

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

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

Plaintiff,

v.

ORACLE AMERICA, INC.,

Defendant.

OALJ Case No. 2017-OFC-00006

OFCCP No. R00192699

**DEFENDANT ORACLE AMERICA
INC.'S UNOPPOSED MOTION TO
SEAL LIMITED PORTIONS OF
PLAINTIFF'S MOTION TO COMPEL
HISTORICAL DATA OF
COMPARATOR EMPLOYEES**

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San Francisco, Ca

I. INTRODUCTION

Defendant Oracle America, Inc. (“Oracle”) moves to seal limited portions of Plaintiff’s Motion to Compel Historical Data of Comparator Employees (“Motion”), pursuant to C.F.R. 18.85(b)(1) and this court’s May 22, 2019 order adopting and amending Judge Larsen’s May 26, 2017 Protective Order (collectively, the “Protective Order”).¹ Mindful that 29 C.F.R. 18.85(b)(1) requires that parties should “propose the fewest redactions possible that will protect the interest offered as the basis for the motion,” Oracle has limited its proposed redactions to only a handful of words on a single page of Plaintiff’s more than 135-page filing, as shown in Exhibit A to the Declaration of Kate Waggoner. The limited material Oracle seeks to seal is content Oracle produced to Plaintiffs in discovery, which was designated as confidential at the time, and which contains confidential, proprietary commercial information and confidential, private information about Oracle employees—the types of information which the Freedom of Information Act (“FOIA”) exempts from disclosure.

Oracle does not share this content externally and only disseminates it internally where there exists a business need-to-know. Indeed, Oracle restricts access and keeps this information confidential because, if publicly disclosed, it would present competitors an unfair business advantage, likely cause Oracle substantial competitive harm, and impinge upon employee privacy rights. Keeping this information confidential through sealing is the only way to avoid these harms. Oracle’s narrowly tailored proposed redactions of confidential information, therefore, meets the applicable legal standard and should be granted.

II. LEGAL STANDARD

“FOIA contemplates that some information may legitimately be kept from the public.” *Lahr v. NTSB*, 569 F.3d 964, 973 (9th Cir.2009). In enacting FOIA, Congress sought “to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate

¹ Although the Protective Order contains a provision which states “A motion under this provision is not subject to the Court’s pre-filing requirement,” counsel for both parties nevertheless met and conferred, and OFCCP does not oppose this motion. Declaration of Jonathan Riddell (“Riddell Decl.”) ¶ 3.

secrecy.” *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152, 110 S. Ct. 471, 475, 107 L. Ed. 2d 462 (1989) *citing* H.R. Rep. No. 1497, 89th Cong., 2d Sess., 6 (1966), U.S.Code Cong. & Admin.News 1966, pp. 2418, 2423.

This includes protecting from disclosure, *inter alia*, “trade secrets and commercial or financial information obtained from a person and privileged or confidential” and material from “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C.A. § 552 (West). Redaction of FOIA-exempted information from agency filings is expressly authorized. *See* 29 C.F.R. § 18.85. *See also U.S. Dep’t of State v. Ray*, 502 U.S. 164, 174, 112 S. Ct. 541, 547, 116 L. Ed. 2d 526 (1991). For this reason, the Protective Order contemplates protecting Confidential Information that may be subject to FOIA Exemptions 4 or 6 through the filing of a motion to seal. Protective Order ¶¶ 2.2 and 12.3.

A. FOIA EXEMPTION 4

Certain confidential materials are properly exempted from disclosure pursuant to FOIA Exemption 4 if the party seeking to seal the information demonstrates the information is “(1) commercial and financial information, (2) obtained from a person or by the government, (3) that is privileged or confidential.” *Watkins v. U.S. Bureau of Customs & Border Prot.*, 643 F.3d 1189, 1194 (9th Cir. 2011). “The terms ‘commercial or financial’ are given their ordinary meanings.” *Id.* The material is confidential under exemption 4 if disclosure is likely to “cause substantial harm to the competitive position of the person from whom the information was obtained.” *Id.* Actual competitive harm need not be demonstrated. The existence of actual competition in the relevant market, and a likelihood of substantial competitive injury if the information were released suffices to qualify such information for exemption from disclosure. *Id.*

B. FOIA EXEMPTION 6

FOIA Exemption 6 prohibits disclosure of information from personnel files that would amount to an unwarranted invasion of privacy. *U.S. Dep’t of Def. v. Fed. Labor Relations Auth.*,

510 U.S. 487, 495, 114 S. Ct. 1006, 1012–13, 127 L. Ed. 2d 325 (1994). Such disclosure is unwarranted when privacy interests outweigh the public’s interest in disclosure. *Id.* The public’s interest in information from personnel files is limited to serving the “‘core purpose of the FOIA,’ which is ‘contribut[ing] significantly to public understanding of the operations or activities of the government.’”—that is, information which provides the public with an understanding of “what the government is up to.” *Id.* citing *Department of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773, 109 S.Ct. 1468, 1482, 103 L.Ed.2d 774 (1989). “That purpose [] is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency’s own conduct.” *Id.* [internal citations omitted].

III. ARGUMENT

Oracle’s motion to seal certain portions of confidential documents meets the standard for sealing documents in an OALJ proceeding record, under 29 C.F.R. § 18.85 (b)(2), because Oracle has proposed the fewest redactions possible in order to protect the competitive business and personal privacy interests recognized as protectable under FOIA Exemptions 4 and 6.

A. FOIA Exemption 4 Excepts Disclosure of Oracle’s Confidential Salary Range Information.

The commercially sensitive compensation-related information Oracle seeks to seal is exempted from FOIA disclosure because it is “(1) commercial and financial information, (2) obtained from a person or by the government, (3) that is privileged or confidential.” *Watkins v. U.S. Bureau of Customs & Border Prot.*, 643 F.3d 1189, 1194 (9th Cir. 2011).

The compensation-related material Oracle seeks to seal through this Motion contains proprietary information about Oracle’s compensation structure, including specific salary range information for two job positions. Declaration of Kate Waggoner (“Waggoner Decl.”) ¶ 5. Wage information such as this is recognized as being “commercial” in nature, thus satisfying the first requirement for purposes of FOIA Exemption 4. *See Flightsafety Servs. Corp. v. Dep’t of Labor*, 326 F.3d 607, 611 (5th Cir. 2003) (wage information gathered by the Department of

Labor and Bureau of Statistics amounted to confidential commercial information.). Likewise, the second requirement is satisfied because the information was “obtained from a person” because Oracle provided the information to Plaintiff OFCCP in discovery. Riddell Decl. ¶ 2. *See* 5 U.S.C.A. § 551 (West) (FOIA definition of “person” includes an individual, partnership, corporation, association, or public or private organization other than an agency.”).

The third requirement is satisfied because Oracle’s salary information is of the type of confidential information which “Congress intended to exempt from disclosure under the FOIA” to further the “goal of ‘protect[ing] the confidentiality of information which is obtained by the government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained.’” *Flightsafety Servs.*, 326 F.3d at 611 (wage and other information gathered by Department of Labor was the type of information Congress intended to shield from FOIA disclosure). *See also 346 Northrop Grumman Sys. Corp. v. Nat’l Aeronautics & Space Admin.*, 346 F. Supp. 3d 109 (D.D.C. 2018) (disclosure of employee wages and labor rates likely to cause substantial competitive harm thus properly exempted from disclosure under FOIA exemption 4); *Gen. Elec. Co. v. Dep’t of Air Force*, 648 F. Supp. 2d 95, 104 (D.D.C. 2009) (noting that disclosure of certain information that would cause competitors to “use such information to bargain for higher...wages...” satisfied the third prong of “likelihood of causing competitive substantial harm”); *Torres Consulting & Law Grp., LLC v. Dep’t of Energy*, No. CV-13-00858-PHX-NVW, 2013 WL 6196291, at *5 (D. Ariz. Nov. 27, 2013) (disclosure of wage information could cause substantial competitive harm.).

Indeed, the competitive value of Oracle’s compensation structure hinges on its confidentiality. *See* Waggoner Decl. ¶ 6. Oracle uses salaries and premium pay to compete for talent. *Id.* Thus, the value of this work product is necessarily dependent upon keeping it confidential within Oracle. *Id.* To that end, Oracle has expended significant resources over many years to develop, adjust, and refine its compensation strategies, both to advance its business interests, and to attract and retain its workforce. *Id.*

The ability to attract and retain talent drives Oracle’s business success because its

talented workforce is the lifeblood that drives all the services, products, and support Oracle provides to its customers. *Id.* ¶ 7. Oracle is keenly aware that competition for talent is fierce within the technology industry; Oracle competes not only against major technology companies, but it often competes for talent with emerging companies – this is especially true within California. *Id.*

Disclosure of the information would eliminate its competitive value and is likely to cause Oracle substantial competitive harm because if Oracle’s competitors gained free access to this information, they would be able to leverage Oracle’s own market research and recruiting strategies to outbid Oracle at the hiring stage or entice Oracle employees to leave. *Id.*

B. FOIA Exemption 6 Precludes Disclosure of the Names and Compensation Information of Certain Oracle Employees.

The names and compensation information of the two employees identified in Plaintiff’s Motion which Oracle seeks to seal was derived from confidential personnel files (*id.* ¶ 9) and is exempted from disclosure pursuant to FOIA Exemption 6, because such a disclosure is unwarranted where the employees’ privacy interests outweigh the public’s interest in disclosure. *U.S. Dep’t of Def.* 510 U.S. 487 at 495, 114 S. Ct. at 1012-1013. Disclosure of these two employees’ names and salaries does not contribute to the public’s understanding of “what the government is up to” for purposes of understanding the controversy related to OFCCP’s Motion to Compel, and thus is properly foreclosed under the statute because the public has no interest in the information. *See e.g. Long v. Office of Pers. Mgmt.*, 692 F.3d 185, 193 (2d Cir. 2012) (names, salary, and job classification information of various government employees exempted from disclosure because there was little to no public interest in learning the information and a cognizable privacy interest favoring protection). *See also Fed. Labor Relations Auth. v. U.S. Dep’t of Veterans Affairs*, 958 F.2d at 512; *Schwarz v. U.S. Dep’t of Treasury*, 131 F.Supp.2d 142, 150 (D.D.C.2000) (disclosure of names does not contribute public’s understanding of government functions); *Voinche v. FBI*, 940 F.Supp. 323, 330 (D.D.C.1996) (same); *Painting & Drywall Work Pres. Fund, Inc. v. Dep’t of Hous. & Urban Dev.*, 936 F.2d 1300, 1303 (D.C. Cir.

1991) (same).

C. Oracle Closely Guards the Information It Seeks to Seal.

Oracle has undertaken substantial efforts to maintain confidentiality over the materials discussed above by limiting the access to, and distribution of, such information. Waggoner Decl. ¶ 11. Even internally Oracle restricts access to the information it has designated as confidential and limits distribution to those who have a legitimate business need-to-know. *Id.* In fact, when the information was broadcast to a wider internal audience, Oracle often designated such information as Confidential, Oracle Internal, and/or Highly Restricted. *Id.* Oracle also controls and safeguards this information by entering into agreements with employees that prohibit them from sharing any proprietary information externally or internally in the absence of a legitimate business need. *Id.* For purposes of this lawsuit, all such information is the subject of a protective order and was produced with a confidential designation. Riddell Decl. ¶ 2.

As explained above, there exists a substantial probability that Oracle's interests will be prejudiced if these materials are not filed under seal. Oracle's financial and competitive interests and the privacy interests of Oracle's employees would be placed in significant jeopardy if the materials Oracle seeks to seal were made publicly available.

IV. CONCLUSION

For the reasons set forth above, Oracle respectfully requests that the court grant Oracle's Motion to Seal limited portions of Plaintiff's Motion.

Respectfully submitted,

April 16, 2019

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