

U.S. Department of Labor

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Issue Date: 18 July 2017

CASE NO. 2017-OFC-00004

In the Matter of

**OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS,
U.S. DEPARTMENT OF LABOR,**
Plaintiff,

v.

GOOGLE INC.,
Defendant.

ORDER SEALING EXHIBITS

OFCCP is the agency at the Department of Labor responsible for auditing federal contractors to determine whether the contractors are complying with certain anti-discrimination and affirmative action obligations. This case concerns a narrow dispute akin to an administrative subpoena enforcement proceeding. The gravamen of OFCCP's complaint is that, after providing access to some materials as well as allowing interviews of executives and managers, Google refused an OFCCP request for additional information. Google contends that OFCCP's demands exceed Constitutional limits and otherwise are overbroad and burdensome. OFCCP seeks an order requiring Google to comply with its request for information.

The case thus is in furtherance of an ongoing administrative audit. It does not reach the merits of any discrimination claim against Google; it does not allege discrimination.

Shortly before the hearing, Google moved to seal its Exhibit 110 and OFCCP's exhibits 216, 218, 219, 220, 221, and 222. There was no time before the hearing to for OFCCP to brief its views. To preserve the *status quo*, I granted Google's motion on a preliminary basis to allow time for briefing and decision.

OFCCP filed a brief, opposing the motion in part. It withdrew exhibits 221 and 222. It also withdrew Exhibit 218, except pages 15-17, 145-51, 158-60, 170-72, 196-222, and 236-47. It replaced the exhibit folders tendered at the hearing so that the withdrawn exhibits no longer were included. I subsequently removed the originally tendered (and later withdrawn) exhibits from the record and returned them to OFCCP.

This leaves for final determination Google's motion to seal Exhibits 110, 216, 219, 220 and the listed pages from Exhibit 218. I will grant the motion.

Facts

There is no dispute that the five exhibits Google seeks to seal contain Google's confidential and proprietary information. They are comprised of compensation policies, employee training materials on performance evaluations, a guide for managers who are evaluating employee performance, documents relating to employee compensation and evaluation, a guide to an internal website used to display compensation items for employees, Google's methodology for calculating employee compensation, and instructions for an internal tool for making compensation decisions.

It is also undisputed that Google takes steps to safeguard this information from public disclosure. Employees must sign confidentiality and non-disclosure agreements. Employees must protect some documents with passwords and must maintain secure document management systems. Google does this because it believes the information would disclose Google's employee evaluation and compensation systems and their rationale to Google's competition, thereby harming Google's business interests.

Google states that it has invested significant resources in developing its compensation and evaluation policies, trainings, and systems, all of which was reflected in testimony at the hearing. It states that its human resources, compensation, and engineering staff invested years of work to produce the information in the exhibits at issue. That too is consistent with the hearing testimony and my review of the exhibits. OFCCP disputes none of it.

Google believes that its investment in these materials is "a key reason why Google has been a successful technology company for many years." Decl. of Wagner (Apr. 6, 2017), ¶ 8. Google believes that the disclosure of this information to the public, including its competitors, would harm its competitive position. *Id.* ¶ 10. OFCCP offers nothing to refute this.

Discussion

The common law right of access to judicial records is well-established. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978)). "The right is an important aspect of the overriding concern with preserving the integrity of the law enforcement and judicial processes." *United States v. Hickey*, 767 F.2d 705, 708 (10th Cir. 1985). Eleven Circuits apply this right to civil cases as well as criminal. *See, e.g., Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006).

Nonetheless, the public's right of access is not absolute. *See Nixon* at 597-98; *Kamakana, supra*.

Unless a particular court record is one "traditionally kept secret," a "strong presumption in favor of access" is the starting point. A party seeking to seal a judicial record then bears the burden of overcoming this strong presumption by meeting the "compelling reasons" standard. That is, the party must "articulate[]

compelling reasons supported by specific factual findings,” that outweigh the general history of access and the public policies favoring disclosure, such as the “public interest in understanding the judicial process.”

Id. at 1192.

For example, trade-secrets or “compelling reasons of personal privacy” may warrant sealing. *Goesel v. Boley International (H.K.) Ltd.*, 738 F.3d 831, 833 (7th Cir. 2013) (Posner, J.)¹ “Generalized allusion[s] to confidential information [are] woefully inadequate.” *JetAway Aviation, LLC v. Board of County Commissioners of County of Montrose, Colorado*, 754 F.3d 824, 826 (8th Cir. 2014).

The requirement for compelling reasons is relaxed, however, in the context of non-dispositive motions. *Kamakana*, 447 F.3d at 1179-80. For example, as the Ninth Circuit held:

When a district court grants a protective order to seal documents during discovery, “it already has determined that ‘good cause’ exists to protect this information from being disclosed to the public by balancing the needs for discovery against the need for confidentiality.” The application of a strong presumption of access to sealed records, not directly relevant to the merits of the case, would eviscerate the “broad power of the district court to fashion protective orders.” Thus a “particularized showing,” under the “good cause” standard of Rule 26(c) will “suffice[] to warrant preserving the secrecy of sealed discovery material attached to non-dispositive motions.”

Id. (citations omitted). “The decision as to access is one best left to the sound discretion of the trial court . . . in light of the relevant facts and circumstances of the particular case.” *Nixon* at 599.

The exhibits at issue here are comprised entirely of materials that Google produced to OFCCP in response to its requests for information as part of a routine compliance review of a federal contractor. The Department’s regulations for compliance reviews require OFCCP to treat materials obtained confidentially, except when disclosure is required under the Freedom of Information Act. 41 C.F.R § 60-1.20(g). This requirement applies so long as the contractor is in business and “indicates, and through the Department of Labor review process it is determined, that the data are confidential and sensitive and that the release of data would subject the contractor to commercial harm.” *Id.* The Freedom of Information Act exempts from production

¹ The Uniform Trade Secrets Act, § 1(4), defines a trade secret as: “information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”

“trade secrets and commercial or financial information obtained from a person and privileged or confidential.” 5 U.S.C. § 552(b)(4).²

Although public access is generally available to papers and pleadings in these cases, the administrative law judge may exclude specific papers and pleadings “for good cause.” 41 C.F.R. § 30.4(a).

Having given considerable weight to the public’s presumed right of access to judicial records, I find that Google has made an adequate showing to seal the four exhibits and excerpts of a fifth exhibit. These exhibits contain trade secrets in the form of programs, methods, techniques, or processes that have economic value to Google from not being known to Google’s competitors. They are not readily ascertainable by these competitors, and Google takes reasonable efforts to maintain their secrecy. *See* UTSA, §1(4), fn. 1, *supra*.³

Even if these are not trade secrets or an otherwise compelling basis for sealing them, Google is alternatively entitled to an order sealing these exhibits under the more relaxed standard for non-dispositive determinations. In the civil litigation or administrative audit context, a subpoena enforcement proceeding is little different from a discovery motion. It is an effort by one party to obtain information from another party. It does not go to the merits of the underlying claim (here, a potential claim of employment discrimination). The strength of the presumption of public access therefore is lessened. *Kamakana*, 447 F.3d at 1179-80.

In particular, these exhibits are materials that Google produced to OFCCP without litigation in cooperation with OFCCP’s compliance review. The Secretary requires the Department to maintain the confidentiality of such submissions unless the Freedom of Information Act requires their production. 41 C.F.R § 60-1.20(g). In my view, these materials come within Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), because they are comprised of confidential commercial information obtained from Google. The materials might also come within Exemption 7 of FOIA.⁴

Thus, whether a compelling reason is required or a more relaxed standard applies, Google has made the required showing to seal these select exhibits and excerpts.⁵

² FOIA also exempts from production: “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings” 5 U.S.C. § 552(b)(7).

³ If these are not trade secrets, they are equivalent to trade secrets in the area of human resources of personnel management.

⁴ Exemption 7 likely applies because contractors will be reluctant to produce voluntarily confidential commercial information in an OFCCP compliance review if the Department then makes this confidential information public. The result could interfere with the Department’s ability to enforce anti-discrimination laws and affirmative action requirements applicable to government contractors.

⁵ I reject OFCCP’s argument that Google waived protection because its Vice President of Compensation revealed the information during testimony at the hearing. The hearing testimony contained almost none of the material in these exhibits. On one occasion, when OFCCP wanted to question the Vice President about the content of Exhibit 216, Google moved to have the courtroom cleared. In colloquy, it was agreed that there was no need to disclose the information in Exhibit 216 in order for OFCCP to make its point. The information was not disclosed. No party referred at any other time in the hearing to any of the exhibits that are the subject of this motion.

Order

Google's motion to seal Exhibits 110, 216, 219, 220, and all pages offered from Exhibit 218 is GRANTED.

The parties must take notice that requests under the Freedom of Information Act are decided by designated officials at the Department of Labor other than the administrative law judge. The administrative law judge's order to seal documents in a file is not a guarantee that the Department will not ultimately unseal and produce the exhibits in response to a FOIA request. This could happen if designated FOIA officials at the Department determine that no exemption in FOIA applies. The sealed exhibits will be labelled to alert Department officials that the materials may not be released without first giving the parties to this action notice, an opportunity to be heard, and an opportunity to appeal any decision to release the sealed information. *See* 29 C.F.R. § 70.26.

This order will be served on counsel for OFCCP and counsel for Google by facsimile or email. All other service is by U.S. mail.

SO ORDERED.

STEVEN B. BERLIN
Administrative Law Judge

I have reviewed the materials and conclude that the necessary redactions to preserve the confidential material would be so extensive that any redacted public version would be meaningless. This order describes in some limited detail what it included in the sealed exhibits.