



Issue Date: 28 July 2017

Case No. 2017-MIS-00005

*In the Matter of*

**ADMINISTRATIVE NOTICE OF  
PROACTIVE DISCLOSURE OF FREQUENTLY REQUESTED RECORDS  
UNDER THE FREEDOM OF INFORMATION ACT  
REGARDING:**

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

*Plaintiff*

v.

**GOOGLE INC., 2017-OFC-00004**

*Defendant.*

**ADMINISTRATIVE NOTICE**

The parties in the above-captioned matter are hereby notified that the Freedom of Information Act (“FOIA”) governs all filings in proceedings before the Office of Administrative Law Judges (“OALJ”), and that proactive disclosure of documents is required under FOIA in certain circumstances for frequently requested records. *See* 5 U.S.C. § 552(a)(2); *Proactive Disclosures of Non-Exempt Agency Information: Making Information Available Without the Need to File a FOIA Request* (U.S. Dept. of Justice, Office of Information Policy (“USDOJ/OIP”) Mar. 16, 2015).

This Administrative Notice is to inform the parties that the pending case of *OFCCP v. Google Inc.*, 2017-OFC-00004 fits the circumstances that require proactive disclosure of documents already requested under FOIA, and that warrant proactive disclosure of non-FOIA exempt filings before OALJ and the Administrative Review Board (“ARB”) going forward, even in advance of a FOIA request.

*Proactive disclosure of records that have been frequently requested under FOIA*

The FOIA Improvement Act of 2016, P.L. No. 114-185 amended FOIA to provide, *inter alia*, that

(2) Each agency ... shall make available for public inspection in an electronic format ...

\* \* \*

(D) copies of all records, regardless of form or format –

(i) that have been released to any person [pursuant to a FOIA request]; and

(ii)

(I) that because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; or

(II) that have been requested 3 or more times....

5 U.S.C. § 552(a)(2)(D).

Just since April 1, 2017, OALJ has received the following FOIA requests:

- FOIA No. 832588 (request from The Wall Street Journal for all documents in Google)
- FOIA No. 832447 (request from the Equal Employment Advisory Council (“EEAC”) for briefs in Google)
- FOIA No. 832307 (request from EEAC for docket in Google since 4/20/2017)
- FOIA No. 832100 (request from EEAC for hearing transcript in Google)
- FOIA No. 831462 (request by law firm for transcript in Google)
- FOIA No. 829619 (request by National Corporate Research, Ltd for hearing transcripts in Google)
- FOIA No. 829032 (request from EEAC for docket in Google)
- FOIA No. 828943 (request from EEAC for hearing transcript in Google)
- FOIA No. 828779 (request from Bloomberg BNA for complaint, answer, prehearing statements and exhibits in Google)
- FOIA No. 827502 (request from law firm for documents in Google)

Moreover, ample evidence exists indicating that this case will be subject to continuing public interest. When this complaint was filed before OALJ, the Office of Federal Contract

Compliance Programs (“OFCCP”) issued a News Release publicizing the matter.<sup>1</sup> Moreover, this case has had widespread coverage in the media, and recent media coverage indicates that the interest is not likely to abate quickly.<sup>2</sup> It is also clear that several law firms representing clients in other OFCCP enforcement actions, and an employer association that advises its members on EEO and affirmative action obligations, are monitoring the progress of the *Google* case.

Accordingly, I have determined that *OFCCP v. Google Inc.*, 2017-OFC-00004 fits within the 5 U.S.C. § 552(a)(2) criteria because of multiple prior FOIA requests that essentially have covered all filings in the case (5 U.S.C. § 552(a)(2)(D)(ii)(II)), and because of the likelihood of continuing public interest in the case (5 U.S.C. § 552(a)(2)(D)(ii)(I)).

### *Proactive disclosure of future filings*

The FOIA statute does not address whether an agency should proactively disclose documents that it believes will become subject to multiple FOIA requests, even before a FOIA request is received. However, guidance from the USDOJ/OIP on proactive disclosures under 5 U.S.C. § 552(a)(2) states the following:

**Posting Before Receipt of Even One Request  
in Accordance with the President’s and Attorney General’s FOIA  
Memoranda**

By virtue of their position in an agency’s FOIA office, FOIA professionals are uniquely situated to identify records that are of interest to the public. Although the FOIA requires the posting of such records after the receipt, or likely receipt, of multiple requests for substantially the same records, agencies should, as a matter of policy, consider posting any FOIA disclosure as a matter of discretion. Indeed, for the past six years agencies have been posting a wide variety of records even before receipt of the first request in accordance with the President’s FOIA Memorandum and the Attorney General’s FOIA Guidelines. The President stressed that agencies “should not wait for specific requests from the public” and the Attorney General directed agencies to “readily and systematically post information online in advance of any public request.”

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<sup>1</sup> See [www.dol.gov/newsroom/releases/ofccp/ofccp20170104](http://www.dol.gov/newsroom/releases/ofccp/ofccp20170104) (Jan. 4, 2017) (“US Department of Labor sues Google Inc. for compensation data”).

<sup>2</sup> See, e.g., [www.bna.com/punching-whats-next-b73014461111/](http://www.bna.com/punching-whats-next-b73014461111/) (July 3, 2017) (Bloomberg, BNA Labor and Employment Blog “Punching In: What’s Next for the Labor Department, GOOGLE?” indicating that federal contractors and their lawyers will be watching for the ALJ holding on the line between reasonable and unreasonable data requests, and the public more broadly will have an interest in the eventual results of OFCCP’s audit); [www.bna.com/trump-dol-scrutinize-n73014460876/](http://www.bna.com/trump-dol-scrutinize-n73014460876/) (June 27, 2017) (Bloomberg, BNA story: “Trump DOL Could Scrutinize Tech, Finance Contractors for Bias,” speculating that the Department of Labor will focus enforcement efforts on alleged workplace bias or other noncompliance in the technology and finance sector).

*Proactive Disclosures of Non-Exempt Agency Information: Making Information Available Without the Need to File a FOIA Request* (USDOJ/OIP Mar. 16, 2015).<sup>3</sup> Although this guidance was issued by a prior Administration, it remains in effect. Moreover, it is clear that the FOIA Improvement Act of 2016 received bipartisan support<sup>4</sup> and was intended generally to codify the policy of a presumption of openness.<sup>5</sup>

Consequently, I have determined that henceforth posting all documents from the administrative record in 2017-OFC-00004 is warranted, even prior to receiving a specific FOIA request.

### *Implementation*

The ARB and OALJ are coordinating the FOIA proactive disclosure postings. Filings and documents issued will be made publicly available on the OALJ website at [https://www.oalj.dol.gov/FOIA\\_Frequently\\_Requested\\_Records.htm](https://www.oalj.dol.gov/FOIA_Frequently_Requested_Records.htm). Jason Nunez, OALJ's FOIA Coordinator, will be the point of contact for proactive disclosures. Mr. Nunez's phone number is (202) 693-7389.

In order to implement this FOIA posting requirement, the parties are requested to follow this procedure **beginning on Monday, August 7, 2017:**

1. Submit any filing with the presiding ALJ or the ARB as normal. *See, e.g.,* 29 C.F.R. § 18.34 (required format of papers filed with OALJ).<sup>6</sup>

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<sup>3</sup> Available at [www.justice.gov/oip/oip-guidance/proactive\\_disclosure\\_of\\_non-exempt\\_information](http://www.justice.gov/oip/oip-guidance/proactive_disclosure_of_non-exempt_information). *See also Department of Justice Guide to the Freedom of Information Act, Proactive Disclosures* at 18-19 (Aug. 10, 2009) (footnotes omitted):

The President has stressed that agencies should take “affirmative” and “innovative” steps in achieving transparency. The Attorney General likewise directed agencies to “post information online in advance of any public request.” Thus, in addition to the proactive disclosure requirements mandated by the FOIA, agencies should actively seek out and identify records which, while not falling into one of the four subsection (a)(2) categories discussed above, are nonetheless of sufficient public interest to warrant automatic disclosure on an agency's website. Such additional proactive disclosures are an efficient way to inform the public about the government's operations, and are essential to the ongoing commitment to the principles of open government embodied in the FOIA.

[www.justice.gov/sites/default/files/oip/legacy/2014/07/23/proactive-disclosures-2009.pdf](http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/proactive-disclosures-2009.pdf).

<sup>4</sup> *See generally* 162 Cong. Rec. S1494, 1495 (Mar. 15, 2016) (statement of Senator Charles Grassley); 162 Cong. Rec. H3714, 3715 (June 13, 2016) (statements of Representatives Darrell Issa, Mark Meadows, and Carolyn Maloney).

<sup>5</sup> *See* S. Rep. No. 114-4 at 3-4 (Feb. 23, 2015) (codification intended to make it clear that presumption of openness under FOIA applies regardless of Administration in power).

<sup>6</sup> The OFCCP rules for hearing procedures at 41 C.F.R. § 60-30 govern practice and procedure in OFCCP hearings. Those rules provide at 41 C.F.R. § 60-30.1 that “[i]n the absence of a specific provision, procedures shall be in accordance with the Federal Rules of Civil Procedure.” On some matters concerning practice before OALJ, however, neither the OFCCP rules nor the FRCP are instructive. Moreover, application of the FRCP to

2. Mail a CD or DVD electronic copy of the filing, preferably in PDF format, to:

Jason Nunez  
FOIA Coordinator  
Office of Administrative Law Judges  
United States Department of Labor  
Suite 400 North  
800 K Street, NW  
Washington, DC 20001-8002

**Parties must redact information in compliance with Fed. R. Civ. P. 5.2 prior to submitting a filing to either the presiding ALJ, the ARB or the OALJ FOIA Coordinator. See also 29 C.F.R. § 18.31 (OALJ rule version of Fed. R. Civ. P. 5.2).**

3. If a document to be filed contains information claimed to be exempt from release under FOIA, the party may include on the CD or DVD both a redacted and unredacted version of the filing. The redactions must be clearly marked and must state the FOIA exemption claimed. Overbroad redactions may be rejected by OALJ's FOIA disclosure officer. Moreover, parties' FOIA exemption redactions and markings are only preliminary. If a FOIA request is received on the requested record, OALJ has the obligation to assess independently whether the redactions are warranted and the claimed exemption is properly raised.

A party that does not timely file a CD or DVD copy of a filing will be presumed to have waived the opportunity to make its own redactions and FOIA exemption markings. The parties are on notice that if OALJ's FOIA Coordinator does not receive a CD or DVD within 5 business days of the filing of the hard copy filing with the presiding judge, OALJ may post an electronic version of the filing without redactions.

4. Parties are encouraged to consider the privacy interests of third parties, such as protected class members, when submitting documents into the record before OALJ or the ARB.
5. Filings already made in 2017-OFC-00004 and already released under FOIA will be posted immediately.

### *Relationship between FOIA requirements and adjudicative proceedings*

The FOIA submissions for proactive disclosure described above should be considered as separate from the proceedings before the presiding ALJ and the ARB. Nonetheless, a relationship exists between the adjudicative proceedings before the presiding ALJs, the ARB and

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administrative hearings is sometimes problematic, as they are designed for Article III courts and not administrative adjudications. As pertinent here, it is noted that Article III courts are not subject to FOIA, while OALJ hearings are. Thus, parties are encouraged to look to the OALJ Rules of Practice and Procedure at 29 C.F.R. Part 18, Subpart A, for guidance on procedural and practice matters that the OFCCP rules and the FRCP do not adequately address.

OALJ's and the ARB's general FOIA obligations as a federal agencies. **OALJ conducts public hearings, and once a document is placed into the administrative record it is subject to FOIA.** The parties should note that there is a significant difference between redactions made to documents prior to filing, which do not need to be justified by a FOIA exemption, and redactions made after filing, which cannot be justified unless a FOIA exemption supports the redaction. Moreover, as noted above, parties are required to redact information in compliance with Fed. R. Civ. P. 5.2. *See also* 29 C.F.R. § 18.31 (OALJ rule version of Fed. R. Civ. P. 5.2).

Parties are also encouraged to clear up any public access issues about filings with the presiding ALJ or the ARB **PRIOR TO SUBMISSION** of the document(s) at issue to the presiding judge for filing in the administrative–adjudicative proceeding. Any motions to seal a record under Fed. R. Civ. P. 5.2, 26 or 45 should be filed with presiding ALJ or the ARB. *See also* 29 C.F.R. §§ 18.52 and 18.85.<sup>7</sup>

### ***Summary***

I have determined that the public interest in *Google Inc.*, 2017-OFC-00004 is evidenced by multiple FOIA requests, press releases by OFCCP, and coverage in the news media. Under these circumstances, FOIA *mandates* online posting of filings in those cases that have been subject to a prior FOIA request, and USDOJ/OIP Guidance strongly indicates that proactive posting of new filings in those cases is warranted, even in advance of anticipated FOIA requests. Accordingly, the parties are hereby placed on notice of the postings, and are strongly encouraged to follow the implementation procedure described above. Failure to follow the procedures will be interpreted as a concession that the filing contains no FOIA-exempt material.

The procedures noted above will commence on Monday, August 7, 2017.

**SO NOTICED.**

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**STEPHEN R. HENLEY**  
Chief Administrative Law Judge

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<sup>7</sup> *See* n.6, *supra*.