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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

**ORACLE AMERICA, INC.'S  
MOTION TO SEAL LIMITED  
PORTIONS OF PLAINTIFF  
OFCCP'S REPLY TO  
OPPOSITION TO OFCCP'S  
MOTION FOR SUMMARY  
JUDGMENT, OFCCP'S REPLY  
IN SUPPORT OF MOTION TO  
EXCLUDE THE TESTIMONY  
AND REPORTS OF DR. SAAD,  
AND OFCCP'S MOTION IN  
LIMINE**

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## **I. INTRODUCTION**

Pursuant to 29 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, “Protective Order”), Defendant Oracle America, Inc. (“Oracle”) moves to seal limited portions of the materials submitted in support of Plaintiff OFCCP’s Reply to Opposition to OFCCP’s Motion for Summary Judgment, OFCCP’s Reply in Support of Motion to Exclude the Testimony and Reports of Dr. Saad (collectively “Replies”) and OFCCP’s Motion in Limine (“MIL”).

In accordance with this Court’s November 12, 2019 Order, the parties met and conferred regarding the limited materials Oracle seeks to seal. To narrow the disputes between the parties Oracle de-designated various confidential materials though they are exempt from disclosure under FOIA. As detailed in the chart below, indicating areas of agreement and/or disagreement, OFCCP opposes sealing all material protected from disclosure under FOIA Exemption 4, and some materials protected from disclosure under FOIA Exemption 6—including information this Court previously ordered sealed, such as individual salary information.

The limited information that Oracle seeks to seal consists of confidential commercial information and/or private information about Oracle employees, which is exempt from Freedom of Information Act (“FOIA”) disclosure. Much of the material should be sealed pursuant to FOIA Exemption 4 because it constitutes “commercial information, obtained from a person, that is confidential.” Oracle treats the information as private and it is subject to a proper motion to seal and/or was provided to OFCCP during this litigation with a confidential designation based on OFCCP’s assurances that it would be treated as sensitive and confidential pursuant to the Protective Order. In addition, much of the material should be sealed under FOIA Exemption 6 because it contains personally identifying and confidential information about non-party current and/or former Oracle employees derived from or stored in personnel and similar files in which Oracle stores private information.

Oracle has a compelling interest in precluding disclosure of confidential commercial information and information about its current and/or former employees. Oracle keeps its

commercial information private so it can retain its commercial value. It is also essential that Oracle keep information about its current and former employees confidential because disclosure would undermine those individuals' privacy rights and harm Oracle's relationship with those individuals. Oracle does not share its confidential commercial information or employee information externally and only disseminates it internally to a limited group of individuals on a need-to-know basis. Here, the confidential commercial information that OFCCP filed and that Oracle seeks to protect with this motion is subject to a motion to seal and/or was produced to the government based on assurances of privacy.

Oracle is mindful that 29 C.F.R. § 18.85(b)(1) requires parties to "propose the fewest redactions possible that will protect the interest offered as the basis for the motion." Oracle has gone to great lengths to ensure that the vast majority of the briefing and supporting evidence at issue remain unredacted and open to the public. Oracle's narrowly-tailored proposed redactions thus meet the applicable legal standards for sealing. Accordingly, the information Oracle seeks to seal is entitled to protection against public disclosure.

Specifically, Oracle moves to seal the following portions of OFCCP's Reply<sup>1</sup>:

<b>Graham Decl. Exhibit</b>	<b>Document Name</b>	<b>Confidential Material</b>	<b>Areas of Agreement and/or Disagreement and Other Locations on the Docket</b>
<b>A</b>	OFCCP's Reply to Opposition to OFCCP's Motion for Summary	Compensation information about non-party employee: p. 9 (FOIA 4 and FOIA 6)  Termination date of non-party employee: p. 9 (FOIA 6)	OFCCP opposes compensation-related redactions but agrees with redaction of termination date.  No other location on the docket.
<b>B</b>	OFCCP's Reply in Support of Motion to Exclude the Testimony and Reports of Dr. Saad	Compensation information about non-party employee: p. 9 fn. 18 (FOIA 4 and FOIA 6)  Termination date of non-party employee: p. 9 fn. 18 (FOIA 6)	OFCCP opposes compensation-related redactions but agrees with redaction of termination date.  No other location on the docket.

<sup>1</sup> Exhibit references are to the redacted documents filed as exhibits to the Declaration of Lara F. Graham in Support of Defendant Oracle America, Inc.'s Motion to Seal ("Graham MTS Decl."). The FOIA exemption under which Oracle proposes to seal each item of confidential material is included in parentheses.

<b>Graham Decl. Exhibit</b>	<b>Document Name</b>	<b>Confidential Material</b>	<b>Areas of Agreement and/or Disagreement and Other Locations on the Docket</b>
<b>C</b>	Declaration of Janet M. Herold in Support of OFCCP's Reply to Oracle's Opposition to OFCCP's Motion to Exclude Testimony and Reports of Dr. Ali Saad ("Herold Decl.")	<p>Compensation information about non-party employees: ¶¶ 2, 3, 5 (FOIA 4 and FOIA 6)</p> <p>Termination date of non-party employees: ¶¶ 4-5 (FOIA 6)</p>	<p>OFCCP opposes compensation-related redactions but agrees with redaction of termination dates.</p> <p>No other location on the docket.</p>
<b>D</b>	Herold Decl., Ex. B	Confidential Internal Network Configuration, Data Entry, and Network Access Information: ORACLE_HQCA_0000382687-0000382710 (FOIA 4)	<p>OFCCP opposes various network screenshot image redactions at ORACLE_HQCA_0000382689-0000382710.</p> <p>No other location on docket.</p>
<b>E</b>	Declaration of Priyanka Jampana	<p>Compensation information about non-party employee: ¶ 9 (FOIA 4 and FOIA 6)</p> <p>Personally-identifying and sensitive information about non-party employees, including names, job duties, race information, disability information, and retirement information: ¶¶ 7, 10, 12 (FOIA 6)</p>	<p>OFCCP opposes sealing the following: a word at ¶ 7, line 21; the number of employees at ¶ 7, line 20; race information at ¶¶ 7, 12; description of job duties at ¶ 7; and compensation information about non-party at ¶ 13.</p> <p>OFCCP agrees with all other redactions.</p> <p>No other location on docket.</p>

<b>Graham Decl. Exhibit</b>	<b>Document Name</b>	<b>Confidential Material</b>	<b>Areas of Agreement and/or Disagreement and Other Locations on the Docket</b>
F	Declaration of Laura C. Bremer in Support of OFCCP's Motion in Limine to Exclude Trial Evidence and Testimony Related to Subjects in Which Oracle Refused to Provide Discovery Based on Privilege or Relevance, Ex. C (Deposition of Tamerlane Baxter)	Personally-identifying information of non-party employee: p. 215:8 (FOIA 6)	OFCCP agrees with this redaction.  No other location on docket.

**II. LEGAL STANDARD**

**A. MOTION TO SEAL**

“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” as well as 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). “FOIA expressly recognizes that

‘important interests are served by its exemptions,’ and ‘those exemptions are as much a part of FOIA’s purposes and policies as the statute’s disclosure requirement.’” *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019) (internal citations and brackets omitted) (emphasis added). Furthermore, 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. *See* Protective Order ¶¶ 2.2 and 12.3.

#### **1. 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 “it is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy.” *Argus Leader Media*, 139 S. Ct. at 2366.<sup>2</sup>

#### **2. FOIA EXEMPTION 6**

FOIA Exemption 6 prohibits disclosure of information from personnel or similar 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). The phrase “similar files” has a broad meaning. *U.S. Dep’t of State v. Wash. Post Co.*, 456 U.S. 595, 600 (1982). “...[R]ecords containing information that applies to particular individuals satisfy the threshold [similar files] test of Exemption 6.” *Forest Serv. Emps. for Envtl. Ethics v. U.S. Forest Serv.*, 524 F.3d 1021, 1024 (9th Cir. 2008). Disclosure of such information is unwarranted when privacy interests outweigh the public’s interest in disclosure. *U.S. Dep’t of Def.*, 510 U.S. at 494-495. The public’s interest

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<sup>2</sup> Because, as is the case here, both conditions were met in *Argus*, the Court did not address whether, to be considered confidential, the material must both be treated confidentially *and* be provided with an assurance of privacy. Thus, even though both conditions are met here, arguably only one condition is necessary to satisfy the “confidential” prong under FOIA Exemption 4.

in information from personnel files is limited to “contribut[ing] significantly to public understanding of the operations or activities of the government.” *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.* Where there is no public interest in the information, even a modest privacy interest “outweighs nothing every time.” *Kowack v. U.S. Forest Serv.*, 766 F.3d 1130, 1136 (9th Cir. 2014), quoting, *Nat’l Ass’n of Retired Fed. Emps. v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989).

### **III. ARGUMENT**

#### **A. FOIA Exemption 4 Precludes Disclosure of the Confidential Commercial Information Filed in Support of OFCCP’s Replies.**

FOIA Exemption 4 excepts from public disclosure the material Oracle seeks to seal which includes Oracle’s confidential and proprietary information about Oracle’s compensation structures and internal networks. The compensation-related materials include specific, detailed salary information and equity distribution amounts for specific non-party employees. *See* Declaration of Kris Edwards in Support of Defendant Oracle America Inc.’s Motion to Seal OFCCP’s Reply and MIL (“Edwards MTS Decl.”) ¶¶ 4-5, 8. The internal network-related information Oracle seeks to seal provides a roadmap regarding the configuration, structure, architecture, and accessibility of Oracle’s internal networks. *See* Les Cundall Declaration in Support of Defendant Oracle America Inc.’s Motion to Seal OFCCP’s Reply and MIL (“Cundall MTS Decl.”) at ¶¶3-4.

The materials described above are exempt from disclosure under FOIA Exemption 4 as they are “(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.

Compensation Structures. The salary information associated with various positions comprises commercial information, thus satisfying the first prong of FOIA Exemption 4. Oracle developed and refined its compensation strategies after substantial effort and investment, with

the objective of advancing its interests and attracting and retaining employees. Edwards MTS Decl. ¶ 6. Disclosure of the information would eliminate its competitive, and thus commercial, value 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.* ¶ 7. As this Court explained in a prior Order granting a motion to seal compensation-related information:

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 compensation and proposed/negotiated salaries of particular employees. With particularized information about Oracle's compensation structure, a competitor could out-bid/compete Oracle in the labor market by ascertaining the offers that Oracle will likely make and altering its offers and negotiating position accordingly in order to attract the top talent.

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

*Internal Networks.* The internal network-related information Oracle seeks to seal is commercial information as it reflects the configuration, structure, architecture, access points, and methods for data entry and extraction to and from the network for college recruiting-related databases. *See* Cundall MTS Decl. ¶ 4. This reflects the proprietary manner in which Oracle integrated the networks into its internal operations. Oracle maintains as confidential the manner in which it instructs its employees to access and navigate these electronic systems. *Id.* at ¶ 5. This is done to protect the sensitive applicant-related information housed in those systems, to protect the confidential details about Oracle's assessment of job applicants, and because Oracle derives economic value from the secret nature of its proprietary network configuration and integration of its systems into its core businesses and college recruiting functions. *Id.*

The second requirement of FOIA 4 is satisfied because the information was "obtained . . . by the government" when Oracle provided the information to OFCCP and designated it confidential at the time of provision, or it is subject to a motion to seal, pursuant to the Protective Order.<sup>3</sup> Graham MTS Decl. ¶ 4.

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<sup>3</sup> All of the material that Oracle seeks to seal in this Motion was historically treated as confidential at Oracle, and all of the confidential commercial information that Oracle seeks to seal under FOIA Exemption 4 was either previously

Finally, the third requirement is satisfied because Oracle undertakes substantial efforts to maintain confidentiality over the materials discussed above by limiting the access to, and distribution of, such information and because Oracle provided it to OFCCP here under an assurance of privacy. Oracle restricts internal access to the compensation-related and internal network information discussed above by limiting distribution to only those with a legitimate business need to know. *See* Edwards MTS Decl. ¶ 11; Cundall MTS Decl. ¶ 6. Oracle controls and safeguards this information by entering into agreements with employees that prohibit them from sharing or using any proprietary information externally or internally in the absence of a legitimate business need—and explicitly prohibiting the unnecessary use or sharing of the types of information discussed above. *Id.* Oracle takes seriously the need to protect its commercially sensitive data and information related to its employees and business strategies, and, accordingly, this information is not public or outward facing, but rather is shared with a selective audience and exists within a secure environment that facilitates access only by employees possessing the requisite login and password credentials; with the requisite credentials, these employees are granted access to materials ranging from Oracle’s confidential business strategies to its employee personnel files. *Id.*

Likewise, as noted above, Oracle provided these materials to OFCCP and designated them confidential, filed the materials in this matter with a concurrent motion to seal, or indicated it will move to seal the materials pursuant to the Protective Order. Graham MTS Decl. ¶ 4. Therefore, Oracle provided the information under the assurance of privacy, pursuant to the Protective Order in this case to which the parties’ agreed and are bound not to share confidentially-designated information except in limited, enumerated circumstances.<sup>4</sup> Protective Order § 7.2. Because Oracle closely guards the information and because it was given to OFCCP

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produced in discovery and designated Confidential within the meaning of the Protective Order (or is derived from such information), was filed in this matter with a concurrent motion to seal, or was filed in this matter and Oracle has indicated to the Court and OFCCP, by letter, it will move to seal. *See* Graham MTS Decl. ¶ 3.

<sup>4</sup> Section 7.2 of the Protective Order permits dissemination only to those to whom disclosure is reasonably necessary for the litigation, who are either the ALJ, court reporters, experts, or witnesses that have signed an agreement not to disclose the information, or to custodians of the information or those with pre-existing knowledge of the information and recipients to whom disclosure is required by law.

with an assurance it would be treated as private information, it is exempted from disclosure under FOIA 4. *See Argus Leader Media*, 139 S. Ct. at 2366; *see also* Order Granting Motion to Seal, dated August 9, 2019 at 4-6 (granting motion to seal commercial/financial information that was treated as confidential and produced to OFCCP as confidential pursuant to the protective order).

Lastly, Oracle has narrowly tailored the information it seeks to seal and has left the vast bulk of the materials public. It seeks to seal only highly-specific compensation information, which is at the heart of its strategy to compete in the labor marketplace, such as salary amounts for various positions, and internal network information that would compromise the integrity of its electronic systems and divulge the proprietary manner in which it integrates those systems with its internal functions.

**B. FOIA Exemption 6 Precludes Disclosure of the Confidential and Private Employee Information Submitted in Support of OFCCP's Replies and MIL.**

**1. There Is a Privacy Interest in Protecting Confidential Employee Compensation Information.**

The personally-identifying and compensation information of current and/or former employees in the materials Oracle seeks to seal was derived from confidential personnel and similar files and databases housing private employee information, *see* Edwards MTS Decl. ¶ 9; Declaration of Anje Dodson in Support of Oracle's Motion to Seal Oracle's Reply ("Dodson MTS Decl.") ¶¶ 4-5, and is exempted from disclosure pursuant to FOIA Exemption 6, because such a disclosure is unwarranted where the individual's privacy interests outweigh the public's interest in disclosure. *See U.S. Dep't of Def.*, 510 U.S. at 488. Disclosure of individual employees' identifying-information and salaries does not contribute to the public's understanding of "what their government is up to" for purposes of understanding this litigation, and thus is properly exempt 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); *Fed. Labor Relations Auth. v. U.S. Dep't of Veterans Affairs*, 958 F.2d 503, 512 (2d Cir. 1992) (precluding disclosure of employee names and home addresses); *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 public's understanding of government functions); *Voinche v. F.B.I.*, 940 F. Supp. 323, 330 (D.D.C. 1996), *aff'd*, 1997 WL 411685 (D.C. Cir. June 19, 1997) (same); *Painting & Drywall Work Pres. Fund, Inc. v. Dep't of Hous. & Urban Dev.*, 936 F.2d 1300, 1303 (D.C. Cir. 1991) (same). As this Court has recognized in a prior order granting a motion to seal the same types of information while the public has no meaningful interest in employee identifying information and salaries, there is a compelling privacy interest in the information:

Individual salary information is the sort of information that is found in personnel files and the individuals in question have a legitimate and compelling privacy interest in their actual and prospective earnings at Oracle. Moreover, disclosure of this particular information would not serve the 'core purpose of FOIA' because it provides no information on the operations or activities of the government. The...[information is] irrelevant to any determination that might be reached...in this litigation.

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

Oracle has undertaken substantial efforts to maintain confidentiality over the materials discussed above by limiting the access to, and distribution of, such information. *See* Edwards MTS Decl. ¶ 9; Dodson MTS Decl. ¶¶ 5-6. 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.* Oracle also controls and safeguards this information by entering into agreements with employees that prohibit them from sharing any confidential information externally or internally in the absence of a legitimate business need. *Id.* For purposes of this lawsuit, all such information is either the subject of a protective order and is covered by Oracle's confidential designations or is the proper subject of a motion to seal under 29 C.F.R. § 18.85, including personnel information related to the individuals identified in the

materials sought to be redacted. *See* Graham MTS Decl. ¶ 4.

As explained above, there exists a substantial probability that the privacy interests of Oracle's employees would be placed in significant jeopardy if the materials Oracle seeks to seal were made publicly available, and this Court has already determined that such information should be protected. *See* April 24, 2019 Order Granting Unopposed Motion to Seal at 3-4 (sealing information related to the identities and salaries of particular employees).

**2. There Is a Privacy Interest in Protecting Personally-Identifying Details About Current and Former Oracle Employees.**

Oracle seeks to seal portions of materials that identify current and/or former Oracle employees, including for example, names, job information, and race information. The evidence that concerns these employees is based on data and information Oracle does not share with the public. The information comes from Oracle's personnel data, thus the first prong of FOIA Exemption 6 is satisfied because it is derived from personnel or similar files. Dodson MTS Decl. ¶ 4; *U.S. Forest Serv.*, 524 F.3d at 1024 (employee names in report are "similar files"). The second prong of FOIA 6 is satisfied because release of the information would constitute an unwarranted invasion of personal privacy. The public has no interest in access to the information. *Id.* at 1025 (redacting names noting "information about private citizens . . . that reveals little or nothing about an agency's own conduct" is not the type of information to which FOIA permits access."). As such, "release of the names . . . would serve no articulable public interest" thus sealing under FOIA Exemption 6 is correct. *Voinche*, 940 F. Supp. at 330 (withholding names). *See also Lakin Law Firm, P.C. v. F.T.C.*, 352 F.3d 1122, 1124 (7th Cir. 2003). Especially here, in a case that has garnered so much media attention, public release of current and/or former employee names or identifying information could lead to harassment by the media and/or aggregation of their personal information for any other purpose once their information and connection with this suit hits the internet. In addition, the public release of identifying information for employees could lead to embarrassment for those individuals and would erode employees' confidence in Oracle's commitment to safeguarding their privacy interests. Accordingly, there is a cognizable privacy interest in protecting the identities of these

individuals. *See U.S. Forest Serv.*, 524 F.3d at 1026 (“the potential for harassment that drew the district court’s attention was that which would be presented by the media [and] curious neighbors . . .” if names were released).

Oracle has carefully and narrowly tailored its redactions to ensure that only information that can be used to identify individuals, and those individuals’ sensitive information is sealed. Because there is a cognizable privacy interest in the identifying information found in these materials, but no cognizable interest in public access, they should be sealed under FOIA Exemption 6.

#### IV. CONCLUSION

For the foregoing reasons, Oracle respectfully requests that the Court grant Oracle’s Motion to Seal limited portions of Oracle’s Reply.

November 25, 2019

Respectfully submitted,

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