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**UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES**

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

Plaintiff,

v.

ORACLE AMERICA, INC.,

Defendant.

OALJ Case No. 2017-OFC-00006

OFCCP No. R00192699

**DEFENDANT ORACLE
AMERICA, INC.'S MOTION FOR
PROTECTIVE ORDER RE:
CONFIDENTIAL
INFORMATION;
MEMORANDUM OF POINTS
AND AUTHORITIES**

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Office of Administrative Law Judges
San Francisco, Ca

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Koeck v. Gen. Elec. Consumer & Indus.,
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Sheets v. Caliber Home Loans, Inc.,
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Dep't of Homeland Security, Written testimony of NPPD Acting Deputy Under Secretary for Cybersecurity and Communications Jeanette Manfra for a House Committee on Homeland Security, Subcommittee on Cybersecurity and Infrastructure Protection hearing titled "The Current State of DHS' Efforts to Secure Federal Networks" (Mar. 28, 2017), <https://www.dhs.gov/news/2017/03/28/written-testimony-nppd-acting-deputy-under-secretary-house-homeland-security>..... 9

Dep't of Justice Guide to FOIA (Aug. 10, 2009), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/reverse-foia-2009.pdf>.....13-14

Memorandum of Understanding Between U.S. Department of Labor and Equal Employment Opportunity Commission, EEOC.GOV (Nov. 7, 2011), https://www.eeoc.gov/laws/mous/eeoc_ofccp.cfm 9

Model Protective Orders, Los Angeles Superior Court, <http://www.lacourt.org/division/civil/CI0043.aspx> 17

Model Protective Orders, U.S. Dist. Court, Northern District of Cal., <http://www.cand.uscourts.gov/model-protective-orders>;16-17

Sam Levin, *Google accused of 'extreme' gender pay discrimination by US labor department*, The Guardian (Apr. 7, 2017, 6:48 p.m. EDT) <https://www.theguardian.com/technology/2017/apr/07/google-pay-disparities-women-labor-department-lawsuit>.....2, 18

U.S. Dep't of Justice Overview of the Privacy Act of 1974 (2015), <https://www.justice.gov/opcl/file/793026/download>..... 15

U.S. Gov. Accountability Office, Federal Information Security: Actions Needed to Address Challenges (Sept. 19, 2016), <http://www.gao.gov/assets/680/679877.pdf> 9

White House Office of the Press Secretary, Fact Sheet: New Steps Toward Ensuring Openness and Transparency in Government (June 30, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/06/30/fact-sheet-new-steps-toward-ensuring-openness-and-transparency>..... 18

I. INTRODUCTION

Defendant Oracle America, Inc. (Oracle) is a premier technology company that provides products and services that address all aspects of information technology (IT) environments. Oracle provides its business customers, as well as the federal government, with essential technology tools, including database, application, and infrastructure software, and hardware systems. Oracle employs approximately 45,000 full-time employees in the United States and approximately 7,000 employees in Redwood Shores, California.

This is an enforcement action brought by the Office of Federal Contract Compliance Programs (OFCCP) alleging a violation of the equal employment requirements under Executive Order 11246, as amended. Defendant Oracle vigorously denies the allegations in the Amended Complaint but has endeavored to meet and confer with the OFCCP as discovery has commenced. As this case involves claims of discrimination, discovery undoubtedly will implicate personal privacy rights and personal, private information of Oracle's employees and applicants, including their race, sex, ethnicity, and compensation (for employees). In addition, this case will involve, at minimum, information on Oracle's confidential business information; organizations and structure, and HR practices, all of which would be of significant value to competitors.

Oracle seeks to protect its own confidential commercial information as well as the private information of thousands of individuals that it employs. To that end, Oracle has drafted and proposed a routine, non-controversial protective order regarding the disclosure, handling, and use of confidential information. But the government has staunchly and irrationally refused to agree with Oracle despite agreeing to other protective orders in the past. Although counsel for OFCCP has suggested that existing statutes are sufficient to protect Oracle and its employees' interests, close analysis of FOIA and the Privacy Act reveals that they, in fact, do not guarantee protection. Furthermore, the Regional Solicitor of Labor's recent comments to the press regarding OFCCP's ongoing litigation against Google suggests that the OFCCP and/or its counsel will not use its

discretion and judgment to protect Oracle and its employees' confidential information.¹ Because this litigation will invariably require the exchange of information that is confidential and private as well as proprietary, commercially sensitive, and even bearing on potential trade secrets, Oracle respectfully requests that the Administrative Law Judge enter a protective order regarding confidential information.

II. FACTUAL BACKGROUND

The OFCCP served its operative Amended Complaint on January 25, 2017. The Complaint alleges that Oracle discriminated against women, Asians, and African Americans with respect to compensation in certain lines of business, and alleges that Oracle discriminated against White, Hispanic, African-American applicants in favor of Asian applicants with respect to hiring in certain job titles.

Oracle vigorously denies these allegations. It intends to file dispositive motions, but in the interim is forced to file this motion for a protective order because OFCCP has served Oracle with document requests and a Rule 30(b)(6) deposition notice, while at the same time refuses to stipulate to any protective order governing the treatment of confidential information. *See* Declaration of Erin Connell ("Connell Decl.") ¶¶ 2-8, Exs. A-G.

More specifically, on March 15, 2017, Oracle submitted a standard protective order for the OFCCP's review. Connell Decl. ¶ 6, Ex. F (Protective Order). During a meet and confer on discovery issues, counsel for Oracle inquired about the protective order. *Id.* ¶ 7. Counsel for OFCCP stated that OFCCP did not need to review the protective order because OFCCP does not enter into protective orders. *Id.* Nevertheless, counsel for OFCCP agreed to get back to Oracle

¹Sam Levin, *Google accused of 'extreme' gender pay discrimination by US labor department*, The Guardian (Apr. 7, 2017, 6:48 p.m. EDT), <https://www.theguardian.com/technology/2017/apr/07/google-pay-disparities-women-labor-department-lawsuit>. The OFCCP's access suit against Google alleges a purported refusal to provide compensation data during an OFCCP compliance evaluation. But despite the limited scope of the lawsuit, and the fact that the OFCCP's compliance evaluation is ongoing with no official findings of discrimination, the Regional Solicitor of Labor already stated publicly to the media that the government has found discrimination. *Id.* ("The government's analysis at this point indicates that discrimination against women in Google is quite extreme, even in this industry."). This document is attached to the Declaration of Erin Connell which is submitted concurrently with this brief.

confirming OFCCP's position on the issue. *Id.* OFCCP later sent two letters reaffirming that it would not agree to a protective order asserting that "a protective order is not necessary in this case" because "FOIA and the Privacy Act provide protections from public disclosure." *Id.* ¶ 8, Ex. G (Letter from N. Garcia to G. Siniscalco at 4 (Mar. 27, 2017)); *accord id.* (Letter from L. Bremer to E. Connell at 1-2 (Mar. 22, 2017)). In response to further inquiries from Oracle's counsel, OFCCP later suggested that the protective order "conflict[s] with FOIA and other federal law." *Id.* (Letter from L. Bremer to E. Connell (Apr. 17, 2017)). Notably, the OFCCP has never suggested alternative language in response to Oracle's draft. *Id.*

Because FOIA and the Privacy Act are inadequate to protect Oracle and its employees' confidential information—and because the government has never explained otherwise—Oracle is forced to file this Motion respectfully requesting a protective order. Indeed, the OFCCP's position is made more unreasonable by the fact that the same lawyers' office for the Department of Labor regularly enters into protective orders regarding confidential information including a recent stipulation approved in February 2017. *Hugler v. Bhatia*, No. 8:16-cv-01548-JVS-JCG (C.D. Cal. Feb. 14, 2017), ECF No. 29 ("*Hugler*, ECF No. 29") (San Francisco Regional Office of the Solicitor of the Department of Labor agreeing to a protective order regarding confidential information).² As such, this motion ensued.

III. THE LAW PROVIDES FOR A PROTECTIVE ORDER AS A STANDARD PROTECTION OF TRADE SECRET AND CONFIDENTIAL INFORMATION

A. The Code of Federal Regulations Authorize the Entry of a Protective Order

The Rules of Practice of Administrative Proceedings provide an Administrative Law Judge (ALJ) with several sources of authority to enter a protective order. *See* 41 C.F.R. § 60-30.1-37. First, the procedural rules applicable to ALJs permit protecting filings and other papers where good cause exists. 41 C.F.R. § 60-30.4(a) ("Unless otherwise ordered for good cause by the Administrative Law Judge regarding specific papers and pleadings in a specific case, all such papers and pleadings are public documents."). Apart from "good cause," an ALJ has the

²This document is attached to the Declaration of Erin Connell which is submitted concurrently with this brief.

authority to waive or modify rules “upon a determination that no party will be prejudiced and that the ends of justice will be served thereby.” *Id.* § 60-30.2. And to the extent that there is no specific provision in the ALJ Rules about protective orders, the Federal Rules of Civil Procedure fill in the gaps in the ALJ Rules and apply. *See* 41 C.F.R § 60-31.1. Rule 26(c) of the Federal Civil Procedure 26(c), aptly entitled “Protective Orders,” expressly permits a judge “for good cause [to] issue an order to protect a party or person,” including “requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way.” Fed. R. Civ. P. 26(c)(1)(G).

There is nothing unusual about ALJs entering protective orders. Indeed, the Office of the Administrative Law Judges procedural rules, at 29 C.F.R. § 18.10, allow ALJs to enter protective orders to, among other things, limit the scope of disclosure, seal documents or depositions, and prohibit or govern the disclosure of trade secret information or other confidential research, development, or commercial information. *See, e.g.,* 29 C.F.R. § 18.52; 29 C.F.R. § 18.85 (addressing “Privileged, sensitive, or classified material.”); 29 C.F.R. § 18.12(b)(10) (authorizing ALJ to take appropriate action authorized by Federal Rules of Civil Procedure).

B. The Department of Labor Frequently Enters Into Protective Orders Regarding Confidential Information

Contrary to the OFCCP’s position in this case, numerous and recent decisions confirm that the enforcement arms of the Department of Labor enter into protective orders regularly. *See, e.g., Hugler*, ECF No. 29 (Solicitor’s Office of the Department of Labor agreeing to a protective order regarding confidential information); *Perez v. Vesuvio’s Pizza & Subs 2, Inc.*, 1:15-cv-00519-LCB-LPA (M.D.N.C. Apr. 6, 2016), ECF No. 30-1 (same); *see also EEOC v. Albertson’s LLC*, No. 1:06-cv-01273-CMA-BNB (D. Colo. June 25, 2007), ECF No. 125 (EEOC agreeing to a protective order regarding confidential information); *see also Copeland v. Marshall*, 641 F.2d 880, 886 (D.C. Cir. 1980) (en banc) (noting that the Department of Labor sought a protective order in a gender discrimination class action filed against the Department); *Perez v. Guardian Roofing LLC*, No. 3:15-cv-05623-RJB (W.D. Wash. May 24, 2016), ECF No. 56

(“The Secretary [of Labor]’s purpose in obtaining this protective order is to ensure confidential portions of the [Field Operations Handbook] disclosed in litigation are reviewed only by Defendants’ counsel of record in this action.”). In *Perez v. Kazu Construction*, No. 16-00077 ACK-KSC, 2017 WL 628455 (D. Haw. Feb. 15, 2017), the district court judge, in a case handled by the San Francisco Regional Solicitor’s Seattle office, required the parties to enter into a stipulated protective order to protect confidential information regarding employees’ non-work activities. The court also addressed the scope of disclosure stating “[a]t a minimum, the protective order should prohibit the parties or their counsel from using information obtained in this litigation for any purpose other than this litigation and from disclosing the same to anyone who is not an officer or agent of the Court or a party to the action.” *Id.* at *9. Similarly, in *Perez v. TLC Residential, Inc.*, No. C 15-02776 WHA, 2016 WL 1569988, at *3-4 (N.D. Cal. April 19, 2016), the court granted the employer’s motion for a protective order requiring DOL to mask the names of counselors in recovery at a drug and alcohol treatment facility. Thus, the DOL regularly enters into and in some cases requests protective orders.³

³ The government may suggest that Oracle’s motion for a protective order is untimely. Although some non-binding case law suggests that a motion for a protective order must be filed prior to the deadline to respond to a particular discovery request, that rule does not apply when a party timely objects to the request and attempts to meet and confer with opposing counsel. *See, e.g., Sheets v. Caliber Home Loans, Inc.*, No. 3:15-cv-72 (GROH), 2015 WL 7756156 at *4 (N.D. W.Va. Dec. 1, 2015) (finding that motion for protective order was timely despite it being filed after the deadline to respond to discovery because defendant stated in its response that it would seek a protective order, and only filed a motion after the parties failed to agree); *Seminara v. City of Long Beach*, 68 F.3d 481, at *4 (9th Cir. 1995) (unpublished) (same). Here, Oracle properly objected to the OFCCP’s discovery requests on the grounds that they sought confidential, trade secret and/or proprietary business information and stated that Oracle would produce information “following the entry of a protective order.” Connell Decl. ¶¶ 2-5, Exs. A-D. Additionally, Oracle and OFCCP met and conferred extensively through letters, emails, and telephone calls attempting to reach an agreement on a protective order. *Id.* ¶¶ 6-8, Exs. E-G. Thus, Oracle’s motion is timely.

Furthermore, any argument that a party is required to move for a general protective order regarding confidential information prior to the date that specific documents requests are due is misguided. Rather, to the extent such a rule exists, it is in the context of a non-party moving for a protective order to resist production of some or all documents requested in response to a subpoena. *See, e.g., United States v. IBM Corp.*, 70 F.R.D. 700, 702 (S.D.N.Y. 1976). It makes little sense to require parties in litigation to move for a general protective order regarding confidentiality prior to the deadline for responding to a document request, as the parties typically are able to reach agreement through the meet and confer process, and to hold otherwise could mean courts and ALJs would be flooded with discovery motions without providing adequate opportunity for the parties to meet and confer.

IV. A PROTECTIVE ORDER IS REQUIRED TO SAFEGUARD THE PRIVACY, THE TRADE SECRETS AND CONFIDENTIAL BUSINESS INFORMATION OF ORACLE AND ITS EMPLOYEES

A. Trade Secrets and Confidential Commercial Information

Oracle is a highly visible technology company in the very competitive computer hardware and software industries. The computer hardware and software industries are composed domestically by only a small number of firms, many of which are headquartered in one or two counties in Northern California (San Mateo and Santa Clara counties)—just like Oracle. These industries are constantly and quickly evolving, and the competition among the companies in all facets (and especially in employment) is fierce. *See* Declaration of Victoria Thrasher (“Thrasher Decl.”) ¶¶ 3-5.

The organizational structure of Oracle’s workforce is proprietary and confidential, the disclosure of which could inadvertently reveal commercially valuable information about Oracle that could be used by Oracle’s competitors. Thrasher Decl. ¶¶ 3-5. Specifically, the way that Oracle organizes its workforce is a direct result of its substantial effort and innovation in devising ways to make the company run effectively in a dynamic industry. *Id.* ¶ 3. The information expected to be produced by Oracle in this litigation reflects Oracle’s experience and expertise for how to structure the workforce to have a well-run, profitable, and efficient company. *Id.* Furthermore, competition remains fierce for qualified individuals. *Id.* ¶ 5. Given the intensely competitive nature of these industries and among high-technology companies, and the frequent raiding of competitors’ employees, Oracle has been careful in protecting its human resources practices. *Id.* ¶ 5.

The information Oracle will likely produce will reflect Oracle’s recruitment, hiring, promotion, and compensation practices. This information includes Oracle trade secrets as well as other confidential commercial information. Thrasher Decl. ¶ 4. For example, Oracle’s Compensation Workbench is an application that reflects Oracle’s practices with respect to employees’ compensation, including annual salary, bonuses, equity bonuses, and raise history. Similarly, Oracle systems i-Recruit and ResuMate reflect Oracle’s decisions about what potential

candidates to target and recruit and includes contact information, resumes, and feedback about that candidate. Competitors could use the information in conjunction with industry knowledge to gain substantial insight into how and why Oracle stratifies its workforce as it does. *See id.* ¶¶ 3-5. These systems also provide commercially valuable information such as Oracle's business decisions with respect to appropriate staffing levels for efficient functionality, for example, the number of sales staff and top-level managers required to oversee Oracle's business functions. In addition, by disclosing the number of employees and specific job titles, in the aggregate these systems disclose the structure of Oracle's HR teams, product lines and information that would prove valuable to its competitors. With this otherwise secret and proprietary information, Oracle's competitors could reverse engineer Oracle's business strategies in the software and hardware industries and Oracle's overall commercial operations. Because release of this information would allow competitors to deduce various aspects of Oracle's business strategy, it is critical to Oracle that its trade secrets and confidential information be protected. *See id.* ¶¶ 3-5.

Allowing Oracle's competitors to obtain this information and use it to compete against Oracle would provide those competitors with an impermissible advantage that has no bearing on the matters at issue. The release of such proprietary commercial information would allow Oracle's competitors to adopt practices that have made Oracle the global success that it is but without those companies having to incur the costs that Oracle bore in developing and perfecting its practices. As these industries are zero-sum, any improper benefit to one of Oracle's competitors can potentially have negative consequences on Oracle and others in the industry. *See Thrasher Decl.* ¶¶ 3-5.

In addition, because a high proportion of Oracle's employees are highly trained and skilled professionals, officials, and managers, disclosure of this information could put Oracle at a competitive disadvantage. For example, Oracle's competitors could use the information to identify and solicit key Oracle employees for employment. For positions for which Oracle has a great number of minority or female employees, the information would be helpful to competitors

because they will know which areas they can specifically target to recruit talented minority or female employees with that particular skill set. Maintaining a diverse workforce is not only important to Oracle, which has made significant efforts to recruit and retain talented minority and female employees, but also to many of Oracle's clients and business associates. Losing highly talented diverse staff would be a costly and huge competitive disadvantage to Oracle. *See* Thrasher Decl. ¶¶ 4-5.

B. The Privacy Interests of Oracle's Employees

Oracle anticipates that the government will seek to use, and thereby disclose, the identity and self-reported protected characteristics of specific individuals, including their race and gender. Self-identification with racial, ethnic, or gender categories is an extremely personal and private matter. First, the data is self-reported, meaning that it does not merely reflect biological categories that are known to the public but rather may include a person's personal identification of his or her own race, ethnicity, and gender. Thrasher Decl. ¶ 6. Even individuals who may have otherwise refused to disclose the group with which they self-identify may have chosen to do so under this promise of confidentiality.

Moreover, certain job categories have few employees of the specified gender and races. Where numbers in the categories are in the single digits, individuals may be discernible since Oracle is such a highly visible employer in the region in a very competitive industry. And obviously, where there is only a single person in a given category, perhaps at the Executive/Senior Level Official or Manager level, that person's identity would be very easy to deduce.

Finally, employee information may be subject to states' unique personal protections under their privacy laws. In California, for example, such information is protected by the privacy rights guaranteed by article I, section 1 of the California Constitution. Oracle (and for that matter the United States Government) has a duty to protect from release to the general public confidential information obtained from Oracle's employees. Disclosure of information contrary to this California privacy right, or similar rights in other states, would be an unwarranted

invasion of personal privacy.

C. Good Cause Exists to Enter a Protective Order That Limits Disclosure of Confidential Information to This Litigation

Counsel for the OFCCP, the Solicitor's Office of the Department of Labor, has refused to agree that it will limit the disclosure of confidential information to this litigation only. Connell Decl. ¶ 8, Ex. G. This refusal is notable because the Solicitor's Office is a component of the Department of Labor. The Department of Labor includes several other components, including but not limited to the OFCCP, which not only is the plaintiff in this case, but also has entered into information-sharing agreements with other agencies. *See, e.g.*, Memorandum of Understanding Between U.S. Department of Labor and Equal Employment Opportunity Commission, EEOC.GOV (Nov. 7, 2011), https://www.eeoc.gov/laws/mous/eeoc_ofccp.cfm. Thus, an order is necessary to protect Oracle's confidential information from being widely disseminated to other components and other agencies who may have their own separate policies and procedures for handling confidential information. The Solicitor's office may have the best intentions of maintaining the confidentiality of the information. Yet those best efforts provide Oracle with no assurance that other components or agencies will employ equally protective practices and interpret federal disclosure- and information-protection laws in a way that ensures Oracle's and its employees' confidentiality.

Limiting the dissemination of confidential information to the current action is also consistent with cybersecurity best practices. "Cybersecurity remains one of the most significant strategic risks to the United States. The past several years have seen a steady drumbeat of cybersecurity compromises affecting the Federal Government, state and local governments, and the private sector."⁴ Despite its best efforts, the federal government has been and continues to be

⁴ Dep't of Homeland Security, Written testimony of NPPD Acting Deputy Under Secretary for Cybersecurity and Communications Jeanette Manfra for a House Committee on Homeland Security, Subcommittee on Cybersecurity and Infrastructure Protection hearing titled "The Current State of DHS' Efforts to Secure Federal Networks" (Mar. 28, 2017), <https://www.dhs.gov/news/2017/03/28/written-testimony-nppd-acting-deputy-under-secretary-house-homeland-security>; *see also* U.S. Gov. Accountability Office, Federal Information Security: Actions Needed to Address Challenges, at 1 (Sept. 19, 2016), <http://www.gao.gov/assets/680/679877.pdf> (criticizing the government's

a target of hackers and unprecedented cyberattacks.⁵ Even if the cybersecurity measures of the Solicitor's Office are robust, other arms of the federal government may not maintain the same level of protection or may be greater targets for cyberattacks. Oracle cannot be expected to secure confidentiality agreements and certain levels of cyber-protection from all arms of the federal government that may end up with Oracle's confidential information if a protective order is not entered.

The Solicitor's Office of the Department of Labor regularly agrees to or requests protective orders that limit the use of confidential information to the action before it. *See, e.g., Hugler*, ECF No. 29 (protective order ¶ 7.1) ("A Receiving Party may use Protected Material that is disclosed or produced by another Party or by a Non-Party in connection with this Action only for prosecuting, defending, or attempting to settle this Action."); *Perez v. Vesuvio's Pizza & Subs 2, Inc.*, 1:15-cv-00519-LCB-LPA (M.D.N.C. Apr. 6, 2016), ECF No. 30-1 (protective order ¶ 1) ("the Secretary and his counsel and the Defendants and their counsel shall only use information and/or documents disclosed pursuant to this [Stipulated Protective Order] for purposes of litigating this action"); *Perez v. Guardian Roofing LLC*, No. 3:15-cv-05623-RJB (W.D. Wash. May 24, 2016), ECF No. 56 (protective order ¶ 4.1) ("Defendants may use confidential attorneys' eyes material that is disclosed or produced by the Secretary [of Labor] in connection with this case only for prosecuting, defending, or attempting to settle this litigation.").⁶ A similar protective order that limits the disclosure of confidential information for use in this litigation only is necessary.

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response to cyberattacks, and noting that "[c]yber incidents affecting federal agencies have continued to grow, increasing about 1,300 percent from fiscal year 2006 to fiscal year 2015").

⁵ *See, e.g.,* Brian Naylor, *OPM: 21.5 Million Social Security Numbers Stolen From Government Computers*, NPR.ORG (July 9, 2015 3:41 p.m.) <http://www.npr.org/sections/thetwo-way/2015/07/09/421502905/opm-21-5-million-social-security-numbers-stolen-from-government-computers> ("The U.S. government says it's concluded 'with high confidence' that the Social Security numbers of 21.5 million people were stolen from government background investigation databases.").

⁶ These documents are attached to the Declaration of Erin Connell which is submitted concurrently with this brief.

V. **EXISTING FEDERAL STATUTES AND REGULATIONS DO NOT PROVIDE ADEQUATE PROTECTION**

During meet and confer, OFCCP's lawyers claimed that FOIA and the Privacy Act guarantee protection against disclosure of Oracle's confidential data. But close analysis reveals that they, in fact, do not guarantee protection of Oracle's confidential data.⁷

A. **FOIA Does Not Provide Adequate Protection**

FOIA establishes a statutory right of public access to Executive Branch information. The Department of Labor's Solicitor's Office and the OFCCP are admittedly subject to FOIA. *See* 5 U.S.C. § 551(1) (FOIA applies to agencies including "each authority of the Government of the United States").⁸ But, as set forth below, FOIA is a "disclosure" statute, "not [a] secrecy" statute. *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976). It makes little sense that a statute enacted to *require* disclosure would suffice to protect Oracle's interest in keeping confidential business, and personal information from the public sphere. Indeed, OFCCP's regulations echo the presumption of disclosure by stating the Agency's policy to "disclose information to the public and to cooperate with other public agencies as well as private parties seeking to eliminate discrimination in employment." 41 C.F.R. § 60-40.1.

In light of these presumptions, FOIA's protections do not comfort Oracle. First, the government has not always taken a consistent position with respect to whether such exemptions are mandatory or permissible. For example, in the Supreme Court case, *Chrysler Corporation v. Brown*, 441 U.S. 281, 293 (1979), the Defense Supply Agency of the Department of Defense, the OFCCP-designated compliance agency⁹, argued and the Supreme Court held that FOIA

⁷ By arguing that FOIA does not *guarantee* protection of Oracle's confidential information, Oracle does not mean to suggest that the government is permitted to disclose its confidential information pursuant to FOIA. To the contrary, should the government seek to disclose any of Oracle's confidential information pursuant to FOIA, Oracle would vehemently object. As discussed below, Oracle's principal point here is that a protective order would eliminate the potential uncertainty regarding disclosure under FOIA alone.

⁸ The Office of the Administrative Law Judges is also subject to FOIA. *Id.*

⁹ At that time, the Secretary of Labor had delegated administrative responsibility for the enforcement of the Executive Order to the Director of the OFCCP. The Director of OFCCP in turn designated various federal agencies as "compliance agencies" with responsibility for assuring adherence to the Executive Order by contractors within certain geographic areas or industrial classifications. In Chrysler's case the Defense Supply Agency of the

exemptions, to some degree, are permissive, meaning that, in some circumstances, the agency may be free to disclose information that is otherwise exempt from disclosure if it so chooses. *Chrysler Corp.*, 441 U.S. at 293 (“We simply hold here that Congress did not design the FOIA exemptions to be mandatory bars to disclosure. . . . Statements in both the Senate and House Reports on the effect of the exemptions support the interpretation that the exemptions were *only meant to permit the agency to withhold certain information, and were not meant to mandate nondisclosure.*” (emphasis added)). Accordingly, even if FOIA Exemptions 4, 6 and 7 apply to confidential trade secrets and commercial or financial information, private personnel and medical files, and information compiled for law enforcement purposes, 5 U.S.C. § 552(b)(4), (b)(6), (b)(7), those exemptions do not guarantee protection against disclosure if OFCCP and its lawyers have the option of ignoring them and arguing that the exemptions that justify not disclosing information are permissive. Indeed, the OFCCP FOIA Rules discuss specific documents that are subject to disclosure including, but not limited to, affirmative action plans, text of final conciliation agreements, validation studies of tests or other pre-employment selection methods, and dates and times of scheduled compliance reviews. 41 C.F.R. § 60-40.2; *see CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1135-36 n.13 (D.C. Cir. 1987) (noting that the OFCCP decided to release pursuant to FOIA and its regulations affirmative action programs, EEO-1 reports, compliance review reports, corrective action programs, and conciliation agreements).

Additionally, courts differ on what information actually fits within the FOIA exemptions that would justify nondisclosure. Take, for example, Exemption 4’s exception for “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” 5 U.S.C. § 552(b)(4). “Courts of Appeals have embraced varying versions of a convoluted test that rests on judicial speculation about whether disclosure will cause competitive harm to the entity from which the information was obtained.” *N.H. Right to Life v. Dep’t of Health & Human Servs.*, 136 S. Ct. 383, 384 (2015) (Scalia, Thomas, JJ., dissenting from denial of

Department of Defense (DSA) was the designated compliance agency. *Chrysler Corp. v. Schlesinger*, 565 F.2d 1172, 1176 (3d Cir. 1977), *vacated sub nom. Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

certiorari) (citing, *inter alia*, *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 878 (D.C. Cir. 1992) (en banc)).¹⁰ “Some [courts] require factual justifications and market definitions to show that there is ‘actual competition in the relevant market’ in which the entity opposing the disclosure of its information operates.” *Id.* Others “take an expansive view of what the relevant market is, and do not require any connection between that market and the context in which an entity supplied the requested information.” *Id.* (citing *Dep’t of Health & Human Servs.*, 778 F.3d 43, 51 (1st Cir. 2015)). “Courts of Appeals also disagree over what a ‘substantial likelihood of competitive harm’ means.” *Id.* Whereas some courts require “evidence that the entity whose information is being disclosed would likely suffer some defined competitive harm (like lost market share) if competitors used the information,” others “accept[] that competitors’ possible use of the information alone constitutes harm.” *Id.* (comparing, *inter alia*, *McDonnell Douglas Corp. v. Dep’t of Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004), with *New Hampshire Right to Life*, 778 F.3d at 51). See also *Donovan*, 830 F.2d at 1151-52, n.138 (holding that the scope of the Trade Secrets Act is “at least co-extensive with that of Exemption 4 of FOIA” but noting that “[t]he Seventh Circuit appears to have a somewhat different conception of the relative scopes of Exemption 4 and the Trade Secrets Act” (citing *General Elec. Co. v. United States Nuclear Regulatory Comm’n*, 750 F.2d 1394, 1401-02 (7th Cir. 1984))). The government’s suggestion that FOIA will protect Oracle’s trade secrets and commercial or financial information is uncertain, at best—which is really no protection at all when it comes to private personal and commercial trade-secret information.

FOIA is also inadequate protection for confidential information due to Oracle’s limited recourse against the DOL in the event of improper disclosure. See Dep’t of Justice Guide to FOIA (Aug. 10, 2009), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/reverse->

¹⁰ This two-part test generally defines as “confidential” any financial or commercial information whose disclosure would be likely either “(1) to impair the Government’s ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.” *Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871, 878 (D.C. Cir. 1992) (quoting *Nat’l Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974)).

[foia-2009.pdf](#). An agency's disclosure of information pursuant to FOIA is reviewed under the deferential standard in the Administrative Procedures Act (APA), and the agency's action may be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). Thus, if the OFCCP were to improperly release confidential information into the public sphere, a court could find that the impropriety did not rise to the level of "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" and permit the disclosure notwithstanding Oracle's legitimate objections. *See, e.g., Donovan*, 830 F.2d at 1155 (upholding OFCCP's decision to release applicant data despite company's affidavits that the release of information "would enable competitors more easily to direct their recruiting efforts to the best sources of potential employees" as OFCCP's decision was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law"). Thus, a protective order is warranted.

B. The Privacy Act Applies to Individuals and Does Not Provide Adequate Protection to Oracle, a Corporation

Nor does the Privacy Act provide sufficient protection. The Privacy Act of 1974, 5 U.S.C. § 552a, was intended to safeguard individuals from unwarranted collection, maintenance, use and dissemination of their personal information contained in federal executive branch agencies. The Act provides, in relevant part: "No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains" 5 U.S.C. § 552a(b).

It is not clear, however, that a corporation such as Oracle would have the requisite standing to enforce any protections under the Privacy Act. 5 U.S.C. § 552a(g)(1)(providing that "the individual may bring a civil action against the agency"); *St. Michael's Convalescent Hosp. v. State of Cal.*, 643 F.2d 1369, 1373 (9th Cir. 1981) ("the Privacy Act only applies to records of individuals," but "corporations or sole proprietorships[] are not 'individuals' and thus lack standing to raise a claim under the Privacy Act." (citations omitted)); *cf. FCC v. AT&T Inc.*, 562

U.S. 397, 409–10 (2011) (corporations have no “personal privacy” interests under FOIA Exemption 7(C)).

Even if Oracle did have standing to enforce the Privacy Act, the efficacy of the Privacy Act is limited in several ways. First, the Privacy Act does not prohibit a disclosure that FOIA requires. 5 U.S.C. § 552a(b)(2) (allowing disclosure of a record if “required under section 552 of this title [FOIA]”); *Greentree v. U.S. Customs Serv.*, 674 F.2d 74, 75 (D.C. Cir. 1982) (“Our reading of the relevant statutes and their legislative history convinces us that material unavailable under the Privacy Act is not per se unavailable under FOIA.”). Thus, the government could take the position that any information disclosable through FOIA is insulated from the Privacy Act.

Second, “a major criticism of the Privacy Act is that it can easily be circumvented.” U.S. Dep’t of Justice Overview of the Privacy Act of 1974, at 32 (2015), <https://www.justice.gov/opcl/file/793026/download>. For example, the Act only applies to protect individuals’ personal information contained in a “record” means “any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.” 5 U.S.C. § 552a(a)(4). Thus, “a system of records exists if: (1) there is an indexing or retrieval capability using identifying particulars [that is] built into the system; and (2) the agency does, in fact, retrieve records about individuals by reference to some personal identifier.” Overview of the Privacy Act of 1974, at 30. But if the personal information that Oracle produces in this litigation is not contained in the highly technical definition of a “system of records,” then the Privacy Act may not apply. Indeed, courts have applied this exception to dismiss Privacy Act claims in the face of clear disclosures of personal information, such as proposed internal disciplinary investigations and actions. *Armstrong v. Geithner*, 608 F.3d 854, 860-61 (D.C. Cir. 2010).

Third, the Privacy Act contains numerous exceptions. 5 U.S.C. § 552a(b)(1)-(12) (Privacy Act exceptions). To take just one example, the Privacy Act may not apply if disclosure

is made “to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request.” 5 U.S.C. § 552a(b)(7); *Doe v. Naval Air Station, Pensacola, Fla.*, 768 F.2d 1229, 1232–33 (11th Cir. 1985) (discussing Privacy Act law enforcement exemption). Other exceptions exist as well. Therefore, the Privacy Act does not provide sufficient protection.

VI. ORACLE HAS PROPOSED A STANDARD PROTECTIVE ORDER THAT ADEQUATELY PROTECTS CONFIDENTIAL INFORMATION

A. Oracle’s Proposed Protective Order is Appropriate

Oracle submitted a proposed draft protective order to the OFCCP to govern the production of confidential, proprietary, trade secret, commercially sensitive, and private information exchanged in this litigation. Connell Decl. ¶ 6, Ex. F (Protective Order ¶ 1). The protective order limits the use of protected material to the parties and certain designated persons for use in this action only. *Id.* ¶¶ 2-3, 7. The order provides mechanisms for the designation of protected material, the manner and timing of designations, challenges to designations, a meet-and-confer process, and dispute resolution. *Id.* ¶¶ 5-6. The protective order also addresses unanticipated issues that may arise in litigation such as the inadvertent failure to designate information as confidential or the inadvertent production of privileged information. *Id.* ¶¶ 5.3, 12. The proposed protective order also acknowledges potential statutory obligations under FOIA as well as the possibility that protected material may be subpoenaed or ordered produced in other litigation. *Id.* ¶¶ 8-9. Finally, the protective order requires that individuals who are provided protected material acknowledge and agree to be bound by it. *Id.* ¶ 7.2, Exhibit A.

Oracle’s proposed protective order is commonplace in litigation, to the point where courts regularly review and approve such orders regarding confidential information. The Northern District of California provides several model protective orders, available on its website and tailored to specific types of cases. Model Protective Orders, U.S. Dist. Court, Northern District of Cal., <http://www.cand.uscourts.gov/model-protective-orders> (last visited Apr. 20,

2017); *see also* Model Protective Orders, Los Angeles Superior Court, <http://www.lacourt.org/division/civil/CI0043.aspx> (last visited Apr. 20, 2017).

B. OFCCP's Objections to the Protective Order are Unfounded

During the parties' meet and confer, OFCCP belatedly raised several concerns about the proposed protective order and suggested that its provisions "conflict with FOIA other federal law." Connell Decl. ¶ 8, Ex. G (Letter from L. Bremer (Apr. 17, 2017)). Not so.

First, OFCCP has cited authority that suggests that broad guarantees of confidentiality are impermissible. Oracle does not dispute that broad guarantees may be impermissible, but its proposed protective order does not violate this rule. Rather, the proposed order expressly disavows any broad assertions of confidentiality and acknowledges that other laws may apply: "The Parties acknowledge that this Order does not confer blanket protections on all disclosures or responses to discovery and that the protection it affords from public disclosure and use extends only to the information or items that are entitled to confidential treatment under applicable legal principles." Connell Decl. ¶ 6, Ex. F (Protective Order ¶ 1).

Next, OFCCP argues that no assurances of confidentiality can be given in advance of a FOIA request and the protective order impermissibly predetermines the application of FOIA exemptions, citing *Debose v. Carolina Power & Light Co.*, No. 92-ERA-14, 1994 WL 897419, at *3 (Sec'y Feb. 7, 1994); *Jordan v. Sprint Nextel Corp.*, ARB Case No. 06-105, 2008 WL 7835837, at *7 (Admin. Rev. Bd. June 19, 2008); and *Koeck v. Gen. Elec. Consumer & Indus.*, ARB Case No. 08-068, 2008 WL 7835869, at *3 (Admin. Rev. Bd. Aug. 28, 2008). These cases, however, are problematic and distinguishable.

As a threshold matter, these cases all rest on the erroneous assumption that FOIA is a reactive statute only and a government agency may only act pursuant to a FOIA request. To the contrary, since these cases, government agencies have been encouraged to make information

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available to the public proactively—without a formal FOIA request.¹¹ None of the OFCCP’s cited cases discuss—let alone acknowledge the possibility—that an agency could proactively reveal information that Oracle or its employees consider confidential or private. Oracle’s concern that the OFCCP or its counsel may proactively reveal information provided in this litigation to others is not unfounded given the Regional Solicitor of Labor’s publicized comments to the press about OFCCP’s pending litigation against Google, particularly because they assert that OFCCP has already concluded Google engaged in discrimination before the completion of OFCCP’s ongoing compliance evaluation of Goggle, and before it has obtained the compensation data sought through its lawsuit.¹² In light of these comments, Oracle has no assurance that the OFCCP and/or its counsel will use its discretion and judgment to protect Oracle and its employees’ confidential information.

Furthermore, the cases are distinguishable on their facts. In *Debose*, the parties before an ALJ requested approval of a settlement agreement. The ALJ disapproved of the agreement because it required confidentiality of its terms, and the parties failed to argue that any information in the agreement was exempt under FOIA. Notwithstanding his disapproval, the ALJ noted that the parties could designate specific information, as opposed to the entire settlement agreement, as confidential commercial information that would arguably be exempt under FOIA. Likewise in *Koeck v. Gen. Elec. Consumer & Indus.*, ARB Case No. 08-068, 2008 WL 7835869, at *3 (Admin. Rev. Bd. Aug. 28, 2008), and *Jordan v. Sprint Nextel Corp.*, ARB Case No. 06-105, 2008 WL 7835837, at *7 (Admin. Rev. Bd. June 19, 2008), the companies in those respective cases sought to seal the entire proceedings without identifying any applicable FOIA exemptions. The Administrative Review Board denied the companies’ requests, relying on *Debose*, but indicated that the companies could designate specific information, as opposed to

¹¹ See White House Office of the Press Secretary, Fact Sheet: New Steps Toward Ensuring Openness and Transparency in Government (June 30, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/06/30/fact-sheet-new-steps-toward-ensuring-openness-and-transparency>.

¹² Sam Levin, *Google accused of ‘extreme’ gender pay discrimination by US labor department*, The Guardian (Apr. 7, 2017, 6:48 p.m. EDT), <https://www.theguardian.com/technology/2017/apr/07/google-pay-disparities-women-labor-department-lawsuit>.

the entire proceedings, as confidential commercial information.

Here, unlike *Debose*, *Koeck*, and *Jordan*, Oracle is not seeking blanket protection of information produced in this litigation without justification. *See* Connell Decl. ¶ 6, Ex. F (Protective Order ¶ 1) (stating that the order “does not confer blanket protections on all disclosures or responses to discovery”). Rather, pursuant to the protective order, Oracle will designate specific information as confidential information. Oracle has articulated that such information is protected under FOIA’s Exemption 4 and the Trade Secrets Act (*see id.* ¶ 9)), and has provided a factual declaration that details the significant harm that may befall Oracle if its information is disclosed. *See* Thrasher Decl. ¶¶ 3-5. Furthermore, to the extent that OFCCP objects to any of Oracle’s confidential designations, the protective order provides a mechanism for the OFCCP to challenge and to resolve those disputes. Connell Decl. ¶ 6, Ex. F (Protective Order ¶ 6).¹³

Finally, OFCCP suggests that paragraph 13 of the protective order may run afoul of the Federal Records Disposal Act, 44 U.S.C. § 3301. That Act delegates authority to the Archivist of the United States to archive and dispose of certain records received by a federal agency. 44 U.S.C. § 3301 *et seq.* But while it is true that the protective order states that protected material must be returned or destroyed, it also explicitly permits counsel to retain archival copies and permits courtesy copies to be “disposed of in accordance with the assigned judge’s discretion in a manner that does not compromise the Protected Material.” Connell Decl. ¶ 6, Ex. F (Protective Order ¶ 13.3). Thus, the proposed protective order permits the archival of protected material and does not violate the Federal Records Disposal Act.¹⁴

¹³ Even if there were any cause for concern that paragraph 7.1 or paragraph 9 of the proposed protective order conflicted with FOIA or other federal law, such a conflict could be remedied by a revision (*e.g.*, providing that to the extent that federal law conflicts with the protective order, federal law governs; applying the notice and objection procedure in FOIA). Notably, OFCCP has never proposed any alternative language in response to Oracle’s draft protective order to address its purported concerns; instead, the Agency consistently has insisted it will agree to no protective order at all. Connell Decl. ¶ 8.

¹⁴ Again, if the ALJ deems it appropriate, Oracle is willing to amend the proposed protective order to confirm that “if the Federal Records Disposal Act conflicts with the provision in this protective order, the Act shall govern.” As

Accordingly, there is no reason for the government not to agree to enter into a routine protective order, especially when this particular Solicitor's Office of the Department has recently done so. *See Hugler*, ECF No. 29 (San Francisco Regional Office of the Solicitor General of the Department of Labor agreeing to a protective order regarding confidential information).

VII. CONCLUSION

Oracle seeks to protect its own confidential commercial information as well as the private information of the thousands of individuals that it employs. Given the intensely competitive nature of these industries and among high-technology companies, and the frequent raiding of competitors' employees, Oracle has been careful in protecting its trade secrets and confidential business information, including Oracle's workforce structure, the identities of its employees, and their personnel activities. Oracle's request for a protective order is unremarkable as the Solicitor's Office of the Department of Labor regularly agrees to limit its dissemination of confidential information and this particular office recently entered into such a stipulation. Accordingly, Oracle requests that the ALJ similarly protect this information by ordering the parties to enter into a protective order regarding the exchange of confidential information.

April 21, 2017

Respectfully submitted,
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