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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

**PARTIES' JOINT STATUS UPDATE**

The parties hereby file a Joint Status Update regarding the dispute relating to the Protective Order.

The parties have met and conferred as ordered. Ex. A (2/28/19 OFCCP email) and Ex. B (3/5/19 Oracle response); Ex. C (3/8/19 OFCCP Letter) and Ex. D (3/11/19 Oracle response); Ex. E (3/12/19 OFCCP letter) and Ex. F (3/12/19 Oracle response); Ex. G (3/12/19 OFCCP letter) and Ex. H (emails of 3/12/19 to 3/13/19).

The parties have reached agreement on one provision of the Protective Order. Otherwise, no agreement has been reached. Each party sets forth its position below.

**OFCCP's Position**

Prior to entry of the Protective Order by Judge Larsen, OFCCP worked diligently to fashion terms consistent with federal law, specifically FOIA's restraints on OFCCP as a federal

agency, and Oracle's goals of protecting proprietary information and employee privacy. It is of particular significance here that OFCCP negotiated substantially narrower terms than those Oracle wanted for the Protective Order. *Compare* Proposed Order, filed Apr. 21, 2017 with Ex. A to Parker Decl., filed Feb. 14, 2019. As a result of negotiations, the parties agreed to a narrow definition of "Confidential" Information, information that, "based on the Designating Party's good faith belief, may be subject to Freedom of Information Act ('FOIA') Exemptions 4 or 6." (Protective Order, § 2.2.) To ensure that the parties could not side-step the Protective Order by presenting the material in another format, the parties also agreed that "all copies, excerpts, summaries, compilations of, or written materials containing" material designated as "Confidential" would be protected. (Protective Order, §§ 2.11, 3.)

Until OFCCP filed its motion for leave to file the Second Amended Complaint, however, Oracle never claimed that any facts included in filings or results of OFCCP's analyses were Confidential and could not be publicly filed. Oracle takes a new tact in response to OFCCP's motion for leave, accusing OFCCP of violating the Protective Order. However, OFCCP did not file any "actual compensation figures and employee counts" in its Second Amended Complaint, as Oracle accused. (Opp. p. 17.) Instead, OFCCP included the results of its statistical analysis and general facts about Oracle's hiring and compensation practices.<sup>1</sup> OFCCP strongly disagrees with Oracle's current position that such information constitutes Confidential "summaries" under the Protective Order. To be clear, OFCCP has always honored the terms of the Protective Order

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<sup>1</sup> Oracle complained about the inclusion of both employee counts and pay data; however, the information in the complaint is wholly the product of OFCCP's analysis of the data. Employee counts are the counts of employees considered in OFCCP's calculations, which excluded certain individuals with missing or incomplete information. Further, the pay information included in the SAC is the product of analysis. Damages estimates arise from the application of OFCCP's model to the underlying pay data produced by Oracle, and cannot be used to "reverse engineer" the pay of any individual or group of employees. And the average pay gap reported in dollars is the product of the pay gap as a percentage applied against the average of all employees for whom OFCCP received data from Oracle for the year 2016. This information cannot be used to identify individual salaries or even the salaries of groups within Oracle.

entered by Judge Larsen. Given the parties' recent disagreement on the scope of the Protective Order, however, before the Court enters a new Protective Order, OFCCP seeks to clarify its provisions to minimize future disputes.

While wrongly accusing OFCCP of violating the Protective Order, Oracle itself has disregarded the Order in producing “[m]ass, indiscriminate, or routinized designations” that do not comport with FOIA. (Protective Order, § 5.1) Despite the narrow scope of information qualifying as “Confidential” under the Protective Order, Oracle designated virtually every document it produced in this action as “Confidential.” If Oracle continues its over-designation of materials in upcoming discovery, OFCCP anticipates that the parties and the Court will be embroiled in endless disputes about whether every fact that has its genesis in documents Oracle (improperly) designated as Confidential is also a protected Confidential “summary.”

The current dispute arose after Oracle accused OFCCP of violating the Protective Order by including facts and analysis in its filing, even though it included no documents marked “Confidential,” and OFCCP did not believe the facts and analyses were Confidential “summaries.” To avoid repeated accusations that OFCCP is violating the Protective Order, when it has no intention of doing so, and to protect Oracle from disclosure of any information that could properly be considered Confidential under the Protective Order, the parties have agreed to revise the sealing procedure in Section 12.3 of the Protective Order (described further in the meet and confer correspondence of March 8, 11-12, 2019). As revised, Section 12.3 provides a mutually beneficial four-day delay between filings and the time information becomes available to the public that would allow Oracle time to invoke the procedure the parties agreed to in Section 12.3 to “file a motion to seal under 29 C.F.R. § 18.85(b) within ten business days of the filing of the Protective Material”:

12.3 Filing Protected Material. If a Receiving Party intends to file with the Office of Administrative Law Judges (“OALJ”) briefs, exhibits or other materials containing material designated “CONFIDENTIAL” by the opposing Party, the Receiving Party must give notice both to the Producing Party, and to this court, of the filing of the document at the time of filing or before.

The notice procedure above is not applicable to filings with the OALJ that do not include material marked “CONFIDENTIAL.” The OALJ will not disclose filings for four business days, giving the non-filing party four business days to notify the OALJ and filing party that it intends to file a motion to seal under 29 C.F.R. § 18.85(b) within ten business days of the filing that it contends contains Protected Material. A filing will remain undisclosed until resolution of any motion to seal.

If the Designating Party seeks to have the Protected Material sealed, the Designating Party must file a motion to seal under 29 C.F.R. § 18.85(b) within ten business days of the filing of the Protected Material.

A motion under this provision is not subject to the Court’s pre-filing requirement.

Ex. H (3/13/19 email of 11:06 a.m.).

While the agreed-upon motion to seal procedure prevents repeated accusations that OFCCP violates the Protective Order when it includes facts derived from Confidential documents or data in its filings, it does not resolve the underlying dispute – the scope of the material considered Confidential under the Protective Order—which triggers other obligations under the Protective Order. Oracle’s new position on the scope of the Protective Order is particularly troublesome in light of the large number of documents they have designated as “Confidential.” Indeed, Oracle has produced tens of thousands of documents and marked nearly all of them confidential. Oracle’s suggestion that OFCCP should simply meet and confer – and ultimately seek court intervention – to resolve the parties’ disputes over this material is not practical. The Order should be clarified now to prevent otherwise inevitable disputes with respect to the Oracle’s upcoming production.

Further, in light of Oracle’s recent accusations, it is of great concern that Oracle intends to employ the Protective Order as a gag on OFCCP’s ability to disclose generalized facts supporting its discrimination claims in order to keep these undesirable facts from public view.

OFCCP has always understood the Protective Order to permit disclosure of both general facts regarding Oracle's recruiting, hiring, and compensation practices, as well as OFCCP's analysis of the data Oracle produced. Indeed, this information goes to the very heart of the matter, and OFCCP did not, and cannot, agree to hide this key information about this litigation from the public. It appears Oracle now intends to use the Protective Order as both a sword and a shield, freely disclosing the facts that serve its purpose, while obscuring others under the guise of the Protective Order in order to control the public narrative.

Oracle's new stance on the scope of the Protective Order will spur numerous disputes on collateral issues. To avoid this, in addition to the revised provision 12.3, regarding sealing, OFCCP seeks to modify the Protective Order in the following ways: 1) to clarify information that falls under FOIA exemption 4 and 6, including examples of particular types of documents and information, as the protective order cannot provide confidentiality beyond the dictates of the Act; 2) to clarify that Oracle must limit its designation of Confidential material, in accord with the narrow definition of "Confidential" under the Protective Order; and 3) to clarify that to qualify as a protected "summary" or "compilation," the "summary" or "compilation" itself must meet the definition of "Confidential" information. OFCCP believes that it is important to clarify these issues now, before the Court enters the Protective Order to govern this case.

OFCCP's Proposed Protective Order (Ex. I) includes the modifications discussed below, which are all aimed at limiting future motion practice based on anticipated disputes given Oracle's new accusations.

**1. Oracle's New Position on the Scope of the Protective Order Presents the Need to Clarify FOIA's Limits on "Confidential."**

Oracle's recent assertion that OFCCP cannot use its own analyses without violating the Protective Order has highlighted a new and problematic disagreement on the limits of FOIA

Exemptions 4 and 6. OFCCP has proposed additional language in attempt to clarify the limits of FOIA with the goal of reducing the need for motion practice on confidentiality disputes. Oracle has rejected all of OFCCP's suggestions to clarify the Protective Order to avoid future dispute while offering no solutions. *See* Parker Letter re OFCCP v. Oracle (Mar. 11, 2019); Parker Letter re OFCCP v. Oracle (Mar. 5, 2019). Oracle appears to suggest that each, inevitable dispute arising from the parties' conflicting interpretation of the Protective Order should come before the Court.

As the Larsen Protective Order acknowledges, any protective order entered cannot afford protections inconsistent with any statute (e.g., the Freedom of Information Act and the Records Disposal Act), regulation, or other law. OFCCP cannot stipulate to any greater protection than FOIA would provide. Indeed, "agencies cannot alter the dictates of the Act by their own express or implied promises of confidentiality." *Pub. Citizen Health Research Group v. Food and Drug Admin.*, 704 F.2d at 1287. Thus, the Administrative Review Board ("ARB") has repeatedly recognized that the protective orders and other confidentiality agreements may not override FOIA and "[e]ven if the record were sealed, the Department of Labor would be required to respond to any request to inspect and copy the record of this case pursuant to FOIA." *Maureen Thomas v. Pulte Homes Inc.*, ARB Case No. 2005-SOX-00009, 2005 WL 4889014, at \*3 (Admin. Rev. Bd. Aug. 9, 2005).

In accordance with FOIA's supremacy over agreements made in litigation, "Confidential" information or items under Section 2.2 are limited to those exempt from disclosure under FOIA Exemptions 4 and 6, 5 U.S.C. § 552(b)(4) or (6). Importantly, FOIA carries a strong presumption in favor of disclosure. *Consumers' Checkbook Ctr. for the Study of Servs. v. HHS*, 554 F.3d 1046, 1057 (D.C. Cir. 2009). "Consistent with 'the basic policy that

disclosure, not secrecy, is the dominant objective of the Act,' the statutory exemptions are 'narrowly construed.'" *Id.* Each exemption serves a different purpose, discussed in turn below, and the basis for withholding information (i.e., as exempt under 4 or 6) implicates how OFCCP can use the information.

a. **Exemption 4**

FOIA Exemption 4 excludes from disclosure "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." 5 U.S.C. § 552(b)(4). Those seeking to prevent disclosure of certain information under FOIA have the burden of proving that the information is confidential. *GC Micro Corp. v. Def. Logistics Agency*, 33 F.3d 1109, 1115 (9th Cir. 1994) *abrogated on other grounds by Animal Legal Def. Fund v. U.S. Food & Drug Admin.*, 836 F.3d 987 (9th Cir. 2016). The strong public interest in favor of disclosure of information is balanced against the right of private businesses to protect sensitive information, which is outweighed if disclosure is not *likely* to cause *substantial* harm to a party's competitive position. *Id.*

First, independent analyses that OFCCP itself creates, such as that included in the Second Amended Complaint are not protected material. Oracle has acknowledged this fact stating, "Oracle does not contend that public disclosure of OFCCP's analyses of Oracle's compensation data violates the Protective Order – so long as the analysis does not reveal the underlying compensation data itself, which is confidential." (Oracle's opposition to motion for leave to amend, p. 17, n.14.). Analyses generated by the government are not excluded from disclosure under Exemption 4. *Bd. of Trade v. Commodity Futures Trading Comm'n*, 627 F.2d 392, 404 (D.C. Cir. 1980) (concluding that scope of Exemption 4 is "restrict[ed]" to information that has "not been generated within the Government"); *Phila. Newspapers, Inc. v. HHS*, 69 F. Supp. 2d 63, 67 (D.D.C. 1999) (finding that an analysis "prepared by the government" is not "obtained

from a person" and so "may not be withheld under Exemption 4"), appeal dismissed per stipulation, No. 99-5335 (D.C. Cir. Mar. 17, 2000).<sup>2</sup> As such, OFCCP's use of summaries of its *own analyses* in the SAC does not violate the Protective Order. OFCCP seeks to clarify this issue now to avoid unnecessary future motions practice regarding OFCCP's use of its analyses. Specifically, because OFCCP's analyses are not exempt under FOIA, the Protective Order should clarify that the following information is not confidential:<sup>3</sup>

2.2.3.3 Non-individualized data, information, and analyses (including summaries, compilations, and comparisons) related to Oracle employees, applicants, and hires, such as: the number of employees, applicants, and hires for particular jobs; the demographic breakdown of employees, applicants, and hires (e.g., by race, gender, country of origin, visa status, educational background, place where recruited, and years of experience); Oracle's job functions, job specialties, job groups, position names, work groups, work group sizes, global career levels, salary grades, and salary ranges; employee reporting relationships and chains of command; aggregated data regarding employee performance ratings, years of tenure with Oracle, span of control, average salaries, average pay gaps, and transfers.

Second, "trade secrets" for purposes of FOIA are construed more narrowly than in other contexts. For example, the D.C. Circuit in *Public Citizen Health Research Group v. FDA* narrowly defined "trade secret" as "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." 704 F.2d 1280, 1288 (D.C. Cir. 1983). This definition also incorporates a requirement that there be a "direct relationship" between the trade secret and the productive process. *Pub. Citizen*, 704 F.2d

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<sup>2</sup> See also *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1154 (D.C. Cir. 1987) (finding OFCCP could release statistics on the racial and sexual composition of the workforce within contractor's various departments; goals developed for equal employment purposes; and "applicant flow information" showing the percentage, by race and sex, of applicants hired from without and employees promoted from within, as this was not within the purview of Exemption 4).

<sup>3</sup> See section (b) below regarding the limits of Exemption 6.

at 1288; accord *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 244 F.3d 144, 150-51 (D.C. Cir. 2001) (reiterating the *Public Citizen* definition and emphasizing that it "narrowly cabins trade secrets to information relating to the 'productive process' itself"). Thus, contrary to what Oracle suggests by designating nearly all documents as Confidential, "trade secret" here does not encompass virtually any information that provides a competitive advantage.

Similarly, the definition of confidential commercial or financial information under FOIA is to be narrowly construed such that disclosure of the information will likely "cause substantial harm to the competitive position of the person from whom the information was obtained." *GC Micro Corp. v. Def. Logistics Agency*, 33 F.3d 1109, 1112-13 (9th Cir. 1994) (citing *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974)), *abrogated on other grounds by Animal Legal Def. Fund v. U.S. Food & Drug Admin.*, 836 F.3d 987 (9th Cir. 2016); *Torres Consulting & Law Grp, LLC v. NASA*, 666 Fed. Appx. 643, 644 (9th Cir. 2016). Substantial injury requires a showing that the disclosure "would allow competitors to estimate, and undercut, the [the producing party's] bids." *Torres*, 666 Fed. Appx. at 644. Again, Oracle's blanket designations of nearly all of the documents produced as confidential is not consistent with this standard.

Finally, Oracle cannot, as it has attempted to do, claim confidentiality for information that is otherwise in the public domain. *CNA*, 830 F.2d at 1154 (holding that "[t]o the extent that any data requested under FOIA are in the public domain, the submitter is unable to make any claim to confidentiality -- a sine qua non of Exemption 4"). Specifically here, Oracle has accused OFCCP of violating the Protective Order by including "compensation information" and "employee counts." As OFCCP stated in its Reply in support of its motion to amend, Oracle salary information is readily available online, including average salary for particular job titles at

Oracle. See <https://www.glassdoor.com/Salary/Oracle-Salaries-E1737.htm#> (showing average salary for a Software Engineer III at Oracle based on approximately 700 salaries).<sup>4</sup> Significantly, OFCCP did not include any individual's compensation, nor even average compensation for job title.

What is more significant here, is that Oracle itself has publicly filed the very kind of information it now claims is confidential under the Protective Order: the number of employees in specific jobs, actual salary figures, pay gaps between white and non-white employees, and information about Oracle's recruiting and compensation practices.<sup>5</sup> Oracle never suggested—as it does now— that including any of this information in any of the filings violated the Protective Order or should have been filed under seal. This reveals Oracle's disingenuous concern with the confidential nature of the information filed, and a troubling intention to use the Protective Order as both sword and a shield, using “Confidential” information to produce summaries and compilations of its own analyses that it presents in public filings (as well as extensive personal information about its employees), while precluding OFCCP from doing the same. As this Court has acknowledged, this case is a matter of public concern and the public has the right to know

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<sup>4</sup>See also, [https://www.payscale.com/research/US/Employer=Oracle\\_Corp./Salary](https://www.payscale.com/research/US/Employer=Oracle_Corp./Salary) (showing salary range by job and gender breakdown); <https://www.linkedin.com/salary/software-engineer-salaries-in-san-francisco-bay-area-at-oracle>; [https://www.payscale.com/research/US/Employer=Oracle\\_Corp./Salary](https://www.payscale.com/research/US/Employer=Oracle_Corp./Salary).

<sup>5</sup> See, e.g., Declaration of Gary Siniscalco re Oracle's motion for summary judgment for failure to conciliate (Apr. 18, 2017), Decl. Exs. K, pp. 17-18 (listing salary of female Software Developer Senior Manager identified by name; listing salary and performance ratings of Software Developer 4 employees identified by name; identifying 334 employees in the Software Developer Senior Manager job and 258 employees in the Software Development Director job title at Oracle's headquarters as of January 1, 2014), Q, pp. 2-4 (describing Oracle's recruiting practices, the source of applicants, and the percentages of applicants applying or working from certain countries), p. 9 (identifying \$37,000 wage gap between black male and white male identified by name and title), p. 21 (attaching unredacted performance ratings of individuals showing employee, name, performance rating, job title, and comments).

the key facts related to whether Oracle has lived up to the nondiscrimination obligations it took on as the recipient of taxpayer funds. *See Multi Ag Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1232 (D.C. Cir. 2008) (recognizing the public interest in monitoring whether USDA subsidy recipients are complying with the law and the agency is “catching cheaters”). Oracle should not be allowed to “selectively disclos[e]” material to the public, “revealing those [facts] that support [its] cause,” while claiming the shelter of the protective order “to avoid disclosing those that are less favorable.” *Tennenbaum v. Deloitte & Touche*, 77 F.3d 337, 340–41 (9th Cir. 1996).

To address Oracle’s selective waiver of confidentiality to gain a tactical advantage, and to further clarify the limits of Exemption 4, OFCCP proposed modifying the language in Section 3, Scope, to include “any information that the Designating Party previously disclosed in this litigation or in any other public forum” as information the Order does not cover. Additionally, because it is well-established that information already in the public domain is not exempt under FOIA, OFCCP proposes that the following examples of documents be specifically identified as not confidential:

2.2.3.4 Information or documents that Oracle has publically disclosed to include in requisitions, on its external website, at places of recruitment or job fairs, to job applicants, in litigation, in public filings with governmental agencies to include the Securities and Exchange Commission.

Further, Oracle’s own willingness to publicly disclose information about recruiting, hiring, and compensation policies, *see supra* n. 4, demonstrates that disclosure of Oracle’s general HR policies will not “cause substantial harm to the competitive position of the person from whom the information was obtained.” *GC Micro Corp. v. Def. Logistics Agency*, 33 F.3d 1109, 1112–13 (9th Cir. 1994). As such, this information cannot be deemed exempt under Exemption 4. *See CNA Fin. Corp.*, 830 F.2d at 1154–55 (allowing disclosure of recruiting data

and goals because company failed to show substantial harm). Accordingly, the protective order should clarify that the following are not confidential:

2.2.3.2 Human resources policies contained in employee handbook and/or Oracle's employee accessible intranet; policies and practices covering routine HR functions such as recruitment, hiring, promotions, compensation, transfers, visas, employee's eligibility to work in the United States, reporting relationships (i.e., statements of who reports to who within Oracle), advancement, roles and responsibilities, job descriptions and duties, discipline, and employee evaluations.

**b. Exemption 6**

FOIA Exemption 6 prevents disclosure of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Aggregated data, or other information that is not linked to an identifiable person, is not protected under Exemption 6. The presumption in favor of disclosure under Exemption 6 "...is as strong as can be found anywhere in the Act." *Multi Ag Media LLC v. USDA*, 515 F.3d 1224, 1229 (D.C. Cir. 2008). Therefore, none of the information that OFCCP included in the SAC is exempt from disclosure on the basis of this exemption and OFCCP can use summaries and compilations of information even if designated confidential on Exemption 6 grounds.

Further, a clearly unwarranted invasion of personal privacy exists only when the information to be disclosed implicates a "substantial privacy interest" that outweighs the public interest in disclosure. *See, e.g. Multi Ag Media LLC v. USDA*, 515 F.3d 1224, 1229 (D.C. Cir. 2008); Substantial privacy interests are generally found to exist in such personally identifying information as a person's name, address, image, computer user ID, phone number, date of birth, criminal history, medical history, and social security number. *Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 600 (1982); Only "information that is linked to an identifiable person" is covered; information that is not tied to any particular individuals, such as aggregated data from payroll

records, is not covered. *Torres Consulting & Law Grp, LLC v. NASA*, 666 Fed. Appx. at 645); *see also, Dep't of Air Force v. Rose*, 425 U.S. 352, 375–76 (1976) (Exemption 6 is “intended to cover detailed Government records on an individual which can be identified as applying to that individual and not the facts concerning the award of a pension or benefit or the compilation of unidentified statistical information from personal records”) (quoting H.R. Rep. No. 1497, 89th Cong., 2d Sess., 11 (1966), U.S. Code Cong. & Admin. News 1966, p.2428) (emphasis added). Thus, to the extent Oracle is concerned with confidentiality of employee information and individual privacy rights, these issues can be disposed of. Thus, although the public interest in disclosure can ultimately outweigh a privacy interest, to the extent Oracle is concerned with confidentiality of employee information and individual privacy rights, these issues can be addressed by ensuring information is not linked to an identifiable person.

## **2. Additional Proposed Modifications**

### **a. Definitions of FOIA Exemptions 4 and 6.**

As discussed above, FOIA is the backstop for what Oracle can designate as “Confidential.” Because it has become apparent through Oracle’s recent accusations that the parties do not have the same understanding of information falling under Exemption 4 or 6, OFCCP suggests the following additional language consistent with the above in an attempt to clarify FOIA’s limits on “Confidential” and again reduce future disputes regarding whether specific information or items are exempt from disclosure:

2.2.1 FOIA Exemption 4 covers “trade secrets” and information that is “commercial or financial and privileged or confidential.” 5 U.S.C. § 552(b)(4)

2.2.1.1 “Trade secrets” shall be narrowly construed, consistent with FOIA exemption 4 and the test set forth in *Pub. Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C.Cir. 1983), as “a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of

either innovation or substantial effort.” This definition incorporates a requirement that there be a “direct relationship” between the trade secret and the productive process itself. *See, e.g. Pub. Citizen*, 704 F.2d at 1288; *accord Ctr. for Auto Safety v. Nat’l Highway Traffic Safety Admin.*, 244 F.3d 144, 150-51 (D.C. Cir. 2001).

2.2.1.2 Confidential commercial or financial information shall be narrowly construed, consistent with exemption 4 and *Torres Consulting & Law Grp, LLC v. NASA*, 666 Fed. Appx. 643, 644 (9th Cir. 2016) (requiring a finding that the disclosure of the information will likely “cause substantial harm to the competitive position of the person from whom the information was obtained.” Substantial injury requires a showing that the disclosure “would allow competitors to estimate, and undercut, the [the producing party’s] bids.” *Id.*

2.2.2 FOIA Exemption 6 covers the Privacy Act, preventing the disclosure of “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). A clearly unwarranted invasion of personal privacy exists only when the information to be disclosed implicates a “substantial privacy interest” that outweighs the public interest in disclosure. *See, e.g. Multi Ag Media LLC v. USDA*, 515 F.3d 1224, 1229 (D.C. Cir. 2008); *Dep’t of State v. Wash. Post Co.*, 456 U.S. 595, 600 (1982) (substantial privacy interests are generally found to exist in such personally identifying information as a person’s name, address, image, computer user ID, phone number, date of birth, criminal history, medical history, and social security number); *Torres Consulting & Law Grp, LLC v. NASA*, 666 Fed. Appx. at 645 (only “information that is linked to an identifiable person” is covered; information that is not tied to any particular individuals, such as aggregated data from payroll records, is not covered.); *see also, Dep’t of Air Force v. Rose*, 425 U.S. 352, 375–76 (1976) (Exemption 6 is “intended to cover detailed Government records on an individual which can be identified as applying to that individual and not the facts concerning the award of a pension or benefit or the compilation of unidentified statistical information from personal records”) (quoting H.R. Rep. No. 1497, 89th Cong., 2d Sess., 11 (1966), U.S. Code Cong. & Admin. News 1966, p.2428) (emphasis added).

#### **b. Challenging Confidentiality Designations**

Consistent with the limits Exemption 4 and 6, the Protective Order anticipates that Oracle will only designate documents as confidential in the narrow circumstances permitted by the Act. It does not appear, however, that Oracle has narrowly limited its designations to these categories. Further, Oracle’s indiscriminate designation of nearly all documents as Confidential makes it entirely unclear if Oracle believes documents to be exempt

from disclosure under Exemption 4, or 6, or has even considered the basis. Oracle suggests that OFCCP invoke the de-designation procedures of the protective order, meeting and conferring and bringing motions regarding document designations. However, as explained in OFCCP's March 8, 2019 letter, it is a more efficient use of resources to reduce the number of designations than to invoke the Order's challenge procedure for thousands of documents. (See Ex. C, pp. 7-8) To ensure that Oracle is considering whether the documents it marks "confidential" meet the FOIA exemption definitions, and that OFCCP has the information to properly challenge each designation, OFCCP suggests the following language requiring Oracle to provide a log of the documents it designates as "Confidential" and the basis underlying this designation:

5.2 . . . .

(d) for all information that Producing Party designates as "Confidential" under subparts (a)-(c), the Producing Party shall provide a log which identifies (1) the specific FOIA exemption(s) that the Producing Party in good faith believes applies to the information; and (2) the basis for that belief.

Finally, in light of Oracle's apparent over-designation of thousands of documents as "Confidential," OFCCP proposes adding the following language to underscore that confidential designations should be made in good faith:

It is the intent of the parties that information will not be designated as confidential for tactical reasons and that nothing be so designated without a good faith belief that it has been maintained in a confidential, non-public manner, and there is good cause why it should not be part of the public record of this case.

**c. Definition of "Summary" and "Compilation" Protected from Disclosure**

Oracle's accusation have also highlighted the parties' disagreement on what constitutes a confidential summary or compilation under the Protective Order. While Oracle takes the position that that the meanings of "summary" and "compilation" in Section 3 require no further clarification, this is untrue. As the language exists now, it does not clearly reflect the limits of

Exemptions 4 or 6, on which Oracle does not appear to be clear. Under FOIA, it is not enough that information is “derived” from a document marked confidential. In order to comport with the Act, the summary or compilation itself must be analyzed and determined exempt under 4 or 6. It is thus possible that a summary or compilations of the underlying information would not qualify for exemption under FOIA. It is necessary to come to an understanding on this issue to prevent numerous motions to seal. Thus, these terms should be defined in the Protective Order to curb future dispute regarding their meaning. OFCCP has suggested the following:

2.13 Summaries or Compilations of Protected Material: lists, excerpted facts or information from Protected Material without any material alteration from the underlying Protected material. Does not include the results of mathematical analyses of Protected Material. Does not include generalized descriptions of a Party’s organizational structure, Human Resources Policies, or employment practices.

To further clarify the meaning of “summary” and “compilation,” OFCCP also proposes the following modification to Section 3:

“All such Summaries or Compilations of Protected Materials, written materials containing Protected Material, testimony, conversations, or presentations by Parties or their Counsel that might reveal Protected Materials must meet the definition of CONFIDENTIAL information or items in paragraph 2.2 before they may be restricted from disclosure by this Order.”

In other words, in order to be “Confidential” and protected from disclosure, any summary or compilation must itself be analyzed under Exemption 4 or 6. Further, the summary/compilation restriction is tied to the exemption. Because each exemption serves a different purpose and requires separate and distinct analysis, the basis for a confidential designation is important as it dictates how OFCCP can use the information. If, for example, Oracle has designated information as confidential for purposes of Exemption 6, then OFCCP can use compilations and summaries

of aggregated data as such use would not infringe on the individual privacy rights Exemption 6 exists to protect.<sup>6</sup>

## ORACLE

The meet and confer letters set out in full Oracle's position. However, to assist, what follows is a summary of Oracle's views on the issue of the Protective Order.

1. It is Oracle's view that the agreement the parties reached regarding Section 12.3, fully resolves the actual dispute that gave rise to OFCCP's view that there was not "a meeting of the minds." As OFCCP has stated regarding the agreed on Section 12.3

"The revision to the sealing procedure anticipates a four-day lag before disclosure of all filings, during which time a party can notify the OALJ that it seeks to bring a motion to seal. It applies regardless of whether the other party agrees that the material is Confidential. This avoids, for example, OFCCP having to guess whether Oracle will argue that a fact it includes in its brief that it does not believe is Confidential, is nevertheless a Confidential "summary" or "compilation." It delays disclosure for four days, while Oracle decides whether to file a motion to seal. Then, the parties can argue their positions in the motion to seal, and opposition."

Ex. H (3/13/19 email of 10:37 a.m.).

This revision therefore protects OFFCP from its concern that it will file items that Oracle believes are confidential, but that OFCCP does not believe are confidential. It will protect Oracle in that Oracle is given an opportunity to keep confidential information under seal. No further changes or modifications need be made to the Protective Order in Oracle's view. What follows are Oracle's reasons for taking this position.

2. In response to Oracle's claim that OFCCP violated the Protective Order by

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<sup>6</sup> As discussed above the privacy interested contemplated by Exemption 6 can be overcome entirely if outweighed by the public interest in disclosure.

placing “dollar figures” and “employee counts” in the Second Amended Complaint OFCCP claimed that there was not a “meeting of the minds” as to at least one provision of the Protective Order concerning summaries and compilations. (See Section 3; see also Mtn re Protective Order; Exs. B, D). OFCCP then offered, as mentioned in Oracle’s motion regarding the Protective Order, a construction of the relevant provision of the Protective Order that strained credulity. To be clear—and Oracle believes a plain reading of the Protective Order, Section 3, supports this—a summary of confidential information, a compilation of confidential information is protected from disclosure under the terms of the Protective Order. An analysis that does not disclose the underlying data itself would not violate the Protective Order.<sup>7</sup>

2. In addition, OFCCP has offered wholesale changes to the Protective Order that are not limited to the scope of Oracle’s complaint regarding the Second Amended Complaint. For example, OFCCP raised the issue of over-designation for the first time. (Mtn re Protective Order; Exs. B, D). Notably, OFCCP does not claim that documents from which it derived the “dollar figures” were improvidently marked confidential. OFCCP does not appear to claim that documents from which it derived the employee count was improvidently marked confidential. (Ex. D). Moreover, OFCCP initially suggested that the changes to the Protective Order be retroactive such that Oracle would be forced to re-designate discovery materials. (Ex. A, B, C, D). In Oracle’s view that is (1) incredibly burdensome, (2) a method for OFCCP to avoid its obligations under Section 6, and (3) entirely unnecessary as OFCCP claims a burden but has made not attempts to actually use the Section 6 procedure. (Ex. B).<sup>8</sup>

3. Despite this background, Oracle considered each and every one of OFCCP’s proposed changes. As is set forth at some length in the meet and confer letters, the proposed changes fall into two categories. (Exs. B, D, F, G).

4. Category One: the changes create more issues than they solve. As an example, one proposed change provides “examples” of things that would not be considered confidential.

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<sup>7</sup> OFCCP falsely claims that Oracle objects to analyses. This statement disproves that accusation.

<sup>8</sup> OFCCP in its position now begins to detail to this Court what it believes the issues are with Oracle’s designations. It could easily do this with Oracle. There is no claim that it tried and Oracle unreasonably resisted its efforts.

Thus proposed Section 2.1.4.1 states that “non-individualized data” would not be considered confidential. The term “non-individualized data” is not defined. And the proposed language only says that non-individualized data are things “such as” a list of items. This language does not resolve issues; it spurs them on. The parties will be left arguing over whether something is “non-individualized data” and more like or less like one of the examples provided. (Exs. B, D).

5. Category Two: there is no apparent need to make the change proposed by OFCCP and OFCCP has not explained why the change is necessary. In proposed Sections 2.1.1 to 2.1.1 [sic], Ex. C, OFCCP proposes to spell out FOIA Exemptions 4 and 6. However, the definition of confidential information in the current Protective Order explicitly references Exemption 4 and 6 stating that confidential information is that which “may be subject to Freedom of Information Act (“FOIA”) Exemptions 4 or 6 . . . .” Section 2.2. Oracle cannot understand, and OFCCP does not explain, why it needs the additional verbiage. (Exs. B, D). Naturally, changing language either has no impact or it will have an impact that OFCCP has not explained. If it won’t change anything, there is no reason to alter the Protective Order. If OFCCP believes it will have some impact, Oracle cannot agree without knowing why OFCCP believes it will make a difference.

In sum, the Protective Order should be entered as is with the exception of the agreed on revision to Section 12.3.

Respectfully submitted,

March 13, 2019



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March 13, 2019

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**From:** "Miller, Jeremiah - SOL" <[Miller.Jeremiah@dol.gov](mailto:Miller.Jeremiah@dol.gov)>  
**Date:** February 28, 2019 at 3:45:50 PM PST  
**To:** "Parker, Warrington" <[wparker@orrick.com](mailto:wparker@orrick.com)>  
**Cc:** "Connell, Erin M." <[econnell@orrick.com](mailto:econnell@orrick.com)>, "Bremer, Laura - SOL" <[Bremer.Laura@dol.gov](mailto:Bremer.Laura@dol.gov)>, "Garcia, Norman - SOL" <[Garcia.Norman@DOL.GOV](mailto:Garcia.Norman@DOL.GOV)>  
**Subject:** OFCCP v. Oracle-- revised protective order

Hi Warrington,

As we discussed, here is our proposal for reaching a new protective order per Judge Clark's order.

Until Oracle filed its opposition to OFCCP's motion for leave to file an amended complaint, we understood the Protective Order entered by Judge Larsen to permit disclosure of both the general facts regarding Oracle's recruiting, hiring, and compensation practices, as well as OFCCP's analysis of the data Oracle produced. This understanding stemmed from the language of the protective order that strictly limited Oracle designations of "Confidential" information to a narrow set of documents that would be considered exempt under the FOIA exemptions 4 (trade secrets or confidential financial or commercial information) or 6 (personnel files that would clearly invade a person's privacy). OFCCP's understanding of the narrow scope of the Protective Order was also founded on Oracle's public disclosure of detailed compensation information in this case, including the salaries and performance ratings of employees identified by name, employee counts for specific job titles, and detailed facts about its recruiting practices. Given this background, Oracle's asserted interpretation of the protective order as stated in its opposition to the motion for leave to amend contradicted OFCCP's understanding of the protective order, and is at odds with Oracle's prior disclosures in public filings.

It is apparent that Oracle's changed stance on the scope of materials that can be disclosed under the protective order is an attempt to prevent the public from learning key information about this enforcement litigation, which is a matter of great public concern. Oracle's attempt to strictly limit disclosure of the facts and OFCCP's analysis in this case is contrary to the strong presumption that judicial proceedings are open to the public. *See, e.g.*, 29 C.F.R. 18.81; *see also Foltz v. State of Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003). Restricting access to court proceedings, including filings, is only permissible when the party advocating that restriction shows compelling reasons, or at a minimum, good cause (depending on the type of motion, *see Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1179-80 (9th Cir. 2006)) to overcome the presumption. And, as we explained in our reply brief in support of OFCCP's motion for leave to amend the complaint, all of OFCCP's enforcement actions are, by definition, a matter of public concern. OFCCP's mission is to protect the interest of taxpayers in ensuring that public is not being used to subsidize discrimination. OFCCP regulations explicitly state that it is the "policy of the OFCCP to disclose information to the public." 41 C.F.R. § 60-40.1. We have always negotiated the protective order with Oracle in light of the presumption of public access.

As we have previously told you, there are elements of Judge Larsen's protective order that do not have to be altered. In light of Oracle's current interpretation of the protective order, however, there are several provisions that need to be revised. First, since it appears that Oracle will be seeking to have documents filed under seal of a type that it previously publicly filed, we request that Oracle re-designate

the documents it already produced, so that its designations are consistent with the revised protective order. We suggest adding language that provides more detail about which documents are considered confidential, and which are not. Second, we need to clarify the definition of summaries and compilations in light of the position Oracle took in its opposition brief.

Finally, we will need to develop a new procedure to determine if documents should be filed under seal, with the intention that this process be as efficient as possible, and that the burden of sealing be put on the party requesting that the document be sealed, which is consistent with case law. We believe that the precise contours of that process will be easier once we have agreed to the definitional changes we believe are necessary, but in brief outline, we would propose a sealing process where a filing party would make a good faith determination as to whether information in its filings were confidential, and file motions or other pleadings accordingly. We would propose that Court alter its filing procedures so that there would be a delay of four days between the filing of a motion or pleading and the affirmative FOIA publication of that filing. This would permit the opposing party three days to file a motion seeking to seal confidential information in the filing if the party believed that it was subject to the protective order. We would ask the court to suspend the FOIA publication of the motion or pleading on the filing of the motion to seal until the motion is resolved. We are prepared to treat filings under this process as non-public until either four days has passed or a motion to seal has been resolved. We believe this process properly allocates the burden for overcoming the presumption of public access to the party asserting that information must be kept private.

Below, we propose alterations to certain portions of the old protective order that we would accept.

Revised sections (revisions are highlighted):

2.1 “CONFIDENTIAL” Information or Items: information (regardless of how it is generated, stored or maintained) or tangible things that, based on the Designating Party’s good faith belief, may be subject to FOIA Exemptions 4 or 6, 5 U.S.C. § 552 (b)(4) or (6). Confidential Information/Items do not include any categories or types of documents or information that a Designating Party has previously disclosed by filings in this matter or published in any other way. In this case, this includes at least the following categories of documents and / or information (including compilations, summaries and comparisons), that Oracle publically disclosed in this litigation: span of control; the citizenship status, national origin, race and / or gender composition; education degree and school; job titles; size of work groups; duties and responsibilities to include projects and products worked on; salaries; countries of applicants; tenure; reporting relationships; recruiting and compensation practices; visas; performance to include performance ratings and evaluations; employee skills, abilities, experience, competencies and / or expertise; and requisitions. It is the intent of the parties that information will not be designated as confidential for tactical reasons and that nothing be so designated without a good faith belief that it has been maintained in a confidential, non-public manner, and there is good cause why it should not be part of the public record of this case.

2.1.1 FOIA Exemption 4 covers “privileged or confidential” “trade secrets and commercial or financial information.” 5 U.S.C. § 552(b)(4)

2.1.1.1 “Trade secrets” shall be defined, using the test set forth in *Clark v. Bunker*, 453 F.2d 1006, 1009 (9th Cir. 1972), as “any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.”

- 2.1.1.2 Confidential commercial or financial information shall be defined using the 9th Circuit definition as set forth in *Torres Consulting & Law Grp, LLC v. NASA*, 666 Fed. Appx. 643, 644, which requires a finding that the disclosure of the information will likely “cause substantial harm to the competitive position of the person from whom the information was obtained. ” Substantial injury requires a showing that the disclosure “would allow competitors to estimate, and undercut, the [the producing party’s] bids.” *Torres Consulting & Law Grp, LLC v. NASA*, 666 Fed. Appx. 643, 644.
- 2.1.2 FOIA Exemption 6 covers the Privacy Act, preventing the disclosure of “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6).
- 2.1.3 Confidential Information or Items Example 1: Confidential information/items shall not include information that is readily available to Oracle’s employees regardless of job title, such as human resources policies contained in an employee handbook and/or Oracle’s employee accessible intranet; and/ or policies covering routine HR functions such as recruitment, hiring, promotions, compensation, transfers, visas, reporting relationships (i.e., statements of who reports to who within Oracle), advancement; discipline; and employee evaluations.
- 2.1.4 Confidential Information or Items Example 2: Confidential information/items shall not include the results of OFCCP’s models and analyses, even if the underlying formula or data used in such models is confidential.
- 2.1.5 Confidential Information or Items Example 3: Confidential information/items shall not include: the number of applicants (at any stage) for a job; the number of hires for a job; the number of employees in a job (e.g., the number of employees by job code, job title, job function, job specialty); recruitment and compensation practices; job titles (formal and discretionary) and / or position names; job functions; job specialties; job codes; salary grades; global career levels; visas; transfers; employee’s eligibility to work in the United States; reporting relationships (i.e., statements of who reports to who within Oracle);

**2.2 Protected Material(s):** any Disclosure or Discovery Material that is designated as “CONFIDENTIAL.”

- 2.2.1 The Parties agree that all designations of confidentiality made prior to the date of this Order are irrelevant. The Parties will re-designate documents produced prior to the date of this Order, consistent with the terms of this Order, within 30 days of the date of the Order.

**3. SCOPE:**

This Order covers not only Protected Material (as defined above), but also (1) all copies, excerpts, Summaries or Compilations of Protected Material, or written materials containing Protected Material, and (2) any testimony, conversations, or presentations by Parties or their Counsel that might reveal Protected Material. All such Summaries or Compilations of Protected Materials, written materials containing Protected Material, testimony, conversations, or presentations by Parties or their Counsel that might reveal Protected Materials must meet the definition of CONFIDENTIAL Information or Items in paragraph 2.2 before they may be restricted from disclosure by this Order.

This Order does not cover the following information: (a) any information that the Designating Party previously disclosed in this litigation or in any other public forum; (b) any information that is in the public domain at the time of full disclosure to a Receiving Party or becomes party of the public domain after its disclosure to Receiving Party as a result of publication not involving a violation of this Order, including becoming part of the public record through trial or otherwise; (c) any information known to the Receiving Party before the disclosure in this proceeding by means other than through the Designating Party's production in the underlying compliance evaluation or obtained by the Receiving Party after the disclosure from a source who obtained the information lawfully and under no obligation of confidentiality to the Designating Party; and (d) the results of models and analysis, even if the underlying formula or data used in such models is confidential. Any use of Protected Material at a hearing on a dispositive motion or the final hearing shall be governed by a separate agreement or order.

5.1 Designating Material for Protection: Party that designates information or items for protection under this Order must take care to limit any such designation to material that qualifies under the appropriate standards. **Mass, indiscriminate, or routinized designations are prohibited.** If it comes to a Designating Party's attention that information or items that it designated for protection do not qualify for protection, the Designating Party must promptly notify the other Party that it is withdrawing the mistaken designation.

New sections:

2.13 Summaries or Compilations of Protected Material: lists, excerpted facts or information from Protected Material without any material alteration from the underlying Protected Material. Does not include the results of mathematical analyses of Protected Material. Does not include generalized descriptions of a Party's organizational structure, Human Resources policies, or employment practices.

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March 5, 2019

Jeremiah Miller  
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Re: OFCCP v. Oracle

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Dear Mr. Miller:

I write in response to your email of February 28, 2019 proposing changes to the Protective Order.

Oracle will not agree to any changes to the Protective Order that would impact discovery already produced. Oracle produced discovery in reliance on the Protective Order. OFCCP agreed to the Protective Order's provisions and its framework in May 2017 and then again on January 18, 2019. OFCCP has a means to challenge confidentiality designations under the Protective Order. See Section 6. OFCCP has not availed itself of Section 6. So, it certainly cannot argue that its provisions are insufficient.

Moreover, what OFCCP is essentially doing is asking to be relieved of its obligations under the Protective Order *after* Oracle produced discovery in reliance on the Protective Order. Oracle began producing documents and information beginning in May 2017, and OFCCP remained silent. Only now, after the production thousands of pages of documents and millions of cells of information, does OFCCP claim it should be relieved of its obligations under the Protective Order. This is bad faith as established by the timing and the arguments OFCCP argues to be relieved of its obligations.

In addition, as to discovery already produced, the Protective Order provides the sole means of challenging any designation. Section 4 contemplates that the Protective Order applies to discovery even if the case were terminated. Therefore, Section 6 provides the means and methods to resolve any dispute.

On a go forward basis, OFCCP offers no valid basis for changing the terms of the Protective Order. OFCCP complains that there is a differing interpretation of certain terms. Even were OFCCP's claimed interpretations reasonable, which they are not, the answer to that is not a wholesale re-writing of provisions. It is to ask the Court to resolve differences as it applies to the designations.<sup>1</sup>

Next, OFCCP has claimed that confidential information has been publicly disclosed. With few exceptions, OFCCP has not identified what it claims is the universe of public disclosures. As importantly, OFCCP has

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<sup>1</sup> OFCCP's email also claims that Oracle has a "changed stance on the scope of materials that can be disclosed" which OFCCP claims is an attempt to prevent the public from learning key information. This assertion is false. There has been no changed stance. If OFCCP believes that is so, it should provide the evidence that supports this assertion. As for the charge about keeping key information from the public, what Oracle wants is the Protective Order in place that OFCCP negotiated and agreed to in May 2017 and reaffirmed its commitment to on January 18, 2019.



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Next, OFCCP has claimed that confidential information has been publicly disclosed. With few exceptions, OFCCP has not identified what it claims is the universe of public disclosures. As importantly, OFCCP has not told Oracle what OFCCP contends should be de-designated as confidential based on this assertion. It may be the parties can reach agreement on those items. But without knowing what documents or specific information OFCCP believes should be de-designated, it is difficult to resolve the issues. Equally true, it is difficult to understand how OFCCP could essentially claim that the Protective Order is unworkable, when OFCCP has not even tried to use the Protective Order's mechanisms to which it agreed to three times.

Finally, as is set forth below, the changes that OFCCP proposes are vague. The proposed changes will result in more disputes. They will not provide clarity. They will create confusion.

***Changing the Under Seal Filing Rules.*** We will not agree to a revision of the rules. We actually do not understand that there has been an issue with under seal filings up to this date. As OFCCP has noted in the past, the ALJ has rules governing under seal filings. We believe those rules have been and are sufficient.

***Section 2.1 Definition of Confidential Information or Items.*** We cannot agree to these provisions. First, OFCCP had the ability to negotiate all this over 18 months ago.

Second, as important, the terms are terribly vague and not workable. In this respect, there are many issues, some of which are set forth below.

OFCCP proposes that confidential information "do not include any *categories or types of documents or information* that a Designating Party has previously disclosed by filings . . . ." There is no definition of "categories" or "types." Vagueness is now introduced. For example, if Oracle disclosed a financial excel spreadsheet that was not marked confidential, there would be concern that *all* financial excel spreadsheets would no longer receive confidential treatment, even if the contents of one did not warrant confidentiality and another did.

The proposal states that the scope of the what is *not* confidential "includes *at least the following* categories of documents and/or information . . ." Although specific items are named, it is clear that the list is not exhaustive. Therefore, what would be confidential becomes more vague, not less.

There are then issues with OFCCP's proposed Sections 2.1.3, 2.1.4 and 2.1.5. Section 2.1.3 would make anything "readily available" to an Oracle employee not confidential. And then, it provides examples. The

assertion is false. There has been no changed stance. If OFCCP believes that is so, it should provide the evidence that supports this assertion. As for the charge about keeping key information from the public, what Oracle wants is the Protective Order in place that OFCCP negotiated and agreed to in May 2017 and reaffirmed its commitment to on January 18 and 22, 2019.



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first part is not workable. There is no definition of "readily available." This will spur more, and not less, disputes.

Also, Oracle employees have access to materials that are not public. These materials may even be "readily available" to that employee because they are an employee of Oracle. This cannot mean that the information is not confidential. Moreover, it does not account for the fact that high level managers are employees and have "readily available" to them things that very few other employees have access to. So, "readily available" cannot be a measure of confidentiality.

The examples provided by 2.1.3 are of little aid as they are just examples. So, it will lead to endless disputes. But, the list also includes things that would not be "readily available." For example, discipline is not something that is widely disclosed. i.e., "readily available," within Oracle.

Section 2.1.4, as phrased, would eliminate the entire Protective Order. Under this provision, OFCCP would simply need to deem something the result of an analyses and it would no longer be considered confidential. Relatedly, it is unclear what OFCCP would define as "the result of OFCCP's models and analyses."

As for Section 2.1.5, it is unclear why this provision is necessary. Therefore, without some more context, Oracle could not agree to this provision.

**Section 2.2 Protected Materials.** Oracle will not agree to wholesale re-designation for the reasons set forth above.

In addition, this is simply burdensome. OFCCP had the means by which to address this issue as Oracle was producing materials. It still does.

Moreover, in terms of burden, it does not appear that OFCCP is claiming that every single confidential designation is improper. Therefore, the set of items that OFCCP is challenging is smaller than the entire set of documents produced. In terms of relative burden, then, it falls on OFCCP to challenge the designations it wishes. And in fact, OFCCP took on this burden when it agreed to the procedures set forth in Section 6 of the Protective Order.

**Section 3 Scope.** For the reasons set forth above, Oracle cannot agree to scope.

But there is one additional note to make. The Scope provision allows for unilateral determinations by OFCCP. Under OFCCP's proposal, OFCCP will be able to unilaterally decide whether documents or information marked confidential are confidential. For example, under the following provision whether the information was obtained lawfully and under no obligation of confidentiality would be a decision that OFCCP would make. (providing that there is no confidentiality afforded to "(c) any information known to



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the Receiving Party before the disclosure. . . or *obtained by the Receiving Party after the disclosure from a source who obtained the information lawfully and under no obligation of confidentiality to the Designating Party . . .*"). Apparently, then, Oracle would have to await disclosure and then challenge the disclosure. Even if Oracle won, the harm would be done.

Again, Section 6 of the current Protective Order provides for an orderly process. Moreover, it allows Oracle notice of what OFCCP believes is or is not confidential information. The Scope provision would allow OFCCP to release information and Oracle would suffer the harm of disclosure, even were it later determined that OFCCP was wrong in its assessment.

**Section 5.1 Designating Material for Protection.** We do not understand the need for this provision. With the exception of perhaps the last sentence, it is hortatory in nature and will lead to disputes that simply repeat the words "mass, indiscriminate or routinized." In any case, there is nothing that stops OFCCP for uttering words like that in a Section 6 challenge brought under the current Protective Order.

**New Section 2.13.** We do not understand the first sentence. We cannot agree to the second sentence as we do not understand its scope. It would appear to be redundant of 2.1.4, which means that it is or that there is some different meaning ascribed to it. The last sentence is vague as the term "generalized" has no particular meaning and will simply lead to disputes. Moreover, it appears to be redundant of 2.1.3, which again means that it is or there is something more intended.

In any case, if Section 2.13 is an attempt to place into the Protective Order the interpretation of summaries and compilations that OFCCP proposed and that Oracle discusses in its Motion for Entry of Protective Order, Oracle rejects such a proposal for the reasons given in the Motion.

If you wish to discuss this matter, please let me know.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Warrington Parker".

Warrington Parker

cc. Laura Bremer  
Norm Garcia

U.S. Department of Labor

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March 8, 2019

**VIA ELECTRONIC MAIL ONLY**

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Re: *OFCCP v. Oracle America, Inc.*, Case No. 2017-OFC-00006,  
Protective Order

Dear Warrington,

This letter responds to your letter dated March 5, 2019 regarding the changes that OFCCP proposed to the Protective Order previously entered by Judge Larsen. We have also reviewed the Order Granting Conditional Leave to File Second Amended Complaint on March 6, 2019. Our response reflects the guidance provided by Judge Clark in his Order.

Initially, we note that Judge Clark gave clear instructions that the parties are to “cooperate,” and attempt to resolve our disagreements about the Protective Order. Oracle’s position in its March 5, 2019 letter – rejecting all OFCCP’s suggestions to resolve the parties’ disputes and offering no solutions – is untenable. We explain our concerns in greater detail and proposed resolutions below in the hopes that Oracle will work to resolve the disputes, rather than forcing the parties to bring all of the outstanding issues before Judge Clark.

In light of Judge Clark’s order, we want to clearly state that OFCCP has not disregarded any of the terms of the Protective Order entered by Judge Larsen. Judge Clark has now entered an Order Granting Temporary Protective Order, which will remain in place until he enters an order governing this case going forward. Since it is OFCCP’s understanding that a new Protective Order will be entered, OFCCP wants to ensure it is clarified to minimize further differences of opinion about its interpretation and applicability.<sup>1</sup>

Until OFCCP filed its motion for leave to amend the complaint after the scheduling conference on January 22, 2019, it appeared that the Protective Order was not interfering with OFCCP’s ability to effectively litigate this case or OFCCP’s policy to litigate these issues of

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<sup>1</sup> The Protective Order itself anticipated that modifications could be made. It provided, 12.1 Right to Further Relief. Nothing in this Order abridges the right of any person to seek its modification by the ALJ or any court in the future.

It makes sense to make such modifications now, before Judge Clark enters a new Protective Order.

public concern publicly. Judge Clark recognized the public interest in disclosure in his March 6, 2019 Order:

It is correct that this is a matter of public concern and has generated public interest. Oracle could not fairly ask that the allegations be kept private and sealed — and it hasn't.

(3-6-19 Order, p. 13.) In the year that the parties actively litigated this case, both parties made all of their filings public. In addition to the numerous examples OFCCP has already provided, Oracle's Answer included employee counts (in 2014, Oracle had 47 Female Support Employees), the results of OFCCP's analyses, and general facts about Oracle's hiring practices (Oracle's applicants apply for technical jobs "from outside the United States, from the local Bay Area job market, or from highly regarded college or university programs"). (See, e.g., Answer, pp. 13, 19.) Oracle had never suggested that including any of this information in any of the filings violated the Protective Order, exposed information exempt from disclosure under FOIA, or would be required to be filed under seal.

Nevertheless, in OFCCP's view, Oracle took a completely different tack in response to OFCCP's motion to amend, by claiming that disclosure of the results of OFCCP's statistical analysis and general facts about Oracle's hiring and compensation practices violated the Protective Order. OFCCP took care not to disclose Oracle's confidential information in its filing and did not disclose any data or documents in its filing that were marked "Confidential." Significantly, and contrary to Oracle's artfully worded accusation in its Opposition brief that OFCCP disclosed "actual compensation figures" (p. 17), OFCCP did not disclose any individual's compensation data in its filing (nor could any individual's compensation data be determined from the average pay gap information included.) OFCCP vehemently disagrees that any of the allegations in its filing violated the Protective Order. But, this is the reason that OFCCP believes the Protective Order should be clarified before it is re-entered. Modification to the Protective Order now will reduce the need for future motion practice on confidentiality issues, saving the time of both the Court and the parties.

### Filings Under Seal

By claiming that the results of OFCCP's analysis included in the proposed Second Amended Complaint violated the Protective Order, Oracle inherently suggests that OFCCP had the following choices under the Protective Order: (1) not to include its analyses in the Protective Order, or (2) send a copy of the filing to Oracle in advance of the filing,<sup>2</sup> presumably so that Oracle could object to OFCCP including this information in the filings (information that OFCCP does not believe is "Confidential" under the terms of the Protective Order).<sup>3</sup> At bottom, Oracle's suggestions attempt to improperly chill OFCCP from including information in OFCCP's filings that are not reasonably considered Confidential under the Protective Order.

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<sup>2</sup> Oracle's opposition to motion to amend the complaint, p. 2 ("This easily could have been avoided if OFCCP had agreed to send Oracle a copy of the SAC prior to filing it.")

<sup>3</sup> The procedure outlined in Section 6 of the Protective Order to challenge confidential designations would not have resolved the issue, since OFCCP did not include any documents marked Confidential in its filings. OFCCP does not claim that the detailed compensation data linked to individual Oracle employees that OFCCP analyzed to come up with the pay gaps, damages, and number of employees in various job functions data should not be designated confidential, rather that OFCCP's analysis of that data is not confidential. OFCCP has not disclosed Oracle's data.

Oracle's suggestion that OFCCP provide advance copies of its filings to Oracle for review is not only impracticable (particularly for responsive filings), it is also contrary to the sealing procedures under the Protective Order that the parties negotiated. During negotiations, the parties added provisions for sealing filed documents in Section 1 and 12.3 that were not included in Oracle's original [Proposed] Order filed on April 21, 2017 with its motion for protective order. Section 1, as negotiated, explicitly provides that "This Protective Order does not entitle the parties to file confidential information under seal. A party designating material as confidential must seek permission from the court to have its material designated as confidential filed under seal." OFCCP's goal in negotiating the insertion of this provision into the Protective Order was to ensure that the burden remained on Oracle to justify sealing information it contends falls within the definition of "Confidential" Information. This provision and burden is consistent with case law. Section 12.3, as included in the negotiated Protective Order, further provides:

**12.3 Filing Protected Material.** If a Receiving Party intends to file with the Office of Administrative Law Judges ("OALJ") briefs, exhibits or other materials containing material designated "CONFIDENTIAL" by the opposing Party, the Receiving Party must give notice both to the Producing Party, and to this court, of the filing of the document at the time of filing or before.

If the Designating Party seeks to have the Protected Material sealed, the Designating Party must file a motion to seal under 29 C.F.R. § 18.85(b) within ten business days of the filing of the Protective Material.

A motion under this provision is not subject to the Court's pre-filing requirement.

This negotiated provision requires notice that "Confidential" materials will be filed only "at the time of filing." It explicitly states that pre-filing notice is not required. So, even had OFCCP filed "Confidential" materials – which it did not – it was not required to give its filings to Oracle in advance.

The issue raised by Oracle's accusations is how to handle a situation in which OFCCP does not believe it is filing "Confidential" material under the Protective Order, and therefore does not provide notice under Provision 12.3 to the Court and Oracle that it is filing such material, but Oracle believes that the material is "Confidential." OFCCP does not believe that accusing OFCCP of violating the Protective Order in such situations is productive or helps either party.

To address Oracle's concern that information it contends is Confidential might be released to the public before it can invoke the sealing procedures of Sections 1 and 12.3, OFCCP suggests a four-day delay between filings and public postings in the OALJ's FOIA reading room (during which time OFCCP also would not release the filings). This would ensure that the filings are not disclosed during a four-day period in which Oracle can invoke the procedure in Section 12.3 to "file a motion to seal under 29 C.F.R. § 18.85(b) within ten business days of the filing of the Protective Material." If you disagree with the resolution, we need to have a better understanding of the reason and what you think the solution should be.

## **“Summaries” and “Compilations” of “Confidential” Information**

OFCCP disagrees that any of the allegations it filed constituted “Confidential” information under the Protective Order. OFCCP did not file any documents marked Confidential, yet Oracle nevertheless accuses OFCCP of violating the Protective Order. Since OFCCP strongly disagrees that any of the information included in its motion seeking leave to amend was Confidential, but wants to avoid repeated accusations that it is violating the Protective Order, it seeks to clarify the information that can be protected as a “compilation” or “summary” of confidential material.

First, we note that the parties agreed to limit “Confidential” information to information that “may be subject to Freedom of Information Act (‘FOIA’) Exemptions 4 or 6.” (Section 2.2.) Moreover, the Protective Order explicitly stated that it “cannot, and therefore does not, afford protections inconsistent with any statute (e.g., the Freedom of Information Act and the Records Disposal Act), regulation, or other law. Nevertheless, Oracle designated almost all of the documents and data it produced as “Confidential.”

Oracle compounds the over-designation of documents by then asserting that any general facts derived from these documents, or the results of any analysis of the documents is also a “Confidential” “summary” or “compilation,” and also protected from disclosure. By Oracle’s new interpretation, OFCCP is prevented from disclosing generalized information related to its compensation and hiring claims, such as (1) the number of women, minorities, and employees included in OFCCP’s compensation analysis of three job functions, (2) the average pay differences between members of the protected class and the average pay for all employees for whom Oracle produced data in 2016, (3) damages estimates, (4) a general description of Oracle’s recruiting practices and compensation practices, and (5) average pay. Oracle’s current interpretation is contrary to the language of the Protective Order, the parties’ prior practice in this case, and case law. But, since it will impact all further filings in the case, OFCCP believes these terms should be clarified now, to avoid further motion practice on this issue.

Oracle’s new interpretation has it backwards. Not every fact or aggregation of information derived from documents marked “Confidential” is Confidential. To the contrary, the fact or aggregation cannot be hidden from public disclosure unless it is itself Confidential. See *Hechavarría v. City & Cty. of San Francisco*, 2011 WL 1099861, at \*2 (N.D. Cal. 2011). So, for example, the question is does the number of women employed in Oracle’s Product Development job function or a general description of Oracle’s recruiting practices itself qualify as a trade secret or confidential commercial or financial information? The answer is no.

As Oracle at least says it recognizes, FOIA cannot be used to shield a government contractor from disclosure of OFCCP’s analyses of its violations: “Oracle does not contend that public disclosure of OFCCP’s analyses of Oracle’s compensation data violates the Protective Order – so long as the analysis does not reveal the underlying compensation data itself, which is confidential.” (Oracle’s opposition to motion for leave to amend, p. 17, n.14.) While Oracle itself acknowledged it had no basis for objecting that the summaries of OFCCP’s analyses that OFCCP included in its filing were not confidential, it did object.

Because Oracle has raised this new interpretation of the Protective Order, OFCCP suggests the definitions of “Summaries” and “Compilations” and the definitions of the FOIA exemptions be clarified in the Protective Order, and that a list be included of specific documents

that will not be considered “Confidential.” While Oracle claims that this will lead to endless disputes, it is actually an effort to avoid endless accusations by Oracle that OFCCP is violating the Protective Order. Therefore, OFCCP suggests clarifying the information that falls within the FOIA exemptions and can reasonably be designated as Confidential under the Protective Order with the following additions:

2.1.1 FOIA Exemption 4 covers “trade secrets” and information that is “commercial or financial and privileged or confidential.” 5 U.S.C. § 552(b)(4)

2.1.1.1 “Trade secrets” shall be narrowly construed, consistent with FOIA exemption 4 and the test set forth in *Pub. Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C.Cir. 1983), as “a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.” This definition incorporates a requirement that there be a “direct relationship” between the trade secret and the productive process itself. *See, e.g. Pub. Citizen*, 704 F.2d at 1288; *accord Ctr. for Auto Safety v. Nat’l Highway Traffic Safety Admin.*, 244 F.3d 144, 150-51 (D.C. Cir. 2001).

2.1.1.2 Confidential commercial or financial information shall be narrowly construed, consistent with exemption 4 and *Torres Consulting & Law Grp, LLC v. NASA*, 666 Fed. Appx. 643, 644 (9th Cir. 2016) (requiring a finding that the disclosure of the information will likely “cause substantial harm to the competitive position of the person from whom the information was obtained.” Substantial injury requires a showing that the disclosure “would allow competitors to estimate, and undercut, the [the producing party’s] bids.” *Id.*

2.1.1 FOIA Exemption 6 covers the Privacy Act, preventing the disclosure of “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). A clearly unwarranted invasion of personal privacy exists only when the information to be disclosed implicates a “substantial privacy interest” that outweighs the public interest in disclosure. *See, e.g. Multi Ag Media LLC v. USDA*, 515 F.3d 1224, 1229 (D.C. Cir. 2008); *Dep’t of State v. Wash. Post Co.*, 456 U.S. 595, 600 (1982) (substantial privacy interests are generally found to exist in such personally identifying information as a person’s name, address, image, computer user ID, phone number, date of birth, criminal history, medical history, and social security number); *Torres Consulting & Law Grp, LLC v. NASA*, 666 Fed. Appx. at 645 (only “information that is linked to an identifiable person” is covered; information that is not tied to any particular individuals, such as aggregated data from payroll records, is not covered.); *see also, Dep’t of Air Force v. Rose*, 425 U.S. 352, 375–76 (1976) (Exemption 6 is “intended to cover detailed Government records on an individual which can be identified as applying to that individual and not the facts concerning the award of a pension or benefit or the compilation of unidentified statistical information from personal records”) (quoting H.R. Rep. No. 1497, 89th Cong., 2d Sess., 11 (1966), U.S. Code Cong. & Admin. News 1966, p.2428) (emphasis added).

In light of the concern you expressed in your letter about “readily available” information and “categories or types” being difficult to define, OFCCP eliminated this suggested language and instead included a list of specific examples to provide additional clarity. The fact that this language “is not exhaustive” does not render the list useless. It will at least provide more clarity as to the items listed.

2.1.4. Confidential Information or Items do not include:

2.1.4.1. Human resources policies contained in employee handbook and/or Oracle’s employee accessible intranet; policies and practices covering routine HR functions such as recruitment, hiring, promotions, compensation, transfers, visas, employee’s eligibility to work in the United States, reporting relationships (i.e., statements of who reports to who within Oracle), advancement, roles and responsibilities, job descriptions and duties, discipline, and employee evaluations;

2.1.4.2 Non-individualized data, information, and analyses (including summaries, compilations, and comparisons) related to Oracle employees, applicants, and hires, such as: the number of employees, applicants, and hires for particular jobs; the demographic breakdown of employees, applicants, and hires (e.g., by race, gender, country of origin, visa status, educational background, place where recruited, and years of experience); Oracle’s job functions, job specialties, job groups, position names, work groups, work group sizes, global career levels, salary grades, and salary ranges; employee reporting relationships and chains of command; aggregated data regarding employee performance ratings, years of tenure with Oracle, span of control, average salaries, average pay gaps, and transfers.

2.1.4.3 Information or documents that Oracle has publically disclosed to include in requisitions, on its website, at places of recruitment or job fairs, to job applicants, in litigation, in public filings with governmental agencies to include the Securities and Exchange Commission.

It is the intent of the parties that information will not be designated as confidential for tactical reasons and that nothing be so designated without a good faith belief that it has been maintained in a confidential, non-public manner, and there is good cause why it should not be part of the public record of this case.

In addition, OFCCP suggests adding the language it provided in its February 28, 2019 email to Section 3, “Scope” to clarify the meaning of “summary” and “compilation.”

Oracle objected to OFCCP’s proposed additions, stating that they allow “for unilateral determinations by OFCCP.” Since the information that Oracle seeks to protect as a “summary” or “compilation” are, by definition, not themselves marked “Confidential,” OFCCP already has to make the determination whether the information falls within the definition of a “summary” or “compilation.” The additions will provide OFCCP with further guidance when it makes those determinations. OFCCP seeks to clarify that:

“All such Summaries or Compilations of Protected Materials, written materials containing Protected Material, testimony, conversations, or presentations by

Parties or their Counsel that might reveal Protected Materials must meet the definition of CONFIDENTIAL information or items in paragraph 2.2 before they may be restricted from disclosure by this Order.”

In the Scope section, OFCCP also seeks to add Oracle’s acknowledgement from its Opposition brief that the Order does not protect against disclosure of “(d) the results of models and analyses, even if the underlying formula or data used in such models is confidential.” It will drop its request to (a), which is already covered by the Protective Order. While Oracle objects to the language in (c), this is already part of the negotiated Protective Order.

### **Challenging Confidentiality Designations**

Another issue OFCCP raised after Oracle accused it of violating the Protective Order is that Oracle over-designated documents as Confidential. OFCCP notes that the Protective Order cautioned that parties designating material as Confidential “must take care to limit any such designation to material that qualifies under the appropriate standards. Mass, indiscriminate, or routinized designations are prohibited.” (Section 5.) Oracle violated this provision of the Protective Order.

Oracle’s blithe response that the Protective Order already has a procedure for resolving disputes about document designations vastly understates the problem. Oracle has produced “75 data export files containing more than 1,000 data fields, and tens of thousands of accompanying documents.” (Oct. 11, 2017 letter from Oracle to OFCCP.) Oracle marked all of these files Confidential. Oracle separately produced tens of thousands of documents, almost all of which were also marked Confidential. OFCCP anticipates Oracle will be producing substantial additional data, as well as documents in the coming months, and wants to ensure that Oracle complies with the Protective Order by designating documents as Confidential, only in the narrow circumstances permitted by the Protective Order.

The Protective Order anticipates a limited universe of documents marked “Confidential,” those Oracle reasonably believes are subject to FOIA exemptions 4 and 6. If Oracle had narrowly limited its designations to these categories, it would not present a problem to individually challenge the few documents for which the parties disagreed were trade secrets or confidential financial or commercial information. However, to individually challenge, meet and confer, and seek ALJ intervention on tens of thousands of documents is not realistic. This is the reason OFCCP seeks to establish general guidelines on the types of materials the will be de-designated and that Oracle will not designate as Confidential during the next round of discovery.

OFCCP will not insist at this time that the parties resolve the over-designation of documents already produced. OFCCP acknowledges that it could invoke this extremely burdensome process in the future. With respect to future productions and designations, OFCCP offers another solution to reduce the number of improper designations. OFCCP suggests that Oracle provide a log of all the documents it designates as “Confidential,” along with a basis. This will ensure Oracle is actually considering whether the documents it marks “Confidential” meet the FOIA exemption definitions, deter Oracle from over-designating documents as “Confidential,” and should not require significant additional burden as Oracle is already obligated to make a good faith determination on Confidentiality and is surely also preparing an index of the documents it produces. With the additions OFCCP suggests above, however, it

seeks to reduce the number of documents Oracle designates as Confidential to reduce future disputes about whether disclosures violate the Protective Order.

We would like to see if we can reach agreement on any of our proposed additions to the Protective Order. Please let us know if you agree to any of OFCCP's proposals or would like to discuss them further.

Sincerely,

A handwritten signature in blue ink that reads "Laura C. Bremer" followed by a stylized monogram "LCB".

Laura C. Bremer



March 11, 2019

Laura Bremer  
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Re: OFCCP v. Oracle

Warrington Parker  
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Dear Ms. Bremer:

I write in response to your letter of March 8, 2019, proposing changes to the Protective Order.

To sum up Oracle's position, it may be that the parties can reach agreement regarding the under seal filing requirements. Oracle does not perceive the issue that OFCCP does. However, Oracle is willing to discuss the matter further once OFCCP drafts the under seal provision it proposes in full. As to the rest of the proposed changes, Oracle will not agree.

You begin your letter suggesting that Oracle has made no attempt to "cooperate" and resolve "our" disagreements about the Protective Order. That is not true. Oracle considered each of OFCCP's proposed changes to the Protective Order. Oracle gave its reasons why those proposed changes were unworkable.

Oracle considered each of the proposed changes despite the fact that Oracle does not believe there is any good faith dispute regarding the Protective Order and its scope. Rather, Oracle believes that OFCCP has launched this effort to change the Protective Order in order to defend itself against the charge that OFCCP did, indeed, disclose information in the Second Amended Complaint that is confidential under the terms of the Protective Order.

Oracle does not believe that there is a good faith issue for the following reasons. On January 18, and again on January 22, 2019, OFCCP stated that it would abide by the Protective Order. OFCCP only changed its tune after Oracle's January 24, 2019, letter that stated that OFCCP violated the Protective Order by disclosing "dollar figures and employee counts . . . derived from data and documents" that Oracle designated as confidential.

In response to the January 24 letter, OFCCP (1) said it would not abide by the terms of the Protective Order; (2) claimed that there was not a "meeting of the minds," offering an interpretation of the Protective Order, Section 3, that strains credulity; and (3) for the first time claimed that Oracle over-designated information and documents as confidential.

In addition, OFCCP began to offer changes to the Protective Order that have no relationship to the issue raised in the January 24 letter. For example, OFCCP has offered changes to the Protective Order regarding handbooks, human resource policies and practices. See OFCCP's proposed Section 2.1.4.1. Those documents are not the subject of Oracle's January 24, 2019 letter. Moreover, while OFCCP claims that there have been over-designations, as to the issue raised in the January 24 letter—whether the dollar



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figures and employee counts were protected by the Protective Order—OFCCP has not argued that the documents and information from which OFCCP derived those figures and counts were improperly designated confidential.<sup>1</sup>

In sum, OFCCP has created its own controversy, has abraded Oracle for failing to agree that the Protective Order needs to change because of OFCCP's self-created controversy, and then has proposed changes that are unworkable even were there an actual controversy.

So again, Oracle will not agree to the changes proposed by OFCCP, with the possible exception of the under seal filing provision. Below, please find responses to each of the proposed changes.

#### **Filings Under Seal**

OFCCP suggests changing the under seal filing procedure because Oracle "inherently" has suggested two courses that OFCCP finds unworkable. To be clear, Oracle has not suggested those two courses. Nor are those the only two courses available. The course available—and it does not require any modification of the Protective Order—is to use Section 6 of the Protective Order and inform Oracle of the documents or the information that OFCCP wishes to have de-designated. Otherwise, if OFCCP does not wish to use Section 6, OFCCP can use Section 12's procedures.

This said, Oracle is willing to entertain further discussion. Oracle would ask that OFCCP draft the provision it proposes in full.<sup>2</sup>

#### **"Summaries" and "Compilation" of "Confidential" Information**

OFCCP starts its discussion by arguing that it did not violate the Protective Order when it filed the Second Amended Complaint. The parties disagree on this point. However, this disagreement cannot justify the wholesale changes OFCCP proposes to the Protective Order.

First, the changes do not actually address the stated dispute. Oracle did not claim that OFCCP violated the Protective Order by disclosing "policies and practices." Oracle claimed, as OFCCP knows, that "dollar

<sup>1</sup> OFCCP's contention that Oracle has changed its position, i.e., "taken a different tack in response to OFCCP's motion to amend," is simply not true. Oracle has complained about the contents of the Second Amended Complaint. Oracle did not perceive the prior filings referenced by OFCCP as violating the Protective Order. It is not a change of tack. It is the content of the Second Amended Complaint that causes issues.

<sup>2</sup> OFCCP references the fact that Section 6 would not address the issue of its summaries and compilations because OFCCP did not include any documents marked confidential in its filings. See March 8, 2019 letter, fn. 3. But OFCCP knew that summaries and compilations were covered by Section 3. It knew that there was a procedure for addressing the filing of confidential information. See Section 12.



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figures and employee counts" were disclosed improperly. Second, as to what OFCCP disclosed, OFCCP does not appear to challenge the fact that the information and documents from which OFCCP derived at least the dollar figures were properly designated confidential. So, the changes proposed are not driven by the issues surrounding the Second Amended Complaint. In fact, they don't touch on those issues.

Turning to the suggested changes, OFCCP has provided no valid reason to place proposed Sections 2.1.1, 2.1.1.1, 2.1.1.2, and 2.1.1, in the Protective Order. Confidential information is already defined in the current Protective Order as those items that "may be subject to Freedom of Information Act ("FOIA") Exemptions 4 or 6 . . . ." See Section 2.2.

There appears to be no reason to import additional language. As a result, it is not clear what OFCCP wishes to gain by adding the additional paragraphs that spell out what FOIA Exemption 4 and 6 might mean. And OFCCP does not explain why the current Protective Order is insufficient.

As for proposed Sections 2.1.4, 2.1.4.1, 2.1.4.2, and 2.1.4.3, Oracle acknowledges that OFCCP has removed the "readily available" language. However, there is no need for the proposed language as the term confidential information is already defined in the Protective Order. Moreover, Section 3 of the current Protective Order further specifies those things that are and are not confidential.

An additional list, which OFCCP acknowledges is not exhaustive does not provide more clarity. It will promote additional argument as the parties will not argue about whether a document meets the definition of confidential. Rather, the argument will be about whether a document is closer to a human resource policy (2.1.4.1) or can be considered "non-individualized data" which is not actually defined and which is limited in no clear way as the provision just provides examples, signaled by its use of the phrase "such as." (2.1.4.1) (emphasis added).

There is also no purpose to add to 2.1.4.3, language concerning the parties' intent. The definition of confidential, Section 2.2, already has a good faith requirement. Therefore, it is not clear what OFCCP wishes to obtain by this new provision.

OFCCP says that it wishes to clarify the provision regarding summaries and compilations. The proposed change does not appear to add anything. The current Protective Order provides that it covers summaries and compilations of Protected Material. Section 3. Protected Material is defined as discovery that is marked confidential. See Section 2.11. This revision seems to say the same thing. Therefore, Oracle would see no reason to change the current provision.

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### Challenging Confidentiality Designations

Oracle understands that OFCCP will not insist on the re-designation of documents already produced. But Oracle rejects the notion that there be a log and a basis provided for each document designated as "confidential."

First, a log will impose a burden on Oracle that OFCCP cannot justify. OFCCP claims that there has been over-designation. It claims that there is a burden to following Section 6 procedures. But, OFCCP does not quantify the burden. It has not actually attempted to use Section 6's procedures. So, the only basis for asking for a log is an *ipse dixit* statement that Section 6 will not work.

Second, and relatedly, there can be little dispute that OFCCP is asking Oracle to produce volumes of documents and information containing private and personal employee information. There should be little dispute that those items are appropriately marked confidential. Thus, what OFCCP's proposal will require is Oracle to log documents even when there would likely be no challenge to the designation. That is make-work for Oracle.

Moreover, such a log will not solve the issue that OFCCP imagines. Were Oracle to over-designate, the document would appear on the log. Perhaps there is a suggestion that the log allows OFCCP a clearer basis to challenge the document or information designated confidential. And yet, OFCCP seems to have no issue raising the issue of over-designation without any such log. The fact is, OFCCP did not ask for a log in the first instance when it negotiated the Protective Order. It has no apparent inability to identify documents that it claims should not have been marked confidential. And OFCCP's sole basis for imposing an additional burden on Oracle is its unsupported assertion that it just can't even start to abide by Section 6. This is not a sufficient basis to change the Protective Order.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Warrington Parker". The signature is stylized and somewhat illegible, with a long horizontal stroke extending to the right.

Warrington Parker

cc: Norm Garcia  
Jeremiah Miller



March 12, 2019

**VIA ELECTRONIC MAIL ONLY**

Warrington Parker  
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Re: *OFCCP v. Oracle America, Inc.*, Case No. 2017-OFC-00006,  
Protective Order

Dear Warrington,

This letter responds to your letter dated March 11, 2019 regarding the changes that OFCCP proposed to the Protective Order previously entered by Judge Larsen. While your letter misrepresents the parties' correspondence and positions, it is not productive to address this in this letter. OFCCP will address its position regarding the parties' disputes in the position paper due tomorrow.

Instead, this letter focuses on the one issue Oracle stated it would consider revising – the provision for sealing documents.

OFCCP suggests that Section 12.3 be revised as follows:

12.3 Filing Protected Material. If a Receiving Party intends to file with the Office of Administrative Law Judges ("OALJ") briefs, exhibits or other materials containing material designated "CONFIDENTIAL" by the opposing Party, the Receiving Party must give notice both to the Producing Party, and to this court, of the filing of the document at the time of filing or before.

The notice procedure above is not applicable to filings with the OALJ that do not include material marked "CONFIDENTIAL." The OALJ will not disclose filings for four days, giving the non-filing party four days to notify the OALJ and filing party that it intends to file a motion to seal under 29 C.F.R. § 18.85(b) within ten business days of the filing that it contends contains Protected Material.

If the Designating Party seeks to have the Protected Material sealed, the Designating Party must file a motion to seal under 29 C.F.R. § 18.85(b) within ten business days of the filing of the Protected Material.

A motion under this provision is not subject to the Court's pre-filing requirement.

The revised provision requires OFCCP to provide notice of a filing of material marked "Confidential," but does not require OFCCP to guess what Oracle believes is "Confidential" when it is not filing documents marked "Confidential." The provision provides a lag time between the filing and disclosure by the OALJ, so that Oracle has the opportunity before disclosure to bring a motion to seal, if it believes the motion is warranted.

Please let us know today if Oracle will agree to this revised provision.

Sincerely,



Laura C. Bremer



March 12, 2019

Laura Bremer  
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Jeremiah Miller  
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Re: OFCCP v. Oracle

Dear Ms. Bremer and Messrs. Garcia and Miller:

We have considered OFCCP's suggested revision. Oracle cannot agree to it as it appears to import the limitation that OFCCP wishes to place on the Protective Order to which Oracle has already disagreed. Specifically, it appears to allow OFCCP to summarize or create a compilation or lift from documents confidential information and submit that to the Court without notice.

With the deletion of the sentence set forth below and the addition of the portions in italics, Oracle would consider agreeing to this provision.

12.3 Filing Protected Material. If a Receiving Party intends to file with the Office of Administrative Law Judges ("OALJ") briefs, exhibits or other materials containing material designated "CONFIDENTIAL" by the opposing Party, the Receiving Party must give notice both to the Producing Party, and to this court, of the filing of the document at the time of filing or before.

~~The notice procedure above is not applicable to filings with the OALJ that do not include material marked "CONFIDENTIAL."~~ The OALJ will not disclose filings for four *business* days, giving the non-filing party four *business* days to notify the OALJ and filing party that it intends to file a motion to seal under 29 C.F.R. § 18.85(6) within ten business days of the filing that it contends contains Protected Material. *Where the non-filing party gives such notice, the OALJ will not disclose the filings at issue until ruling on the motion to seal.*

If the Designating Party seeks to have the Protected Material sealed, the Designating Party must file a motion to seal under 29 C.F.R. § 18.85(b) within ten business days of the filing of the Protected Material.

Very truly yours,

  
Warrington Parker



March 12, 2019

**VIA ELECTRONIC MAIL ONLY**

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Re: *OFCCP v. Oracle America, Inc.*, Case No. 2017-OFC-00006,  
Protective Order

Dear Warrington,

We are puzzled by your response to OFCCP's suggestion of a solution to Oracle's concerns that material that Oracle deems Confidential, but OFCCP does not, will be disclosed through filings before Oracle has an opportunity to bring a motion to seal under Section 12.3 of the Protective Order. Oracle offers no solution, which OFCCP fears will lead to repeated accusations that OFCCP violated the Protective Order by filing material that OFCCP does not believe is protected by the Order, and repeated motion practice.

Your letter objects to Oracle's solution because it "appears to allow OFCCP to summarize or create a compilation or lift from documents from confidential information and submit that to the Court without notice." The only notice procedure that OFCCP's proposed language eliminates is the requirement that OFCCP provide notice "at the time of filing or before" for material that is not marked Confidential. (Section 12.3.) Practically, Oracle will obtain notice of the contents of the entire filing at the time of the filing, regardless of whether OFCCP provides separate notice that the filing contains information not marked Confidential, but that Oracle might consider Confidential. In these circumstances, Oracle would have four days to determine whether it believes material not marked Confidential is nevertheless protected, because Oracle considers it to be a "summary" or "compilation" of Confidential material. OFCCP's proposed language eliminates the need for OFCCP to correctly anticipate whether Oracle will consider the non-marked material to be Confidential, yet protects Oracle by delaying disclosure while Oracle decides whether to seek to have the material sealed. It is worth repeating that "the Protective Order does not entitle the parties to file confidential information under seal," and the party seeking to have material filed under seal bears the burden in any event, to file a motion to seal. (Section 1.)

OFCCP does not understand Oracle's objection to the proposed compromise. Even if OFCCP did "summarize or create a compilation or lift from documents confidential information and submit that to the Court without notice," the material would not be disclosed for four days while Oracle determined whether to bring a motion to seal. The motion to seal would be

required to seal the material whether or not OFCCP provided notice at the time of filing. The proposed language is intended, however, to eliminate disputes in a slightly different situation (which OFCCP contends occurred when it filed its motion for leave to amend) – OFCCP included information not marked Confidential and that OFCCP does not consider to be a “compilation” or “summary” of Confidential material in its filing. Therefore, it did not provide notice at the time of the filing that the filing “contain[ed] material designated ‘CONFIDENTIAL’ by the opposing party,” pursuant to paragraph 12.3 of the Protective Order.

Regarding Oracle’s proposed revision to Section 12.3, OFCCP will agree to a delay of four “business” days, as Oracle requests, if Oracle will agree to an objective test for whether notice has to be provided – whether the material included in the filing is marked “Confidential.” (In other words, include the solution proposed by OFCCP that “The notice procedure above is not applicable to filings with the OALJ that do not include material marked ‘CONFIDENTIAL.’”) With the other revisions OFCCP suggests, Oracle is not prejudiced by a filing that contains information that Oracle might consider Confidential, but OFCCP does not. This procedure will eliminate OFCCP’s need to determine whether Oracle believes the material is protected, and subjecting OFCCP to repeated accusations that it violated the Protective Order.

OFCCP requests that Oracle reconsider the compromise language OFCCP suggests for Section 12.3. Please let us know today if Oracle will agree to this revised provision.

Sincerely,



Laura C. Bremer

**From:** [Parker, Warrington](#)  
**To:** [Bremer, Laura - SOL](#); [Kaddah, Jacqueline D.](#); [Miller, Jeremiah - SOL](#); [Garcia, Norman - SOL](#); [Pilotin, Marc A - SOL](#)  
**Cc:** [Siniscalco, Gary R.](#); [Connell, Erin M.](#); [Mantoan, Kathryn G.](#); [Grundy, Kayla Delgado](#); [McAllister, Hailey - SOL](#)  
**Subject:** RE: OFCCP v. Oracle, Case No. 2017-OFC-00006  
**Date:** Wednesday, March 13, 2019 11:03:31 AM  
**Attachments:** [image003.png](#)

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Understood. I agree.

We agree to the provision with the modifications.

12.3 Filing Protected Material. If a Receiving Party intends to file with the Office of Administrative Law Judges ("OALJ") briefs, exhibits or other materials containing material designated "CONFIDENTIAL" by the opposing Party, the Receiving Party must give notice both to the Producing Party, and to this court, of the filing of the document at the time of filing or before.

The notice procedure above is not applicable to filings with the OALJ that do not include material marked "CONFIDENTIAL." The OALJ will not disclose filings for four **business** days, giving the non-filing party four **business** days to notify the OALJ and filing party that it intends to file a motion to seal under 29 C.F.R. § 18.85(b) within ten business days of the filing that it contends contains Protected Material. **A filing will remain undisclosed until resolution of any motion to seal.**

If the Designating Party seeks to have the Protected Material sealed, the Designating Party must file a motion to seal under 29 C.F.R. § 18.85(b) within ten business days of the filing of the Protected Material.

A motion under this provision is not subject to the Court's pre-filing requirement.

Thank you.

**From:** Bremer, Laura - SOL [mailto:[Bremer.Laura@dol.gov](mailto:Bremer.Laura@dol.gov)]  
**Sent:** Wednesday, March 13, 2019 11:01 AM  
**To:** Parker, Warrington <[wparker@orrick.com](mailto:wparker@orrick.com)>; Kaddah, Jacqueline D. <[jkaddah@orrick.com](mailto:jkaddah@orrick.com)>; Miller, Jeremiah - SOL <[Miller.Jeremiah@dol.gov](mailto:Miller.Jeremiah@dol.gov)>; Garcia, Norman - SOL <[Garcia.Norman@DOL.GOV](mailto:Garcia.Norman@DOL.GOV)>; Pilotin, Marc A - SOL <[Pilotin.Marc.A@DOL.GOV](mailto:Pilotin.Marc.A@DOL.GOV)>  
**Cc:** Siniscalco, Gary R. <[grsiniscalco@orrick.com](mailto:grsiniscalco@orrick.com)>; Connell, Erin M. <[econnell@orrick.com](mailto:econnell@orrick.com)>; Mantoan, Kathryn G. <[kmantoan@orrick.com](mailto:kmantoan@orrick.com)>; Grundy, Kayla Delgado <[kgrundy@orrick.com](mailto:kgrundy@orrick.com)>; McAllister, Hailey - SOL <[mcallister.hailey@DOL.GOV](mailto:mcallister.hailey@DOL.GOV)>  
**Subject:** RE: OFCCP v. Oracle, Case No. 2017-OFC-00006

Warrington,

That makes sense, but I think the language should be clear that it remains undisclosed only until resolution of "any motion to seal."

Laura C. Bremer  
Senior Trial Attorney  
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**From:** Parker, Warrington <[wparker@orrick.com](mailto:wparker@orrick.com)>  
**Sent:** Wednesday, March 13, 2019 10:55 AM  
**To:** Bremer, Laura - SOL <[Bremer.Laura@dol.gov](mailto:Bremer.Laura@dol.gov)>; Kaddah, Jacqueline D. <[jkaddah@orrick.com](mailto:jkaddah@orrick.com)>; Miller, Jeremiah - SOL <[Miller.Jeremiah@dol.gov](mailto:Miller.Jeremiah@dol.gov)>; Garcia, Norman - SOL <[Garcia.Norman@DOL.GOV](mailto:Garcia.Norman@DOL.GOV)>; Pilotin, Marc A - SOL <[Pilotin.Marc.A@DOL.GOV](mailto:Pilotin.Marc.A@DOL.GOV)>  
**Cc:** Siniscalco, Gary R. <[grsiniscalco@orrick.com](mailto:grsiniscalco@orrick.com)>; Connell, Erin M. <[econnell@orrick.com](mailto:econnell@orrick.com)>; Mantoan, Kathryn G. <[kmantoan@orrick.com](mailto:kmantoan@orrick.com)>; Grundy, Kayla Delgado <[kgrundy@orrick.com](mailto:kgrundy@orrick.com)>; McAllister, Hailey - SOL <[mcallister.hailey@DOL.GOV](mailto:mcallister.hailey@DOL.GOV)>  
**Subject:** RE: OFCCP v. Oracle, Case No. 2017-OFC-00006

Laura—

Thanks for this. A question. It is my assumption that should Oracle give notice in the four day period, the filing will remain undisclosed until resolution of the motion.

I have added language to that effect. I have also put in the word business after the word four.

**From:** Bremer, Laura - SOL [<mailto:Bremer.Laura@dol.gov>]  
**Sent:** Wednesday, March 13, 2019 10:37 AM  
**To:** Parker, Warrington <[wparker@orrick.com](mailto:wparker@orrick.com)>; Kaddah, Jacqueline D. <[jkaddah@orrick.com](mailto:jkaddah@orrick.com)>; Miller, Jeremiah - SOL <[Miller.Jeremiah@dol.gov](mailto:Miller.Jeremiah@dol.gov)>; Garcia, Norman - SOL <[Garcia.Norman@DOL.GOV](mailto:Garcia.Norman@DOL.GOV)>; Pilotin, Marc A - SOL <[Pilotin.Marc.A@DOL.GOV](mailto:Pilotin.Marc.A@DOL.GOV)>  
**Cc:** Siniscalco, Gary R. <[grsiniscalco@orrick.com](mailto:grsiniscalco@orrick.com)>; Connell, Erin M. <[econnell@orrick.com](mailto:econnell@orrick.com)>; Mantoan, Kathryn G. <[kmantoan@orrick.com](mailto:kmantoan@orrick.com)>; Grundy, Kayla Delgado <[kgrundy@orrick.com](mailto:kgrundy@orrick.com)>; McAllister, Hailey - SOL <[mcallister.hailey@DOL.GOV](mailto:mcallister.hailey@DOL.GOV)>  
**Subject:** RE: OFCCP v. Oracle, Case No. 2017-OFC-00006

Warrington,

The revision to the sealing procedure anticipates a four-day lag before disclosure of **all** filings, during which time a party can notify the OALJ that it seeks to bring a motion to seal. It applies regardless of whether the other party agrees that the material is Confidential. This avoids, for example, OFCCP having to guess whether Oracle will argue that a fact it includes in its brief that it does not believe is Confidential, is nevertheless a Confidential "summary" or "compilation." It delays disclosure for four days, while Oracle decides whether to file a motion to seal. Then, the parties can argue their positions in the motion to seal, and opposition. Here is the proposed language:

**12.3 Filing Protected Material.** If a Receiving Party intends to file with the Office of Administrative Law Judges ("OALJ") briefs, exhibits or other materials containing material designated "CONFIDENTIAL" by the opposing Party, the Receiving Party must give notice both to the Producing Party, and to this court, of the filing of the document at the time of filing or before.

The notice procedure above is not applicable to filings with the OALJ that do not include material marked "CONFIDENTIAL." The OALJ will not disclose filings for four **business** days, giving the non-filing party four **business** days to notify the OALJ and filing party that it intends to file a motion to seal under 29 C.F.R. § 18.85(b) within ten business days of the filing that it contends contains Protected Material. **A filing will remain undisclosed until resolution of any motion.**

If the Designating Party seeks to have the Protected Material sealed, the Designating Party must file a motion to seal under 29 C.F.R. § 18.85(b) within ten business days of the filing of the Protected Material.

A motion under this provision is not subject to the Court's pre-filing requirement.

Please confirm that you agree. Thanks.

Laura C. Bremer  
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**From:** Parker, Warrington <[wparker@orrick.com](mailto:wparker@orrick.com)>

**Sent:** Wednesday, March 13, 2019 10:15 AM

**To:** Bremer, Laura - SOL <[Bremer.Laura@dol.gov](mailto:Bremer.Laura@dol.gov)>; Kaddah, Jacqueline D. <[jkaddah@orrick.com](mailto:jkaddah@orrick.com)>; Miller, Jeremiah - SOL <[Miller.Jeremiah@dol.gov](mailto:Miller.Jeremiah@dol.gov)>; Garcia, Norman - SOL <[Garcia.Norman@DOL.GOV](mailto:Garcia.Norman@DOL.GOV)>; Pilotin, Marc A - SOL <[Pilotin.Marc.A@DOL.GOV](mailto:Pilotin.Marc.A@DOL.GOV)>  
**Cc:** Siniscalco, Gary R. <[grsiniscalco@orrick.com](mailto:grsiniscalco@orrick.com)>; Connell, Erin M. <[econnell@orrick.com](mailto:econnell@orrick.com)>; Mantoan, Kathryn G. <[kmantoan@orrick.com](mailto:kmantoan@orrick.com)>; Grundy, Kayla Delgado <[kgrundy@orrick.com](mailto:kgrundy@orrick.com)>; McAllister, Hailey - SOL <[mcallister.hailey@DOL.GOV](mailto:mcallister.hailey@DOL.GOV)>  
**Subject:** RE: OFCCP v. Oracle, Case No. 2017-OFC-00006

Laura—

This is what I understand from our conversation regarding 12.3. If there is a filing that discloses confidential information or could disclose confidential information, there is a four day period before it will be filed publicly.

With regard to the "could disclose," 12.3's four day period would apply to summaries and compilations even though OFCCP has a different view than Oracle regarding what would be a summary and compilation.

If that is the case, I believe we can reach agreement. I have asked that you send the provision so that I can take one last look.

Thank you.

**From:** Bremer, Laura - SOL [<mailto:Bremer.Laura@dol.gov>]

**Sent:** Wednesday, March 13, 2019 9:58 AM

**To:** Parker, Warrington <[wparker@orrick.com](mailto:wparker@orrick.com)>; Kaddah, Jacqueline D. <[jkaddah@orrick.com](mailto:jkaddah@orrick.com)>; Miller, Jeremiah - SOL <[Miller.Jeremiah@dol.gov](mailto:Miller.Jeremiah@dol.gov)>; Garcia, Norman - SOL <[Garcia.Norman@DOL.GOV](mailto:Garcia.Norman@DOL.GOV)>; Pilotin, Marc A - SOL <[Pilotin.Marc.A@DOL.GOV](mailto:Pilotin.Marc.A@DOL.GOV)>  
**Cc:** Siniscalco, Gary R. <[grsiniscalco@orrick.com](mailto:grsiniscalco@orrick.com)>; Connell, Erin M. <[econnell@orrick.com](mailto:econnell@orrick.com)>; Mantoan, Kathryn G. <[kmantoan@orrick.com](mailto:kmantoan@orrick.com)>; Grundy, Kayla Delgado <[kgrundy@orrick.com](mailto:kgrundy@orrick.com)>; McAllister, Hailey - SOL <[mcallister.hailey@DOL.GOV](mailto:mcallister.hailey@DOL.GOV)>  
**Subject:** RE: OFCCP v. Oracle, Case No. 2017-OFC-00006

I am available to talk. Please give me a call at the number below.

Laura C. Bremer  
Senior Trial Attorney  
Office of the Solicitor  
U.S. Department of Labor  
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San Francisco, California 94103  
(415) 625-7757

**From:** Parker, Warrington <[wparker@orrick.com](mailto:wparker@orrick.com)>

**Sent:** Wednesday, March 13, 2019 9:54 AM

**To:** Bremer, Laura - SOL <[Bremer.Laura@dol.gov](mailto:Bremer.Laura@dol.gov)>; Kaddah, Jacqueline D. <[jkaddah@orrick.com](mailto:jkaddah@orrick.com)>;

Miller, Jeremiah - SOL <[Miller.Jeremiah@dol.gov](mailto:Miller.Jeremiah@dol.gov)>; Garcia, Norman - SOL <[Garcia.Norman@DOL.GOV](mailto:Garcia.Norman@DOL.GOV)>; Pilotin, Marc A - SOL <[Pilotin.Marc.A@DOL.GOV](mailto:Pilotin.Marc.A@DOL.GOV)>  
**Cc:** Siniscalco, Gary R. <[grsiniscalco@orrick.com](mailto:grsiniscalco@orrick.com)>; Connell, Erin M. <[econnell@orrick.com](mailto:econnell@orrick.com)>; Mantoan, Kathryn G. <[kmantoan@orrick.com](mailto:kmantoan@orrick.com)>; Grundy, Kayla Delgado <[kgrundy@orrick.com](mailto:kgrundy@orrick.com)>; McAllister, Hailey - SOL <[mcallister.hailey@DOL.GOV](mailto:mcallister.hailey@DOL.GOV)>  
**Subject:** RE: OFCCP v. Oracle, Case No. 2017-OFC-00006

Laura—

The only way I know how to get past this is to have a conversation. It may be that we will remain in heated disagreement after we talk. It may be that we reach agreement on this issue. But, I believe we might be talking past each other on this issue. Let me know when you wish to have that conversation.

I understand that a joint status update is due today. I am sending over our portion immediately after this email. In there, I indicate that we are discussing resolving Section 12.3, but have not done so yet. If that should change before we file, of course, I will change the statement.

I have provided a section for OFCCP to set forth its views. Once completed, please return and we will handle the filing.

**From:** Bremer, Laura - SOL [<mailto:Bremer.Laura@dol.gov>]  
**Sent:** Tuesday, March 12, 2019 5:39 PM  
**To:** Parker, Warrington <[wparker@orrick.com](mailto:wparker@orrick.com)>; Kaddah, Jacqueline D. <[jkaddah@orrick.com](mailto:jkaddah@orrick.com)>; Miller, Jeremiah - SOL <[Miller.Jeremiah@dol.gov](mailto:Miller.Jeremiah@dol.gov)>; Garcia, Norman - SOL <[Garcia.Norman@DOL.GOV](mailto:Garcia.Norman@DOL.GOV)>; Pilotin, Marc A - SOL <[Pilotin.Marc.A@DOL.GOV](mailto:Pilotin.Marc.A@DOL.GOV)>  
**Cc:** Siniscalco, Gary R. <[grsiniscalco@orrick.com](mailto:grsiniscalco@orrick.com)>; Connell, Erin M. <[econnell@orrick.com](mailto:econnell@orrick.com)>; Mantoan, Kathryn G. <[kmantoan@orrick.com](mailto:kmantoan@orrick.com)>; Grundy, Kayla Delgado <[kgrundy@orrick.com](mailto:kgrundy@orrick.com)>; McAllister, Hailey - SOL <[mcallister.hailey@DOL.GOV](mailto:mcallister.hailey@DOL.GOV)>  
**Subject:** RE: OFCCP v. Oracle, Case No. 2017-OFC-00006

Warrington,

The “objective test” is that a document being filed is marked Confidential. Objectively, OFCCP can determine this. If it is, then OFCCP will provide notice “at or before the filing.” If it is not, then Oracle will have four business days before the OALJ makes the documents public to determine whether it believes that any material in the filing is nevertheless, Confidential. If Oracle believes material which, although not marked confidential, nevertheless meets the definition of Confidential under the Protective Order, it can bring a motion to seal (as it can if it receives notice at the time of filing that the filing contains material marked Confidential).

Oracle’s deletion of the sentence that says that the party does not need to provide notice when it files material not marked confidential fails to address the dispute that the parties are having where OFCCP did not file anything marked confidential, nor a summary of information marked confidential but rather its analysis. Nonetheless Oracle has claimed the information is confidential thereby

creating this dispute. Our proposed sealing procedure merely establishes OFCCP's obligations if OFCCP believes it is not filing confidential information, but Oracle later argues that it is confidential. This protects Oracle from any improper public disclosure of information and OFCCP from improper accusations of violating the Protective Order. It is thus mutually beneficial, and OFCCP does not understand Oracle's refusal to this solution. Oracle's language provides no solution to this dispute.

Including the sentence that notice is unnecessary when a party files material that is not marked Confidential does not "import the dispute." It recognizes the dispute and seeks a resolution to prevent the recurrence of the dispute every time OFCCP makes a filing. OFCCP requests that Oracle reconsider its refusal to find a solution to this issue.

Sincerely,

Laura C. Bremer  
Senior Trial Attorney  
Office of the Solicitor  
U.S. Department of Labor  
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San Francisco, California 94103  
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**Sent:** Tuesday, March 12, 2019 4:25 PM  
**To:** Bremer, Laura - SOL <[Bremer.Laura@dol.gov](mailto:Bremer.Laura@dol.gov)>; Kaddah, Jacqueline D. <[jkaddah@orrick.com](mailto:jkaddah@orrick.com)>; Miller, Jeremiah - SOL <[Miller.Jeremiah@dol.gov](mailto:Miller.Jeremiah@dol.gov)>; Garcia, Norman - SOL <[Garcia.Norman@DOL.GOV](mailto:Garcia.Norman@DOL.GOV)>; Pilotin, Marc A - SOL <[Pilotin.Marc.A@DOL.GOV](mailto:Pilotin.Marc.A@DOL.GOV)>  
**Cc:** Siniscalco, Gary R. <[grsiniscalco@orrick.com](mailto:grsiniscalco@orrick.com)>; Connell, Erin M. <[econnell@orrick.com](mailto:econnell@orrick.com)>; Mantoan, Kathryn G. <[kmantoan@orrick.com](mailto:kmantoan@orrick.com)>; Grundy, Kayla Delgado <[kgrundy@orrick.com](mailto:kgrundy@orrick.com)>; McAllister, Hailey - SOL <[mcallister.hailey@DOL.GOV](mailto:mcallister.hailey@DOL.GOV)>  
**Subject:** RE: OFCCP v. Oracle, Case No. 2017-OFC-00006

I have read your letter. I simply do not understand it. For example, you ask that we agree to "an objective test." I don't know what that means.

My understanding is that we are trying to reach an agreement that if a filing (exhibits, briefs or other materials) that is confidential notice is to be given. It allows a process by which the parties can resolve issues. Right now, we have agreed on four business days.

I don't think there is any dispute as to that.

The language I struck seems to import the dispute we have been having over what constitutes confidential documents and information. If that is not so, then let me know. But otherwise I don't

know what that sentence means to do.

This is the best I can do right now in terms of stating our position. It is not a categorical rejection of the notion. It is a rejection of what I perceive is a dispute that animates the entirety of our discussion concerning the Protective Order.

**From:** Bremer, Laura - SOL [<mailto:Bremer.Laura@dol.gov>]

**Sent:** Tuesday, March 12, 2019 4:13 PM

**To:** Kaddah, Jacqueline D. <[jkaddah@orrick.com](mailto:jkaddah@orrick.com)>; Miller, Jeremiah - SOL <[Miller.Jeremiah@dol.gov](mailto:Miller.Jeremiah@dol.gov)>; Garcia, Norman - SOL <[Garcia.Norman@DOL.GOV](mailto:Garcia.Norman@DOL.GOV)>; Pilotin, Marc A - SOL <[Pilotin.Marc.A@DOL.GOV](mailto:Pilotin.Marc.A@DOL.GOV)>

**Cc:** Siniscalco, Gary R. <[grsiniscalco@orrick.com](mailto:grsiniscalco@orrick.com)>; Connell, Erin M. <[econnell@orrick.com](mailto:econnell@orrick.com)>; Parker, Warrington <[wparker@orrick.com](mailto:wparker@orrick.com)>; Mantoan, Kathryn G. <[kmantoan@orrick.com](mailto:kmantoan@orrick.com)>; Grundy, Kayla Delgado <[kgrundy@orrick.com](mailto:kgrundy@orrick.com)>; McAllister, Hailey - SOL <[mcallister.hailey@DOL.GOV](mailto:mcallister.hailey@DOL.GOV)>

**Subject:** RE: OFCCP v. Oracle, Case No. 2017-OFC-00006

Warrington,

Please see the attached response regarding your letter today about the Protective Order.

Laura C. Bremer  
Senior Trial Attorney  
Office of the Solicitor  
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**From:** Kaddah, Jacqueline D. <[jkaddah@orrick.com](mailto:jkaddah@orrick.com)>

**Sent:** Tuesday, March 12, 2019 2:50 PM

**To:** Bremer, Laura - SOL <[Bremer.Laura@dol.gov](mailto:Bremer.Laura@dol.gov)>; Miller, Jeremiah - SOL <[Miller.Jeremiah@dol.gov](mailto:Miller.Jeremiah@dol.gov)>; Garcia, Norman - SOL <[Garcia.Norman@DOL.GOV](mailto:Garcia.Norman@DOL.GOV)>; Pilotin, Marc A - SOL <[Pilotin.Marc.A@DOL.GOV](mailto:Pilotin.Marc.A@DOL.GOV)>

**Cc:** Siniscalco, Gary R. <[grsiniscalco@orrick.com](mailto:grsiniscalco@orrick.com)>; Connell, Erin M. <[econnell@orrick.com](mailto:econnell@orrick.com)>; Parker, Warrington <[wparker@orrick.com](mailto:wparker@orrick.com)>; Mantoan, Kathryn G. <[kmantoan@orrick.com](mailto:kmantoan@orrick.com)>; Grundy, Kayla Delgado <[kgrundy@orrick.com](mailto:kgrundy@orrick.com)>

**Subject:** OFCCP v. Oracle, Case No. 2017-OFC-00006

Dear Counsel:

Please see attached correspondence.

Jacqueline D. Kaddah  
Senior Paralegal

Orrick

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405 Howard Street  
San Francisco, CA 94105-2669 ☎  
T +1-415-773-5558  
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