumption of public access, providing,

Unless 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.*

41 C.F.R. § 60-30.4(a) (emphasis added).

//  
//  
//  
//  
//  
//

---

<sup>5</sup> Google omits from its quotation of the regulation the reference to, consistent with FOIA, “the Department of Labor review process” to determine whether in fact data a contractor produces through a compliance evaluation is “confidential and sensitive and” whether “the release of data would subject the contractor to commercial harm.” 41 C.F.R. § 60-1.20(g).

<sup>6</sup> Google also cites a portion of the OFCCP Federal Contract Compliance Manual (“FCCM”), which simply repeats what § 60-1.20(g) provides. *See* Mot. at 3. In any event, Google cannot enforce the FCCM as it “does not establish substantive agency policy” and “does not create new legal rights or requirements.” FCCM at 1, *available at* [https://www.dol.gov/ofccp/regs/compliance/fccm/FCCM\\_FINAL\\_508c.pdf](https://www.dol.gov/ofccp/regs/compliance/fccm/FCCM_FINAL_508c.pdf).

**CONCLUSION**

Because it fails to show good cause to seal the requested exhibits in their entirety, Google's overbroad motion to seal should be denied. At a minimum, Google should be required to propose the requisite narrowly tailored redactions, consistent with Mr. Wagner's public testimony and the company's public statements.

Respectfully submitted,

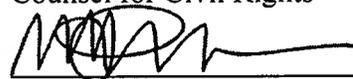
Date: April 13, 2017

NICHOLAS GEALE  
Acting Solicitor of Labor

JANET M. HEROLD  
Regional Solicitor

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

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 April 13, 2017, I served the attached **PLAINTIFF'S OPPOSITION TO GOOGLE'S MOTION TO SEAL and EXHIBIT A** on Defendant Google Inc. through serving its attorneys below via electronic mail, pursuant to the parties' agreement:

Camardella, Matthew J. (CamardeM@jacksonlewis.com);  
Duff, Daniel V., III (Daniel.Duff@jacksonlewis.com);  
Raimundo, Antonio (Antonio.Raimundo@jacksonlewis.com);  
Sanchez-Moran, Amelia (Amelia.Sanchez-Moran@Jacksonlewis.com)  
Suits, Eric (Eric.Suits@jacksonlewis.com)  
Sween, Lisa Barnett (Lisa.Sween@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 April 13, 2017.



---

MARC A. PILOTIN  
Trial Attorney



DIVERSITY

APR 11, 2017

# Our focus on pay equity



Eileen Naughton

VICE PRESIDENT, PEOPLE OPERATIONS

Pay equity is a huge issue, not just for Silicon Valley companies, but across every industry in every country.

It's very important to us that men and women who join Google in the same role are compensated on a level playing field, when they start and throughout their careers here.

That's why, in the hopes of encouraging a broader conversation around the pay gap - and how companies can fight it - we shared our top-level analysis publicly in 2016. Google conducts rigorous, annual analyses so that our pay practices remain aligned with our commitment to equal pay practices.



(OFCCP) accused us of not compensating women fairly. We were taken aback by this assertion, which came without any supporting data or methodology. The OFCCP representative claimed to have reached this conclusion even as the OFCCP is seeking thousands of employee records, including contact details of our employees, in addition to the hundreds of thousands of documents we've already produced in response to 18 different document requests.

The fact is that our annual analysis is extremely scientific and robust. It relies on the same confidence interval that is used in medical testing (>95%). And we have made the methodology available to other businesses who want to test their own compensation practices for equal pay.

### **So how does it work?**

In short, each year, we suggest an amount for every employee's new compensation (consisting of base salary, bonus and equity) based on role, job level, job location as well as current and recent performance ratings. This suggested amount is "blind" to gender; the analysts who calculate the suggested amounts do not have access to employees' gender data. An employee's manager has limited discretion to adjust the suggested amount, providing they cite a legitimate adjustment rationale.

Our pay equity model then looks at employees in the same job categories, and analyzes their compensation to confirm that the adjusted amount shows no statistically significant differences between men's and women's compensation.



The Keyword

Latest Stories

Product News

Topics

Menu



Choose job family (e.g. Level 4 Account Manager, Mountain View).



Compare suggested and adjusted compensation across genders (salary, bonus and equity).



Hold the data constant for performance ratings and other variables, and assess if there's any statistically significant difference between genders.



If women or men, as a group, are paid a statistically significantly lower amount, make adjustments to the affected group's compensation to bring it in line.

In late 2016, we performed our most recent analysis across 52 different, major job categories, and found no gender pay gap. Nevertheless, if individual employees are concerned, or think there are unique factors at play, or want a more individualized assessment, we dive deeper and make any appropriate corrections.

Our analysis gives us confidence that there is no gender pay gap at Google. In fact, we recently expanded the analysis to cover race in the US.

We hope to work with the OFCCP to resolve this issue, and to help in its mission to improve equal pay across federal contractors. And we look forward to demonstrating the robustness of Google's approach to equal pay.

POSTED IN: DIVERSITY