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Issue Date: 09 August 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 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. It involves Plaintiff Office of Federal Contract Compliance Programs ("OFCCP") and Defendant Oracle America, Inc. ("Oracle"). On June 19, 2019, OFCCP filed a Motion to Compel Oracle's Compensation Analysis. That motion remains pending. On June 25, 2019, Oracle filed notice that it would be filing a motion to seal portions of that filing. On July 2, 2019, Oracle filed a Motion to Seal Portions of Plaintiff OFCCP's Motion to Compel Oracle's Compensation Analyses ("Motion to Seal" or "DM").[1] OFCCP filed an Opposition to the Motion to Seal on July 16, 2019 ("Opposition" or "PO").

For the reasons set forth below, Oracle's Motion to Seal is granted.

Background

The parties in this case negotiated a Protective Order to govern use of the materials produced in discovery. Judge Christopher Larsen entered the Protective Order on May 26, 2017. After this case was assigned to me, some disagreements arose regarding the meaning and applicability of the Protective Order, but in a May 22, 2019, order, I clarified that since neither party wished to withdraw from the original agreement, the Protective Order remained in force. However, the Protective Order, as it must, is subject to the limitations of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and other provisions of law.

Oracle's Motion to Seal seeks to "seal limited portions of two exhibits" submitted with OFFCP's Motion to Compel Oracle's Compensation Analyses. First, it seeks to seal "portions of

[1] The Motion to Seal is supported by a Declaration of Jonathan Riddell ("Riddell Declaration" or "RD") and a Declaration of Victoria Thrasher ("Thrasher Declaration" or "TD") with two exhibits.

Oracle's Affirmative Action Plan Workforce Analysis," which is contained in Exhibit 3 to the Declaration of Laura C. Bremer ("Exhibit 3 Material"). Second, it seeks to seal "information regarding Oracle's compensation structure in the form specific [sic] premium percentages that Oracle may pay to attract candidates," which was submitted in Exhibit 46 to the Bremer declaration ("Exhibit 46" Material"). DM at 1. Oracle represents that the material in both exhibits was designated confidential when produced. It deems the Exhibit 3 Material "highly sensitive" and produced "based upon assurances that . . . it would be treated as sensitive and confidential to the maximum extent possible permitted under [FOIA]." It describes the Exhibit 46 Material "confidential and proprietary trade secret information." *Id.* Oracle contends that it treats the material in question as confidential and has a "compelling interest" in preventing further disclosure. *Id.* at 2, 10.

Oracle argues that the Exhibit 3 Material is exempt from disclosure under FOIA Exemption 4 because it is commercial or financial information that it submitted to the government and that is privileged and confidential because it contains information about Oracle's workforce that would cause it significant competitive harm if disclosed. It points to several cases where similar material has been withheld pursuant to Exemption 4. *Id.* at 4-5. As to the Exhibit 46 material, Oracle represents that OFCCP does not oppose sealing this material and similar material has been sealed previously in this case. Oracle argues that the information would disclose Oracle's compensation structure and harm its competitive position in recruiting employees. *Id.* at 6-8. In addition, Oracle contends that the Exhibit 3 Material is exempt from disclosure under FOIA Exemption 6 because disclosure would result in an unwarranted invasion of personal privacy in that the identity of individuals could be deduced, revealing other personal information about that employee. *Id.* at 8-9. Oracle includes proposed redacted versions of both the Exhibit 3 Material and Exhibit 46 Material. *See* TD, Ex. A-B.

OFCCP does not actually oppose sealing either the Exhibit 3 Material or the Exhibit 46 Material, at least "with respect to their use in the instant Motion." It takes the position that the material is not "sufficiently critical" to its current arguments to render them important enough to disclose. But it "does not agree that the [Exhibit 3 Material], or similar summaries of employee counts by race and gender, is exempt from disclosure under FOIA." PO at 1. OFFCP represents that it "can see" how the Exhibit 46 Material "might fall within FOIA exemption 4," but "is more doubtful of the application of FOIA exemptions 4 or 6" to the Exhibit 3 Material. *Id.* OFCCP points to prior orders that explained that FOIA determinations for OALJ as an agency are made independently of a decision in a particular case and avers that both OFCCP and the Solicitor's office are in the same position. *Id.* at 1-2. OFCCP's position is that Oracle has overstated the extent of the exemptions and so it "explicitly reserves the right to dispute the application of either exemption 4 or 6 to any aspect of Oracle's AAP, including this data, if OFCCP offers this evidence or data later at trial or in relation to dispositive motions." *Id.* at 2 (emphasis removed). Its rationale appears to be that the information may become critical to its arguments later on, and at that point it would be necessary to disclose the materials to the public under FOIA. So it is only willing to consent to sealing the material under a "reservation of rights." *Id.*

Discussion

"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 Corp. 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 harm 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, Exemption 4 and Exemption 6, are potentially at issue here.

FOIA Exemption 4 protects "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. *See, 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).

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).

OFCCP's position is not very helpful. It avers that the question is premature since FOIA determinations in response to a request proceed on a different track. While this last point is true,

the FOIA question is ripe and in need of decision now for three reasons: 1) a motion to seal in this forum is evaluated in light of FOIA; 2) insofar as the motion turns on the Protective Order, the Protective Order is read in light of FOIA; and 3) since OALJ is making proactive FOIA disclosures in this case,[2] the determination on the motion to seal will have direct implications for whether or not the material is made available now.[3]

It is not entirely clear what OFCCP means by a "reservation of rights" in this context. Although OFCCP may wish to defer its internal consideration of whether the material is subject to a FOIA exception, whether to seal information in this administrative adjudication is a question I must answer now. The motion will result in an order and a party cannot reserve a right to nullify or defy an order. OFCCP does not argue any opposition to the motion, but represents that it believes the Exhibit 3 Material is not subject to a FOIA exemption. If that is correct, the material should not be sealed. Yet absent any argument, I am deprived of the rationale that might lead me to what OFCCP seems to believe is the right result.

More charitably, OFCCP's stance is that the answer to the FOIA question may change. Exemption 6 involves a balancing test, and it is possible that as the public's legitimate interest in some materials changes, the result of the balancing could change as well. However, this is not true of Exemption 4. Exemption 4 is co-extensive with the Trade Secrets Act, 18 U.S.C. § 1905[4]—if material is exempt from FOIA disclosure under Exemption 4, disclosure is prohibited under the Trade Secrets Act. *See, e.g., McDonnel Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F.3d 1182, 1185-86 (D.C. Cir. 2004) (citing *McDonnell Douglas Corp. v. Widnall*, 57 F.3d 1162, 1164 (D.C. Cir. 1995); *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1151 (D.C. Cir. 1987)). There is thus no balancing under Exemption 4—the material either qualifies or it does not. That determination can be made at this juncture.

I begin with FOIA exemption 4, which, protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). "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)).

The Exhibit 3 Material and Exhibit 46 Material were submitted by Oracle, which is a "person" for the purposes of Exemption 4. The material is also commercial/financial in nature since it concerns the composition of Oracle's workforce and its recruitment strategies, respectively.

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[2] *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).

[3] In addition, at least as to Exemption 4, given recent changes in the governing law discussed below, disposition of a motion to seal could have implications for the subsequent agency FOIA determination.

[4] The Trade Secrets Act is a broadly worded criminal statute that applies to, among others, officers and employees of the United States and criminalizes disclosure of a wide variety of material related to "trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association" that became available to the individual in the course or his or her duties "except as provided by law." 18 US.C. § 1905.

The question, then is whether the material is "privileged or confidential." On this point, Oracle's briefing is not very helpful. As the question was analyzed in prior orders in this case, the issue was whether disclosure would either "(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). To show the relevant competitive harm, a proponent of Exemption 4 had to 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 *GC Micro Corp. v. Defense Logistics Agency*, 33 F. 3d. 1109, 1113 (9th Cir. 1994)). Oracle's Motion to Seal is argued along these lines.

However, on June 4, 2019, the Supreme Court issued *Food Mktg. Inst. v. Argus Leader Media*, __ U.S. ___, 139 S. Ct. 2356 (2019), which significantly altered the relevant analysis of the meaning of "privileged or confidential" under FOIA Exemption 4. In *Argus Leader*, the Court fairly decisively rejected the "substantial competitive harm" test that had developed by the D.C. Circuit and then more widely adopted, holding that "a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself" and that "[w]here, *as here*, that examination yields a clear answer, judges must stop." 139 S. Ct. at 2364 (emphasis added). The Court criticized the "substantial competitive harm" test as based on "casual disregard of the rules of statutory interpretation" and "a relic from a 'bygone age of statutory construction'" that both "inappropriately resort[ed] to legislative history before consulting the statute's text and structure" and "went even further astray" by relying "heavily on statements from witnesses in congressional hearings years earlier on a different bill that was never enacted into law." *Id.*

Looking to contemporary dictionaries and cases interpreting FOIA prior to the development of the "substantial competitive harm" test, the Court isolated two "senses" of "confidential" that provided "conditions" for the application of Exemption 4. First, "information communicated to another remains confidential whenever it is customarily kept private, or at least closely held, by the person imparting it." Second, "information might be considered confidential only if the party receiving it provides some assurance that it will remain secret." *Id.* at 2363. The Court held that the first condition *must* be satisfied for the material to be confidential in the meaning of FOIA Exemption 4, since "it is hard to see how information could be deemed confidential if its owner shares it freely." *Id.* The Court, however, did not decide whether the second condition—whether the information was communicated to the government with assurances that it would be kept private—was also necessary for the material to be protected by FOIA Exemption 4. *Id.* Since in the case presented there were such assurances, the Court reasoned that it did not need to decide the issue to resolve the case. *Id.*

A significant amount of case law had developed around the "substantial competitive harm" test, but in light of *Argus Leader*, that test cannot be sustained. *Argus Leader* itself leaves significant gaps in the meaning of Exemption 4, since it does not address the status of material provided without assurances of confidentiality, or provide guidance as to what alternative conditions, if any, might apply in those instances. *Argus Leader* does provide some guidance as to where courts should look for answers in those cases, but development of a new analysis remains a task for the future.

In this case, however, there is no need to delve into the areas of uncertainty. "At least where commercial or financial information is both customarily and actually treated as private by its owner

and provided to the government under an assurance of privacy, the information is 'confidential' within the meaning of Exemption 4." *Id.* at 2366. The Thrasher Declaration establishes that Oracle considers and treats the portions of the Exhibit 3 Material and Exhibit 46 Material that it seeks to redact as confidential and proprietary, and that it has not disclosed this information to the public. *See* TD at ¶¶ 3-4, 6, 8, 13, 15-17.

The Riddell Declaration represents that when the material in question was produced to OFCCP, it was marked as confidential. *See* RD at ¶¶ 2-3. This is undisputed. Reviewing the pages on which Oracle has proposed redactions in the Exhibit 3 Material, all were marked as confidential when produced to OFCCP. *See* TD, Ex. A. The Exhibit 46 Material is not so marked. *See* TD, Ex. B. Based on correspondence in the exhibit, the material was actually produced to OFCCP during the compliance review, before this matter moved into litigation and before the Protective Order or any discovery. *See id.* at ORACLE_HQCA_0000000405. It is possible that the material in both exhibits was produced both during the compliance review and during discovery.

Under the regulations governing compliance evaluations, "OFCCP will treat information obtained in the compliance evaluation as confidential to the maximum extent the information is exempt from public disclosure under [FOIA]." 41 C.F.R. § 1-20(g). Section 2.2 of the Protective Order in this case defines "confidential," and derivatively "protection material," with reference to the FOIA exemptions. In Section 7 it sharply limits the access to and use of this material. Section 9 represents that OFCCP and the Solicitor will respond to requests for the material consistent with FOIA and the Department's regulations for processing FOIA requests. Given the language of the regulations and the agreement made in the Protective Order, I conclude that assurances were made that the material in question would be kept private when Oracle submitted the material to OFCCP or its attorneys, whether submission was to OFCCP during the compliance review, OFCCP's attorneys during discovery, or both.

OFCCP represents that it believes that Exemption 4 does not apply to the Exhibit 3 Material, but it does not make any argument to that conclusion or challenge Oracle's representations and evidence. I conclude that both conditions articulated in *Argus Leader* are satisfied—the material in question "is both customarily and actually treated as private" by Oracle and Oracle "provided [it] to the government under and assurance of privacy." 139 S. Ct. at 2366. Pursuant to *Argus Leader*, the Exhibit 3 Material and Exhibit 46 Material are thus exempt from disclosure under Exemption 4. Sealing the material is therefore justified.

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 redacted portions of the Exhibit 3 Material involve the data in the "Work Force Analysis," "Job Group Analysis," and "Incumbency vs. Availability" analysis. Other portions of the Affirmative Action Plan are unredacted and within the various analysis it remains possible to see what Oracle is analyzing/tracking—only the resulting data fields are obscured. *See* TD, Ex. A. The proposed redactions to the Exhibit 46 Material are very minimal: small portions on one line on two pages contained within a 50 page document that would disclose the manner in which Oracle calculates "premium" offers. *See* TD, Ex B at

ORACLE_HQCA_0000000407-16/17. Reviewing the proposed redactions, I am satisfied that Oracle has properly segregated the portions subject to Exemption 4.[5]

Order

1. Oracle's Motion to Seal Portions of Plaintiff OFCCP's Motion to Compel Oracle's Compensation Analyses is granted.
2. The redacted copy of Exhibits 3 and 46 to the Declaration of Laura C. Bremer attached to OFCCP's Motion to Compel Oracle's Compensation Analyses will be placed in the public case file and transmitted for proactive FOIA disclosure. *See* 29 C.F.R. § 18.85(b)(1). The unredacted pages from those two exhibits will be sealed and "placed in a clearly marked, separate part of the record." 29 C.F.R. § 18.85(b)(2).
3. Although the unredacted copies 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.
4. The sealed and separate envelope containing the unredacted pages 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

[5] Since I find that the Motion to Seal should be granted on the grounds that FOIA Exemption 4 applies to the redacted material, I do not reach the question of whether FOIA Exemption 6 would apply to all or part of the redacted material.