

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

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

Plaintiff,

v.

ORACLE AMERICA, INC.,

Defendant.

OALJ Case No. 2017-OFC-00006

OFCCP No. R00192699

**DEFENDANT ORACLE
AMERICA, INC.'S MOTION TO
SEAL PORTIONS OF PLAINTIFF
OFCCP'S MOTION TO COMPEL
ORACLE'S COMPENSATION
ANALYSES**

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I. INTRODUCTION

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"), Defendant Oracle America, Inc. ("Oracle") moves to seal limited portions of two exhibits submitted in support of Plaintiff OFCCP's Motion to Compel Oracle's Compensation Analyses ("Plaintiff's Motion"): (1) portions of Oracle's Affirmative Action Plan Workforce Analysis Data ("AAP Data"), attached as Exhibit 3 to the Declaration of Laura C. Bremer in Support of Plaintiff's Motion ("Bremer Decl."); and (2) information regarding Oracle's compensation structure in the form specific premium percentages that Oracle may pay to attract candidates, contained in Exhibit 46 to the Bremer Declaration.¹

The information Oracle seeks to seal comprises proprietary commercial information and/or private information about Oracle employees, which is exempt from Freedom of Information Act ("FOIA") disclosure. Specifically, the AAP Data should be sealed pursuant to FOIA Exemption 4 because it constitutes "commercial information, obtained from a person, that is confidential." Oracle designated the AAP Data from Exhibit 3 as highly sensitive and confidential and produced it to OFCCP during the compliance review desk audit at issue in this litigation, and the production was made based upon assurances that upon providing the information to OFCCP it would be treated as sensitive and confidential to the maximum extent possible permitted under the Freedom of Information Act. Likewise, the AAP Data was produced again in this litigation and designated Confidential pursuant to the Protective Order. Similarly, the specific premium percentages that Oracle may pay to attract candidates, as found in Exhibit 46, should be sealed because it amounts to confidential and proprietary trade secret information, produced to OFCCP in discovery and designated confidential pursuant to the Protective Order, and thus protected from disclosure by FOIA exemption 4.

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 pertaining to the compensation structure material in Exhibit 46 to the Bremer Decl., but indicated it will oppose the Motion as related to AAP Data material in Exhibit 3 to the Bremer Declaration. Declaration of Jonathan Riddell in Support of Oracle's Motion to Seal ("Riddell Decl.") ¶ 4.

Furthermore, public disclosure of the AAP Data would risk exposing confidential employee personnel information, which is exempted from disclosure under FOIA Exemption 6. Keeping this information confidential through sealing is the only way to avoid these harms. Oracle's narrowly tailored proposed redactions of this confidential information, as reflected in the redacted versions attached to the Declaration of Victoria Thrasher in Support of Oracle's Motion to Seal ("Thrasher Decl."), meets the applicable legal standard and should be granted.

Finally, Oracle has a compelling interest in precluding disclosure of the AAP Data and specific premium percentages. Oracle does not share this content externally and only disseminates it internally to a limited group of individuals on a business need-to-know basis. 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 put at risk the security of employees' confidential information in which they possess a compelling privacy interest. Accordingly, the information should be sealed from public disclosure.

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 secrecy." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (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 (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 a trade secret or 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.* Commercial 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, 494-5 (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 their government is up to.” *Id. citing Dep’t of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773, 775 (1989) (emphasis omitted). “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.*

III. ARGUMENT

Oracle seeks to seal information as exempted from FOIA disclosure on two independent grounds. First, the AAP Data and the confidential and proprietary information regarding Oracle's premium percentages is "commercial information, obtained from a person, that is confidential," and thus is protected against disclosure under FOIA Exemption 4. Additionally, public disclosure of the AAP Data would risk exposing confidential employee personnel information, which is exempted from disclosure under FOIA Exemption 6. Oracle has a compelling interest in preventing public disclosure of these materials.

A. FOIA Exemption 4 Exempts Disclosure of Oracle's Confidential Affirmative Action Workforce Analysis Data and Confidential and Proprietary Premium Percentages that Oracle May Pay to Attract Candidates

The confidential AAP Data and information regarding Oracle's compensation structure that Oracle seeks to seal is exempted from FOIA disclosure under FOIA exemption 4 because it is "(1) commercial and financial information, (2) obtained from a person or by the government, (3) that is privileged or confidential." *Watkins*, 643 F.3d at 1194.

1. FOIA Exemption 4 Exempts Disclosure of Oracle's Confidential Affirmative Action Workforce Analysis Data

The AAP Data Oracle seeks to seal through this Motion satisfies the requisite prongs of FOIA exemption 4. First, the AAP Data comprises commercial and financial information. Specifically, Oracle's AAP Data provides competitively significant information about Oracle's workforce. Thrasher Decl. ¶ 6. The AAP provides a detailed accounting of the number of Oracle employees in specific job titles, and the corresponding salary codes for those job titles. *Id.* This reflects commercially valuable and confidential information such as Oracle's strategic decisions regarding how many people it needs in various roles to effectively create, test, and sell its products, how many people it needs to support or manage its workforce, and how many people it should devote to marketing, finance, and legal operations. *Id.* The AAP Data also divulges the number of employees falling into each job title and their salary codes based on race and gender. *Id.* Therefore, the AAP Data identifies the size, structure, and overall composition

of Oracle's workforce. The AAP Data conveys a detailed breakdown of how Oracle stratifies its workforce. *See id.* ¶ 7. The way that Oracle organizes its workforce is a direct result of its substantial effort and innovation in devising ways to make the company run effectively in rapidly evolving economic times, and the organizational structure of Oracle's workforce is an important part of its entirely private plans to maintain competitiveness in the industry. *Id.* ¶ 8. Providing insight into Oracle's successful strategy would cause Oracle competitive harm. *See id.*

The second requirement is satisfied because the information was "obtained . . . by the government" when Oracle provided the information to OFCCP during its compliance review desk audit of Oracle's Affirmative Action Program, and again in discovery in this case pursuant to the Protective Order. Riddell Decl. ¶ 2.

Finally, the third requirement is satisfied because Oracle's AAP Data is exactly the type of AAP information that courts have held to be confidential and thus exempt from disclosure under FOIA exemption 4. *See Rubbermaid v. Kleppe*, 1976 WL 731, at *2-3 (D. Md. Nov. 5, 1976), *relying on Westinghouse Elect. Corp. v. Schlesinger*, 392 F. Supp. 1246, 1249-50 (E.D. Va. 1974) (holding AAP is protected from disclosure by exemption 4 as documents "contain commercial or financial information which is confidential"). *See also Metro. Life Ins. Co. v. Usery*, 426 F. Supp. 150, 159-160 (D.D.C. 1976), *aff'd and remanded sub nom. Nat'l Org. for Women, Washington, D.C. Chapter v. Soc. Sec. Admin. of Dep't of Health & Human Servs.*, 736 F.2d 727 (D.C. Cir. 1984) (holding that workforce analyses data in AAP was exempt from disclosure under FOIA 4, because disclosure of the "breakdown by specific job categories of the total number of employees...and number of women and minorities in each...would cause the companies substantial competitive harm by increasing the companies' vulnerability to employee raiding."); *U.S. Steel Corp. v. Schlesinger*, No. 183-74-A, 1974 WL 260, at *1 (E.D. Va. Sept. 20, 1974) (FOIA 4 exempts from disclosure portions of AAP which if disclosed would cause substantial competitive harm.).

Accordingly, Oracle's AAP Data should be sealed under FOIA exemption 4.

2. **FOIA Exemption 4 Exempts Disclosure of the Specific Premium Percentages Oracle May Pay to Attract Candidates**

The information regarding Oracle's compensation structure that Oracle seeks to seal through this Motion contains proprietary information about Oracle's compensation structure. Specifically, Oracle seeks to seal the specific premium percentages that Oracle deems appropriate to pay to attract certain talent, and OFCCP does not oppose. Thrasher Decl. ¶¶ 16-17. This Court has twice ordered similar compensation information sealed. *See* April 24, 2019 Order Granting Unopposed Motion to Seal; June 4, 2019 Order Granting Unopposed Motion to Seal. 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 OFCCP in discovery. Riddell Decl. ¶ 3. *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 612 (wage and other information gathered by Department of Labor was the type of information Congress intended to shield from FOIA disclosure). *See also 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] substantial competitive 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* Thrasher Decl. ¶ 17. Information concerning Oracle’s compensation structure was developed through expending significant time and effort studying the labor market and continuously adjusting Oracle’s recruiting strategies and competitive offers over the years. *Id.* Oracle uses salaries and premium pay to compete for talent, and with knowledge of this information, Oracle’s competitors could, without expending any cost or effort, adjust their offers to outbid Oracle for talent. *Id.*

A significant component of Oracle’s success has been its ability to cultivate and maintain a valuable, talented, and loyal workforce to create and support the products and services Oracle provides to its customers. *Id.* ¶ 18. Oracle competes for talent in an industry that is constantly and quickly evolving, and the competition among the companies is fierce. *Id.* Oracle competes with both large and emerging companies. *Id.*

Public disclosure of Oracle’s competitors of the premiums Oracle pays to attract talent would undermine its ability to attract talent, while empowering its competitors. Oracle’s competitors would be able to use this information to develop salary offers to outbid Oracle in hiring or to poach Oracle’s existing employees. *Id.* That would cause Oracle substantial competitive harm because its business is entirely dependent upon its talented employees. *Id.*

As this Court reasoned when ordering similar information sealed:

Ms. Waggoner’s declaration supports the common sense point that Oracle’s ability to attract and retain the employees it seeks in the fluid labor market would likely be impaired if its competitors had knowledge of the details of the salary ranges it has used for particular positions and/or the actual and proposed/negotiated salaries of particular employees. With particularized information about Oracle’s compensation structure, a competitor could out-

bid/out-compete Oracle in the labor market by ascertaining the offers that Oracle will likely make and altering its offers and negotiating positions accordingly in order to attract the top talent.

April 24, 2019 Order Granting Unopposed Motion to Seal at pp. 3-4.

For these reasons, Oracle's confidential and proprietary premium percentages should be sealed under FOIA exemption 4.

B. FOIA Exemption 6 Exempts Disclosure of Oracle's AAP Data

The AAP Data identified in OFCCP's Motion, which Oracle seeks to seal was, in part, derived from confidential race and gender self-reporting materials provided to Oracle by its employees and contained in their personnel files. As a result, in addition to FOIA Exemption 4, the AAP data is exempted from disclosure pursuant to FOIA Exemption 6, as protecting against such an unwarranted invasion of personal privacy rights outweighs the public's interest in access to the information. *U.S. Dep't of Def.*, 510 U.S. 487 at 495.

The information contained in the AAP Data may reveal the identity of, and personal information related to, specific Oracle employees, and the data shows the salary codes into which those employees fit. Thrasher Decl. ¶ 14. For certain job titles, the gender and race information associated with them in the AAP Data are such that it would enable others to determine and deduce private, personal information related to the individual. *Id.* Indeed, where numbers in the job titles are in the single digits, it is possible that individuals reviewing the AAP Data may discern the identity of these employees and their salary codes since Oracle is such a highly visible company. *Id.* Similarly, where there is only one person in a given category, especially where the person is an executive or manager, it is very easy to deduce the person's identity and salary code. *Id.*

Oracle does not require its employees to report the race and gender information contained in its AAP. *Id.* ¶ 13. Instead, each employee is afforded an opportunity to voluntarily self-report his or her race and gender. *Id.* In collecting this information, Oracle assures each employee that it will maintain the information about an employee's race and gender as confidential and will use

it only in accordance with applicable government regulations. *Id.* In turn, Oracle's employees provide this information under the expectation of confidentiality. *Id.*

Disclosure of the AAP Data 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. OFCCP cites to the AAP only once to support the statement that "On May 8, 2019, OFCCP deposed Shauna Holman-Harries, who oversees Oracle's OFCCP compliance efforts. Oracle's Affirmative Action Plan . . . designates Ms. Holman-Harries as 'responsible for implementing an effective auditing and reporting system' . . ." ² See OFCCP Motion at 5. ³

Because Oracle only seeks to seal confidential information that is entirely unnecessary to support OFCCP's position, it is properly foreclosed under the statute as the public has no interest in the extraneous and highly sensitive 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 503, 512 (2d Cir. 1992); *Schwarz v. U.S. Dep't of Treasury*, 131 F.Supp.2d 142, 150 (D.D.C. 2000) (disclosure of names does not contribute to the 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). Accordingly, Oracle's AAP Data should also be sealed under FOIA exemption 6.

² OFCCP cites to page 5 of the AAP which shows that Ms. Holman-Harries is responsible for Oracle's AAP—the only information the public has an interest in for purposes of OFCCP's Motion. However, this portion of the AAP is missing from the Bremer Declaration in support of Plaintiff's Motion. Therefore, Oracle is not moving to seal the information cited by Plaintiffs from page 5 of the AAP. Additionally, Oracle does not move to seal ¶ 4 of the Bremer Decl. which purports to quote from page 5 of the AAP.

³ Indeed, OFCCP could have honored Oracle's Confidentiality designation by redacting the substantive content of the AAP Data and obviated the need for a motion to seal this material.

C. Oracle Has a Compelling Interest in Precluding Disclosure of AAP Data and Information Regarding Oracle’s Compensation Structure

Disclosure of the information Oracle seeks to seal would divulge commercially valuable confidential information. *See* Thrasher Decl. ¶¶ 6, 16. For purposes of this lawsuit, the AAP Data Oracle seeks to seal was provided to OFCCP during the compliance desk audit based on the assurance it would be treated confidential to the maximum extent permitted under FOIA, upon request and assurance it would be treated confidential to the utmost extent possible, and that it would be designated as confidential when provided. *See* Bremer Decl. Ex. 5 (September 24, 2014 letter from Hea Jung Atkins requesting AAP Data and assuring Oracle that OFCCP “will treat the information [Oracle] submit[s] in response to this letter as sensitive and confidential to the maximum extent permitted under the Freedom of Information Act.”). The compensation-related information Oracle seeks to seal is the subject of a protective order and was produced in discovery with a confidential designation. *Id.* ¶ 3. As explained above, there exists a substantial probability that Oracle’s competitive interests and the privacy interests of Oracle’s current and former employees will be prejudiced if these materials are not protected from public disclosure. Oracle’s sealing request protects its proprietary data and the privacy interests of its employees while simultaneously protecting any potential interest the public may have in access to the data.

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IV. CONCLUSION

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

Respectfully submitted,

July 2, 2019

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