



August 23, 2017

HAND DELIVERED and FIRST CLASS MAIL

Paul Igasaki
Chair, Administrative Review Board
200 Constitution Ave, N.W.
Room S-5220
Washington, D.C. 20210

Re: *OFCCP v. Google, Inc.*,
ARB Case No. 17-059
ALJ Case No. 2017-OFC-004

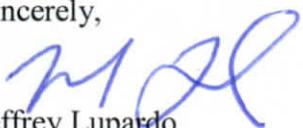
2017 AUG 23 P 4: 07

OFFICE OF THE CLERK OF
THE APPELLATE BOARDS
U.S. DEPT. OF LABOR

Dear Chairman Igasaki:

Enclosed for filing is Plaintiff OFCCP's *Exceptions to the Administrative Law Judge's July 31, 2017 Recommended Decision and Order* in the above-captioned matter. This document will be served today on those copied below via first class mail.

Sincerely,


Jeffrey Lupardo
Senior Attorney
Civil Rights and Labor-Management Division
U.S. Department of Labor
(202) 693-5759 (Telephone)
Lupardo.Jeffrey@dol.gov

Attachments

cc: Lisa Barnett Sween, Esq.
Amelia Sanchez-Moran, Esq.
Antonio Raimundo, Esq.
Matthew Camardella, Esq.
Daniel Duff, Esq.

UNITED STATES DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD

2017 AUG 23 P 4: 07

OFFICE OF THE SOLICITOR
THE APPELLATE BOARD
U.S. DEPT OF LABOR

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

Plaintiff,)

ARB Case No. 17-059

v.)

ALJ Case No. 2017-OFC-004

GOOGLE INC.,)

Defendant.)

**PLAINTIFF OFCCP'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S JULY 14, 2017
RECOMMENDED DECISION AND ORDER**

Respectfully submitted by:

NICHOLAS C. GEALE
Acting Solicitor of Labor

BEVERLY I. DANKOWITZ
Associate Solicitor

KEIR BICKERSTAFFE
Counsel for Interpretation and Advice



JEFFREY M. LUPARDO
Senior Attorney
U.S. Department of Labor
200 Constitution Avenue, NW
Room N-2474
Washington, D.C. 20210
(202) 693-5759 (Telephone)

Counsel for Plaintiff

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**PLAINTIFF OFCCP'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S JULY 14, 2017
RECOMMENDED DECISION AND ORDER**

The Office of Federal Contract Compliance Programs (“Plaintiff” or “OFCCP”), United States Department of Labor, through its undersigned counsel, respectfully submits the following Exceptions to Administrative Law Judge Steven B. Berlin’s July 14, 2017 Recommended Decision and Order (RD). Pursuant to the Administrative Review Board’s (ARB) July 28, 2017 Order regarding the parties’ stipulated briefing schedule, OFCCP timely submits these Exceptions by the August 23, 2017 filing deadline.¹ Judge Berlin’s RD misapplied well-settled Fourth Amendment legal standards applicable to administrative enforcement actions seeking production of documents or other information, leading him to deny portions of OFCCP’s requests for information. For the reasons discussed in detail below, OFCCP respectfully requests that the ARB apply the proper Fourth Amendment standard and order that Google fully comply with OFCCP’s information requests, which include: employee-level compensation data from 2014, full salary and job history information for those employees listed in the 2014 dataset, and names and contact information for employees listed in the compensation data request.

INTRODUCTION

This is an action to enforce requests for information, akin to an administrative subpoena – nothing more. The Supreme Court, as well as a multitude of lower courts,

¹ The ARB also issued an order on July 20, 2017 removing this matter from OFCCP’s Expedited Procedures. As such, the controlling regulations are found at 41 C.F.R. §§ 60-30.28, 30.30.

have long held that administrative subpoenas are subject to the Fourth Amendment, but the Fourth Amendment inquiry is narrow. The court is permitted to evaluate whether the request is “sufficiently limited in scope, relevant in purpose, and specific in direction so that compliance will not be unreasonably burdensome.” *Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 415 (1984) (reaffirming *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946)).

The controlling Fourth Amendment standard does not fluctuate. Regardless of the scope of the investigation, governing precedent mandates a narrow and limited judicial inquiry. The scope of the compliance evaluation at issue is atypical in that it involves Google’s Mountain View, California headquarters. As such, this evaluation requires that OFCCP consider and determine compliance as it relates to Google’s employment practices that affect more than 21,000 employees. But, the Fourth Amendment standards applicable to the government’s requests for information must not be manipulated by the relevant size or scope of a lawfully initiated investigation.

To this end, in Judge Berlin’s own words, “probable cause is not required for an administrative subpoena...[i]t is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite, and information sought is reasonably relevant.” RD at 20. Unfortunately, Judge Berlin failed to apply this well-settled standard and instead adopted a probable cause standard by finding that OFCCP is not entitled to documents absent proving it had previously “identif[ied] actual policies and practices that might cause the disparity, and then craft[ed] focused requests for information that bears on these identified potential causes.” RD at 38. Judge Berlin found that OFCCP’s requests were relevant to the investigation, but erroneously denied certain requests based

on: (1) unsupported (and largely irrelevant) burden arguments that Google raised, and (2) Judge Berlin's evaluation of the likelihood of success in the merits case that has neither been filed nor was before him for consideration.

As discussed in detail below, Judge Berlin's RD unlawfully heightens the applicable standard for evaluating the enforcement of an administrative subpoena. His erroneous legal findings will have a detrimental effect on OFCCP's (and other DOL enforcement agencies') abilities to effectively conduct investigations and bring enforcement actions. Judge Berlin's clear legal errors in applying the Fourth Amendment administrative subpoena standard must be reviewed by the ARB *de novo* and reversed.

STATEMENT OF THE CASE

OFCCP conducts compliance evaluations to determine if federal contractors "maintain[] nondiscriminatory hiring and employment practices." 41 C.F.R. § 60-1.20(a). During the hearing, OFCCP offered testimony that Google has been a federal contractor, subject to OFCCP's jurisdiction since at least 2007.² Following selection from OFCCP's neutral administrative plan (the Federal Contractor Selection System), on September 30, 2015, OFCCP sent Google's Mountain View, California headquarters the standard OMB-approved scheduling letter, which initiated the compliance evaluation at issue. *See*

² *See* Hearing Transcript ("Tr.") at 65:2-6 (Suhr testifying that OFCCP conducted compliance evaluations of Google in 2007, 2010, 2011, and 2012).

Publicly-available federal contract data posted on the General Service Administration's (GSA) website www.fpds.gov establishes that Google has held contracts of \$50,000 or more since at least 2006. *See* <https://www.fpds.gov/ezsearch/search.do?indexName=awardfull&templateName=1.4.4&s=FPDSNG.COM&q=google> (last visited August 17, 2017).

Exhibit (“Ex.”) 5.³ Per OFCCP’s governing regulations, a compliance evaluation entails “a comprehensive analysis and evaluation of a contractor’s employment practices.” Tr. at 33:19-21 (Wipper); *see also* 41 C.F.R. § 60-1.20(a)(1).

I. Initiation of the Compliance Evaluation and Preliminary Indicators

Because OFCCP sent the scheduling letter on September 30, 2015, the compliance evaluation at issue has a review period that spans from September 2013 through at least September 2015. Tr. at 35:15-36:3 (Wipper) (explaining OFCCP’s two-year timeframe for compliance evaluations and that review period may go beyond September 2015 if OFCCP identifies violations); *see also* Federal Contract Compliance Manual (“FCCM”) § 2L at 97. The scheduling letter requested that Google provide an initial set of “employee level compensation data as of September 1, 2015 (“2015 snapshot”) for all employees included in the scheduled establishment’s affirmative action program (“AAP”). Because Google’s headquarters is the subject of the current review, it encompasses the over 21,000 employees that Google included in its AAP. Tr. at 34:14-20, 38:15-18 (Wipper). The number of employees implicated in this evaluation distinguishes it from the “typical” OFCCP compliance evaluation of an individual contractor establishment. Indeed, OFCCP Regional Director Wipper testified that the Google compliance evaluation is one of the agency’s largest reviews. Tr. at 40:1-5 (Wipper).

Of particular relevance to this matter, during compliance evaluations, OFCCP evaluates contractors’ compensation practices based on the guidance in its Directive 307

³ Throughout this brief, Hearing Exhibits will be referenced as “Ex.” Hearing Exhibits numbered 1-16 are Joint Exhibits, those numbered 101-122 are Google Exhibits, and those numbered 201-223 are OFCCP Exhibits.

– a publicly-available document that describes for federal contractors and other interested parties how OFCCP evaluates compensation practices. Tr. at 36:5-13 (Wipper).⁴ Among other things, Directive 307 instructs OFCCP investigators that “when you’re investigating compensation, you should be looking at all employment practices that have an impact on pay.” Tr. at 36:18-20 (Wipper); *see* Directive 307 at 13. The Directive also provides that, in conducting an evaluation, the agency considers “the factors the Agency believes are relevant and legitimate and also the factors that the Contractors assert are relevant to pay practices and pay decisions.” Tr. at 36:22-25 (Wipper); *see* Directive 307 at 13. Further, Directive 307 provides that evaluations of compensation practices are done on a case-by-case basis, and that principles of Title VII of the Civil Rights Act guide OFCCP’s analysis. Tr. at 158:21-159:3 (Wipper); *see* Directive 307 at 2.

After receiving OFCCP’s initial scheduling letter, in November and December 2015, Google produced initial data for OFCCP’s review. *See* Ex. 103 and 104; *see also* TR. at 127:24-25 (Wipper). As mentioned above, this initial set of data included employee-level compensation data of all employees covered by the AAP as of September 30, 2015. *See* Ex. 103 and 104. OFCCP analyzed compensation data Google produced in 2015, and also interviewed human resource personnel and other managers. Tr. at 48:3-6 (Wipper); 67:7-10 (Suhr). OFCCP’s analysis of this initial data submission revealed preliminary indicators of widespread, systemic pay disparities adversely affecting women. *See* Tr. at 48:4-5; 132:1-7 (Wipper). These analyses led OFCCP to request

⁴ OFCCP Directive 307 was renamed Directive 2013-03. It is available at: https://www.dol.gov/ofccp/regs/compliance/directives/Dir307_508c.pdf.

additional information in June 2016. *See* Tr. at 40:14-24; 124:6-24; 128:6-11 (Wipper). Having observed these preliminary indicators of widespread compensation disparities, reasonably and consistent with Directive 307, OFCCP sought to determine potential causes for such disparities and also how long such disparities have persisted. *See* Tr. at 40:21-24; 41:7-10 (Wipper). As Regional Director Wipper testified, understanding the root of the observed disparities will enable OFCCP to determine if they are unlawful, and if so, propose to Google how to eliminate them. Tr. at 47:7-9 (Wipper)(“[W]e want to understand what’s causing the disparity as well as how we can propose to correct it.”).

II. OFCCP’s Subsequent Information Requests

After observing the preliminary indicators of widespread compensation disparity, and after obtaining further information related to how Google compensates its employees, on June 1, 2016, OFCCP requested the following categories of additional information:

1. The 2014 snapshot: A compensation database (or snapshot) as of September 1, 2014, for the employees Google identified in its AAP and produced as part of the September 1, 2015 compensation database/snapshot. The 2014 snapshot should also include the following categories of information: bonus earned, bonus period covered, campus hire or industry hire, competing offers, current compa ratio, current job code, current job family, current level, current manager, current organization, date of birth, department hired into, education equity adjustment, hiring manager, job history, locality, long-term incentive eligibility and grants, market reference point, market target, name, performance rating for past three (3) years, prior experience, prior salary, referral bonus, salary history, short-term incentive eligibility and grants, starting compa ratio, starting job code, starting job family, starting level, starting organization, starting position/title, starting salary, stock monetary value at award date, target bonus, and total cash compensation. Ex. 6 at 2.
2. Salary and Job History: The full job and salary history for the employees in Google’s September 1, 2015 compensation snapshot and employees included in the above-requested September 1, 2014 compensation snapshot. *Id.*
3. Contact Information: The names and contact information for the employees in Google’s September 1, 2015 snapshot and the employees included in the September 1, 2014 snapshot. *Id.*

Over the following months OFCCP and Google had several communications, but ultimately, Google refused to provide the requested information. In short, Google refused to provide the information for two reasons: (1) Google required that OFCCP first provide a “brief, but specific, description of the potential issues it had observed,”⁵ before it would produce the requested information; and (2) Google asserted that producing the subject categories of additional information would be unduly burdensome.

Google’s refusal to submit the requested information absent OFCCP’s “specific description” of the potential indicators is contrary to controlling Fourth Amendment law that governs such requests. The Fourth Amendment only allows for a narrow judicial inquiry into whether the request is “sufficiently limited in scope, relevant in purpose, and specific in direction so as not to be unreasonably burdensome.” *Lone Steer*, 464 U.S. at 415. Relevance “must be understood generously” to permit an agency to “access to virtually any material that might cast light on the” matter under investigation. *McLane Co. In. v. E.E.O.C.*, 137 S. Ct. 1159, 1169 (2017), citing *E.E.O.C. v. Shell Oil Co.*, 466 U.S. 54, 68-69 (1984). In essence, Google proposed (and Judge Berlin adopted) a heightened probable cause requirement, which is absolutely beyond the limits of the applicable Fourth Amendment inquiry. Further, Fourth Amendment review of administrative subpoenas must not focus on the motivation for issuance. *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950)(emphasis added). Google’s demand that OFCCP provide a specific description of the evidence (or indicators) justifying its requests for information is nothing more than an attack on the motivations driving the

⁵ Joint Ex. 12 at 4 (emphasis added); *see also* Joint Ex. 7 at 3-4.

relevant requests, which has no place in the evaluation of whether an administrative subpoena comports with the Fourth Amendment.

Regarding undue burden, the applicable legal standard is that the party opposing the administrative subpoena must establish that the requests “threaten to unduly disrupt or seriously hinder normal business operations.” *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977). Throughout these proceedings, Google’s “burden calculation” has remained an undefined, moving target. At the outset, Google asserted that the information production would require “over 154,000 hours” of work at a cost of more than “1.5 million dollars.” Joint Ex. 9 at 5. In a dramatic shift, at the hearing, a Google executive testified that the information collection related to OFCCP’s requests would only require approximately 400-500 hours of work at a cost of approximately \$100,000. Tr. at 276:18-277:14 (Zrnhal). Further, at trial Google merely presented barebones totals of “hours” and “overall cost” without providing any itemization establishing how it arrived at its burden calculation. Google has never tied its vague and shifting descriptions of the resources it would take to comply with OFCCP’s requests to the applicable legal standard. Finally, it is worth noting that Google’s failure to do so is not surprising; given Google’s size, resources, and sophistication, any such argument would strain credulity.

JUDGE BERLIN’S RECOMMENDED DECISION

Following a two-day hearing, Judge Berlin ordered Google to produce a subset of OFCCP’s three requests for information, fully listed above at p. 6.⁶ However, Judge

⁶ Regarding the *2014 snapshot*, Judge Berlin held that Google need not include the following categories of information: department hired into, job history, salary history, starting comp-ratio, starting job code, starting job family, starting level, starting organization, starting salary, employee date of birth, and locality information. RD at 29. Regarding *employee contact information*, Judge Berlin held that Google initially must provide contact information for 5,000 employees, and that OFCCP may subsequently obtain contact information for an additional 3,000 employees. RD at 32-33. Regarding *salary and job history*, Judge

Berlin also held that portions of OFCCP's requests failed the Fourth Amendment test the Supreme Court formulated for administrative subpoenas, which courts have applied to OFCCP's requests in compliance evaluations. RD at 20-21.⁷ That analysis requires courts to consider, as pertinent here, the relevance of the items requested and the burden of the responding party to produce them. *See* RD at 20-21. However, when evaluating relevance and burden, Judge Berlin applied erroneous legal standards.

Despite correctly acknowledging that relevance must be generously construed, Judge Berlin evaluated relevance through a new, narrow analysis that neither party advocated. *See* RD at 24-25. Noting that the compliance evaluation is not confined by a "pending charge or complaint," Judge Berlin acknowledged that the agency's investigation was bounded only by the non-discrimination provisions of Executive Order 11246, which resulted in "an investigation in which a vast amount of information could be relevant." *Id.* at 25. Although the regulatory framework compels this result, Judge Berlin nonetheless found it unacceptable. To address his concerns, without citing any case law in support, he formulated a more restrictive relevance test that required OFCCP to: (1) "identify specific areas that are relevant to its investigation" and (2) determine

Berlin denied this request in total; not requiring Google to produce any of the requested salary and job history. RD at 32 and 42.

⁷ *See United Space Alliance LLC v. Solis*, 824 F. Supp. 2d 68, 92-93 (D.D.C. 2011)(OFCCP's requests for information are akin to administrative subpoenas). Further, the RD makes clear that the "parties agree that OFCCP's current request is akin to an administrative subpoena...[and] for an administrative subpoena, the government meets Fourth Amendment demands by showing only reasonableness." RD at 20-21, n.67.

whether, in the context of those identified areas, the information requests are relevant. *Id.* at 26.⁸

Applying this unsupported Fourth Amendment framework, Judge Berlin narrowed the scope of OFCCP's compliance evaluation to two specific areas related to Google's compensation practices: (1) the factors Google identified as being relevant to its compensation decisions, and (2) a potential "theory of causation" that explains the pay disparities the agency observed. RD at 26. In addition to this improper narrowing of the scope of OFCCP's requests for relevant information, Judge Berlin's analysis of burden in the context of administrative subpoenas is also flawed. Regarding burden, Judge Berlin dismissed dozens of prior, related decisions, which require the commonly applied test for evaluating burden based on whether "compliance threatens to unduly disrupt or seriously hinder normal operations of a business." *FTC v. Texaco, Inc.*, 555 F.2d at 882. Applying a broader, open-ended test focused on a "balancing of hardships and benefits"⁹ to determine whether the information requests are overly burdensome, Judge Berlin limited OFCCP's requests or disallowed them entirely.

Judge Berlin disallowed requests he found to have no relation to what Google claimed were the factors it used to make compensation decisions. *See* RD at 28-29. In doing so, and despite citing Directive 307, he disregarded the Directive's charge that OFCCP consider not only the "relevant factors offered by the contractor," but also "other

⁸ Although neither party presented this argument, Judge Berlin based this restrictive relevance analysis on OFCCP Directive 307, which outlines OFCCP's investigative procedures for reviewing a contractor's compensation system. RD at 26. Directive 307 does not address what is relevant to OFCCP's investigation for purposes of evaluating an administrative subpoena, and certainly does not supersede well-settled Supreme Court case law in this specific area of Fourth Amendment jurisprudence.

⁹ *E.E.O.C. v. Royal Caribbean*, 771 F.3d 757, 760-61 (11th Cir. 2014).

legitimate factors” that may explain pay. *See* Directive 307. For example, Judge Berlin disregarded the agency’s explanation for requesting several factors like date of birth, which OFCCP requested as “a proxy for experience.” Tr. at 52:18-19.¹⁰

Judge Berlin also disallowed OFCCP’s requests for employees’ job and salary history at Google, which he evaluated in the context of what he defined to be OFCCP’s “theory of causation” targeting “Google’s practice of negotiating starting salaries.” RD at 33. Judge Berlin’s findings related to the “theory of causation” essentially amounts to his weighing-in on a merits case that is not before him and bears no relevance to the requisite legal analysis for enforcing an administrative subpoena. As discussed below, Judge Berlin repeatedly – and erroneously – evaluates OFCCP’s requests in the context of a disparate impact claim that OFCCP has neither alleged nor filed.

In fact, as established through Regional Director Wipper’s testimony, OFCCP requested job and salary history to evaluate **whether** Google engaged in disparate impact discrimination and, if so, what practice caused the observed pay disparities. Tr. at 47:7-9 (explaining that, if OFCCP were to pursue a disparate impact claim, “we want to understand what’s causing the disparit[ies]”). Per Directive 307’s guidance, OFCCP was seeking “other legitimate factors” that may explain the observed pay disparities. OFCCP did not commit to any particular legal theory of discrimination. The requests for job and salary history reveal that the agency was attempting to conduct a thorough investigation

¹⁰ The RD goes so far as to issue an advisory opinion attempting to prevent OFCCP in the future from requesting information such as place of birth, citizenship, or visa status which was not before the Court and was not briefed by either party. While the conclusion reached is inaccurate, *Koehler v. Infosys Techs. Ltd. Inc.*, 107 F. Supp. 3d 940, 948–49 (E.D. Wis. 2015) (rejecting claim by employer that national origin case cannot relate to a misuse of visa programs), OFCCP construes this aspect of Judge Berlin’s ruling as dicta as it was outside the scope of the proceedings.

and was performing its due diligence in evaluating all potential factors that may be driving the observed pay disparities.

Ultimately, Judge Berlin ordered Google to produce (1) a limited 2014 Snapshot, eliminating data on several factors OFCCP requested and (2) contact information for up to 8,000 employees of OFCCP's choosing. RD at 41-42. He denied without prejudice OFCCP's request for employees' job and salary history, requiring OFCCP first "to engage with Google in meaningful, good faith conciliation . . . , including by showing why the information sought is reasonable, relevant, focused, and not unduly burdensome." *Id.* at 42.¹¹

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to review exceptions to an ALJ's RD and is charged with the authority to issue the Department's final decision in cases arising under E.O. 11246, Section 503 of the Rehabilitation Act of 1973 (Section 503), and the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA).¹² The ARB holds, consistent with the Administrative Procedure Act, that its review of ALJ RDs is *de novo*. *OFCCP v. Bank of America*, 2016 WL 2892921, at *5, ARB Case 13-099 (ARB Apr. 21, 2016); *OFCCP v. Bank of America*, 2009 WL 3165855, at *4, ARB Case 07-090 (ARB Sept. 30, 2009); *OFCCP v. Greenwood Mills, Inc.*, 2002 WL 31932547, at *3, ARB Case 00-044, 01-89 (ARB Dec. 20, 2002); *OFCCP v. Keebler Co.*, 1999 WL 35580619, at *17, ARB

¹¹ Judge Berlin recommended good faith conciliation. Since the RD was issued, the parties have been in communication, but have not reached a settlement because of our respective positions related to the legal requirements of the Fourth Amendment in the context of administrative subpoena enforcement actions.

¹² Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibilities to the Administrative Review Board), 77 Fed. Reg. 69378 (Nov. 16, 2002); *see also* 41 C.F.R. §§ 60-30.28, 60-30.30, 60-300.65(b)(1), 60-741.65(b)(1).

Case 97-127 (ARB Dec. 21, 1999). The Supreme Court has held that *de novo* review requires that the reviewing court accord no deference to the prior resolution on appeal. See *U.S. v. First City Nat. Bank of Houston*, 386 U.S. 361, 368 (1967); *U.S. v. Raddatz*, 447 U.S. 667, 690 (1980)(dissent)(“*de novo* has an accepted meaning in law. It means an independent determination of a controversy that accords no deference to any prior resolution of the same controversy.”).

STATUTORY AUTHORITY AND REGULATORY FRAMEWORK

Section 201 of Executive Order 11246 states, “The Secretary of Labor shall be responsible for the administration and enforcement of Parts II and III of this Order. The Secretary shall adopt such rules and regulations and issue such orders as are deemed necessary and appropriate to achieve the purposes of Parts II and III of this Order.”

Section 205 of the Executive Order provides that the Secretary of Labor shall be responsible for “securing compliance by all Government contractors and subcontractors with this Order and any implementing rules or regulations.”¹³

Pursuant to the Executive Order, the Secretary has promulgated regulations at 41 C.F.R. Parts 60-1 through 60-50. It is well established that Executive Order 11246 and its implementing regulations have the force and effect of law, and thus, are entitled to significant deference.¹⁴ Similarly, Congress has empowered the Secretary to ensure

¹³ The Secretary of Labor delegated to the Director of OFCCP the authority for carrying out the Secretary’s responsibilities under the Executive Order. See Secretary’s Order 7-2009; 74 Fed. Reg. 58834 (Nov. 13, 2009).

¹⁴ See *Liberty Mutual Insurance Co. v. Friedman*, 639 F.2d 164, 170 (4th Cir. 1981); *United States v. Mississippi Power and Light Co.*, 638 F.2d 899, 905 (5th Cir. 1981); *Legal Aid Society v. Brennan*, 608 F.2d 1319, 1330 n.14 (9th Cir. 1979); *Northwest Constr. Co. v. Romney*, 485 F.2d 752 (D.C. Cir. 1973); *Contractor’s Assn v. Secretary of Labor*, 442 F.2d 159, 166-171 (3d Cir. 1971); *Uniroyal Inc. v. Marshall*, 482 F.Supp. 364, 368 (D.D.C. 1979); *Beverly Enterp. v. Herman*, 130 F. Supp. 2d, 1, 9 n.4 (D.D.C. 2000).

affirmative action and non-discrimination with respect to employment of certain categories of veterans and individuals with disabilities under VEVRAA and Section 503. *See* 38 U.S.C. § 4212(b); 29 U.S.C. § 793(b). Regulations similar to the Executive Order regulations have been promulgated under VEVRAA at 41 C.F.R. Part 60-300 and under Section 503 at 41 C.F.R Part 60-741.

As the regulations state, their purpose is to achieve the aims of Parts II, III, and IV of Executive Order 11246. *See* 41 C.F.R. § 60-1.1. Specifically, the Executive Order regulations require that contractors “not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin ... [and] take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin.” 41 C.F.R. § 60-1.4(a)(1). The VEVRAA regulations provide that government contractors and subcontractors are “prohibit[ed] [from] discriminated against protected veterans and requires that contractors and subcontractors take affirmative action to employ and advance in employment qualified covered veterans.” 41 C.F.R. § 60-300.1(a). The Section 503 regulations provide that government contractors and subcontractors are “prohibit[ed] [from] discrimination against individuals with disabilities and requires Government contractors and subcontractors to take affirmative action to employ and advance in employment qualified individuals with disabilities.” 41 C.F.R. § 60-741.1(a).

In addition, the Department’s regulations require federal contractors and subcontractors, as defined in 41 C.F.R. § 60-1.3, with 50 or more employees and a covered contract of \$50,000 or more, to develop written AAPs for each establishment,

within 120 days from the commencement of the contract. 41 C.F.R. § 60-2.1(b) and (c).¹⁵ The regulations under Executive Order, Section 503, and VEVRAA, in this respect, are essentially the same except for the threshold amounts for AAP coverage. *See, e.g.*, 41 C.F.R. §§ 60-2.1(b)(1) and (2); 60-300.40(a) and (b); 60-741.40(a) and (b). Once coverage is established, the obligation to comply with the Executive Order “does not turn on whether, as applied to a particular contractor, the contractor’s government derived revenues exceed costs associated with compliance. Cost alone does not make application of a law unconstitutional.” *OFCCP v. Coldwell Banker*, No. 78-OFCCP -12, 1987 WL774229, at *6 (U.S.D.O.L. Sec’y Aug. 14, 1987).¹⁶

One of the most critical features of OFCCP’s statutory and regulatory framework relates to its authority to access contractors’ records to evaluate compliance with the non-discrimination and affirmative action requirements. The “access to records” authority is found throughout these implementing regulations. *See* 41 C.F.R. §§ 60-1.4(a)(5), 60-1.43 (Executive Order); 60-300.81 (VEVRAA); and 60-741.81 (Section 503). The Executive

¹⁵ As in the Executive Order regulations, Section 503 and VEVRAA both require that a covered contractor develop a written AAP within 120 days from the commencement of the contract. *See* 41 C.F.R. § 60-741.40(b) and 41 C.F.R. § 60-300.40(b).

¹⁶ In his Order Denying Summary Judgment and again in footnote 97 of the RD, Judge Berlin’s burden analysis violated the Secretary’s order in *Coldwell* by considering the amount Google received based on one contract. Moreover, the RD erroneously suggests that the \$600,000 was the only amount received during the review period, despite Google’s stipulation that it received approximately \$30 million as a federal subcontractor and two federal contracts that were in the record expressly showing that Google was awarded subcontracts worth over \$3,000,000. *See* Ex. 202 at 4-5 (subcontract providing estimate of \$2.5 million for Google); Ex. 203 (subcontract estimate of \$2.2 million for Google). Moreover, the RD incorrectly states that “there is no evidence of Google’s being a government contractor or subcontractor after sometime in 2012 until it was awarded the AIMS contract on June 2, 2014.” RD at 8, fn. 44. OFCCP submitted significant evidence establishing the contrary which the court simply ignores. *See* Ex. 206 (report stating that Google was subcontractor for a 3-year, \$11.5 million dollar federal contract beginning in 2011); and Ex. 209 (2012 report stating that Google awarded seven-year federal contract valued at \$34.9 million). *See also* footnote 2, p. 3 *supra* (publicly-available government contract data on GSA’s website, www.fpds.gov, confirms Google’s status as a covered federal contractor since at least 2006).

Order requires that contracts with the federal government contain the following access requirement:

The contractor will furnish all information and reports required by Executive Order 11246...and by the rules, regulations, and orders of the Secretary of Labor...and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

41 C.F.R. § 60-1.4(a)(5); *see also* 41 C.F.R. § 60-1.43.

ARGUMENT

I. **The Recommended Decision Recognized that the Fourth Amendment Administrative Subpoena Standard Controls, but Misapplied that Standard.**

OFCCP's challenges to Judge Berlin's RD are grounded in his fundamental misunderstanding and misapplication of the Fourth Amendment legal standard that governs administrative subpoenas. To thoroughly address the numerous errors that repeat throughout Judge Berlin's RD, and because this Court reviews his RD *de novo*, OFCCP now provides a full discussion of the Fourth Amendment legal framework within which Judge Berlin should have analyzed the matter.

Administrative warrants and subpoenas must both comport with the Fourth Amendment, but a lower standard applies for subpoenas. The touchstone of the Fourth Amendment is "that the disclosure sought shall not be unreasonable." *Oklahoma Press Publishing Co.*, 327 U.S. at 208. The protections necessary to make a search reasonable vary according to the context: a higher level of protection is required for more intrusive government inspections. *Camara v. Mun. Ct.*, 387 U.S. 523, 530-31 (1967).

Accordingly, the vehicle through which OFCCP seeks to conduct its compliance

evaluation (document request vs. on-site review) under 41 C.F.R. § 60-1.20(a) will determine the Fourth Amendment protection that a contractor is afforded.

Courts, as well as the parties in this matter, recognize that OFCCP's requests for off-site production of documents and other information are akin to administrative subpoenas. *United Space Alliance LLC v. Solis*, 824 F. Supp. 2d 68, 92-93 (D.D.C. 2011).¹⁷ The less stringent Fourth Amendment standard used for determining the enforceability of an administrative subpoena is set forth in *Donovan v. Lone Steer*, 464 U.S. 408 (1984) (reaffirming *Oklahoma Press*). Under *Lone Steer*, "when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in direction so that compliance will not be unreasonably burdensome." 464 U.S. at 415, citing, *See v. City of Seattle*, 387 U.S. 541, 544 (1967). It is notable that in two OFCCP cases decided before *Lone Steer* established the lower standard for subpoenaed documents, the courts still held that as a matter of law, "searches conducted pursuant to E.O. 11246...are properly limited in scope." *First Alabama Bank of Montgomery v. Donovan*, 692 F.2d 714, 721 (11th Cir. 1982), citing *United States v. Miss. Power & Light Co.*, 638 F.2d 899, 908 (5th Cir. 1981). The same must be true under the narrower Fourth Amendment judicial inquiry established by *Lone Steer* and its progeny.

In *United Space*, which also involved an OFCCP request for information, the court noted that the *Lone Steer/Oklahoma Press* line of cases "hold administrative subpoenas to a considerably lower standard than administrative warrants – a standard that

¹⁷ The "parties agree that OFCCP's current request is akin to an administrative subpoena...[and] for an administrative subpoena, the government meets Fourth Amendment demands by showing only reasonableness." RD at 20-21, n.67.

notably focuses on the breadth of the subpoena rather than the motivation for its issuance.” *United Space*, 824 F. Supp. 2d at 91, citing, *Morton Salt Co.*, 338 U.S. at 652 (“Even if one were to regard the request for information...as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest.”).¹⁸ This line of cases, however, “in no way leaves an employer defenseless against an unreasonably burdensome administrative subpoena requiring the production of documents.” *United Space*, 824 F. Supp. 2d at 91-92, citing, *Lone Steer*, 464 U.S. at 415. Rather, just as has occurred in this matter, the employer may question the reasonableness of the subpoena before suffering any penalties for refusing to comply. *Id.*¹⁹

Unfortunately, in this case, Judge Berlin’s RD reaches far beyond the controlling legal standard, improperly elevating both burden and relevance inquiries for administrative subpoena enforcement matters. In fact, Judge Berlin elevates the legal standard to the point of requiring that the government present probable cause justifying its requests. Judge Berlin considered the agency’s motivations for requesting the

¹⁸ Throughout his RD, Judge Berlin commits the legal error of reviewing each of OFCCP’s information requests in the context of what motivated the request and whether there were adequate grounds (or probable cause) to make such requests. Judge Berlin’s inquiries into the agency’s motivations and evaluations of the merits of agency’s rationale for making such information requests squarely contradicts 70 years of Supreme Court precedent. (see *Oklahoma Press* decided in 1946 and *Morton Salt* decided in 1950).

¹⁹ Because OFCCP’s requests in this matter clearly meet the test for administrative subpoena’s, recourse to other defects in Google’s Fourth Amendment defense are not necessary to decide this case. However, OFCCP notes that the Supreme Court and numerous cases establish a waiver of Fourth Amendment rights where, as the contractor did here, a person or entity agrees to provide specific information to the government in exchange for a benefit. See e.g., *Zap v. United States*, 328 U.S. 624, 628 (1946) (“[W]hen petitioner, in order to obtain the government’s business, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts.”), vacated on other grounds, 330 U.S. 800 (1947); see also *United States v. Schleining*, 181 F. Supp. 3d 531, 537 (N.D. Ill. 2015) (holding government contractor “to the terms of a contract in which it voluntarily relinquished Fourth Amendment rights in exchange for a valuable business opportunity”).

information as well as the merits of the potential claim he believed OFCCP may bring, despite a string of legal precedent establishing that such a merits-based analysis is “simply irrelevant to the inquiry whether [an agency] could issue administrative subpoenas that might uncover evidence for use in a later lawsuit.” *E.E.O.C. v. Karuk Tribe Housing Auth.*, 260 F.3d 1071, 1076 (9th Cir. 2001); *see also id.* at 1076-77 (“[A] party may not avoid an administrative subpoena on the ground that it has a valid defense to a potential subsequent lawsuit.”). His instruction regarding how the agency should conduct its investigation and should establish certain predicate facts first was also contrary to long-standing Supreme Court precedent that such judicial intervention is impermissible. *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943)(in administrative subpoena action, “District Court had no authority to control [the Secretary’s] procedure or to condition enforcement of her subpoenas upon her first reaching and announcing a decision on some of the issues in her administrative proceeding”). As the Ninth Circuit held in *McLane Co, Inc. v. E.E.O.C.*, “[t]he governing standard is not necessity; it is relevance. If the EEOC establishes that the evidence it seeks is relevant to the charge under investigation, we have no warrant to decide whether the EEOC could conduct the investigation just as well without it.” 2017 WL 2261015, at *2 (9th Cir. 2017). Accordingly, this Court must evaluate OFCCP’s requests under the limited, and well-established, “relevance” framework – *i.e.*, does this information cast light on Google’s compensation practices – not the “needs-based” framework that Google proposed throughout the proceedings and that Judge Berlin ultimately applied.

Judge Berlin’s RD initially recites the controlling legal standard applicable to enforcement of administrative subpoenas, but he promptly departs from the bedrock

Fourth Amendment principles, providing analyses and legal conclusions squarely contradicting those established principles. As a demonstration of the internal inconsistency and flawed nature of Judge Berlin's analysis and findings, it is notable that although Judge Berlin improperly heightened Fourth Amendment administrative subpoena standard, he recognized that "OFCCP must meet Fourth Amendment standards for an administrative subpoena," and specifically held that "probable cause is not required for an administrative subpoena." RD at 20. Relying upon the long line of cases discussed above, Judge Berlin stated that "[i]t is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite, and information sought is reasonably relevant." *Id.* Further, the RD recognized that Fourth Amendment precedent requires that "the scope of judicial review in an administrative subpoena enforcement proceeding is 'quite narrow.'" RD at 21, citing *E.E.O.C. v. Children's Hospital Med. Ctr. of N. Cal.*, 719 F.2d 1426, 1428 (9th Cir. 1983)(*en banc*). Yet, Judge Berlin ultimately institutes a probable cause standard, finding that OFCCP is not entitled to documents absent proving it had previously "identif[ied] actual policies and practices that might cause the disparity, and then craft[ed] focused requests for information that bears on these identified potential causes." OFCCP's three requests seek information relevant to the agency's ability to determine compliance with E.O. 11246 during the review period. These requests are appropriately limited in scope. Judge Berlin's inappropriate (and unsupported) heightening of the controlling Fourth Amendment standard and opining on the merits of OFCCP's potential systemic case that was not before him both constitute reversible legal error.

A. *The Recommended Decision Fails to Apply the Correct “Undue Burden” Analysis under Fourth Amendment Administrative Subpoena Precedent*

Regarding relative burdens, Judge Berlin observed that “[t]he government bears the initial burden to show that these criteria²⁰ have been met, although the burden to make a *prima facie* case is minimal. Once the government has made a *prima facie* case, the burden going forward shifts to the party opposing the subpoena.” RD at 21, citing *U.S. v. Transocean Deepwater Drilling, Inc.*, 767 F.3d 485, 489 (5th Cir. 2014). For purposes of the Fourth Amendment, an administrative subpoena is unduly burdensome only if compliance with the subpoena “threatens to unduly disrupt or seriously hinder normal operations of a business.” *Texaco, Inc.*, 555 F.2d at 882. The support for OFCCP’s position – that Google must establish that compliance with the request would unduly disrupt or seriously hinder normal business operations – is overwhelming.²¹

²⁰ In the RD, “these criteria” refer to the *Oklahoma Press/Lone Steer* reasonableness inquiry – *i.e.*, is the request “sufficiently limited in scope, relevant in purpose, and specific in direction so that compliance will not be unreasonable.” RD at 21, citing *United Space*, 824 F. Supp. 2d at 93.

²¹ Courts apply this standard in a majority of the Federal Circuits. In addition to the D.C. Circuit, the courts of appeal for the Second, Fourth, Fifth, Eighth, and Tenth Circuits have adopted this formulation or a similar standard. *See N.L.R.B. v. Am. Med. Response*, 438 F.3d 188, 193 (2d Cir. 2006)(noting “courts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business”)(citation omitted); *E.E.O.C. v. Randstad*, 685 F.3d 433, 438 (4th Cir. 2012)(“The burden of proving that an administrative subpoena is unduly burdensome is not easily met. . . . The party subject to the subpoena must show that producing the documents would seriously disrupt its normal business operations.”)(citation omitted); *United States v. Chevron U.S.A., Inc.*, 186 F.3d 644, 649 (5th Cir. 1999)(“[A] subpoena is not unreasonably burdensome unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business.”); *United States v. Whispering Oaks Residential Care Facility, LLC*, 673 F.3d 813, 819 (8th Cir. 2012)(holding that a subpoena was not unduly burdensome because it was not shown that compliance “will interfere with care at the facility”); *E.E.O.C. v. Citicorp Diners Club, Inc.*, 985 F.2d 1036, 1040 (10th Cir. 1993)(“A court will not excuse compliance with a subpoena for relevant information simply upon the cry of ‘unduly burdensome.’ Rather, the employer must show that compliance would unduly disrupt and seriously hinder normal operations of the business.”). District courts in the First, Third, and Ninth Circuits have also applied this standard. *See, e.g., N.L.R.B. v. Champagne Drywall, Inc.*, 502 F. Supp. 2d 179, 182 (D. Mass. 2007)(“Not only does Champagne Drywall not detail how compliance would hinder its business, but that prospect seems unlikely.”); *U.S. ex rel. Office of Inspector Gen. v. Philadelphia Hous. Auth.*, No. 10-0205, 2011 WL 382765, at *3 (E.D. Pa. Feb. 4, 2011)(A demand that is “unreasonably broad or burdensome” has been defined as a demand with which compliance threatens to unduly disrupt or seriously hinder normal operations of a business.)(citation omitted); *U.S. E.E.O.C. v. Aaron Bros., Inc.*, 620 F. Supp. 2d 1102, 1106 (C.D. Cal. 2009)(“Compliance

Judge Berlin’s opinion ignores dozens of cases that thoroughly examine the “undue burden” showing that the party opposing the subpoena must present in order to rebut the government’s *prima facie* case; instead, adopting the reasoning of one outlier decision, *E.E.O.C. v. Royal Caribbean*, 771 F.3d 757 (11th Cir. 2014), which is at odds with the six other Courts of Appeals that have considered the issue. Beyond the disregard for the overwhelming weight of the case law, Judge Berlin’s reliance upon *Royal Caribbean* is misplaced because the case is so clearly distinguishable from the circumstances here. *Royal Caribbean* involved a single individual’s narrow charge of discrimination, and the court’s rationale for applying “a balancing of hardships and benefits” rested upon the fact “that the disputed portions of the subpoena are aimed at discovering members of a potential class of employees or applicants who suffered from a pattern or practice of discrimination, rather than fleshing out [the complainant’s] charge.” *Royal Caribbean*, 771 F.3d at 760-61, 763.

In contrast, OFCCP’s compliance evaluation process entails a facility-wide evaluation of a contractor’s employment practices, not tied to a narrow charge of discrimination. The compliance evaluation is OFCCP’s tool by which it determines whether federal contractors are complying with the nondiscrimination and affirmative action requirements that apply by virtue of their decision to enter into business with the federal government. To make this determination and fulfill its agency mission, OFCCP must review the federal contractor’s employment practices – which inevitably requires access to vast amounts of employer and employee information.

with a subpoena is excused if it threatens to unduly disrupt or seriously hinder normal operations of a business.”)(citation omitted).

Beyond the factual and procedural distinctions, *Royal Caribbean* relies on *E.E.O.C. v. Packard Elec. Div., Gen. Motors Corp.*, 569 F.2d 315 (5th Cir. 1978), which is a decision that contradicts the Federal Rules of Civil Procedure (FRCP). That is, in determining that the relevant burden may be evaluated based on a balancing test, both *Royal Caribbean* and *Packard* cite FRCP 45(c) to suggest that such a balancing test exists. *See Packard*, 569 F.2d at 318. This rationale, however, directly contradicts the advisory committee comments to FRCP 45, which provide that the “rule does not apply to the enforcement of subpoenas issued by administrative officers and commissions pursuant to statutory authority.” (emphasis added). If any such balancing test exists, it must be conducted in the context of whether the request threatens to unduly disrupt or seriously hinder normal operations of a business. *See FTC v. Jim Walter Corp.*, 651 F.2d 251, 258 (5th Cir. 1981)(notably decided by the Fifth Circuit three years after *Packard*).

At no point during the proceedings did Google establish that compliance with OFCCP’s information requests would threaten to unduly disrupt or seriously hinder normal business operations. As mentioned above, it is unclear that Google has a sound calculation of the burden associated with these requests – in June 2016 Google’s counsel asserted that production of the requested information would require “over 154,000 hours” of work at a cost of more than “1.5 million dollars,”²² yet, at the hearing, Google’s Senior Legal Operations Manager, Kristin Zrmhal, testified that Google’s information collection would take between 400-500 hours of work at a cost of approximately \$100,000.²³

²² Joint Ex. 9 (6/30/16 Ltr from Attorney Camardella).

²³ Tr. at 276:18-277:14.

Regardless of the actual cost associated with Google's compliance with OFCCP's information requests, Google has never produced any itemization or specifics related to such compliance. Google has presented totals without sufficient explanation, let alone a demonstration of how such burden would unduly disrupt or seriously hinder normal business operations of an entity that had a *net* operating profit over \$27 billion in 2016. Google is a highly-sophisticated, multi-billion dollar company with expansive expertise in dealing with big data.²⁴ To find that OFCCP's pending information requests would have any meaningful impact (let alone unduly disrupt or seriously hinder) Google's business operations strains credulity.

Judge Berlin's legal determinations of "undue burden" in the administrative subpoena enforcement context is fundamentally flawed because he fails to apply the correct standard. Further, Google could not concretely articulate the burden/cost of compliance with OFCCP's requests. Because he applied the wrong legal standard, Judge Berlin's erroneous rulings regarding burden as justification for limiting OFCCP's information requests must be reversed.

B. *The Recommended Decision Fails to Apply the Correct "Relevance" Analysis under Fourth Amendment Administrative Subpoena Enforcement Precedent*

Relevance in the subpoena enforcement context is construed broadly, and a reviewing "court defers to the agency's appraisal of relevancy...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*

²⁴ As provided in their Form 10-K filings with the Securities and Exchange Commission (SEC), Google is "an information company" with a mission to "organize the world's information and make it universally accessible and useful." Ex. 201 at 3. Further, in such SEC filings, Google describes its company as leveraging its "technical expertise to tackle big problems" and to "provid[e] ways to access knowledge and information. Ex. 212 at 2. For proper perspective on any calculation of burden sufficient to "unduly disrupt or seriously hinder normal business operations," Google's 10-K filings reveal that since 2014, Google has earned nearly \$70 billion in income. Ex. 201 at 83.

also *Office of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1307 (D.C. Cir. 1997). As the D.C. Circuit 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...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).

Apparently concerned that “OFCCP’s investigation finds its limits only in the expanse of ... [the Executive Order’s] anti-discrimination provisions,” Judge Berlin’s RD holds that OFCCP must engage in an “iterative process” to establish the relevance of information, insisting that the Agency must “identify specific areas” of concern to obtain requested information. RD at 25-26.²⁵ Judge Berlin’s decision disregards 70 years of Supreme Court precedent up to and including *McLane Co, Inc. v. E.E.O.C.*, 137 S. Ct. 1159 (2017), that define relevance in the context of administrative enforcement actions. Further, Judge Berlin’s holding contradicts his own earlier ruling in this same case where he held that “OFCCP need not engage in an iterative process with Google, explaining the status of the investigation when it requests further information.” *Order Denying Summary Judgment* at 7 (issued March 15, 2017).

In *McLane*, the Supreme Court recently reaffirmed long-established precedent that relevance must “be understood ‘generously’” to permit an agency to “access virtually any material that might cast light on the” matter under investigation. 137 S. Ct. at 1169 (emphasis added), citing *Shell Oil Co.*, 466 U.S. at 68-69. As mentioned above, the

²⁵ As noted above at p. 17 n.16, Judge Berlin’s insistence on evaluating the agency’s motivations for issuing the information request (*e.g.*, requiring identification of specific areas of concern as part of the relevance inquiry), runs afoul of foundational Fourth Amendment precedent, developed in the 1940s and 1950s and continuing through 2017. *See, e.g. McLane*, 137 S. Ct. 1159 (2017).

traditional construction of relevance in the administrative subpoena context is broad, permitting agencies to “investigate merely on suspicion that the law is being violated, or even just because it wants assurances that it is not.” *Morton Salt*, 338 U.S. 643-44; see also *United States v. Golden Valley Elec. Ass’n*, 689 F.3d 1108, 1114 (9th Cir. 2012)(“The information subpoenaed does not need to be relevant to a crime; in fact, it may be used to dissipate any suspicion of a crime. The information subpoenaed need only be relevant to an agency investigation.”).

Erroneously, Judge Berlin attempts to distinguish *McLane* and *Shell Oil* because OFCCP’s compliance evaluation is “not complaint-driven and currently focuses on an adverse impact theory of sex discrimination in compensation.” RD at 24. Judge Berlin opines that the “lack of complaint is important because in *Shell Oil* relevance in an EEOC Title VII investigation encompasses ‘virtually any material that might cast light on the allegations against the employer.’” *Id.*, citing *McLane*, 137 S.Ct. at 1165; *Shell Oil*, 466 U.S. at 68-69. First, OFCCP has statutory authority to conduct an investigation into Google’s employment practices to confirm compliance with the laws that OFCCP enforces. The fact that *McLane* and *Shell Oil* involved complaints is a meaningless distinction. The point is that relevance in the administrative subpoena context must be construed generously to include virtually any material that might cast light on the **investigation**, whether the investigation is complaint-driven or initiated pursuant to a neutral selection system.

Moreover, generally speaking, complaints serve to provide an agency with some indicator or relevant evidence that warrants further investigation. In this case, though it was not required to do so, OFCCP explained that the agency had preliminary statistical

analyses revealing systemic compensation disparities adverse to women employees at Google's Mountain View facility to provide context for its data requests.

Second, OFCCP has not committed to any theory of discrimination. In fact, OFCCP has repeatedly explained that it has only presented preliminary findings and thus is not currently pursuing a merits case alleging compensation discrimination adversely affecting women – let alone alleging a specific theory of discrimination. The reason OFCCP has requested the information at issue here is to determine whether, and if so what kind of, discrimination has occurred.²⁶ Throughout the RD, Judge Berlin offers advisory opinions regarding the merits and likelihood of success of OFCCP's "adverse impact case."

By evaluating the relative strength of OFCCP's preliminary findings and speculating as to what type of discrimination claim OFCCP *may* bring in the future, and using this reasoning to strike down aspects of OFCCP's requests for information, Judge Berlin commits a clear legal error. In essence, Judge Berlin turned an administrative subpoena enforcement matter into a preliminary trial on the merits, and by doing so inappropriately elevated the government's preliminary burden to a showing of probable cause, which stands in stark contradiction to the controlling Fourth Amendment law.

Further, it must be noted that in his attempt to distinguish *McLane* and *Shell Oil*, Judge Berlin consistently conflates "adverse impact" and "disparate impact," which leads him to many incorrect findings. *See, e.g.*, RD at 24-26. Adverse impact describes the negative treatment of a group of individuals while "disparate impact" is a term of art that

²⁶ *See* Tr. at 47:2-17 (Wipper)("[i]f we get to the point where we wanted to issue a violation, in order to do our due diligence, we want to look at not only pay level, but the cause").

defines one theory of discrimination.²⁷ Judge Berlin inappropriately boxes the agency into a disparate impact claim, and then sets out to decide this matter by holding OFCCP to a probable cause standard, which squarely contradicts controlling precedent.

To illustrate this point, Judge Berlin held that “OFCCP’s investigation is incomplete unless it can identify and prove what practice is causing the disparity it claims to have found.” RD at 25. In support of his position, Judge Berlin relies upon Regional Director Wipper’s testimony that OFCCP would seek to determine the cause of the disparity so that the disparity may be corrected. RD at 25 n.77. Responding to Wipper’s testimony, Judge Berlin opines that Wipper’s testimony “might be true, but misses the point that OFCCP must prove the cause of the disparity if it is to establish a violation.” *Id.* (emphasis added). The fact that OFCCP’s investigation seeks the reason for the observed pay disparities is in no way is a concession that at some point in the future OFCCP is limiting its position to a “disparate impact” case. Further, Judge Berlin’s assertion that OFCCP’s investigation is incomplete unless it identifies the practice(s) – discriminatory or not – causing the disparities should be grounds for granting OFCCP’s requests for information, as each request is focused on identifying the cause of the observed disparities and assessing whether such causes constitute unlawful discrimination.

It is also possible that OFCCP could determine that the observed disparities are consistent with a disparate treatment theory of discrimination, in which case it would not

²⁷ Title VII recognizes two theories of employment discrimination – disparate impact and disparate treatment. **Treatment** focuses on intentional discrimination – that is, treating one group less favorably than another. In contrast, **Impact** involves a facially-neutral employment practice, where all groups are treated uniformly, but the result is an adverse impact on a protected group.

be required to prove the specific, facially neutral practice that is causing the disparity.²⁸ OFCCP has appropriately requested additional information to complete its investigation to determine if any unlawful discrimination has even occurred. Judge Berlin's decisions to limit OFCCP's requests based on his advisory opinions evaluating the merits and likelihood of success of some future discrimination case that OFCCP might file go far beyond the limits of the Fourth Amendment standard for evaluating whether an agency's administrative subpoena should be enforced and must be rejected in their entirety.

In striking portions of OFCCP's relevant and lawful requests for information, Judge Berlin states that "in the present case, there is no pending charge or complaint...OFCCP's investigation finds its limits only in the expanse of these several anti-discrimination provisions; there is no focus, for example, on discrimination against a person based on a single characteristic – or even discrimination against a group of people..." RD at 25 (emphasis added). Although E.O. 11246's regulatory framework compels this result, Judge Berlin nonetheless found it unacceptable. To address his concerns, without citing any case law in support, he formulated much more restrictive tests for determining "relevance" in the administrative subpoena context.

A properly initiated OFCCP compliance review is only limited to determining compliance with the nondiscrimination and affirmative action laws that the agency is tasked with enforcing. 41 C.F.R. § 60-1.20(a). Further, as is the case for all compliance evaluations, OFCCP's review of Google covers the contractor's compliance with its E.O.

²⁸ See *Int'l Brotherhood of Teamsters v. U.S.*, 431 U.S. 324, 360 (1977)(explaining that in a disparate treatment pattern or practice case, the government must produce evidence that "unlawful discrimination has been a regular procedure or policy followed by an employer.").

11246 over a two-year period.²⁹ OFCCP's request for the "2014 snapshot" is within the scope of the review period (2013-2015). And, consistent with the agency's Directive 307, OFCCP requested that the "2014 snapshot" contain information that both the contractor and OFCCP believe are relevant to, or may impact, pay determinations. Finally, it is important to evaluate the "2014 snapshot" request in the context of OFCCP's preliminary indicators revealed in the "2015 snapshot." As Regional Director Wipper testified, "because we found systemic compensation disparities against women pretty much across the entire workforce, we wanted to look to see what happened the year before." Tr. at 48:4-6 (Wipper).

The broad standard of relevance notwithstanding, in the pending requests for information OFCCP *has* limited the information sought. Here, OFCCP requested information relevant to the preliminary indicators of compensation discrimination. But whether OFCCP's data requests are specifically tied to a potential violation is neither relevant nor appropriate for Judge Berlin's evaluation of the enforceability of the agency's administrative subpoena request. *See also Golden Valley*, 689 F.3d at 1114 (noting that information "does not need to be relevant to a crime," but simply "relevant to an agency investigation").

Given OFCCP's preliminary indicators – in addition to its broad statutory authority to determine compliance with E.O. 11246 – the requests for: (1) a "2014 snapshot" with data points relevant to the contractor's and OFCCP's understanding of

²⁹ Federal Contract Compliance Manual §2L at 97; *see also* 62 Fed. Reg. 44174, 44178 (Aug. 19, 1997)("[r]eviews of contractors' compliance with the Executive Order and regulations cover a two-year period. The policy and practice are to examine the contractor's personnel policies and activities for the two years preceding the initiation of the review"); and Tr. at 40:17-24 (Wipper).

factors that impact pay determinations; (2) contact information for employees so that OFCCP may confidentially contact and interview rank-and-file employees; and (3) job and salary histories of employees included in the “2015 snapshot” seek information that will “cast light” on the matter under investigation. *See McLane*, 137 S. Ct. at 1169.

Whether the requests are relevant to supporting and proving a specific disparate impact case in the future should have had no bearing on Judge Berlin’s evaluation of the administrative subpoena. Because Judge Berlin erroneously heightened the legal standard for determining “relevance” in the subpoena enforcement context leading him to assert numerous advisory opinions on a merits case that does not exist (and certainly was not before him), his recommended findings must be reversed.

II. The Recommended Decision’s Treatment of the Request for Employee Contact Information is Internally Inconsistent and Raises Serious Impediments to OFCCP’s Ability to Fulfill its Mission.

To demonstrate the arbitrary and inconsistent treatment of OFCCP’s specific request for employee contact information, Judge Berlin begins his discussion of this issue by asserting that “I am persuaded that anecdotal information obtained from employees is relevant to OFCCP’s systemic adverse impact investigation.” RD at 29. And although Judge Berlin generally credits Google’s Compensation Director, Frank Wagner’s testimony regarding compensation policies, Judge Berlin finds that “[Wagner] cannot know with certainty that Google’s managers are faithfully implementing Google’s policies and practices; there might be exceptions – few or many.” *Id.* at 29-30. Finally, Judge Berlin goes as far as to state that, “[t]he question is only whether the contact information is relevant to the investigation. It is. In addition, if OFCCP concludes that it must initiate an enforcement proceeding on the merits, the anecdotal testimony from

adversely affected employees would be a crucial part of its proof in a systemic adverse impact case.” RD at 30 (emphasis added).³⁰

Despite finding contact information relevant and important to the compliance evaluation, Judge Berlin then leaps to an unsupported determination that “OFCCP’s request for contact information is unreasonable in that it is over-broad, intrusive on employee privacy, unduly burdensome, and insufficiently focused on obtaining the relevant information.” RD at 31. Related to this matter, Judge Berlin then goes entirely off-script with a number of unfortunate statements related to governmental data breaches. *Id.* There is nothing in the record supporting Judge Berlin’s alarmist language related to potential data breaches involving OFCCP. Any personal information disclosed to OFCCP would be protected under numerous statutes, regulations, and policies; including; the Privacy Act (5 U.S.C. § 552 *et seq.*), OALJ Rules of Practice and Procedure at 29 C.F.R. § 18.31, as well as the Department of Labor Guidance on the Protection of Personal Identifiable Information (<https://www.dol.gov/general/ppii>). Further, OFCCP has consistently assured both Google and Judge Berlin that it would protect any information it receives to the fullest degree possible. Tr. at 60:3-15; 156:20-21; 157:10-20 (Wipper); *see also* 41 C.F.R. § 60-1.20(g).

Despite this detrimental language related to the “unreasonableness” and “intrusive” nature of OFCCP’s request for employee contact information, Judge Berlin

³⁰ As noted above at pp. 27-28, Judge Berlin appears to conflate the concepts “adverse impact” and disparate impact” in defining OFCCP’s potential action as a “systemic adverse impact claim.” But regardless, whether OFCCP were to litigate a systemic discrimination case based on either a disparate impact or disparate treatment theory of discrimination, employee contact information is both relevant and central to the agency’s ability to properly investigate the employment practices of the company. Not only because the employees may provide anecdotal evidence of discrimination, but because if OFCCP is to conduct a thorough review of Google’s employment practices (specifically, its compensation practices), it must have the opportunity to interview unbiased rank-and-file employees in a confidential setting.

then seemingly dismisses his own reasoning by ordering that Google provide OFCCP with the contact information of between 5000 and 8000 employees of OFCCP's choosing. RD at 32-33. While OFCCP agrees that it is entitled to the contact information of these employees, based on the findings of relevance and relative importance of OFCCP's ability to confidentially interview rank-and-file employees, there is no rationale for drawing the line at 5000, 8000, or 25000. OFCCP's request easily satisfies the Fourth Amendment standard that governs administrative subpoenas. To a large degree, it appears that Judge Berlin agrees with OFCCP; however, his line-drawing is completely arbitrary and lacks any support in the record.

It is critical that the ARB review OFCCP's request for employee contact information in the context of this specific compliance evaluation. This is a review of Google's headquarters facility. Though not required to do so, Google chose to include all of its employees – approximately 21,000 – in this one facility-wide AAP.³¹ So while at first glance, the request for contact information for more than 20,000 employees is atypical, given the context of this particular compliance evaluation, the request is reasonable, relevant, and pertinent to OFCCP's ability to perform its job.

Judge Berlin's RD fails to recognize that it is standard operating procedure for OFCCP to request employee interviews³² and employee contact information during a

³¹ While OFCCP's regulations require that a contractor with a contract of \$50,000 or more must develop and maintain an AAP for each of its establishments with 50 or more employees, 41 C.F.R. § 60-2.1(b), the regulations provide a contractor with flexibility as to which employees are covered by a particular AAP. See 41 C.F.R. 60-2.1(d).

³² See 41 C.F.R. 60-1.20(a)(1)(ii)(typically, the compliance evaluation will involve an examination of the contractor's personnel and employment policies, inspection and copying of documents related to employment actions, and interviews with employees, supervisors, managers, and hiring officials). The natural outgrowth of this regulation is that OFCCP must be given access to employees' contact information in order to conduct interviews to gain confidential, unbiased insights into the contractors' employment

compliance evaluation; the only difference here is the relatively large scale of the facility. But just as important, the RD reaches an arbitrary conclusion of limiting OFCCP access to 5000-8000 Google employees without any foundation or support. The request is relevant and material to OFCCP's investigation, and falls within OFCCP's broad authority to determine compliance with E.O. 11246. Further, Google failed to produce any lawful justifications for limiting OFCCP's request. As such, the ARB should apply the proper Fourth Amendment standard and order Google to provide access to names and contact information for all employees in the September 1, 2015 and September 1, 2014 snapshots.

III. By Heightening the "Burden" and "Relevance" Analyses Applicable to Administrative Subpoenas, the Recommended Decision Improperly Denied OFCCP's Request for Salary and Job History.

OFCCP requested salary and job history information for employees contained in the "2015 snapshot" because that information is relevant to identifying the cause of observed disparities that are present during the review period. It is entirely possible that these observed disparities are the result of actions that occurred prior to the review period and have persisted. As such, OFCCP is entitled to information related to pay practices – discriminatory or not – that may have caused the disparities revealed in OFCCP's preliminary analyses to determine if the disparities are the result of unlawful discrimination.³³

practices. *See also* 80 Fed. Reg. 54934, 54937 (Sept. 11, 2015)(recognizing that "interviewing...employees potentially impacted by discriminatory compensation is also an invaluable way for the agency to determine whether compensation discrimination in violation of E.O. 11246 has occurred and to support its statistical findings").

³³ *See* Tr. at 47:2-17 (Wipper)("[i]f we get to the point where we wanted to issue a violation, in order to do our due diligence, we want to look at not only pay level, but the cause").

In denying OFCCP's request for employees' salary and job histories, Judge Berlin states that "[e]ven were I to accept the most generous construction of the Fourth Amendment's required relevance, I would not find this request enforceable without a greater showing of relevance. Moreover, the request raises serious questions about the burden on Google and its employees." RD at 33. Judge Berlin concludes his determination rejecting OFCCP's salary and job history request by stating that "[i]f OFCCP accurately understood Google's practices or had evidence to refute – or at least bring into question – Google's statement of what those practices are or have been, OFCCP could have made an entirely different showing on relevance." *Id.* at 38. Once again, Judge Berlin's treatment of OFCCP's request for salary and job history is fundamentally flawed in that he fails to apply the appropriate legal standard for determining whether a particular request is "unduly burdensome" and also fails to apply the well-settled generous construction of "relevance" in the context of administrative subpoena enforcement actions.

A. *OFCCP's Request for Salary and Job History is not Unduly Burdensome*

As a threshold matter, Google has the burden of establishing that complying with the information request – which is clearly relevant to OFCCP's investigation of the contractor's compliance with its obligations under E.O. 11246 – is unduly burdensome. As discussed in detail above, to rebut OFCCP's relevant information requests, the party opposing the subpoena must establish that compliance with the request would "unduly disrupt or seriously hinder normal business operations." *See pp. 19-20 supra.* The only evidence produced during the 2-day hearing related to burden calculations was presented through Google's Senior Legal Operations Manager, Kristin Zrmhal. Her testimony, however, never touched on the applicable standard; instead, simply presenting an

aggregated, speculative cost for Google to collect the requested information of 400-500 hours at a cost of approximately \$100,000.³⁴ Google does not provide a clear cost estimate for each of the three information requests individually. Accordingly, based on the record evidence it would not be possible for Judge Berlin to ascertain the specific cost (or overall burden) associated only with Google responding to OFCCP's request for salary and job history. And more importantly, there is no evidence supporting a finding that the burden satisfies the relevant legal standard required to establish sufficient undue burden.

B. *OFCCP's Request for Salary and Job History is Relevant to its Investigation of Google's Compliance with E.O. 11246*

OFCCP's request for salary and job history must be analyzed under the Fourth Amendment standards, as set forth by the Supreme Court. As discussed above, in the subpoena enforcement context, "relevance" is construed "generously" to permit an agency to "access virtually any material that might cast light on the" matter under investigation. *McLane*, 137 S. Ct. at 1169 (emphasis added), citing *Shell Oil Co.*, 466 U.S. at 68-69. Here, OFCCP presented preliminary statistical analyses indicating compensation discrimination against women working at Google's Mountain View facility. OFCCP further explained that job and salary history was relevant to tracing the cause of the observed disparities. Tr. 42:19-21; 45:14-23. Thus, as part of its investigation into the compensation practices at Google, OFCCP sought salary and job history information for employees included in the "2015 snapshot." OFCCP's investigative and enforcement authority under E.O. 11246, in combination with its

³⁴ Tr. at 276:18-277:14.

showing of preliminary indicators of systemic compensation discrimination, satisfy the broad construction of “relevance” for subpoena enforcement actions. Judge Berlin’s unsupported conclusion that this particular request was unenforceable “without a greater showing of relevance” is contrary to law and must be reversed.³⁵

Erroneously, Judge Berlin found it necessary that OFCCP “refute” or “bring into question” Google’s compensation practices before he would find the request sufficiently relevant. Ironically, by striking OFCCP’s request, Judge Berlin denies OFCCP access to information necessary to confirm, refute, or bring into question Google’s compensation practices. As OFCCP has asserted throughout these Exceptions, by finding that OFCCP has failed to adequately refute Google’s description of its pay practices, Judge Berlin has incorrectly waded into the merits of a systemic discrimination case that has not been filed and is not before him. Further, to the extent that Judge Berlin is concerned that OFCCP’s request is not relevant because of the agency’s misunderstanding of Google’s compensation practices, then OFCCP’s ability to review salary and job histories will either confirm or contradict Google’s statements related to how it establishes compensation when it on-boards employees.

OFCCP’s investigation should not be limited by Judge Berlin’s decision to accept in total Google’s description of its compensation practices. At a minimum, OFCCP must

³⁵ Consistent with OFCCP’s position throughout these proceedings, the agency is attempting to complete its investigation and determine whether Google complied with its obligations under E.O. 11246 during the review period. OFCCP presented preliminary pay disparities that existed during the review period, and now seeks information relevant to determining whether the underlying cause(s) of these disparities was unlawful. Prior acts of discrimination that result in a present disparity in pay are a violation of the Executive Order, and are thus certainly relevant to OFCCP’s lawful investigation. *See Bazemore v. Friday*, 478 U.S. 385, 395–96, 106 (1986); *cf. Lilly Ledbetter Fair Pay Act of 2009*, 123 Stat 5 (2009); *see also* FCCM § 7B at 228-29. Moreover, regarding any arguments related to burden associated with providing salary and job histories, Google presented *no* evidence itemizing how much less expensive compliance would be if it produced data for a shorter time frame.

be able to establish the veracity of these statements. *Cf. McLane*, 2017 WL 2261015, at *3 ("The very purpose of the EEOC's investigation is to determine *whether* the test is being neutrally applied; the EEOC does not have to take McLane's word for it on that score."). In essence, Judge Berlin concludes that Google's salary and job history records will mirror testimony from Compensation Director Wagner, but this is an unjustified leap into the merits of the case. The best evidence for fully understanding and analyzing Google's compensation practices – specifically for establishing pay for new hires – is to review the employees' salary and job history. Judge Berlin's unsupported requirement that OFCCP first "refute" Google's description of its compensation practices before the agency is entitled to the requested information constitutes reversible legal error.

CONCLUSION

Judge Berlin's RD misapplied well-settled Fourth Amendment legal standards applicable to administrative subpoena enforcement actions, leading him to deny portions of OFCCP's requests for information. For the reasons discussed above, OFCCP respectfully requests that the ARB apply the proper Fourth Amendment standard and /

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order that Google **fully** comply with OFCCP's three requests for information.

Respectfully submitted,

NICHOLAS C. GEALE
Acting Solicitor of Labor

BEVERLY I. DANKOWITZ
Associate Solicitor
KEIR BICKERSTAFFE
Counsel for Interpretation and Advice



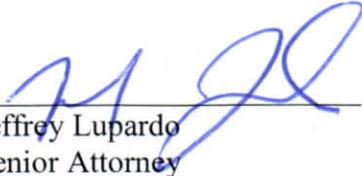
JEFFREY M. LUPARDO
Senior Attorney
U.S. Department of Labor
Office of the Solicitor
200 Constitution Avenue, NW
Room N-2474
Washington, D.C. 20210
(202) 693-5759 (Telephone)
Lupardo.Jeffrey@dol.gov

CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2017, the foregoing *Exceptions to the Administrative Law Judge's July 31, 2017 Recommended Decision and Order* was served by first class mail upon:

Lisa Barnett Sween, Esq.
Antonio C. Raimundo, Esq.
Amelia Sanchez-Moran, Esq
Jackson Lewis P.C.
50 California Street, Floor 9
San Francisco, CA 94111

Matthew J. Camardella, Esq
Daniel V. Duff, Esq
Jackson Lewis P.C.
58 South Service Road
Suite 250
Melville, NY 11747



Jeffrey Lupardo
Senior Attorney
U.S. Department of Labor
(202) 693-5759
Lupardo.Jeffrey@dol.gov