

CASE NO.: 2017-0FC-00006

In the Matter of.

OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS, U.S. DEPART-
MENT OF LABOR,

Plaintiff,

vs.

ORACLE AMERICA, IN C.,
Defendant.

RECEIVED

MAR 13 2019

Office of Administrative Law Judges
San Francisco, Ca

[OFCCP'S PROPOSED] PROTECTIVE ORDER

This matter arises under Executive Order 11246 (30 Fed.Reg. 12319), as amended, and associated regulations at 41 C.F.R. Chapter 60. It is currently set for hearing in San Francisco, California, on June 26, 2018.

The parties have met and conferred with respect to issuance of a Protective Order in this matter. The court, having considered the stipulations and arguments of the parties,¹ orders:

1. PURPOSES AND LIMITATIONS

Discovery activity in this action may involve production of confidential, trade secret, or private information for which public disclosure may not be warranted. This Order does not confer blanket protections on all disclosures or responses to dis-

¹ The parties disagree on paragraph 7.1 of their Proposed Stipulated Protective Order, which would limit the use of "Protected Material" only to "prosecuting, defending, or attempting to settle this action," with certain exceptions. The court concludes that Oracle's cited authorities, including the Fourth Amendment, restrain the government's ability to acquire information in the first place, rather than limiting the use of that information once the government has acquired it. Therefore, in issuing this order, the court neither limits nor extends OFCCP's authority, as otherwise provided under law, to use "Protected Material" it has properly obtained in compliance with this Protective Order. The court accordingly excises most of paragraph 7.1 and all of paragraph 7.2, subsection (g), as they appear in the Proposed Stipulated Protective Order.

covery. The protection it affords from public disclosure and use extends only to the information or items that are entitled to protection under applicable legal principles. This Protective Order 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.

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.

2. DEFINITIONS

2.1 Challenging Party: a party that challenges the designation of information or items under this Order.

2.2 “CONFIDENTIAL” Information or Items: information (regardless of how it is generated, stores, or maintained) or tangible things that, based on the Designating Party’s good faith belief, may be subject to Freedom of Information Act (“FOIA”) Exemptions 4 or 6, 5 U.S.C. § 552(b)(4) or (6). **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.**

2.2.1 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 Cir. 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).

2.2.3 Confidential information/items shall not include:

2.2.3.1 The results of OFCCP’s models and analyses, even if the underlying formula or data used in such models is 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., statement of who reports to whom within Oracle), advancement, roles and responsibilities, job descriptions and duties, discipline, and employee evaluations.

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.

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.

2.3 **Counsel**: any attorney serving as legal counsel for a party, as well as their support staff.

2.4 **Designating Party**: a Party that designates information or items that it produces in disclosures or in responding to discovery as “CONFIDENTIAL.”

2.5 Disclosure or Discovery Material: all items or information, regardless of the medium or manner in which it is generated, stored, or maintained (including, among other things, testimony, transcripts, and tangible things), that are produced or generated in disclosures or responses to discovery in this matter.

2.6 Expert: a person with specialized knowledge or experience in a matter pertinent to the litigation who has been retained by a Party or its counsel to serve as an expert witness or as a consultant in this action.

2.7 Non-Party: any natural person, partnership, corporation, association, or other legal entity not named as a Party to this action.

2.8 Party: either Party, meaning the Office of Contract Compliance Programs (“OFCCP”) and Oracle America, Inc. (“Oracle”), (collectively “Parties”) including any officers, directors, employees, consultants, and Counsel (and their support staffs).

2.9 Producing Party: a Party or Non-Party that produces Disclosure or Discovery Material in this action.

2.10 Professional Vendors: persons or entities that provide litigation support services (e.g. photocopying, videotaping, translating, preparing exhibits or demonstrations, and organizing, storing, or retrieving data in any form or medium) and their employees and subcontractors.

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

2.12 Receiving Party: a Party that received Disclosure or Discovery Material from a Producing Party.

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.

3. SCOPE

This Order covers not only Protected Material (as defined above), but also (1) all copies, excerpts, summaries, compilations of, 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. However, this Order does not cover the following information: (a) any information that is in the public domain at the time of disclosure to a Receiving Party or becomes part of the public domain after its disclosure to a 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; and (b) 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. 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.

4. DURATION

Even after final disposition of this litigation, the confidentiality obligations imposed by this Order remain in effect unless a Designating Party agrees otherwise, an order otherwise directs, or a subsequent change in the law or regulation provides otherwise. If Counsel become aware of a change in law or regulation that affects the terms of this provision during the pendency of this litigation, such Counsel will advise Counsel for the other Party. Final disposition is the later of (1) dismissal of all claims and defenses in this action, with or without prejudice; or (2) final judgment herein after the completion and exhaustion of all appeals, rehearings, remands, trials, or reviews of this action, including the time limits for filing any motions or applications for extension of time under applicable law.

5. DESIGNATING PROTECTED MATERIAL

5.1 Designating Material for Protection. Each 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.

5.2 Manner and Timing of Designations. Except as otherwise provided in this Order or as otherwise stipulated or ordered, Disclosure and Discovery Material that qualifies for protection under this Order must be clearly so designated before the material is disclosed or produced.

Designation in conformity with this Order requires:

(a) for information in discovery form (e.g., paper or electronic documents, but excluding transcripts of depositions or other pretrial or trial proceedings), to the extent practicable, that the Producing Party affix the legend “CONFIDENTIAL” to each page that contains protected material. If only a portion or portions of the material on a page qualifies for protection, the Producing Party will make reasonable efforts clearly

to identify the protected portion(s). A Party that makes original documents or materials available for inspection need not designate them for protection until after the inspecting Party has indicated which material it would like copies and produced. During the inspection and before the designation, all of the material made available for inspection shall be deemed "CONFIDENTIAL." After the inspecting Party has identified the documents it wants copied and produced, the Producing Party must determine which documents, or portions thereof, qualify for protection under this Order. Then, before producing the specified documents, the Producing Party must affix the "CONFIDENTIAL" legend to each page that contains Protected Material.

(b) for testimony given in deposition or in other pretrial or trial proceedings, that the Designating Party identify all protected testimony on the record at the time of testimony or in a written notice served on all parties within 14 days of delivery of the final transcript.

(c) for information produced in some form other than documentary, including

(d) the production of electronic files in native format that cannot be marked as "CONFIDENTIAL," and for any other tangible items, that the Producing Party affix in a prominent place on the exterior of the medium or container in which the information or item is stored the legend "CONFIDENTIAL." If only a portion or portions of the information or item warrant protection, the Producing Party shall make reasonable efforts to identify the protected portion(s).

(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.

5.3 Inadvertent Failure to Designate. If timely corrected, meaning corrected as soon as practicable after discovered, an inadvertent failure to designate qualified information or items does not, standing alone, waive the Designating Party's right to secure protection under this Order for such material. Upon timely correction of a designation, the Receiving Party must make reasonable efforts to assure that the material is treated in accordance with this Order.

5.4 Designations of Material Produced by Another Party. If any Party in good faith deems material it provided in the underlying compliance evaluation that is produced by another Party in this litigation to constitute "CONFIDENTIAL" information as defined in this Protective Order, it may timely designate such material, meaning designated as soon as practicable after discovered. Upon such timely designation, the Parties must make reasonable efforts to assure that the material is treated in accordance with this Order.

6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

6.1 Timing of Challenges. Any Party may challenge a designation of confidentiality at any time. A Party does not waive its right to challenge a confidentiality designation by electing not to mount a challenge promptly after the original designation is disclosed.

6.2 Meet and Confer. The Challenging Party initiates the dispute resolution process by providing written notice of each designation it is challenging and providing the basis for each challenge. To avoid ambiguity as to whether a challenge has been made, the written notice must recite that the challenge to confidentiality is being made under this specific paragraph of this Order. The Parties must attempt to resolve each challenge in good faith and must begin the process by conferring within 14 days of the date of service of the notice. In conferring, the Challenging Party must explain the basis for its belief that the confidentiality designation was not proper and must give the Designating Party an opportunity to review the designated material, to reconsider the circumstances, and, if no change in designation is offered, to explain the basis for the chosen designation. A Challenging Party may proceed to the next stage of the challenge process only if it has first engaged in this meet-and-confer process, or establishes that the Designating Party is unwilling to participate in the meet-and-confer process in a timely manner.

6.3 Judicial Intervention. If the Parties cannot resolve a challenge without the ALJ's intervention, the Designating Party may file and serve a motion to retain confidentiality within 21 days of the initial notice of challenge or within 14 days of the parties agreeing that the meet-and-confer process will not resolve their dispute, whichever is earlier, unless the Parties agree to extend this time period. Each such motion must be accompanied by a competent declaration affirming that the movant has complied with the meet-and-confer requirements imposed in the preceding paragraph. Failure by the Designating Party to make such a motion including the required declaration within the time indicated by this paragraph, or as otherwise agreed by the Parties, automatically waives the confidentiality designation for each challenged designation. In addition, the Challenging Party may file a motion challenging a confidentiality designation within the time indicated by this paragraph, or as otherwise agreed by the Parties, including a challenge to the designation of a transcript or any portions thereof. Any motion brought under this provision must be accompanied by a competent declaration affirming that the movant has complied with the meet-and-confer requirements imposed by the preceding paragraph.

The burden of persuasion in any such challenge proceedings is on the Designating Party. Unless the Designating Party has waived the confidentiality designation by failing to file a motion to retain confidentiality as described above, all parties shall continue to afford the material in question the level of protection to which it is entitled under the Producing Party's designation until the ALJ rules on the challenge.

The procedures set forth in this Section 6 do not apply to responses to requests for information under FOIA, which are governed by Section 9 below.

7. ACCESS TO AND USE OF PROTECTED MATERIAL

7.1 Storage of Protected Material. Protected Material must be stored and maintained by a Receiving Party at a location and in a secure manner that ensures access is limited to the persons authorized under this Order.

7.2 Disclosure of "CONFIDENTIAL" Information or Items. Unless otherwise ordered by the ALJ or permitted in writing by the Designating Party, in addition to

the individuals encompassed by the definition of Receiving Party above, a Receiving Party may disclose any information or item designated "CONFIDENTIAL" only to:

- (a) the ALJ and her or his personnel;
- (b) court reporters and their staff to whom disclosure is reasonably necessary for this litigation;
- (c) experts (as defined in this Order), professional jury or trial consultants, mock jurors, and Professional Vendors to whom disclosure is reasonably necessary for this litigation and who have signed the "Acknowledgment and Agreement to Be Bound" in the form attached as Exhibit "A" to the "[Proposed] Stipulated Protective Order" which the Parties submitted to the court on May 19, 2017.
- (d) witnesses or potential witnesses in the action who have not been or applied to be Oracle employees to whom disclosure is reasonably necessary for this litigation, unless otherwise ordered by the ALJ, and who have signed the "Acknowledgment and Agreement to Be Bound" in the form attached as Exhibit "A" to the [Proposed] Stipulated Protective Order" which the Parties submitted to the court on May 19, 2017.

(e) witnesses or potential witnesses in the action who have been or applied to be Oracle employees to whom disclosure is reasonably necessary for this litigation, unless otherwise ordered by the ALJ, and who have signed the "Acknowledgment and Agreement to Be Bound" in the form attached as Exhibit "B" to the "[Proposed] Stipulated Protective Order" which the Parties submitted to the court on May 19, 2017.

(f) the author or recipient of a document containing the information or a custodian or other person who otherwise possessed or knew the information; and

(g) recipients to whom disclosure is required by law, regulation, or court order .

Nothing in this Protective Order limits or is intended to limit the way a Party uses its own Protected Material.

7. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER LITIGATION

If a Party is served with a subpoena or a court order issued in other litigation that compels disclosure of any information or items designated in this action as "CONFIDENTIAL," that Party will (1) promptly notify in writing the Designating Party (and such notification must include a copy of the subpoena); (2) promptly notify in writing the party that caused the subpoena or other order to issue in the other litigation that some or all of the material covered by the subpoena or order is sub-

ject to this Protective Order (and such notification must include a copy of this Protective Order); and (3) cooperate in good faith with respect to all reasonable procedures sought to be pursued by the Designating Party whose Protected Material may be affected. If the subpoena is served on OFCCP or its agents, the agency will follow the procedures for handling such subpoenas set forth at 29 C.F.R. §§ 2.20-2.25 in responding to the subpoena. To the extent permitted by law and regulation, where the Designating Party timely seeks a protective order in the proceedings from which the subpoena arose, the Party served with the subpoena or court order shall not produce any information designated in this action as "CONFIDENTIAL" before a determination by the court from which the subpoena or order issued, unless the Party has obtained the Designating Party's permission. The Designating Party bears the burden and expense of seeking protection in that court of its confidential material, and nothing in this Order authorizes or encourages a Receiving Party in this action to disobey a lawful directive from another court.

8. PROTECTED MATERIAL REQUESTED UNDER THE FREEDOM OF INFORMATION ACT

If OFCCP or OFCCP's Counsel receive a request under FOIA that seeks Protected Material, OFCCP or OFCCP's Counsel shall respond consistent with the U.S. Department of Labor's rules for processing requests for records under FOIA, 29 C.F.R. Part 70. With respect to material marked in good faith as CONFIDENTIAL, OFCCP shall follow the procedures set forth at 29 C.F.R. § 70.26 before any disclosure is made under FOIA.

9. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed Protected Material to any person or in any circumstance not authorized under this Protective Order, the Receiving Party must immediately (a) notify in writing the Designating Party of the unauthorized disclosures; (b) use its best efforts to retrieve all unauthorized copies of the Protected Material; (c) inform the person or persons to whom unauthorized disclosures were made of all the terms of this Order; and (d) request such person or persons to execute the "Acknowledgment and Agreement to Be Bound" in the form attached as Exhibit "A" to the "[Proposed] Stipulated Protective Order" which the Parties submitted to the court on May 19, 2017. If the person or persons to whom unauthorized disclosures were made refuses to execute the "Acknowledgement and Agreement to Be Bound," or otherwise to comply with this Protective Order, and judicial intervention is required, the Receiving Party will, at its own expense, use its best efforts to maintain the protection of the improperly-disclosed material.

10. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE PROTECTED MATERIAL

When a Protected Party gives notice to Receiving Parties that certain inadvertently-produced material is subject to a claim of privilege or other protection, the obligations of the Receiving Parties are those set forth in 29 C.F.R. § 18.51 (e)(2), which is adopted by reference. This provision is not intended to modify whatever

procedure may be established in an e-discovery order that provides for production without prior privilege review. Under Federal Rule of Evidence 502, and by agreement of the Parties, no Party shall be deemed to have waived claims of privilege as a result of production in this matter.

12. MISCELLANEOUS

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.

12.2 Right to Assert Other Objections. No Party waives any right it otherwise would have to object to disclosing or producing any information or item on any ground not addressed in this Protective Order. Similarly, no Party waives any right to object on any ground to use in evidence of any of the material covered by this Protective Order.

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 Protective Material.

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

13. FINAL DISPOSITION

Following final disposition of this case, as defined in paragraph 4 above, Protected Materials in OFCCP’s possession must be maintained and disposed of under the Federal Records Disposal Act, 44 U.S.C. §§ 3301, *et seq.*; any applicable regulations promulgated thereunder; and any other applicable law. Pending disposal of the records, the confidentiality obligations imposed by this Order remain in effect consistent with Paragraph 4 (DURATION).

SO ORDERED.

Richard M. Clark
Administrative Law Judge

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