

**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

RECEIVED

JUL 16 2019

Office of Administrative Law Judges
San Francisco, CA

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

OFFCP does not oppose the sealing of either of the portions of Exhibit 46 or Exhibit 3 to the Declaration of Laura Bremer in support of OFCCP's Motion to Compel Compensation Analyses ("Motion") with respect to their use in the instant Motion. Neither the portions of Exhibit 46 relating to specific premium percentages used by Oracle to attract candidates nor the portions of Exhibit 3 relating to compensation data which form part of Oracle's Affirmative Action Plan Workforce Analysis ("AAP") are sufficiently critical to the arguments OFCCP advances in *this motion*— OFCCP's Motion to Compel Compensation Analyses—to render them necessary to the public's rights to know "what the government is up to."¹ However, OFCCP does not agree that the AAP data in Exhibit 3, or similar summaries of employee counts by race and gender, is exempt from disclosure under FOIA.

Oracle's Motion to Seal is founded on the assertion that information in Exhibits 3 and 46 is exempt from disclosure under FOIA exemptions 4 and 6. While OFCCP can see how the premium percentages might fall within FOIA exemption 4 – which is why OFCCP advised Oracle it did not oppose the sealing of those portions of Exhibit 46 – OFCCP is more doubtful of the application of FOIA exemptions 4 or 6 to the AAP data Oracle seeks to seal in Exhibit 3.² The Court previously explained that it cannot make such FOIA determinations here, as they are evaluated independently of this matter. Specifically, the Court noted in its March 22, 2019 Order,

¹Oracle's Mot. to Seal at 3 (citing *U.S. Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 494-5 (1994)).

² With respect to exemption 4, "trade secrets" are narrowly construed. See *Pub. Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983); *accord Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 244 F.3d 144, 150-51 (D.C. Cir. 2001) (exemption 4 "narrowly cabins trade secrets to information relating to the 'productive process' itself"). Further, only "information that is linked to an identifiable person" is covered by exemption 6, which excludes aggregated data. See *Torres Consulting & Law Grp, LLC v. NASA*, 666 Fed. Appx. 643, 645; see also, *Dep't of Air Force v. Rose*, 425 U.S. 352, 375–76 (1976).

“[a]s the assigned hearing judge, I am not in a position to direct how the OALJ agency complies with FOIA or makes proactive disclosures.” Order at 2-3. The Court further explained:

“It is important for the parties to realize the limitations of a protective order in this context. OFCCP and the Solicitor’s office are administrative agencies subject to FOIA regardless of any agreement the parties might otherwise reach. If there is a FOIA request, it will be evaluated with reference to FOIA and its exemptions—not the terms of the protective order and independently of the current litigation.”

Id. at 3, FN 3. OFFCP and the Solicitor’s office are in precisely the same position as the OALJ in relation to such FOIA determinations. As to OFCCP’s current pending motion, OFCCP agrees that the AAP data is not sufficiently necessary to the arguments OFCCP advances to oppose sealing now, in relation to this motion. Yet, as to the broader question of whether the AAP data Oracle seeks to seal here fits within FOIA exemptions 4 and 6, OFFCP thinks Oracle overstates the breadth of both of those exemptions and *explicitly reserves the right to dispute the application of either exemption 4 or 6 to any aspect of Oracle’s AAP, including this data*, if OFCCP offers this evidence or data later at trial or in relation to dispositive motions. As the Court is well aware, a significant part of this litigation and upcoming hearing will concern the obligations Oracle freely entered into when agreeing to accept taxpayer money and become a federal contractor. In relation to those obligations, the precise portions of the AAP data that Oracle seeks to seal here may be critical to OFFCP’s arguments – rendering this information necessary for the public to have to understand “what the government is up to.”

With that reservation of rights, and acknowledgement that OFCCP’s non-opposition to the sealing of these portions of Exhibit 3 *as it relates to this motion only* does not represent an agreement by the Solicitor’s office or OFCCP as to the applicability of exemption 4 or 6 of FOIA, OFCCP has no objection to the sealing of the requested portions of Exhibit 3 at this time.

Date: July 16, 2019

UNITED STATES DEPARTMENT OF
LABOR

Office of the Solicitor
90 7th Street, Suite 3-700
San Francisco, CA 94103
Telephone: (415) 625-2702
Fax: (415) 625-7772
E-Mail: mcallister.hailey@dol.gov

KATE S. O'SCANNLAIN
Solicitor of Labor

JANET M. HEROLD
Regional Solicitor

JEREMIAH MILLER
Counsel for Civil Rights



HAILEY McALLISTER
Trial Attorney

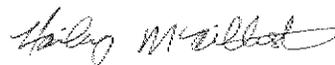
CERTIFICATE OF SERVICE

I certify that on this 16th day of July, 2019, the foregoing **PLAINTIFF'S OPPOSITION TO ORACLE AMERICA, INC.'S MOTION TO SEAL PORTIONS OF PLAINTIFF'S MOTION TO COMPEL ORACLE'S COMPENSATION ANALYSES**

was served on the following individuals by email at the following addresses:

ERIN M. CONNELL (econnell@orrick.com)
GARY R. SINISCALCO (grsiniscalco@orrick.com)
WARRINGTON S. PARKER, III (wparker@orrick.com)
JOHN GIANSELLO (jgiansello@orrick.com)
KAYLA GRUNDY (kgrundy@orrick.com)
JACQUELINE KADDAH (jkaddah@orrick.com)
Orrick, Herrington & Sutcliffe LLP
The Orrick Building
405 Howard Street
San Francisco, CA 94105-2669

as requested by attorneys for Defendant Oracle America, Inc.



HAILEY McALLISTER