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Issue Date: 24 April 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 UNOPPOSED MOTION TO SEAL

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. On April 10, 2019, Plaintiff filed a Motion to Compel Historical Data of Comparator Employees. That motion remains pending, with briefing ongoing. On April 12, 2019, Defendant filed notice that it would be filing a motion to seal a small excerpt of one page of one of the attached exhibits. On April 16, 2019, Defendant filed an Unopposed Motion to Seal Limited Portions of Plaintiff’s Motion to Compel Historical Data of Comparator Employees.

Defendant seeks to seal particular compensation related information from one page of one of the exhibits submitted with Plaintiff’s Motion to Compel. It argues that the particular information in question is confidential commercial or financial information that would cause Oracle substantial competitive harm if disclosed—and so is protected by Freedom of Information Act (“FOIA”) Exemption 4—and that it would impinge on employee privacy rights—and so is also protected by FOIA Exemption 6. Defendant has filed a copy of the page in question with proposed redactions. The redactions obscure only particular numbers and identifying information. The bulk of the paragraph is untouched. Plaintiff does not oppose the motion.

“It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.” *Nixon v. Warner Commc’ns*, 435 U.S. 589, 597 (1978). But “the right to inspect and copy judicial records is not absolute.” *Id.* at 598. “Where the common-law right of access is implicated, the court must consider the degree to which sealing a judicial record would interfere with the interests served by the common-law right of access and balance that interference against the salutary interests served by maintaining confidentiality of the information sought to be sealed.” *IDT Cor. V. EBay, Inc.*, 709 F.3d 1220, 1223 (8th Cir. 2013) (citing *Webster Groves Sch. Dist. v. Pulitzer Publ’g Co.*, 898 F.2d 1371, 1376 (8th Cir. 1990)). The

purpose of the right of public access “is to enable interested members of the public, including lawyers, journalists, and government officials, to know who’s using the courts, to understand judicial decisions, and to monitor the judiciary’s performance of its duties.” *Goesel v. Boley Int’l (H.K.) Ltd.*, 738 F.3d 831, 833 (7th Cir. 2013). Privacy interests can justify sealing the record, as can concern that unsealed records could be “sources of business information that might hard a litigant’s competitive standing.” *Nixon*, 435 at 598; *see also Goesel*, 738 F.3d at 833.

The Rules of Practice and Procedure for the Office of Administrative Law Judges “OALJ”) provide that “[o]n motion to any interested person or the judge’s own, the judge may order any material that is in the record to be sealed from public access.” 29 C.F.R. § 18.85(b)(1). “An order that seals material must state findings and explain why the reasons to seal adjudicatory records outweigh the presumption of public access.” 29 C.F.R. § 18.85(b)(2). OALJ is an administrative agency that serves a judicial function, not part of the judiciary. Hence, OALJ records are subject to disclosure under FOIA. *See* 5 U.S.C. § 522. As such, a record will not be sealed “unless the record qualifies for an exemption to such disclosure.” *Jordan v. Sprint Nextel Corp.*, ARB No. 06-105, ALJ No. 2006-SOX-041, slip op. at 12 (ARB June 19, 2008). Under FOIA, agencies may withhold records subject to 9 statutory exceptions. 5 U.S.C. § 552(b)(1)-(9). Two of these exemptions, 4 and 6, are at issue here.¹

FOIA Exemption 4 exempts “trade secrets and commercial or financial information obtained from a person and privileged and confidential.” 5 U.S.C. § 552(b)(4). A “trade secret” in the meaning of Exemption 4 is “a secret, commercially valuable plan, formula, process, or device that is used for making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.” *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983). For other information to be covered by Exemption 4, that information must be (1) commercial or financial information; (2) obtained from a person; and (3) privileged or confidential.² *E.g. Bowen v. U.S. FDA*, 925 F.2d 1225, 1227 (9th Cir. 1991); *Getman v. NLRB*, 450 F.2d 670, 673 (D.C. Cir. 1971). “[C]ommercial or financial matter is ‘confidential’ for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government’s ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.” *National Parks & Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974); *see also Watkins v. United States Bureau of Customs*, 643 F.3d 1189, 1194 (9th Cir. 2011); *GC Micro Corp. v. Defense Logistics Agency*, 33 F. 3d. 1109, 1112 (9th Cir. 1994).

¹ The ARB has suggested that motions to seal might be premature where there is no FOIA request pending, on the grounds that “it would be premature to determine whether any of the exemptions in the FOIA would be applicable.” *McDonnell v. Doyon Drilling Servs., Ltd.*, ARB No. 97-053, ALJ No. 96-TSC-00008, slip op. at 3 (ARB May 19, 1997); *see also Bettner v. Crete Carrier Corp.*, ARB No. 07-093, ALJ No. 2007-STA-033, slip op. at 3, n.11 (ARB Sept. 27, 2007). I have previously adopted this reasoning. *See Lewis v. Wells Fargo Bank, N.A.*, No. 2017-SOX-00032 (ALJ Apr. 20, 2018). This case is different in that OALJ has already determined that it will make proactive disclosures under FOIA. *See In Re Administrative notice of Proactive Disclosure of Frequently Requested Records Under the Free of Information Act Regarding OFCCP v. Oracle*, No. 2017-MIS-00006 (ALJ July 28, 2017).

² “Commercial” and “financial” are given their ordinary meanings and apply when the submitters “have a commercial interest in the requested information.” *Pub. Citizen Health Research Group*, 704 F.2d at 1290 (citing *Washington Post Co. v. United States Dep’t of Health & Human Servs.*, 690 F.2d 252, 266 (D.C. Cir. 1982); *Board of Trade v. Commodity Futures Trading Comm’n*, 627 F.2d 392, 403 (D.C. Cir. 1980). A “person” in the meaning of Exemption 4 includes “an individual, partnership, corporation, association, or public or private organization other than an agency.” *Nadler v. FDIC*, 899 F. Supp. 158, 160 (S.D.N.Y. 1995) (quoting 5 U.S.C. § 551(2)).

Exemption 6 applies to “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). The threshold question is whether the information in question is contained in a personal, medical, or similar file. If it is, it must be determined whether disclosure would constitute a clearly unwarranted invasion of personal privacy. *United States Dep’t of State v. Wash. Post Co.*, 456 U.S. 595, 598 (1982); *N.Y. Times Co. v. NASA*, 920 F.2d 1002, 1004 (D.C. Cir. 1990) (en banc). The privacy interests of the individual in question must then be weighed against “the core purpose of FOIA,’ which is ‘contributing significantly to public understanding of the operations or activities of the government.’” *United States Dep’t of Defense v. Federal Labor Relations Auth.*, 510 U.S. 487, 495 (1994) (quoting *Department of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 775 (1989)) (emphasis removed).

The information in question was submitted by Defendant and refers to particular employees, the salaries of those employees, and salary range provisions for certain positions. The specific identifying information is exempt from disclosure under Exemption 6. Individualized salary information is the sort of information that is found in personnel files and the individuals in question have a legitimate and compelling privacy interest in their actual and prospective earnings at Oracle. Moreover, disclosure of this particular information would not serve the “core purpose of FOIA” because it provides no information on the operations or activities of the government. The individualized identifiers are irrelevant to any determination that might be reached on the pending motion to compel or, more broadly, in this litigation. The redactions in the proposed public copy of the page in question are minimal and do not obscure the underlying meaning of the paragraph. Insofar as the information could play any role in the operations or activities of the government, disclosure of the redacted version fully satisfies the public interest under FOIA.

Furthermore, Exemption 4 applies to the particulars about salaries for the individuals and to the particulars of Defendant’s salary ranges/compensation structure. It was submitted by Oracle, a “person” in the meaning of FOIA, and constitutes commercial or financial information. It was submitted with an expectation of confidentiality. The Declaration of Kate Waggoner is persuasive in explaining the competitive harm that would flow from disclosure. To show the relevant competitive harm, a proponent of Exemption 4 must establish “(1) actual competition in the relevant market, and (2) a likelihood of substantial competitive injury if the information were released.” *Watkins*, 643 F.3d at 1194 (citing *G.C. Micro*, 33 F.3d at 1113). “There is no set test for determining actual competition in a relevant market” and courts “embrace a common sense approach to this issue.” *Id.* at 1196. The relevant market is the labor market for the positions Oracle fills. If common sense were not enough, Ms. Waggoner’s declaration shows that there is “actual competition” in the relevant labor markets as different companies seek to attract and retain employees.

Determinations of “the likelihood of substantial competitive injury” can also rely on common sense and declarations from individuals in a position to understand the relevant market. “[T]he law does not require the [Agency] to engage in a sophisticated economic analysis of the substantial competitive harm to [the submitter] that might result.” *Id.* (quoting *G.C. Micro*, 33 F.3d at 1115) (second alteration in original). Ms. Waggoner’s declaration supports the common sense point that Oracle’s ability to attract and retain the employees it seeks in the fluid labor market would likely be impaired if its competitors had knowledge of the details of the salary ranges it has used for particular positions and/or the actual and proposed/negotiated salaries of particular employees. With particularized information about Oracle’s compensation structure, a competitor could out-

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

Even “if a document contains exempt information, the agency must still release ‘any reasonably segregable portion’ after deletion of the nondisclosable portions.” *Oglesby v. United States Dep’t of the Army*, 79 F.3d 1172, 1176 (D.C. Cir. 1996) (quoting 5 U.S.C. § 552(b)). Accordingly, a motion to seal at OALJ “must propose the fewest redactions possible that will protect the interest offered as the basis for the motion.” 29 C.F.R. § 18.85(b)(1). The proposed redactions in this instance are minimal and obscure only the particular words, phrases, and numbers that would divulge the particularized information about the individual’s in question, the salaries, and the compensation structure used by Oracle. The paragraph retains its general sense. I find that the proposed redactions are appropriate and minimal and enable the agency to release a reasonably segregable portion while still protecting the legitimate interests in Exemptions 4 and 6.

Therefore, the unopposed motion to seal is granted. The redacted copy of the page in question will be placed in the public case file and transmitted for proactive disclosure. *See* 29 C.F.R. § 18.85(b)(1). It is hereby ordered that the unredacted copy be sealed and “placed in a clearly marked, separate part of the record.” 29 C.F.R. § 18.85(b)(2).

Although the unredacted copy will not be transmitted for proactive disclosure, “no assurances of confidentiality can be given in advance of an FOIA request because an agency promise of confidentiality [cannot] in and of itself defeat the right of disclosure.” *Jordan*, ARB No. 06-105, slip op. at 12 (citation omitted). “Notwithstanding the judge’s order, all parts of the record remain subject to statutes and regulations pertaining to public access to agency records.” 29 C.F.R. § 18.85(b)(2).

Any FOIA requests will be handled in the usual course of agency business. The sealed and separate envelope containing the unredacted page in question will be clearly marked with notice that the parties object to disclosure and seek the procedures of 29 C.F.R. § 70.26 prior to any release of information.

SO ORDERED.

RICHARD M. CLARK
Administrative Law Judge