U.S. Department of Labor

Office of Administrative Law Judges
90 Seventh Street, Suite 4-800
San Francisco, CA 94103-1516

(415) 625-2200
(415) 625-2201 (FAX)

Issue Date: 07 October 2019

CASE NO.: 2017-OFC-00006

In the Matter of

OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS,
U.S. DEPARTMENT OF LABOR,
Plaintiff,

v.

ORACLE AMERICA, INC.,
Defendant.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO COMPEL OFCCP TO COMPLY WITH THE COURT'S DISCOVERY ORDERS

This matter arises under Executive Order 11246 (30 Fed. Reg. 12319), as amended, ("EO 11246") and associated regulations at 41 C.F.R. Chapter 60. It has been pending at the Office of Administrative Law Judges ("OALJ") since January 17, 2017. Plaintiff Office of Federal Contract Compliance Programs ("OFCCP") filed the operative Second Amended Complaint ("SAC") on March 13, 2019. Defendant Oracle America, Inc. ("Oracle") answered on April 2, 2019. Hearing is set to begin on December 5, 2019. Currently pending is Oracle's Motion to Compel OFCCP to Comply with the Court's Discovery Orders Regarding Redacted Interview Memoranda and 30(b)(6) Testimony ("Oracle's Motion to Compel Compliance"), which is opposed by OFCCP.

For the reasons set forth below, Oracle's Motion to Compel Compliance is granted in part and denied in part.

I. LEGAL STANDARD

This proceeding is governed by the "Rules of Practice for Administrative Proceedings to Enforce Equal Opportunity under Executive Order 11246 contained in part 60-30." 41 C.F.R. § 60-1.26(b)(2). Where the regulations in 41 C.F.R. §§ 60-30.1 *et seq.* do not provide a rule, the Federal Rules of Civil Procedure apply. 41 C.F.R. § 60-30.1. Where a rule is needed and neither 41 C.F.R. Part 60-30.1 nor the Federal Rules supply one, the Rules of Practice and Procedure for Administrative Hearings Before OALJ in 29 C.F.R. Part 18, subpart A apply. *See* Pre-Hearing Order at 2 n.2.

The pending motion concerns enforcing prior orders requiring the production of documents and appearance at an oral deposition. 41 C.F.R. § 60-30.10 provides that:

> (a) After commencement of the action, any party may serve on any other party a request to produce and/or permit the party, or someone acting on his behalf, to inspect and copy any unprivileged documents, phonorecords, and other compilations, including computer tapes and printouts which contain or may lead to relevant information and which are in the possession, custody, or control of the party upon whom the request is served. If necessary, translation of data compilations shall be done by the party furnishing the information.

41 C.F.R. § 60-30.10(a); *see also* Fed. R. Civ. P. 34. "An objection [to a request] must state whether any responsive materials are being withheld on the basis of that objection." Fed. R. Civ. P. 34(b)(2)(C). "The party submitting the request may move for an order with respect to any objection or to other failure to respond." 41 C.F.R. § 60-30.10(d). Depositions are provided for in 41 C.F.R. § 60-30.11 and may be taken on an organization under Fed. R. Civ. P. 30(b)(6).

A party may withhold documents or refuse to answer questions based on a claim of privilege.

> When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial preparation material, the party must: (i) expressly make the claim; and (ii) describe the nature of the documents communications or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

Fed. R. Civ. P. 26(b)(5)(A). The party asserting the privilege "bear[s] the burden of showing that the privilege exists and applies." *Heathman v. United States Dist. Court for Cent. Dist.*, 503 F.2d 1032, 1033 (9th Cir. 1974). Boilerplate objections and blanket claims of privilege are insufficient. *See, e.g., BNSF v. United States Dist. Court*, 408 F.3d 1142, 1149 (9th Cir. 2005).

If a party believes that discovery responses have been inadequate, it may, after conferring or attempting to confer in good faith, file a motion to compel discovery, including a motion to produce documents or respond to interrogatories. 41 C.F.R. §§ 60-30.09(c); 60-30.10(d); Fed R. Civ. P. 37(a)(1), 37(a)(3)(B)(iii)-(iv). An ALJ is empowered to require parties to respond to discovery. 41 C.F.R. § 60-30.15(c); *see also* 29 C.F.R. § 18.12(b)(3). The regulations relevant to this case authorize an ALJ to "[i]mpose appropriate sanctions against any party or person failing to obey an order" including:

> (1) Refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting it from introducing designated matters in evidence;
> (2) Excluding all testimony of an unresponsive or evasive witness, or determining that the answer of such witness, if given, would be unfavorable to the party having control over him; and
> (3) Expelling any party or person from further participation in the hearing;

41 C.F.R. § 60-30.15(j); *see also* Fed. R. Civ. P. 37(b)(2)(A); 29 C.F.R. § 18.12(b)(1), (9)-(10); 29 C.F.R. § 18.57(b)(1).

II. BACKGROUND

This case is about allegations of discrimination. OFCCP alleges that Oracle engages in "widespread" discrimination at its headquarters facility against "women, Asians, and African Americas or Blacks in compensation." SAC at ¶ 11. Oracle denies these allegations. It has been pending in this office for over two-and-a-half years. A lengthy compliance review preceded the litigation. The action was stayed between October 30, 2017, and January 23, 2019, while the parties unsuccessfully attempted to mediate the case and Appointments Clause issues related to the assignment of an ALJ were addressed. Outside of lengthy stay, this litigation has been marked by repeated and voluminous discovery disputes, resulting in multiple orders. Oracle's current Motion to Compel Compliance concerns two of those orders.

On June 10, 2019, I issued an Order Granting in Part and Denying in Part Defendant Oracle America, Inc.'s Second Motion to Compel Plaintiff OFCCP to Produce Documents and Further Respond to Interrogatories. Only part of that order is at issue now. It concerns the production of documents, and in particular the notes that OFCCP produced from its interviews with Oracle employees. OFCCP invoked three sets of privileges: the attorney-client privilege as extended by the common interest doctrine, the government informant privilege, and attorney work-product protection. On that basis, OFCCP had produced highly redacted notes from the compliance review period in 2015 and no materials at all from the 2019 interviews. Based on the government informant's privilege, OFCCP had also refused to produce a list of Oracle employees with relevant information, which would have allowed Oracle to gather information on its own. Moreover, OFCCP had refused to provide substantive answers to interrogatories that directly or indirectly touched on this evidence.

The June 10, 2019, order rejected the invocation of the attorney-client privilege as a basis to withhold all communications with Oracle employees, rejecting the proposition that all of Oracle's current and former employees were in some common interest agreement with OFCCP such that they were as-if clients of the Solicitor of Labor's office. It agreed with OFCCP's invocation of the government informant's privilege to withhold identifying information. Thus, it denied Oracle's motion insofar as it requested a list of Oracle employees with relevant information or unredacted interview notes. But it further determined that OFCCP's redactions were facially improper in that they very clearly obscured much more than just the identifying information of the individuals in question, which is all that the government informant privilege protects. OFCCP was thus ordered to re-do its redactions.

The June 10, 2019, order also found that the interview notes from 2019 were protected work product, but that this qualified privilege had been overcome as to the "ordinary" work product in the notes. OFCCP's attorneys had gathered relevant information from Oracle employees. Ordinarily this would be protected as attorney work product, but OFCCP would disclose who had potentially relevant information, allowing Oracle to engage in its own information gathering. Here, OFCCP was properly withholding that identifying information, preventing Oracle from having any reasonable way to procure the relevant information on its own. In addition, OFCCP had avoided collecting statements or questionnaires from Oracle employees, or anything in writing, so that it wouldn't need to produce documents containing the relevant facts to Oracle. And again, OFCCP was also refusing to provide any substantive interrogatory responses about the anecdotal (or other) evidence supporting its allegations—a manifest deficiency that it hardly defended in its opposition.

I found this unacceptable. Oracle is entitled to notice of the allegations and evidence against it and a fair opportunity to defend itself. Yet OFCCP had deployed privileges and discovery non-responses in a way that effectively deprived Oracle from gaining knowledge of the evidence it might face or the underlying facts about its employees' experience—unless it undertook the task of interviewing or deposing all of its current and former employees. Both the government informant privilege and work product protections are qualified—they give way at need. Here, something had to give. I found that in the context of this case, protecting the identity of the Oracle employees who had talked to OFCCP was more important than protecting the work product of OFFCP's attorneys as to the facts at issue. OFCCP was thus ordered to produce the notes except that it could redact 1) identifying information protected by the government informant privilege; and 2) opinion work product, which remained protected. OFCCP was further directed to make its claims of privilege consistent with Fed. R. Civ. P. 26(b)(5)(A), i.e. by providing a privilege log or its equivalent.

OFCCP filed what was styled as a motion for clarification or reconsideration. That motion was denied on July 2, 2019. In briefing that motion, OFCCP represented that it could not distinguish fact from opinion in the interview notes. The July 2, 2019, order rejected this suggestion, stating that the entirety of the notes could not be opinions and that the mere fact that another attorney could guess at opinions from the facts presented did not turn catalogues of facts into opinion work product. The order instructed OFCCP to "redact the opinions and produce the facts." OFCCP's briefing also hinted that there would be further motion practice because after the identifying information and opinion work product was redacted, there would be little left for Oracle. The July 2, 2019, order declined to modify the prior order on these grounds. OFCCP was told that not all information was identifying and not all content was attorney opinion. It was directed to make good faith redactions supported by a privilege log or equivalent.

The second order that was at issue concerns Oracle's attempts to depose OFCCP. On July 1, 2019, I issued an Order Granting Defendant Oracle's Motion to Compel Plaintiff OFCCP to Designate and Produce 30(b)(6) Witnesses. Particularly at issue in that order was inquiry by Oracle into the factual basis for the SAC, and the various statistical assertions made therein. OFCCP claimed that this material was covered by work-product protection and attorney-client privilege. It also represented that going forward with the deposition(s) would be a waste of time because its attorneys would just object to the questions and instruct the witnesses not to answer. The July 1, 2019, order allowed that some objections might be proper—depending on what was asked—but that this was not a reason bar a deposition altogether. It instructed the parties that Oracle was "not entitled to inquire into *why* certain facts were found significant or *how* the OFCCP's legal theories work or *why* certain decisions about the econometric model were made. But it is proper to inquire into *what* factual basis was considered, *what* instructions were given as to the econometric model, and *how* that model is supposed to work." It reached the same conclusion as to the attorney-client privilege.

On July 30, 2019, Oracle filed its Motion to Compel Compliance, along with a supporting memorandum ("DM"), a declaration from Kathryn G. Mantoan with three supporting exhibits[1], and a declaration from David P. Fuad ("FD1") with five supporting exhibits ("DF1X A-E") in two

[1] A corrected copy of the Mantoan declaration containing the complete contents of one of the exhibits was filed later on July 20, 2019. The Mantoan declaration and exhibits pertain solely to the Rule 30(b)(6) deposition dispute, which was subsequently mooted and withdrawn. I thus do not refer to this material below.

volumes.[2] The Motion to Compel Compliance alleged that OFCCP had failed to comply with aspects of the June 10, 2019, order and the July 1, 2019, order.[3] On August 13, 2019, OFCCP filed an Opposition to Oracle's Motion to Compel Compliance ("PO" or "OFCCP's Opposition"), along with a declaration from Michael J. Brunetti ("BD"), a declaration from Norman E. Garcia ("GD") with seven supporting exhibits[4], and a declaration from Abigail G. Daquiz ("DD") with sixteen supporting exhibits ("PDX 1-16").[5] OFCCP generally denied that it had failed to comply with the orders in question. Oracle filed a permitted reply brief ("DR")[6] on August 21, 2019, supported by another declaration from David Fuad with nine more exhibits.[7]

After Oracle's Motion to Compel Compliance and OFCCP's Opposition were filed, the parties conducted a renewed deposition of OFCCP under Rule 30(b)(6). At that deposition, counsel for OFCCP permitted the witness to respond to the line of questions that had been deemed permissible in the July 1, 2019, order, but that counsel had previously refused to allow on claims of attorney-client privilege and work product protections. That change of approach and attitude mooted part of Oracle's Motion to Compel Compliance, and in its reply, Oracle withdrew its motion as to compliance with the July 1, 2019, order. Hence, only compliance with the June 10, 2019, order continues to be at issue.

III. Motion to Compel Compliance with the June 10, 2019, Order

The Motion to Compel Compliance with the June 10, 2019, order requires a determination of whether or not OFCCP's redactions to the interview notes in question are permissible by the terms of the June 10, 2019, order and the July 2, 2019, order denying reconsideration/clarification. After reviewing the papers filed by the parties, I decided that I could not resolve the pending disputes without conducting *in camera* review of the interview notes in question. Accordingly, on August 22, 2019, I ordered OFCCP to submit unredacted copies of the disputed documents and Oracle to submit the redacted copies. The parties made their submissions on September 5, 2019 ("PIC" and "DIC").

As ordered, the parties have coordinated their submissions to enable comparisons of the redacted and unredacted copies in question. They designate four categories of documents. Category A includes interview notes from the compliance review in 2015, which were initially produced in

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[2] DF1X A and DF1X B are selected redacted interview notes. Since I subsequently ordered *in camera* review of all of the notes, these selections are no longer relevant. DF1X C and DF1X D are OFCCP's two privilege logs. DF1X E contains the meet and confer correspondence, which is not relevant to the merits of the motion.

[3] Oracle's Motion to Compel Compliance included a request for expedited briefing whereby OFCCP would have been given only three business days to respond, making any opposition due that Friday afternoon. I denied this request as manifestly unreasonable on July 31, 2019.

[4] The exhibits all contain redacted interview notes. Since I ordered in camera review of all such notes, the exhibits are contained elsewhere in the submissions.

[5] PDX 1 is a sample redaction, which is also contained in the *in camera* submissions. PDX 6-8 relate to the meet and confer on this motion. PDX 9-16 relate to the Rule 30(b)(6) deposition dispute that was subsequently mooted.
On August 27, 2019, Oracle a motion to seal portions of three exhibits submitted with the Daquiz Declaration, PDX 3, PDX 10, and PDX 15, and/or to exclude PDX 10 and PDX 15 on the grounds that subsequent developments rendered them irrelevant. OFCCP filed an opposition as to only the extent of the redactions in PDX 15 on August 28, 2019. On September 10, 2019, I granted the motion to seal as to PDX 3 and striking and returning PDX 10 and PDX 15. There is no claim that those two exhibits had no bearing on any of the issues in dispute. They are no longer part of the record.

[6] Oracle asked permission to file the reply on August 15, 2019, which was opposed by OFCCP. Since reply briefs have been consistently permitted in this case, on August 16, 2019, I granted the motion and allowed a "short" reply brief.

[7] Eight of the nine exhibits are sample redacted notes. Since I subsequently ordered *in camera* review, these exhibits are contained within the full set of notes provided. The ninth exhibit pertains to the Rule 30(b)(6) deposition dispute and the aspect of Oracle's Motion to Compel Compliance that was withdrawn.

redacted form in 2017 and then not re-produced following the June 10, 2019, order. PIC at 1; DIC at 1. There are 16 documents in this category ("A-1 to A-16"). Category B includes notes from the compliance review that were re-produced with revised redactions after the June 10, 2019, order. PIC at 1-2; DIC at 1. Category B contains 30 documents ("B-1 to B-30"). In category C the parties have included the 2019 interview notes, which were produced pursuant to the June 10, 2019, order. PIC at 2; DIC at 1. It contains 250 documents ("C-1 to C-250"). Finally, category D contains one interview note from 2019 ("D-1"), for which Oracle wished to submit two versions of redactions produced ("D-1.1" and "D-1.2"). PIC at 2; DIC at 1.

OFCCP has also produced an interview template used in the 2019 interviews as an appendix to its *in camera* submissions. The introduction to the script is similar to a solicitation letter sent to some Oracle employees. It contains an assurance of confidentiality and asks potential witnesses to communicate by phone. The script then contains five pages of questions. The Daquiz declaration explains that the interviews were conducted by 16 attorneys but that the "leadership team" developed the template to assist the process. Some attorneys did not follow the template or only used sections. Interviewing attorneys were instructed not to read any notes to the callers. DD at ¶¶ 8-9. Based on my review, several versions of the template were used and some attorneys edited or eliminated the introduction and some of the questions. Based on the notes alone, outside of questions where answers are recorded, it is not clear if the actual interview involved use of the template.

Oracle represents that OFCCP made a rolling production of documents in response to the June 10, 2019, order with 12 productions and two privilege logs. DM at 4-5; FD1 at ¶ 3. It complains that the interview notes produced after the June 10, 2019, order "remain incomprehensible" in that OFCCP continues to redact extensive information with claims of work-product protection and the government informant privilege and has added a new category of redactions for information that is "not responsive." DM at 1. It asks that I issue an order barring evidence at hearing that was not properly disclosed. *Id.* at 3.

OFCCP protests that it has fully complied with the prior orders in this case and fulfilled its discovery obligations. PO at 1. It represents that it disclosed the 2015 notes earlier in this litigation and then after the June 10, 2019, order produced all of the notes that were compelled, with permissible redactions applied, along with detailed privilege logs. *Id.* at 2-4. It reports that a large team of attorneys were assigned to the response, and paid overtime and holiday pay to complete the discovery responses. *Id.* at 5; *see also* DD at ¶¶ 12-14, 22-23. To make the redactions, its attorneys developed rules to determine what information might be identifying. It also prepared separate factual summaries to remedy instances where the permitted redactions obscured significant amounts of the notes. PO at 5-6; *see also* DD at ¶¶ 15, 17; PDX 2. In addition to the permitted categories, OFCCP redacted material it found non-responsive. PO at 6. OFCCP represents that its interrogatory responses and factual summaries have been fulsome and that it complied with the terms of the June 10, 2019, order. *Id.* at 6-7. OFCCP accuses Oracle of prematurely meeting and conferring and then filing the motion before that process was completed.[8] *Id.* at 7-8; *see also* DD at

[8] This allegation isn't really relevant given the meet and confer that followed. It is also meritless. OFCCP makes much of the fact that Oracle claimed OFCCP had not complied before even opening the documents in the first production. *E.g.* PO at 7-8. But Oracle didn't need to open any documents to know that OFCCP had failed to comply. The June 10, 2019, order gave OFCCP a deadline and OFCCP confirmed that it had failed to produce the documents by that deadline. OFCCP did not seek relief from that deadline. Instead it unilaterally altered the order to give itself a rolling deadline. Hence, OFCCP failed to comply with the June 10, 2019, order by its own admission as soon as the first set of

¶¶ 25-37; PDX 6-8. It asks that I deny Oracle's motion and find that it has fully complied with the prior orders. *Id.* at 20.

Oracle replies that OFCCP has essentially admitted its non-compliance with the June 10, 2019, order in that it did not make timely production, redacted every question as work-product, and added unauthorized bases for redactions. DR at 1. It argues that it is merely trying to enforce the order as written and that it engaged in substantial meet and confer to attempt to achieve compliance, filings its renewed motion only when it became clear that OFCCP had made decisions about redactions that were contrary to the order. *Id.* at 1-2. It argues that the 2015 and 2019 interview notes continue to be over-redacted, *id.* at 3-6, and asks for evidentiary sanctions barring OFCCP from calling witnesses whose interview notes were over-redacted in violation of the prior orders. *Id.* at 8-9.

IV. DISCUSSION

The propriety of several sorts of redactions are at issue. Having reviewed the parties' arguments as well as a random sampling of the redacted and unredacted versions of the notes,[9] I find that OFCCP has significantly over-redacted the documents in question. However, I find that no sanctions are appropriate at this time. Rather, OFCCP will instructed to re-produce the documents consistent with the guidance below. Sanctions may be appropriate at a later date.

A. Category A Documents

Category A consists of 2015 interview notes where OFCCP did not re-do its redactions after the June 10, 2019, order. Oracle contends that this violates the terms of that order and that re-doing a privilege log does not suffice. DM at 4-5, 8. OFCCP represents that it has re-produced all notes subject to the June 10, 2019, order, though it acknowledges that there are a set of notes that it did not re-produce on the grounds that the individuals had already been identified to Oracle as possessing knowledge and so the notes were outside the scope of the order. PO at 9; *see also* DD at ¶¶ 2, 6; PIC at 1. It points to language in the June 10, 2019, order that allowed OFCCP to withhold work-product related to individuals who had been identified as possessing relevant evidence on the grounds that in this circumstance Oracle could procure the information on its own. OFCCP explains that while Oracle was not present for the interviews that resulted in the Category A notes, it knows who OFCCP talked to and thus can interview those individuals separately. PO at 12-13.

As to the suggestion that since it knows the identity of these people generally then the June 10, 2019, order does not apply, Oracle points out that this is not what the order said and that since the government informant privilege is the only privilege at issue, this argument cannot work to excuse OFCCP. DM at 5. It claims that it was not present for the interviews and so cannot know what was said. *Id.* at 8-9. Oracle argues that OFCCP cannot make additional work-product redactions to these memos, since that privilege was not claimed earlier. It contends that the June 10, 2019, order already found the existing redactions overbroad and that the privilege log submitted by

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documents were produced—it didn't make a timely complete production. Oracle's complaints to that effect were proper.

[9] I have reviewed all of the Category A, B, and D notes. I have reviewed a random sampling of the category C notes. Only some of the notes are specifically discussed below as examples of points. One of the random documents I reviewed, C-228, contained no interview notes—only the script. Two others I reviewed, C-216 and C-234, only indicate that a message was left with the individual (and apparently not returned). Though it would have been better for OFCCP to explain to Oracle at the outset that these were "null" interview notes, the amount of redaction is really a moot point since no information is contained therein except the name and contact information of the individual.

OFCCP shows that it is still over-applying this claim of privilege to obscure non-identifying information. *Id.* at 9.

The June 10, 2019, order provided that OFCCP could withhold "internal documents relating to communications with third parties who have been explicitly identified to Oracle."[10] The rationale for this exception to the general order was that if Oracle already knew who had relevant information, it could interview or, if necessary, depose those individuals instead of relying on OFCCP's notes. OFCCP apparently reasoned from this that since some of 2015 interview notes came from a group of individuals who Oracle knew had talked to OFCCP, no further production of those notes was required either—Oracle knew who these people were, though not what they had individually told OFCCP, and so Oracle could otherwise procure the relevant information.

OFCCP's reading of the June 10, 2019, order, however, contorts its meaning in an impermissible manner. The section of the order quoted above pertained to OFCCP's assertion of work product protection. It did not address assertions of the government informant privilege, which were addressed in another section of the order that did not include the exception OFCCP relies on. All of the redactions at issue in the 2015 interview notes involved the government informant privilege, not work product protection. Work product protection was pertinent to the 2019 interview notes since that is where OFCCP asserted that privilege. It had already produced the 2015 notes, which came from the compliance review, claiming only the government informant privilege. The rationale for the exception was based on the analysis of work product protection—where Oracle knew who to talk to, there was no substantial need for OFCCP's notes. But that rationale has no relevance to the government informant privilege asserted in the 2015 notes, which is why the order provided the exception only within its work-product related instructions.

OFCCP's attempt to read an exception to the order to produce documents subject only to ordinary work-product protections as a license to continue to assert facially overbroad government informant privilege redactions is an unreasonable construction of the June 10, 2019, order. At the least, this creative expansion was something that OFCCP needed to seek permission to pursue. As it is, OFCCP failed to comply with the June 10, 2019, order. It continues to retain the same broad redactions on the basis of the government informant privilege that the June 10, 2019, order found facially unacceptable. As will be discussed briefly below, after *in camera* review, the facial impression is confirmed and reinforced—OFCCP is redacting far too much on the basis of the claimed government informant privilege, including improperly using the privilege to shield relevant information from Oracle.

In any event, OFCCP has failed to comply with the June 10, 2019, order as it relates to the Category A documents. Only the government informant privilege is at issue in those documents, and the June 10, 2019, order did not permit OFCCP to withhold documents or continue with the same redactions on the bases of the government informant privilege. OFCCP must therefore re-do the redactions to the Category A documents, consistent to the guidance in the prior orders and below.

B. <u>Government Informant Privilege Redactions</u>

The government informant privilege is "the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged

[10] Enumerated order 1.c found on page 42.

with enforcement of that law." *Roviaro v. United* States, 353 U.S. 53, 59 (1957); *see also McCray v. Illinois*, 386 U.S. 300, 308-13 (1967). It

> protects "the identity of persons who furnish information of violations of law to officers charged with enforcement of that law" from "those who would have cause to resent the communication." However, the privilege will give way "[w]here the disclosure of an informer's identity, or the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause."

Perez v. United States Dist. Court, Tacoma, 749 F.3d 849, 855-56 (9th Cir. 2014) (quoting *Roviaro*, 353 U.S. at 59-61) (internal citations removed) (alternation in original). "The scope of the privilege is limited by its underlying purpose. Thus, where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged." *Roviaro*, 353 U.S. at 60. Where particular contents of communications or information about the communication would compromise the identity of the informer, they may be protected as well. *See United States v. Gil*, 58 F.3d 1414, 1421 (9th Cir. 1995).

Both the 2015 notes and the 2019 notes contain government informant privilege redactions. Oracle claims that OFCCP has continued to over-redact on this basis, in violation of the June 10, 2019, order. DM at 9, 11. It reports that OFCCP has redacted general information about when and how an employee may have left Oracle, as well as the race of all interviewees. It contends that the redaction of race information deprives the notes of much of their potential value, since it is unclear if a comment might provide anecdotal evidence in favor of Oracle or OFCCP, and that the possibility that from an employee could be identified if race is revealed is too hypothetical. *Id.* at 11.

OFCCP defends its redactions, arguing that Oracle has acknowledged in other briefing that its employees can be identified with minimal information. In particular, it points to Oracle's argument in a motion to seal to the effect that identification of salary code, job title, and race could be used to identify employees. It argues that Oracle is demanding job code, race, and gender, and that since job code encompasses information about a job title, the type of work performed, specialty area, and global career level, this could be used by Oracle to identify employees. PO at 10-11. In OFCCP's view, race must be redacted "due to the extremely small number of Blacks and Hispanics Oracle employs." Per Mr. Brunetti's calculations, between 2013 and 2016 Oracle employed 58 Black employees and 147 Hispanic employees, which OFCCP contends would allow identification if race is disclosed. *Id.* at 11; BD at ¶¶ 2-3. It notes that since redacting only the race of those employees would effectively disclose the race in question, all race information must be redacted. *Id.* at 11 n.75; *see also* DD at ¶ 18. It offered to identify race as "white" or "non-white" but Oracle declined this compromise. PO at 11-12. OFCCP adds that given Oracle's technical prowess, it would be especially able to identify informants with limited information. *Id.* at 12.

While acknowledging that some of the government informant and other redactions obscure facts, OFCCP points to its interrogatory responses, which it claims contained factual summaries of the interviews and thus provided the pertinent information. PO at 12 n.78. It adds later that its redactions of information about experiences with coworkers and promotions and similar topics is proper because this "is precisely the kind of information that would tend to identify informants in this case." *Id.* at 13.

Oracle replies that it rejected OFCCP's proposal to designate "white" and "non-white" employees because that would be insufficient to inform Oracle or which claims that individual might

speak to, given that OFCCP is alleging discrimination against both Asian and African-American employees. DR at 5-6. In addition, Oracle argues that the amount of "government-informant" redactions in the 2015 memos are still facially implausible and obscure entire paragraphs of information. *Id.* at 6.

I find that many of OFCCP's redactions on the basis of the government informant privilege are proper, but that OFCCP continues to redact too much information. OFCCP seems to have reasoned that if a certain combination of information could be used to identify an individual, it may redact each element of that combination. This is incorrect. For instance, if race, sex, and job code together enable identification, then race and sex can still be disclosed so long as job code is not. Manner and date of leaving Oracle might allow identification, in combination with other information disclosed, but manner absent date would be quite unlikely to do so. I accept OFCCP's general argument that information that isn't facially identifying might still enable Oracle to determine who spoke with OFCCP. And where information alone would not be identifying but in combination with other information becomes identifying, it is proper to redact parts of the combination. But OFCCP has stretched this rationale too far, obscuring too much information.[11]

The redactions in the Category A documents are overbroad.[12] Take Document A-2. That the individual didn't provide her global career level, has had several managers, and has had no other positions at Oracle, does not identify an individual. Other redactions are over-zealous. OFCCP's approach is often to redact entire sentences when parts would be identifying. This misses the mark. The first sentence of the narrative begins, "One of our products is…" and after that point I agree that the information in the rest of the paragraph is potentially identifying. OFCCP removes the whole paragraph. But by leaving this beginning phrase in—which cannot possibly be identifying—Oracle is at least provided with a sense of what *sort* of information is being redacted. The next paragraph is just one sentence. OFCCP redacted it in full in concert with a three paragraph redaction. It begins, "I got my degrees in…" This is not identifying, even if the rest could be and is properly redacted. Seeing "I got my degrees in…" doesn't provide useful information except that it tells Oracle what sort of information is being redacted, which is an important thing to know when trying to ascertain what it may be facing. OFCCP's redaction produces a large gap. For all Oracle knows, this could include anecdotal evidence of discrimination that it will be blindsided with at a later date. Document A-8 provides an example of the same point. It contains huge blocks of information removed where significant parts could be unredacted to indicate general topics and provide assurances to Oracle of the sort of information being removed, and what it is *not* being deprived of.

Some redactions are more concerning. On page three of Document A-3, the note includes, "No I have not witnessed or received inappropriate behaviors from coworkers. There were no people touching me." OFCCP redacts the entire second sentence and "or received inappropriate" from the first sentence, so Oracle sees "No, I have not witnessed [redacted] behaviors from coworkers. [Redacted.]" The removed information is in no manner identifying and I cannot conceive of a good-faith argument otherwise. Troublingly, this information it is potentially relevant to the case. The individual is providing evidence that there were no inappropriate behaviors,

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[11] The assertion that the interrogatory responses remedy any shortcomings is not convincing. If OFCCP wished to negotiate how information was to be provided or to obviate the need to produce interview notes by producing fulsome interrogatory responses, the time to do so was before the issues were litigated and an order was issued. It did not do so and may not re-negotiate or modify the order that resulted now that it has been compelled to engage in meaningful discovery.

[12] Though there are 16 documents, some interview notes are included twice, so that there are redundancies.

something theoretically beneficial to Oracle. It might want to introduce a properly redacted note. But OFCCP prevented that by removing portions of the paragraph that would make that point clear, improperly using the government informant privilege to hide information potentially helpful to Oracle. The same thing happens in Documents A-10 and A-14.

Document A-15 improperly redacts general information about promotions in the company, rather than just the individual's particular experience. General reflections on the culture at Oracle are also redacted without good reason. Sometimes over-redactions are trivial. On page three of Document A-13, OFCCP redacts "We have different people in our team from different countries." That non-descript statement isn't identifying. The following breakdown of the team by nationality is properly redacted, but there is no reason to remove the general statement that likely holds true of a great many teams at Oracle.

Document A-12 contains what initially appears to be improper redactions. The interview in question was taken in two parts, one with Oracle representatives present and one without them present. OFCCP redacted the entire portion of the interview without Oracle representatives present on the basis of the government informant privilege. Of course, Oracle already knows the identity of the informant. In this instance, however, connecting the information below to what Oracle already knows would tie particular information to the informant, so I agree that the information is privileged. Oracle can attempt to interview or depose the individual in question, if it so desires. This is different, however, when the individual in question is not affirmatively identified in connection with a particular note, even if Oracle knows the broader field of potential sources. In those instances, provision of a properly redacted note would not disclose the identity of the source *of that information*. With A-12, it would do so.

A large chunk is redacted from the first page of Document A-11. Much of this is proper, but it includes redaction of the fact that the individual is at Oracle HQ—which is true of almost everyone relevant to this case—and general statements about the individual's satisfaction with his salary and the fact that Oracle met his expectations. OFCCP also removes "At the workplace I can see that I don't see gender or race issues. It is a good working environment." None of this information is identifying and it again shows OFCCP redacting information that could be helpful to Oracle on the obviously incorrect basis that it is identifying. The government informant privilege serves very important purposes. Those purposes are seriously undermined when the government improperly uses it to gain tactical litigation advantages by hiding manifestly non-identifying discoverable information that might aid the target of an enforcement action. Improper use of the privilege here may lead to private parties and adjudicators attaching less credence to the Department's claims in the future.

The Category B documents are also from the 2015 interviews and so contain only government informant privilege redactions. But unlike the Category A documents, OFCCP did re-redact the notes after the June 10, 2019, order. As a whole, these notes are more properly redacted than those in Category A. For most of these notes, OFCCP has at least made a good faith, reasonable effort to limit its redactions in an appropriate manner. While one might dispute the exact amount of redactions made, I do not find non-compliance where the redactions have a reasonable basis and do not obscure relevant information. However, there are exceptions, both as to entire documents and as to particular redactions in the documents.

Looking at B-4, for instance, OFCCP has engaged in more selective redactions of particular information while retaining aspects of the notes that signal to Oracle what is being discussed in the

paragraph in question. However, OFCCP continues to over-redact to a lesser degree. For instance on DOL796 OFCCP redacts the entire sixth paragraph, which contains general reflections on visas. While the name of the prior company is properly redacted, by all indications Oracle has enough employees on visas that merely knowing this point will not tend to identify the individual. Similarly, the point from the ninth paragraph that the individual received a pay raise after his manager requested one is likely to be true of many individuals. Nor is the point from the next page that the individual has a masters degree. B-5, for instance, does not redact the same information.

Returning to B-4, the second full paragraph on DOL798 is somewhat troubling. While the financial particulars are properly redacted, this is not: "I did not negotiate. I just accepted it." This must be true of many employees at Oracle (and is revealed in other notes). Similarly the fact that the individual received a signing bonus (of a properly redacted amount) is not identifying. I also do not follow why any of the fifth full paragraph is redacted—the obscured portion only states that the individual went through a training program related to the product he was working on. That says very little. Similarly, on DOL799, the fact that some people on the individual's team work remotely is not identifying, even if the locations of each member would be.

B-9 contains facially overbroad redactions that are inconsistent with OFCCP's approach in other documents. Large "background information" chunks are redacted where in other notes much of the same sort of the information is retained. For instance, that the individual is female and has a bachelor's degree is not identifying. It is the sort of information that OFCCP produced in other notes. OFCCP also improperly redacts that the individual is on a visa and was hired into the job level that she applied for. These are not identifying points and are potentially relevant to the case. B-27 is also overly redacted, removing, in a similar block-redaction manner, information that on other notes is produced. Further, while the specifics of the hiring/compensation package are properly redacted, the components involved are not. Nor are facts about whether or not the individual received bonuses, raises, or promotions. Once specifics about time and amount are removed, those simple facts are highly unlikely to identify an employee at a company as large as Oracle.

OFCCP claims that it developed and deployed a system of rules for its redactions. *See* PO at 5. But reviewing the redactions, this does not appear to be correct, or at least that some redactors did not follow the general guidance. This is evident in comparing the differing scope of redactions among the documents and is especially stark with B-20 and B-26. The redactions in B-26 are facially overbroad, concealing much more than necessary. Those in B-20 are much sparser. As it turns out, these two documents are the *same* interview note, which was produced twice in different bates stamp sequencing. Apparently, different redactors were assigned the two documents and took very different approaches. As a whole, the redactions should look much more like B-20 than B-26.

Some of the over-redactions are consistent. So, for instance, B-3 redacts the response to the question of whether the individual was hired into the job level that he or she applied for and whether the individual came to Oracle in an acquisition. These are not identifying points since regardless of the answers, they will hold true of many individuals. Similar redactions appear in the other notes. B-3 has other issues. The note discusses, in general terms, the different levels on the two "tracks" at Oracle, technical and management. OFCCP reveals the levels for the technical track, but redacts the entire management track. One redaction in that section is appropriate where particularized information gets added, but the general levels at Oracle will not identify the individual in question. Similarly, the fact that the individual negotiated starting salary is not identifying, even if

the details of the negotiations are properly obscured. Overall, however, B-3 is good about leaving information that is relevant and non-identifying, in contrast with those in Category A.

B-19 is also generally properly redacted. The fact that the individual has a bachelor's degree is not identifying, but for the most part OFCCP has done a good job of minimizing the redactions and leaving enough information to discern what particulars *are* being redacted, rather than blocking out whole sections that leave the basis for the redaction a mystery. That said, the redactions in the second full paragraph on DOL878 are overdone. The reference to the duration at Oracle and the location of the worksite are potentially identifying—the general reflections about movements between teams and gender balances are not.

The redactions in B-14 are rather minimal, though still overdone. The redaction on DOL845 about differences in pay between India and headquarters is not identifying (and similar points are left unredacted in other notes). Nor is the fact later on the page that the individual negotiated and was successful—even if the interposing details about the negotiation are.

B-12 is over-redacted in general. For instance, the general reflection on DOL830 that "there are more males than females" is not identifying information. Particulars about the demographics of the team an individual is part of might be identifying, but broad statements about demographics as a whole are not. In the next paragraph, the details about when the individual received a raise, how much it was, and who gave it are properly redacted, but not the other statements, such as linking the raise to a performance review. The fact that the individual was not promoted is also not identifying; nor is the fact that the individual has a bachelor's degree. On the next page, the job title of the individual might be identifying, but the comment that the title "reflects what I am doing in my role and responsibilities" is not.

Over-redactions on the basis of the government informant privilege continue in the Category C and D documents. In C-11 Oracle is not told that the individual is white and a U.S. citizen on the grounds that this information would disclose the identity of the informant. This is not convincing. While it is true that this information could help Oracle identify the informant, OFCCP has already redacted a series of other particulars that would make citizenship, gender, and race insufficient to meaningfully narrow the field of possible Oracle employees to the point where the individual could be identified. This issue persists through the Category C documents I have reviewed.

Sometimes redactions are improperly used to disadvantage Oracle. In C-9 at DOL40850, the note contains "Afraid to provide email at this time because wants to remain confidential as long as possible." This suggests to Oracle that the individual is unlikely to testify and it need not devote resources to investigating the relevant claims in the note. That statement is followed by a redaction on the basis of the government informant privilege. The redacted material reads, "She will eventually testify." The redacted sentence is in no manner identifying and, once revealed, conveys that the information in the note is something that Oracle may wish to investigate—the opposite implication from that which OFCCP's selective redactions suggested. This redaction is thus very concerning. Later comments on DOL40851 have similar problems, but other claimed bases for redactions. The individual stated that she wanted to know if she was a part of the class and "[i]f so, how much she could get? Willing to testify." OFCCP redacts the response as "non-responsive" and work-product, both issues to be discussed below. But regardless of the propriety of those categories generally, here they have no application. It simply appears that OFCCP is trying to hide likely witnesses and prevent Oracle from learning information that could impact that witness' credibility.

In C-144 the government informant privilege is for the most part properly used. The note redacts more than is necessary, but OFCCP made a good faith attempt and for the most part has not obscured relevant information. There is an exception in the "VII Direct Evidence of Discrimination" section at DOL 42107. The first two redactions are proper. The next two are over-done. The name of the accused individual is properly redacted, but the fact that it is a VP is not. This is potential anecdotal evidence, so it is important that Oracle be made aware of the allegations it may face. While I will accept that the name of the accused might help identify the individual speaking to OFCCP, the level within the company is a stretch too far. In addition, the last redaction on the page is improper. Earlier in the note, OFCCP already revealed that this individual could hire employees and so cannot obscure that point here. Nor is the statement that "he was told to hire in different geographic" [sic] identifying. This redaction is troubling. The last statement cannot be understood as identifying, but redacting it effectively renders the information in the bullet point meaningless to Oracle. With the point left in, it indicates a factual point that Oracle might wish to explore.

C-132 also contains over-redactions on the basis of the government informant privilege. In the response to the first question in III on DOL41930, OFCCP redacts too much. It should have at least revealed "no," which would not identify the individual and would give Oracle basic information to understand what comes below. Similarly, on DOL41932, the fact that the individual is a citizen or green-card holder is not identifying. The year is properly redacted; the general answer is not.

C-60 contains what appear to be well-intentioned but over-inclusive government informant privilege redactions. In the "His story" section, OFCCP redacts too many general reflections about Oracle policy, such as what the individual understood to be the policy about salary for returning employees. This is not identifying. The particular circumstances of the individual's return are potentially identifying, but what an employee understands to be corporate practice is not.

In C-120, the government informant redactions are for the most part proper and made in good faith. As in the others, race and citizenship status are not identifying given the other redactions that OFCCP has made. The same occurs in C-108, though it contains an additional troubling over-redaction. On DOL41754, OFCCP again claims that "She may be willing to testify" is protected by the government informant privilege. It is not and I don't apprehend the good faith argument to claim otherwise. What it does do is signal that the note contains evidence that could be presented at trial. OFCCP may well not want Oracle to know that so it can have a tactical advantage, but that isn't what the government informant privilege allows OFCCP to do.

C-96 has mostly proper government informant privilege redactions. The redaction at the bottom of DOL41647 is improper—this information in no way identifies an individual, though it could be informative to Oracle. That isn't a proper basis for asserting the privilege. Race and citizenship status are also improperly redacted. Otherwise, the redactions based on the government informant privilege are made in good faith and do not obscure material information. For instance, the redactions in section VIII are properly done in that they remove the potentially identifying information while still giving Oracle a picture of the facts being related by the individual.

C-168 at DCL42324, contains another problematic government informant redaction. The query is 'Start date at OR" and after the redaction, what Oracle sees is "2018." This would put the individual outside of the period most relevant to this case. In the unredacted version, however, 2018 represents the *end* date, not the start date. OFCCP has redacted the starting year and month of

departure in a manner that falsely conveys that the start date is sometime in 2018. While start dates and end dates can be redacted where they would identify an individual in combination with other disclosed information, OFCCP cannot use the privilege in a manner to actively deceive Oracle about the underlying facts. The government informant redactions in the first paragraph of DOL42326 are also overdone. It is proper to redact who made the decision not to approve the promotion, but not that "It went all the way up to", "is not feeling it right now" and "Asked for mtg," since it is unclear how these general points enable identification if the details about who and when are redacted.

In C-240 at DOL40869, OFCCP improperly redacts that fact that the individual helped with interviews of candidates. This simple point is likely true of many employees and would not tend to identify the individual in question. It is also revealed in other notes. Aside from the issues of race and citizenship status that are generally present and will be discussed below, the government informant redactions in C-180 are entirely proper and do a nice job of removing the potentially identifying information without obscuring unnecessarily.

Part of the problem in the 2019 notes, as in the 2015 notes, is a lack of consistency. This is seen in note D-1. Two versions were provided by Oracle (D-1.1 and D-1.2), and they contain substantially different redactions. When OFCCP re-redacted the document a second time, it removed government informant redactions that it had previously included, but then it added new government informant redactions when it had previously revealed the information. Information produced cannot be taken back and it is important that OFCCP actually deploy some principled method in making redactions for identifying information.

OFCCP and Oracle dispute, in particular, the propriety of the block redactions in the Category A and some of the Category B documents as well as the redaction of information like race. The block redactions are improper and those documents discussed above should be re-produced with more narrowed redactions (with the exception of B-26, since it is already produced in B-20). Redaction of racial information is a more difficult question. OFCCP contends that there are so few members of particular races at Oracle that production of this information would enable Oracle to identify some of the individuals in question. However, even by OFCCP's calculations, between 2013 and 2016, Oracle employed 58 black employees and 147 Hispanic employees. BD at ¶¶ 2-3. Though race information will considerable narrow the potential sources, it will not on its own be identifying. In addition, based on my review, the sources of information are not limited to the employees who worked at Oracle during that period, broadening the field of possible sources further.

Even so, when racial information is combined with other information, it might become identifying, which I take to be OFCCP's point. For example, if Oracle is told that the individual talking to OFCCP is a black female who is not a U.S. citizen and has never been given a raise, identification might follow. OFCCP proposed using "white" and "non-white" demarcations. Oracle argues that this would be insufficient because the allegations at issue are not "white" vs. "non-white." There is a reasonable compromise given these competing concerns. Looking at the numbers, the largest racial component at Oracle, by far, is Asian. White non-Hispanic employees make up another large contingent. The rest are split among American Indian, Black/African American, Decline to State, Hispanic or Latino, Native Hawaiian/Other, and Two or More Races. If OFCCP produces race designations of "White" or "Asian" or "Not White and Not Asian" Oracle will get more relevant information to prepare its defense while OFCCP's worries about identifying the sources can be mitigated—grouping the "smaller" categories together produces a sizable contingent, especially when the potential sources includes individuals who worked at Oracle outside

of the relevant period.[13] Given that OFCCP has redacted particulars about the individual, including job codes, particular work groups, particular duties, supervisors, and co-workers, identification is unlikely even with this additional information.

Information about citizenship, immigration, and visa status also provides a more difficult question. It remains relevant to the compensation case, since a potential line of inquiry is whether racial disparities result from compensation practices linked to these points. The basic fact of whether or not the interviewee is a U.S. citizen is not identifying—evidently, Oracle employs a significant number of non-citizens. A binary answer will be useful in identifying the source. The same holds for the question of whether or not the individual is on a visa. These yes/no answers won't be identifying, even with the other information already produced. But OFCCP has correctly redacted more particularized information such as what sort of visa a person is on or when various statuses changed. That information, in combination with others, could enable Oracle to effectively identify the individual. Therefore, the proper redaction here is to divulge the basic yes/no answers while redacting the details. Where only details are contained, it would be proper to redact the details but add a yes/no notation.

Several other sorts of information appear to be at issue. OFCCP is not consistent in its redactions of educational background. It is proper to redact the school, graduation year, and particular field of study, but not to redact level of education received. This general information is highly unlikely to identify an informant. There are also inconsistencies in redactions of the compensation packages and employment history. OFCCP properly redacts job code, particular job titles, particular dates, particular supervisor and co-worker information, particular assignments, and particular amounts. But it is not proper to redact the components of a compensation package (devoid of dates and amounts), whether the individual received promotions or raises, and whether the individual changed jobs. Similarly, OFCCP may redact particulars concerning the circumstances of hire and, if applicable, the end of the employment relationship, but may not redact the nature of the hire and, if applicable, the end of the employment relationship. For instance, if an employee joined Oracle via an acquisition, OFCCP may redact when the acquisition occurred and what company was acquired, but not the fact *that* the individual joined Oracle in an acquisition.

This guidance is consistent with what OFCCP has done in some parts of some of the notes. The deficiency, however, is that OFCCP is not consistent and has quite often redacted the general information that is not identifying. Along the same lines, it was improper to redact basic information about whether or not an individual was hired into the job applied for, though OFCCP properly redacts the titles of the jobs. General reflections about Oracle's culture are not identifying and should not be redacted. Particular anecdotes are properly redacted to eliminate the names, locations, and time periods, but not to remove the underlying factual scenario.

C-10 deserves particular attention. OFCCP properly redacts details about who made the statement and exactly where and when, but has over-redacted non-identifying information in the third paragraph of the first page in an apparent effort to obscure the facts related. The start of the paragraph, "She provided more context for the meeting where she heard" is not identifying. The identification of who is alleged to have said the quote in question is properly redacted, as are the names of the other people present. OFCCP correctly reveals, "They were talking about talent management issues, and performance management issues." But the rest of the paragraph should read, "It was in connection with [redacted] doing talent management for [redacted]. [Redacted]

[13] Redaction of additional information added to the categories, such as "Chinese" added to Asian is proper.

comment was in response to [redacted] statement that they had a position to fill. [Redacted] was stunned that [redacted] would say that in a [redacted] meeting."[14]

Over-redactions based on alleged identifying information continue in C-10 and are used to hide anecdotal evidence. In the fully redacted paragraph on DOL40852,[15] OFCCP should have revealed at least that there are allegations of bullying women, even if the details might be identifying. The same holds for the fully redacted paragraph on DOL40852. Some of the redacted information here is, inconsistently, not redacted in the emails lower in the chain, though even there the redactions are overbroad. For instance, the parenthetical on DOL40855 is not properly redacted in full. It should read, "I think she attributed this quote to [redacted], but she said it was commonly stated."

These are not merely technical problems. This is the sort of anecdotal evidence OFCCP may wish to present and that Oracle is entitled to prepare a defense to. That is limited by the government informant privilege, which allows OFCCP to withhold the identifying information that would allow Oracle to notice a deposition on this individual so that it can prepare for trial. But it is essential that Oracle be given as much as possible so that it is aware of the evidence it may face. Too often here and elsewhere OFCCP appears to have adopted an improper approach of expanding the privilege to cover general non-identifying information when that information would be important to Oracle, or where redacting more renders the remainder less meaningful.

C. Attorney Work Product Redactions

Work-product protection applies to "documents and tangible things prepared by a party or his representative in anticipation of litigation." *Admiral Ins. Co. v. U.S. Dist. Ct.*, 881 F.2d 1486, 1494 (9th Cir. 1989); *see also Hickman v. Taylor*, 329 U.S. 495 (1947). "To qualify for work-product protection, documents must: (1) be 'prepared in anticipation of litigation or for trial' and (2) be prepared 'by or for another party or by or for that other party's representative.'" *United States v. Richey*, 632 F.3d 559, 567 (9th Cir. 2011) (quoting *In re Grand Jury Subpoena, Mark Torf/Torf Envtl. Mgmt. (Torf)*, 357 F.3d 900, 907 (9th Cir. 2003)). Generally, attorney work product prepared in anticipation for litigation or trial is not subject to discovery, but may be discoverable if it is otherwise discoverable and party seeking discovery "shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." Fed. R. Civ. P. 26(b)(3)(A). Even where the materials are discoverable, a court "must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation." Fed. R. Civ. P. 26(b)(3)(B).

The June 10, 2019, order permitted OFCCP to make redactions for opinion work-product, but not for fact work-product. These redactions are relevant only to the 2019 notes, Category C and Category D. Oracle argues that OFCCP has over-redacted information based on work-product protection because it has refused to produce all of the questions being asked and has used the claim of privilege to obscure whole pages of text. It adds that the questions were already disclosed to non-

[14] The redactions are also not proper on opinion work-product grounds. The anecdotes are facts and though the facts may enable Oracle to infer how OFCCP might deploy them, this is true of all facts. If the attorney added, "we should use this to ___," the comment would be opinion work product. But simply because Oracle's attorneys might guess how the facts will be used based on the content of the facts—because that is how *they* would use them—does not give license to OFCCP to hide the facts. This is a point that OFCCP seems to fail to understand at times, leading to overbroad work-product redactions where the documents contain facts that OFCCP or Oracle might find useful.

[15] The pagination is slightly different in the redacted and unredacted versions due to spacing issues—the redacted version is 5 pages long while the unredacted version is only 4 pages. I refer to the pagination in the redacted version.

parties—the interviewees—and so the privilege was waived. It argues that the June 10 and July 2, 2019, orders already rejected the proposition that everything an attorney records is opinion work-product and that the latter order warned OFCCP against over-redacting on this basis. DM at 9-11.

OFCCP contends that case law supports its redactions of the questions asked by attorneys because those questions could reveal an attorney's mental impressions and trial strategy. PO at 13; *see also* DD at ¶ 19. It also argues that Oracle overstated the amount of the redactions in the documents.[16] PO at 14; *see also* GD at 6-8. OFCCP maintains that it has compromised and attempted to compromise with Oracle to resolve the disputes and has provided more information than required. PO at 14-15; *see also* GD at ¶¶ 3-5, 9. As to any potential waiver, OFCCP argues that the notes in question were never disclosed to Oracle employees, so there has been no waiver of the documents containing the questions. *Id.* at 15. As to the argument that OFCCP's areas of interest and legal theories are already disclosed in the complaint, OFCCP retorts that this would prove too much because then there would be no protection of legal theories after a complaint was filed. *Id.* at 15 n.82.

In reply, Oracle argues that not every question in an interview is opinion work product and that even the revised redactions continue to obscure too much. DR at 3. It points to language in the June 10, 2019, order to the effect that in-coming and out-going communications are not privileged and argues that the questions asked of potential witnesses are outgoing communications. *Id.* at 6.

At the outset, I agree with OFCCP that work product protections have not been waived on the grounds that Oracle employees participated in the interviews. The information itself might not be privileged, but the *documents* created by an attorney to prepare for an interview or to record the responses remain protected. Work product protection applies to the work-product, here the documents. While facts in the work-product alone are not subject to work product protection, *documents* prepared in anticipation of litigation that recount facts do receive protection. *Am. Civil Liberties Union of N. Cal. v. U.S. Dep't of Justice*, 880 F.3d 473, 488 (9th Cir. 2018). Waiver occurs if the *documents* in question are shared with third-parties. *See, e.g., Menasha Corp. v. United States DOJ*, 707 F.3d 846, 847 (7th Cir. 2013). I accept OFCCP's representations that its interview script and the resulting notes were not shared with the interviewees.

The June 10, 2019, order found that although the 2019 notes were protected work-product, in the particular circumstances of this cases, and due to the choices OFCCP and its attorneys made in an apparent attempt to shield relevant information, the substantial need test had been satisfied, overcoming the qualified privilege and requiring OFCCP to produce its ordinary work-product. It was directed to redact opinion work-product and produce the rest. The order denying reconsideration rejected OFCCP's intimations that everything useful was opinion work-product. Based on my sampling of the Category C documents, OFCCP only partially complied with the order. The attorney work product redactions are at times seemingly arbitrary or appear to be designed to deprive the notes of comprehensible, useful information. Sometimes all questions are redacted, regardless of whether they were asked or not. At other times questions are un-redacted, even where no answer is given, suggesting that the question wasn't asked. Sometimes the redactions are inconsistent.

[16] Since I have conducted *in camera* review of the least redacted versions of the documents, this dispute does not need to be addressed.

As one example, on page DOL000040819 of C-5 under bullet point IV, OFCCP redacts the first two questions as opinion work product, though it leaves the answers, which are rendered meaningless. The third question, however, is left unredacted and includes an answer—indicating that the question was asked. The fourth and fifth questions don't have answers, suggesting that they weren't asked. Both are left unredacted. This doesn't make sense. If the questions are protected regardless of whether they were asked, then they should all be redacted. If the protection in OFCCP's view turns on whether they were asked, then there should be consistency on those grounds. Nor do I see intrinsic differences in the questions whereby one would reveal attorney opinions while the other would not. These are intake interviews exploring a wide variety of areas of potential relevance, all of which should be no surprise to Oracle at this point in the case. Here there are multiple inconsistencies in the space of only a few lines as to what OFCCP claims is protected.

C-7 at DOL40833 has the same issue. Questions relating to the individual's position are left unredacted, until suddenly "How many people were on your team?" is deemed attorney work-product and redacted. I don't follow this line of reasoning whereby questions and prompts are fine to disclose, but then suddenly an innocuous background question that doesn't point to any particular legal theory needs to be redacted. The same patterns continue in more substantive sections of this note, reaching a peak when the note deals with evidence of discrimination, where redactions are used to render the note meaningless.

The pattern continues. For instance, C-144 at DOL42105, leaves a series of questions unredacted, but almost haphazardly claims that three questions are protected work-product. Again, I do not follow the principled distinction at work here. In this note, the bullet points are for the most part left intact, but this differs from other documents I have reviewed where the same information is redacted as opinion work product. In C-144 the redactions are mostly proper, with one exception. I agree that internal instructions to the interviewers, as found in I and V, can be redacted as opinion work-product (although the instructions are so innocuous that it is unclear why it is worth the trouble). However, the second half of the title in VIII is not work product—it is merely the title of the section, which in other instances was produced. There is no good reason to obscure the partial title here. That OFCCP is interested in whether or not the individual will participate further does not betray any opinion or theory or impression of OFCCP's attorneys—that was the point of doing the interviews and was already known from the solicitation letter. The major work-product redactions occur at the start of the note and in the script and questions that get redacted. The script and questions are a general issue, discussed below. The initial reflections on page DOL42099 are properly redacted as opinion work-product.

C-132 at DOL41934 improperly redacts the section title—"Job Experience"—where elsewhere this information is provided. In the section, the basic questions/sub-sections are not properly redacted. That OFCCP asked about "First Job" is not opinion work-product. Troublingly, Section VII on Direct Evidence of Discrimination is overly redacted to render it meaningless. The questions are removed so that any answers are meaningless, and the answers are even inconsistently removed as opinion work-product—which they simply cannot be. Again, this is just an improper claim of privilege with the seeming aim to hide facts from Oracle. Facts that might support or not support legal theories are still facts, not opinions.

In C-108, the initial call summary/highlights are properly redacted. But the sections titles and questions are improperly redacted seemingly at random, sometimes disclosed and sometimes not. Why are the first three section titles on "manager status," "background & visa status," and "recruitment and employment status" fit for disclosure, but then section title IV, "additional job

experience at Oracle" suddenly deemed opinion work-product? This feels arbitrary. The same thing occurs in regards to the questions, some of which are disclosed and some of which are obscured. The questions in the "Direct Evidence of Discrimination" section are entirely redacted so as to render the answers indecipherable and deprive Oracle of access to the facts.

C-120 does not redact the section titles, except that it improperly redacts the second half of the title in VIII. The instructions contained below the section title in VIII and in the section titles in I and IV are properly redacted. The reflections at the start of the note are also properly redacted opinion work product. The major issues here concern the questions and the introduction script. For instance, the redaction of the question on the first line of section VII renders the rest meaningless. C-72 repeats the same issues with seemingly arbitrary redactions of section titles and questions based on work product claims, again seemingly done without a principled basis in order to make the note more difficult to decipher. The section title "Job Experience" on DOL41459 is not opinion work product, and I don't understand how OFCCP can maintain otherwise when prior section titles are left unredacted.

C-96 contains an improper work product redaction in the last paragraph of DOL41647. The information here is simply what the individual told the attorney and does not reflect any attorney impressions. It and any similar notes should not be redacted. Later in the document, OFCCP is inconsistent in redacting section titles and questions, sometimes claiming opinion work product protection while at other times leaving it out. If there is a method, it appears to be to redact questions where there were answers but leave questions that were not asked—a tactical assertion of the privilege to obscure the facts. As usual, all of the questions in the "Direct Evidence of Discrimination" section are redacted, leaving the note useless as a provision of the facts apparent in the unredacted note.

C-250 at DOL41614 improperly redacts the statement that the individual is willing to talk to OFCCP. This is not an attorney opinion or impression. The "Interviewer's Evaluation" at the end of DOL41618 is properly redacted as opinion work-product. But as in the other notes, section titles and questions asked are redacted without clear consistency and in a manner that renders the facts revealed meaningless. In C-240, the fact that they are talking about the individual's "first job" at Oracle is redacted as work product at DOL40870, but then revealed when they return to the subject on DOL40871. This is not opinion work product. It tells Oracle nothing about OFCCP's attorneys' thoughts, impressions, or theories. As in the other notes, C-240 haphazardly redacts questions and section titles on claims of work product, in effect obscuring the facts represented in the note.

The "Summary" in C-180 is properly redacted, but the questions/prompts are over-redacted on the basis of work-product protections. The fact that counsel asked about "Salary" on DOL42418 is not opinion work-product. Oracle knows that OFCCP is investigating compensation. The individual's answers are not opinion work product either (though some of this is properly redacted on government informant grounds). Similarly, in C-156 at DOL42217, the fact that the attorney asked about pay is not opinion work-product. This is a case about pay and OFCCP may not try to hide that from Oracle.

The differences between the redactions in D-1.1 and D-1.2 again suggest that OFCCP did not adopt a consistent policy. In the second redaction, OFCCP revealed portions that it had previously designated as opinion work-product—which is to be expected given that the second redaction was an effort to give Oracle more information and forestall the need for motion

practice—but at the same time expanded opinion work product protections to obscure information previously revealed. For instance, the two short paragraphs at the bottom of DOL40771 were revealed in the first version but then obscured in the second. The first version had it right—the information here is a factual rendition of what the interviewee stated, not attorney analysis or impressions on what was stated.

C-10 again merits special comment. OFCCP has correctly redacted the entire body of the two short emails on DOL40854-55. These involve discussions among the attorneys and do not function as any notes from an interview. The first two paragraphs of the first email in the document are properly redacted on the basis of the combination of the work-product and government informant privileges, but the next paragraph begins a recital of the factual content and is not opinion work product (though as discussed above, some of this is identifying information). The same holds of the first two paragraphs of the last email in the document—they are opinion work product or identifying information. The remaining opinion work product redactions are too extensive—it is proper to redact the attorney's commentary on the individual that is contained within the note, but not things stated by the individual. Facts and anecdotes related by the individual are not opinion work product and cannot be redacted on that basis. Based on a fact stated, an attorney might be able to make guesses about how opposing counsel might use that fact. But OFCCP appears to have improperly converted this truism about all discovery into a license to redact what it seems to consider potentially useful facts, or to redact context to the point that what is left is unnecessarily confusing or incomplete. Finally, the recipients of the emails are also improperly redacted. These should have been included in the privilege log and this is not one of the rare instances where the recipients would somehow betray opinion work-product. Oracle knows which attorneys are working on the case.

After my review, I find that OFCCP has over-redacted on the basis of opinion work-product. Its central claim is that the script and questions are attorney opinion work-product, since they would betray the theories and impressions of the attorneys. It points to a series of cases that in some manner protected attorney questions.[17] PO at 13-14. But some of these cases are discussing work product generally, not the distinction between fact and opinion work product, and the most that these cases establish is that questions *can* be protected as opinion work product when they contain or implicate the theories, opinions, or impressions of an attorney.[18] None considers a situation like the present in which redaction of the questions renders the responsive facts incomprehensible. Insofar as the cases consider circumstances where facts must be produced but opinions do not, they restrict disclosure of questions where the facts are independently disclosable and comprehensible.[19] The valid point that questions can be opinion work product falls short of the proposition that all questions are attorney work product. Yet that proposition is exactly what OFCCP claims, portraying its subsequent un-redaction of some questions as an act of gracious

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[17] *U.S. ex re. Fago v. M&T Mortg. Corp.*, 242 F.R.D. 16, 18-19 (D.D.C. 2007); *Sanchez v. Matta*, 229 F.R.D. 649, 659 (D.N.M. 2004); *In re Student Fin. Corp.*, No. 02-11620 JBR, 2006 U.S. Dist. LEXIS 86603, at *45-46 (E.D. Pa. Nov. 29, 2006); *Barrett Indus. Trucks, Inc. v. Old Republic Ins. Co.*, 129 F.R.D. 515, 519 (N.D. Ill. 1990); *Motley v. Columbia Broad. Sys., Inc.*, 94 F.R.D. 733, 735 (N.D. Ind. 1982); *Connolly Data Sys., Inc. v. Victor Tech., Inc.*, 114 F.R.D. 89, 96 (S.D. Cal. 1987); *Milbeck v. TrueCar, Inc.*, CV 18-02612-SVW (AGRx), 2019 U.S. Dist. LEXIS 95470, at *5-6 (C.D. Cal. May 23, 2019); *U.S. ex rel. Bagley v. TRW, Inc.*, 212 F.R.D. 554, 563 (C.D. Cal. 2003).

[18] The statement in *Bagley* that OFCCP quotes (PO at 14 n. 80) highlights this point: "*Where* the selection organization, and characterization of facts reveals the theories, opinions, or mental impressions of a party or the party's representative, that material qualifies as opinion work product." 212 F.R.D. at 563 (emphasis added).

[19] For example, *Barrett* and *Connolly* involve situation where the underlying facts were being explored in a deposition. If OFCCP produced each of its interviewees for depositions or identified them to Oracle, there would be no need to produce the notes at all.

compromise. PO at 14. Most questions, at least in the sort of initial intake interview notes at issue here, will not constitute opinion work-product because they merely indicate areas of interest in the case, something that should come as no surprise to anyone involved in the litigation, especially at this stage.

OFCCP made several redactions in C-100 of innocuous information that had the effect of obscuring the facts. At DOL41688, OFCCP redacts "Her salary" as opinion work-product. This bullet point flags that the interviewer asked about the interviewee's salary—nothing more. It is not opinion work product. It says nothing about the impressions, opinions, or theories of OFCCP's counsel. Oracle knows that OFCCP is interested in employee salary. The actual effect of the redaction is to make it more difficult for Oracle to make sense of what comes next because it is deprived of the context for the brief statements that follow. OFCCP's approach is also inconsistent since the next topical bullet point, "Asking for raises," is not redacted.

C-100 contains the same haphazard redactions of section titles and questions noted in the review above. So the section title IV, "Additional Job Experience at Oracle" is redacted along with some of the following questions. But the most these could tell Oracle is that OFCCP is interested in gaining a full picture of an individual's time at Oracle, including the various positions held and the basic information about an individual's tenure. The resulting information might support a variety of legal theories, but the mere fact that OFCCP is interested in an individual's full experience at Oracle does not divulge a particular legal theory and contains no opinions or impressions about the case.

Even within the section the redactions are seemingly random. That OFCCP asked how many promotions an individual received at Oracle is deemed opinion work product, but questions about whether the promotions came with a raise, additional job duties, or different global career level are apparently not opinion work product. In addition, though the heading "Additional Job Experience at Oracle" is redacted as opinion work product, the sub headings "Additional Job Questions" are not redacted. No opinion work product is conveyed by the mere heading, but even if it were, it is equally conveyed by both. As it so happens, in C-100 this section is empty of answers, so nothing is lost. But the same thing happens in other notes where there are answers. In C-100 the "Performance Appraisals" section does the same thing with the effect of protecting no opinions but rendering the facts difficult to discern. The actual result of the redactions here and elsewhere is not to protect any opinions or theories. Rather, it is to render the notes and the facts contained therein more difficult for Oracle to understand because what is left is rendered less comprehensible. This either deprives Oracle of the discovery it is entitled to under the June 10, 2019, order or needlessly compounds the time and cost burdens imposed on Oracle.

Seemingly unprincipled selective redactions of questions or section heads are found throughout the document in C-100. The section on 'Direct Evidence of Discrimination" is particularly problematic. OFCCP has indicated that its case will be statistical and that employee's will be used to provide anecdotal evidence. So the facts about the anecdotal evidence are just the sort of facts that Oracle is entitled to know as part of discovery and that OFCCP had prevented it from gaining by tactical uses of privilege and discovery non-responses. That OFCCP is interested in various sorts of anecdotal evidence is no secret and does not betray any legal theories or impressions. Nonetheless, OFCCP redacts (here and in each of the documents reviewed) the questions in the section as attorney work-product. Again, this doesn't protect any theories or impressions. But it does result in a document that provides incomprehensible information on the point. In response to the first question, Oracle sees "No." This obscures the fact related by the

interviewee—here that she was not called any derogatory names at work. But it does nothing to protect opinions, or legal theories, or the impressions of the attorney conducting the interview.

OFCCP claims that its revised redactions limit redactions of questions to "(1) those giving advice, opinions, or instructions to the OFCCP attorneys conducting the interviews, and (2) those that do not seek direct and specific factual responses." PO at 14-15. But based on my *in camera* review, that is simply incorrect. The question "Were you ever called any derogatory names at work?" is redacted in C-100 and the other notes. But this question fits neither category that OFCCP claimed it was redacting. Rather, it is paradigmatically a question that seeks a "direct and specific factual response." The follow-up questions, also redacted, also seek direct and specific factual responses.

As prior orders have explained, the mere fact that some material in a note could permit an attorney to guess at some of opposing counsel's theories or opinions does not turn all such material into opinion work product. "[N]ot every item which may reveal some inkling of a lawyer's mental impressions, conclusions, opinions, or legal theories is protected as opinion were product. Were the doctrine to sweep so massively, the exception would hungrily swallow up the rule." *In re San Juan Dupont Plaza Hotel Fire Litigation*, 859 F.2d 1007, 1015 (1st Cir. 1988). The protections afforded to opinion work-product are triggered only where "disclosure creates a real, nonspeculative danger of revealing the lawyer's thoughts." *Id.* As another court has put it, "[o]pinion work product protection is warranted only if the selection or request [or question] reflects the attorney's focus in a meaningful way." *F.T.C. v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 778 F.3d 142, 151 (D.C. Cir. 2015).

Moreover, materials that might implicate attorney theories, impressions, and opinions are not protected opinion work product where there is no reasonable expectation that those theories, impressions, and opinions will remain private. *In re San Juan Dupont*, 859 F.2d at 1015-16. OFCCP filed a complaint, has filed briefs articulating its theories, and has (presumably) responded to interrogatories that set out, for instance, the policies and practices it alleges create a disparate impact and its anecdotal evidence of discrimination (among other things). OFCCP can have no reasonable expectation that material that might indicate the sorts of things that will be at issue in the case relate to theories and opinions that are private. By this point in the litigation, that sort of thing should not be private.

OFCCP does rightly point out that this point cannot be taken to eliminate the entire category of opinion work product. PO at 15 n.82. But properly understood, it does not do so. The actual impressions of the attorney about the witness, which are contained in summaries or notes at the start or end of some interview notes, are properly protected as opinion work product. That is the sort of thing that directly implicates opinions and impressions of an attorney about a witness and/or strong points/weak points in the case. Oracle is not entitled to those impressions, which contain OFCCP's counsel's analysis or assessments. The majority of the redactions, however, are categorically different in that they contain no analysis or assessment at all. Instead they involve section titles and questions/prompts that signal *what* the attorney asked about, not the attorney's impressions or opinions about the facts that were provided. That says very little if anything about opinions, theories, and impressions. Indeed, it is not even an arrangement of facts or selection of facts—it only indicates the potential issues in the case, which are already known.

Having reviewed a selection of the interview notes, I find that the section headings and questions do not divulge counsel's opinions, theories, or impressions in any meaningful way and do

not provide any information about the theories in the case beyond what Oracle does or should already know based on the pleadings, filings, and discovery responses. I therefore conclude that the questions and section titles are not opinion work product and must be produced. Based on the June 10, 2019, order, Oracle is entitled to the facts. Since the manner of the notes means that the facts contained therein cannot be comprehended without the prompts, it is important that OFCCP make this material available to Oracle.

The introductory script and internal instructions to the interviewer present a different question. The interview notes were typed into a template prepared by counsel, though it appears that several different templates were used and some attorneys made alterations to the template. The questions from the template, where there are answers noted, must be produced. In addition to the questions, at some points the template includes instructions from the attorney who prepared the template to the attorney using it about what to say, do, or ask next. In a few notes, there are specially typed in instructions or notes between attorneys. These internal instructions/comments between attorneys may be redacted as opinion work product. Unlike the questions, they do not provide that facts garnered when combined with the recorded answers. There are no recorded answers. And internal instructions between attorneys about the way that an interview should proceed is more likely to divulge the attorney theories, opinions, or impressions. Hence, redactions to these very limited sets of internal instructions was proper, with this caveat: where an instruction has an appended question with a recorded answer, the redaction of the question and answer is not proper, even if the initial instruction can be obscured.

In most instances the notes also contain a template introductory script, though, again, several scripts appear to have been used and some attorneys made individual alterations. This material does not give any of the factual content of the interview and in most instances it isn't even clear that it played any role in the interview. The template script is close in content to OFCCP's solicitation letter, which Oracle already possesses. Nonetheless, the introductory script as it exists in the template is more similar to the internal instructions between attorneys than the questions that were asked and answered. It contains no factual content and does not shed light on the factual content that is contained below. It is more likely than the questions to divulge the impressions, theories, and opinions of the attorneys who prepared the template. Therefore, I find that OFCCP properly redacted the introductory script. This comes with one caveat as well: where an interviewer added notes below the template introduction that are not particular impressions about the witness but instead state factual content related by the witness, that cannot be redacted simply because it was appended to the introductory script.

To summarize: some of OFCCP's redactions of opinion work product are proper but many are not. It was proper to redact 1) the recorded impressions and attorney summaries discussing the witness; 2) the internal instructions in the template that do not contain questions with answers; and 3) the template introduction script (not including notes from the interview added below it). But it was not proper for OFCCP to redact 1) answers to questions; 2) section titles that give the necessary context as to what the answers below mean; or 3) questions where an answer is recorded. This sort of information, and especially the third category, are redacted throughout the notes. They do not contain opinion work product, so OFCCP is not in compliance with the June 2, 2019, order.

D. "Non-Responsive" Redactions

Last, Oracle objects to OFCCP's redactions on the grounds of "non-responsive," which it understands to have been done based on a claim that the information related to the hiring claim that

has now been settled.[20] But Oracle argues that hiring information remains relevant because OFCCP's claims include allegations that compensation disparities arise from hiring decisions. It avers that since most of the interviewees could not have been in the hiring classes, the notes would not even have pertained to those claims. DM at 12. In addition, Oracle argues that these redactions are inconsistent with the basic rules of discovery, which does not permit parties to unilaterally decide which portions of an otherwise responsive document to redact. *Id.* at 12-13. It adds that such redactions were not permitted by the terms of the June 10, 2019, order. *Id.* at 13.

OFCCP argues that these redactions are sanctioned by the settlement agreement, which was entered into in order to save "unnecessary time, burden, and expense of engaging in discovery on settled issues." In OFCCP's view, Oracle should be held to this compromise, permitting OFCCP to make additional redactions. It complains that Oracle unilaterally made decisions about which discovery it would refuse to produce and so it should be permitted to also unilaterally dictate what falls outside of the agreed issues. PO at 15-16; *see also* DD at ¶ 20.

In its reply brief, Oracle complains that OFCCP is over-using these redactions to remove relevant information. It points to one example where OFCCP made additional redactions to information in a subsequent production and removed an answer to a question about whether the individual was asked about prior pay at hire. It avers that the role of prior pay is an important component of the compensation case and so is very much relevant. DR at 3-4. Oracle states that OFCCP has done the same in relation to whether an individual received that job that he or she applied for, which is central to OFCCP's claims about "assignment" of employees on a discriminatory basis. *Id.* at 4-5. As to the claim that the redactions are indeed to save OFCCP from the unnecessary burdens of discovery, Oracle points out that adding redactions on this basis increases OFCCP's burdens. *Id.* at 5. It adds that the hiring claims that were settled were narrow, relating only to college recruitment, and that the information being redacted here wouldn't have been relevant to those settled claims, whereas it could be relevant to the compensation claims. *Id.*

To begin with, OFCCP represents that it made only "limited redactions for information with was non-responsive to Oracle's Requests for Production." PO at 6. This is incorrect. In my sampling of the Category C documents, large sections of the notes are often redacted on this basis. Recruitment and hiring information is often redacted, usually in large block redactions, but other responses are redacted as well when OFCCP decides that they are off-point.

OFCCP's reliance on the settlement agreement and Oracle's conduct is misguided, and OFCCP appears to misapprehend this process. Oracle sought these notes in a motion to compel and OFCCP was ordered to produce them subject to specifically delineated exceptions, which decided the issue. Once an order was issued, the time for negotiation and new objections was over, and OFCCP was obliged to follow the order. OFCCP complains that Oracle unilaterally limited its discovery responses based on the settlement, but OFCCP did not pursue the issue through motion practice. The June 10, 2019, order did not authorize OFCCP to unilaterally modify the order to redact material that it decided was non-responsive. OFCCP sought clarification and reconsideration, but it did not seek permission to add a category to the permitted redactions. It

[20] In addition to the compensation discrimination claims at issue now, this case once included hiring discrimination claims related to Oracle's college recruitment program. The parties were able to settle those claims, and their consent findings were approved in an April 30, 2019, order.

simply unilaterally amended the order so that it could withhold additional information it didn't want to share. This is impermissible.[21]

Moreover, based on my review, the material that OFCCP deems non-responsive is often relevant to the case and should be produced. For instance, in C-12, OFCCP redacts large portions of Section IV on "Recruitment" at DOL40878-79 on the grounds that the material is non-responsive. This includes questions and answers related to whether or not the individual was hired for the job applied for and the circumstances of being "assigned" to a different position. Since a significant portion of the remaining case involves the allegations that Oracle assigns workers to positions in a discriminatory manner, *see* SAC at ¶¶ 18-22, this anecdotal evidence is directly relevant to the remaining case. I see no persuasive argument that the information here is actually "non-responsive" because it isn't relevant to the remaining issues in the case. The same section is redacted as supposedly "non-responsive" generally. Even where the answer is "no," as in C-108, the fact discerned needs to be produced to Oracle as evidence pertinent to the "assignment" theory.

In C-156, OFCCP redacts almost the entire "recruitment" section as non-responsive, including questions related to whether the individual received the job applied for. OFCCP also redacts as non-responsive the answers to questions probing whether Oracle inquired into prior pay during the hiring process. Yet both are clearly relevant to the remaining case. OFCCP filed a complaint claiming discrimination in job assignment and continues to litigate that issue. Unless it is prepared to voluntarily dismiss that theory entirely, it cannot declare evidence pertinent to the claim somehow non-responsive just because it would prefer Oracle not to have access to those facts. In the same way, the role of prior pay in compensation is part of the complaint, *see* SAC at ¶ 32, and is a theory that, to my understanding, OFCCP continues to pursue. I do not follow how OFCCP's attorneys can be actively litigating a theory of disparate impact based on the role of prior pay while at the same time declaring to Oracle and the adjudicator that information about prior pay is somehow "non-responsive."

These deficiencies recur through the notes, but some of the sample notes reviewed also contained other problematic redactions on these grounds. For instance, C-132 at DOL41936, redacts information about how the individual learned about the suit and information added about the individual's perspective on Oracle and who they hire. This material isn't directly on point in the way that some recruitment information is, but it does provide important information relevant to evaluating the individual's statement and what testimony he might offer.[22] In C-250, the response to the question about positions hired and applied for is produced (with a permissible government informant redaction), but the surrounding material is redacted as non-responsive, eliminating the context. OFCCP also then redacts any educational background information as non-responsive—something not done in other notes. A paragraph that would provide context is also removed at the top of DOL41618. And the interviewee's suggestions on where information can be found given the culture at Oracle are redacted later in the page. This information is pertinent and part of the factual content provided by the interviewee.

Hence, even if OFCCP had been permitted to redact "non-responsive" material, I find that it has improperly used this basis to redact information that is relevant and material to this litigation. The rules of discovery do not permit a party to redact otherwise relevant documents to remove

[21] OFCCP's reliance on the settlement agreement and Oracle's conduct is misplaced. Here there was an order.

[22] The redaction at the bottom of DOL41933 is also improper as "non-responsive" but the added paragraph is properly redacted as work product since it represents communications between attorneys that found its way into the note for some reason. That redaction may be retained.

information it doesn't want to share and finds irrelevant and in this case OFCCP was subject to an order compelling production. That order gave the permissible bases for redactions and OFCCP did not seek to add another basis for doing so. It therefore violated the June 10, 2019, order.

E. Remedy

OFCCP failed to comply with the June 10, 2019, order by 1) not re-doing the redactions in the Category A documents, which are only based on the government informant privilege; 2) impermissibly redacting non-identifying information on the basis of the government informant privilege in each category of documents; 3) impermissibly redacting information in the Category C and D documents as opinion work-product; and 4) adding a new basis for redaction as "non-responsive" without seeking modification of the prior orders and then using this unauthorized basis for redaction to remove relevant and material factual information from the notes. The remaining question is what remedy follows.

Oracle seeks an order imposing an evidentiary sanction preventing OFCCP from introducing at trial information that it did not produce in discovery. DM at 18. OFCCP avers that it is not clear exactly what Oracle wants in this sanction. PO at 1, 18. It represents that it does not intend to offer any of the disputed interview notes at trial as evidence. It opposes a prohibition on calling a witness who gave an interview, pointing out that the witness will be identified, and unredacted notes will be provided, when witnesses are disclosed. *Id.* at 1 n.2, 18-19. In any event, OFCCP contends that no sanctions are warranted because even if it did not comply with the order, it made its best efforts to comply in good faith, producing significant amounts of additional material. *Id.* at 19. In reply, Oracle clarifies that it seeks a sanction barring OFCCP from calling witnesses where the interview note for that witness was over-redacted in violation of the prior orders. DR at 8-9. It argues that this is a proportionate sanction, consistent with the rules of discovery and sanctions in other cases. *Id.* at 9.

I find that any evidentiary sanction is premature. Though some of the individual redactions cannot be supported by a good faith argument, I accept OFCCP's representations that it has made good faith attempts to comply with the order, even if those attempts have fallen short. In particular, based on the submissions now, I am convinced that OFCCP and its attorneys are now taking their discovery obligations seriously. While some of the behavior and redactions still shows disregard for prior orders and the process, ultimately OFCCP has taken substantial steps to come into compliance with its discovery obligations. Moreover, any evidentiary sanction will be more properly considered closer to the time of hearing, after it becomes apparent what the parties intend to offer as evidence.[23]

Though I do not impose any sanctions now, OFCCP must re-do its redactions consistent with the guidance given above and enumerated in the order below. Its re-redactions must be completed by October 24, 2019. This need not be a complicated process and although the OFCCP complains about the resources involved in complying with its discovery obligations, the need to re-do the productions is a problem that OFCCP created. The material in question should have been produced much earlier, during discovery—indeed, had OFCCP initially made robust discovery responses, some of the production required here would likely have never been necessary because Oracle had been provided with the pertinent information. Had OFCCP fully accepted the guidance in the June 10, 2019, and July 2, 2019, orders, repeated productions would likely be unnecessary.

[23] OFCCP maintains that it will not be offering interview notes. If it also makes the decision not to offer testimony from current or former employees, which appears to be a possibility, the question of any evidentiary sanction would appear to be moot.

Nor am I convinced that this project requires any extraordinary amount of time. The earlier process appears to have been cumbersome because OFCCP decided to attempt to creatively interpret and stretch the prior orders to its advantage. That was, and is, unnecessary and ill-advised. To simplify and expedite the task, I have provided detailed discussion above and will provide precise directions below, including directions designed to eliminate needless work in completing the process. For instance, where no information is contained in the notes, OFCCP need not re-redact the notes, it need only make plain to Oracle that the notes contain nothing more than the template. In addition, since additional redactions are not being made, OFCCP does not need to revise its privilege log.

If OFCCP fails to implement the guidance herein, sanctions may be appropriate, particularly if Oracle shows that the interview notes related to that witness were improperly redacted in a material way resulting in some prejudice. Sanctions could include evidentiary bar on any evidence OFCCP has gained from a current or former employees deriving from these interviews. I reject OFCCP's suggestion that later full production of the notes for witnesses who will testify resolves any shortcoming. The point is to provide Oracle with the information about the allegations and facts in the case so that it can prepare a defense. Moreover, considerable judicial resources have been invested in attempting to provide OFCCP with directions that provides Oracle with the discovery it is entitled to while also protecting the privileges OFCCP validly claims. Further non-compliance could result in forfeiture of all of the privileges involved, leading to the full disclosure of the un-redacted notes.

ORDER

1. Defendant Oracle's Motion to Compel Compliance is granted in part and denied in part.

2. Oracle's Motion to Compel Compliance as to the July 1, 2019, order concerning 30(b)(6) depositions is denied as moot.

3. Oracle's Motion to Compel Compliance as to the June 10, 2019, order concerning interview notes is granted in part.

4. OFCCP has failed to comply with the June 10, 2019, order by a) not redoing the redaction in the Category A documents; b) over-redacting on the basis of the government informant privilege; c) over-redacting on the basis of opinion work-product protection; and d) impermissibly redacting for non-responsiveness.

5. Oracle's request for an evidentiary sanction is denied at this time.

6. OFCCP must reproduce the documents with proper redactions, consistent with the guidance above and the directions enumerated below.

    a. OFCCP must revise its government informant privilege redactions in the Category A documents, with the exception of A-12, consistent with the June 10, 2019, order and this order.

    b. OFCCP must revise its government informant privilege redactions in all documents along the following parameters:

        i. OFCCP must eliminate block redactions, taking care to only redact identifying information.

ii. OFCCP may redact particular identifiers within anecdotal evidence, but may not redact other substantive aspects or any general reflections.

iii. OFCCP may redact racial information, but must do so in a manner that indicates whether the interviewee is white/Caucasian (non-Hispanic), Asian, or non-white and non-Asian. OFCCP may redact more particular identifiers within these categories, insofar as the notes contain them.

iv. OFCCP may redact details regarding citizenship and visa status, but, insofar as the notes contain the information, must do so in a manner that indicates whether or not the interviewee stated that he or she was a U.S. Citizen and whether or not the interviewee stated that he or she worked on a visa.

v. OFCCP may redact educational information concerning school, dates, and field of study, but may not redact educational levels.

vi. OFCCP may redact particulars regarding date and circumstances of hire, time and manner of promotions, date and amounts of compensation packages or raises, and date and circumstances of job changes, but may not redact nature of hire/departure, whether an individual received a promotion or raise, the components of compensation, or the fact of job changes.

c. OFCCP must revise its opinion work product privilege redactions in the Category C documents along the following parameters:

i. OFCCP may redact portions of the notes that contain attorney summaries and impressions about the witness.

ii. OFCCP may redact the introductory script, except that any notes relating to the conversation appended to the script must be unredacted.

iii. OFCCP may redact internal instructions to/between attorneys that are contained in the notes, except that where such instructions contain questions where an answer is provided, the questions (and answer) may not be redacted.

iv. OFCCP may not redact interview questions or section titles where there is some information recorded in response to the question or under the section titles.

d. OFCCP must remove its "non-responsive" redactions. OFCCP may redact material in these sections on the basis the government informant privilege or opinion work-product protection, consistent with the guidance provided above.

e. In re-producing the documents, OFCCP may not add redactions to cover information already released in previous productions.

f. Since the re-production will only involve a reduction of redactions, OFCCP does not need to update its privilege log.

g. OFCCP need not re-do redactions in documents or portions of documents where there is no information recorded, but should in some manner inform Oracle that these documents/sections contain only the template without any interview notes.

7. OFCCP must make all productions no later than October 24, 2019.

8. The *in camera* submissions will be returned to OFCCP and Oracle. The parties are ordered to maintain the submissions in the same manner and format as they were made for purposes of this ruling.

SO ORDERED.

RICHARD M. CLARK
Administrative Law Judge