

**U.S. Department of Labor**

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**Issue Date: 04 December 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 REGARDING MOTIONS TO SEAL AND HEARING CONFIDENTIALITY**

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”) and has been pending at the Office of Administrative Law Judges (“OALJ”) since January 17, 2017. Hearing is set to begin on December 5, 2019. Presently there are a number of pending motions to seal and disputes about confidentiality at the hearing. This order provides some guidance and direction for these issues going forward.

**BACKGROUND**

Prior to hearing, the parties filed cross motions for summary judgment and cross motions to exclude the evidence from the opposing expert, as well as motions in limine. Numerous pre-hearing filings and other assorted motions have been made. This motion practice was accompanied by a flurry of motions to seal. Generally, when Oracle filed substantive exhibits, it would file a companion motion to seal. After OFCCP filed substantive exhibits, Oracle would notice and then file a motion to seal. The motions were then opposed by OFCCP, though it appeared that often there was significant agreement on some redactions. There are now seven pending motions to seal noticed or in various stages of briefing.

On November 12, 2019, I issued an Order Regarding Motions to Seal that modified the procedures surrounding these motions in an attempt to encourage the parties to both avoid the need for motions to seal and narrow or eliminate the disputes presented by them. In that order, I directed the parties to review their submissions to determine if private or confidential needed to be submitted at all and to determine if anything that was being filed should be sealed, in which case the

party was to file a motion to seal. I required the parties to engage in additional meet and confers after motions to seal had been filed and noticed, and I required that this be done in face-to-face meetings. I ordered parties filing or opposing motions to seal to also file proposed redactions. As to the pending motions to seal, I ordered the parties to meet and confer in person to reach agreement or narrow their disputes, and then to file a status update as well as updated proposed redactions. Finally, I ordered the parties to meet and confer about the hearing exhibits and confidentiality concerns in an attempt to reach some agreements about what material should be sealed. I directed the parties to file a status report before the pre-hearing conference.

On November 25, 2019, the parties filed a Joint Status Report Re Hearing Exhibits (“HSR”). Though styled as the required joint status report, the filing consists of two distinct arguments with little apparent common ground. OFCCP stressed that hearings are open to the public and averred that confidentiality concerns could be addressed without impacting the hearing and would be alleviated if Oracle agreed to more stipulations. HSR at 1-3. It proposed “guidelines” for the parties under which PII and salary/compensation information tied to particular individuals would remain confidential, but more general salary/compensation information would not and no information already referenced by Oracle here without requesting that the information to seal or in *Jewett* matter would be sealed. *Id.* at 3-4. It proposed redaction of confidential material to be used at trial, with other redactions to be made later, as well as full release of the transcript. OFCCP asked for a ruling on its proposed “guidelines.” *Id.* at 5.

Oracle complained that OFCCP was not agreeing to general types of confidential documents and was not taking consistent positions. *Id.* at 6. Oracle had determined that 179 (of over 1000) exhibits did not contain confidential information and “expect[ed]” OFCCP to agree, which would then result in “the only area of categorical agreement.” *Id.* In Oracle’s view, the process of addressing confidentiality concerns required a document-by-document review since they could not reach agreement on a categorical approach. *Id.* at 6-7. Oracle thus proposed that all exhibits be withheld from the public until a reasonable period after the hearing so that the parties could further meet and confer, with an omnibus motion to seal to be filed thereafter. *Id.* Oracle also proposed closure of the courtroom during the testimony of the experts, avoiding public display of confidential information during the hearing, and withholding publication of the transcript for a reasonable period while the parties met and conferred about potential redactions. *Id.* at 7. OFCCP opposed any closure of the courtroom during the hearing. *Id.* at 4-5.

Hearing confidentiality was discussed further at the pre-hearing conference on November 26, 2019, as summarized in the Order Following Pre-Hearing Conference (“PHO”) issued on November 29, 2019. As to hearing exhibits:

Oracle is highly concerned about the potential use of proprietary and confidential information during the hearing. The parties will continue to meet and confer to resolve the confidentiality issues related to hearing exhibits prior to hearing. During testimony, the parties can request a sidebar if confidentiality is an issue during questioning. Because the parties agreed to give 48 hour notice regarding which witnesses will be called on a particular day, the parties will have time to review what potential exhibits will be used that may have confidentiality concerns. Exhibits will not be published in the proactive FOIA library until the sealing issues have been resolved.

PHO at 4. I heard further argument regarding Oracle's request to close the courtroom during expert testimony. I then denied the request. In the subsequent order, I cautioned that

The parties should not invite confidential information during questioning and may request a sidebar if confidential information may be called for by a question. If the answer given relates to confidential or proprietary information, the transcript will be marked and the decision to seal will be made once the transcript is received and before it is published to the FOIA library. If the answer does not contain confidential or proprietary information, the answer will be given in open court.

PHO at 5.

The parties filed a Joint Status Report Re Pending Motions to Seal ("MSR") on November 26, 2019. Oracle also filed a chart of Documents Subject to Pending Motions to Seal and both parties filed updated redactions. Again, the joint status report consists of dueling position statements. OFCCP reported that the parties had reached agreement on 19 documents, but continued to dispute the information that could be sealed. MSR at 1-2. OFCCP sought categorical guidance as to what was confidential and contended that Oracle was being inconsistent in attempting to claim material as confidential when it was produced previously. In OFCCP's view, any information made public before cannot be sealed now. *Id.* at 2-3. Oracle disagrees, pointing out that context can matter for some information that could be disclosed in some instances without infringing on privacy interests but not in others. *Id.* at 4. It contends that OFCCP has not been consistent and would not agree to categorical designations of confidentiality. *Id.* at 4-5. The parties included a chart indicating areas of agreement and disagreement on various documents subject to a motion to seal. *See generally id.* at 5-37. Some agreement has been reached, but very large areas of disagreement remain.

As ordered in the pre-hearing conference, the parties filed an update on the exhibits on December 2, 2019. As to issues of confidentiality: "The parties will continue to meet and confer regarding what is or is not considered confidential. It would be helpful to the parties for the Court to provide guidance on what would be deemed confidential."

### DISCUSSION

OALJ is an adjudicatory agency and hearings are open to the public. *See* 29 C.F.R. § 18.81(a). The February 6, 2019, Pre-Hearing Order provided notice that this would be a public hearing. "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).

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, but is not part of the judiciary. Hence, OALJ records are subject to disclosure under the Freedom of Information Act ("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). 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 motions to seal and issues presented in the hearing exhibits and testimony involve two FOIA exemptions, Exemption 4 and Exemption 6. 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).

Exemption 6 involves balancing, so information in the record that is more central to the disputes in the case is less likely to be sealed and withheld under FOIA. In addition, in ascertaining the privacy interest involved, context matters. Information that is disclosed in one context, like a name, might implicate serious privacy interests in another. It is initially unclear why PII would warrant disclosure—indeed, the parties should not even be submitting certain sorts of PII to begin with. See Fed. R. Civ. P. 5.2; 29 C.F.R. § 18.31. I am tasked with weighing statistical and other evidence. I will not be conducting my own statistical analyses or developing evidence. In addition, personnel information on particular employees and compensation information for particular employees appears to be subject to Exemption 6 in this case, unless the individual has in some manner waived the privacy interest. This is not a case about individual employees and the public interest in disclosure of this sort of information is not significant because it will not contribute to understanding the decision in the case. Again, there may be exceptions for individuals who have put aspects of their history and compensation at issue, but these should be genuine exceptions, not the rule.

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). “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)).

On June 4, 2019, the Supreme Court issued *Food Mktg. Inst. v. Argus Leader Media*, \_\_\_ U.S. \_\_\_, 139 S. Ct. 2356 (2019), which altered the FOIA test for confidentiality. It 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.* In *Argus Leader*, such assurances were present so the Court did not need to reach the question. *Id.* Though the case involved an explicit assurance, the Court favorably cited to some early FOIA case law, including a Ninth Circuit decision that approved of a definition of “confidentiality” that looked to whether there was an “express or implied promise by the government that the information will be kept confidential.” *Id.*; *GSA v. Benson*, 415 F.2d 878, 881 (9th Cir. 1969).

To be confidential in the meaning of Exemption 4, the information must be treated as confidential by the submitter, here Oracle. So if Oracle treats information as proprietary, this condition is fulfilled. If Oracle wants a document sealed, it should be prepared to provide evidence that it treats the information in the document in a proprietary or confidential manner. It has submitted declarations to that end in the past. Reviewing the briefing, the parties have disputes on this point, with OFCCP contending that Oracle does not in fact treat certain information as proprietary or confidential, even though it seeks to seal it now, because Oracle has published the information to the public in some manner. If this is correct, it would undermine Oracle’s showing of confidential treatment as to the particular information in question. OFCCP should be prepared to point out, and evidence, how Oracle has published the disputed information in the past.

*Argus Leader* does not make satisfaction of this first “condition” sufficient for Exemption 4 protection. But it also does not fill in exactly what else must be present for the exemption to apply, except to say that an assurance of confidentiality at the time of submission will suffice. This aspect of *Argus Leader* has been enough to deal with past motions to seal. In those instances, Oracle sought to seal documents that OFCCP filed with OALJ. There is a protective order in this case, as well as OFCCP regulations governing disclosure of confidential material. The limits of both were defined in reference to FOIA, but *Argus Leader* produced a peculiar dynamic in this regard. Whereas in the past an “objective” test defined the limits of Exemption 4, now agency assurances (coupled with confidential treatment by the submitter) can bring a document within Exemption 4. So an agency saying “we will treat your information as confidential so long as it is confidential in the meaning of Exemption 4” becomes circular—it is the indication that it will be treated as confidential that makes it confidential in the meaning of Exemption 4. OFCCP gave those sorts of assurances, so long as Oracle marked a document as confidential, so with OFCCP’s submission to OALJ, the sealing question comes down to the first condition provided in *Argus Leader*, Oracle’s treatment of the information in the documents.

However, the terrain shifts when Oracle files a document with OALJ, even if it is the *same* document that OFCCP filed. As before, the information in the document must be treated as confidential by Oracle. Oracle must provide evidence that it treats the information as confidential, and if OFCCP believes otherwise, it should provide indications that Oracle has not treated the particular information as confidential. But this is not the end of the inquiry. Oracle cannot rely on the protective order or OFCCP regulations as an assurance of confidentiality. The protective order was entered by Judge Larsen, but it does not provide assurances of confidentiality for documents that Oracle willingly files with OALJ—it addressed documents that Oracle provided to OFCCP and its attorneys.

Unlike most institutions subject to FOIA, OALJ is adjudicatory agency and there is already an explicit presumption of public access to records. *See* 29 C.F.R. § 18.81(a); *Nixon*, 435 U.S. at 597. OALJ’s Rules of Practice and Procedure provide a way in which a submitting party can receive an assurance of confidentiality when it submits a document: it can file a motion to seal under 29 C.F.R. § 18.85(b)(1). If a motion to seal is granted, the agency has given an assurance of confidentiality.<sup>1</sup> Presently, Oracle is seeking an assurance of confidential treatment by OALJ by filing motions to seal or, for the hearing exhibits, indicating that it will do so in accordance with a schedule and guidance provided, which will be given below. This creates some circularity. In ruling on a motion to seal under ARB precedent, an adjudicator looks to whether a FOIA exemption applies; but in determining whether or not Exemption 4 applies, the inquiry could lead back to the original question of whether a motion to seal has been granted.

The result is that at least for information that is described as confidential commercial or financial information, a motion to seal must be adjudicated on the merits applying the same law as a proper court. If the parties seek substantive guidance on what commercial or financial information will be sealed, they should look to how the federal courts adjudicate these motions, since that will guide the adjudication here. The Ninth Circuit has recently articulated the standard as follows:

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<sup>1</sup> There may be other ways in which documents submitted to the agency in a case would be deemed confidential, such as submission for *in camera* review only.

“[C]ourts 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, Inc.*, 435 U.S. 589, 597, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978) (footnotes omitted). We therefore “start with a strong presumption in favor of access to court records.” *Foltz*, 331 F.3d at 1135. “A party seeking to seal a judicial record . . . must ‘articulate[ ] compelling reasons supported by specific factual findings.’” *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) (quoting *Foltz [v. State Farm Mut. Auto Ins. Co.]*, 331 F.3d [1122,] 1135 [(9th Cir. 2003)]). “[C]ompelling reasons’ sufficient to outweigh the public’s interest in disclosure” exist when court records might “become a vehicle for improper purposes,’ such as the use of records to gratify private spite, promote public scandal, circulate libelous statements, or release trade secrets.” *Id.* at 1179 (quoting *Nixon*, 435 U.S. at 598). “The mere fact that the production of records may lead to a litigant’s embarrassment, incrimination, or exposure to further litigation will not, without more, compel the court to seal its records.” *Id.*

*Demaree v. Pederson*, 887 F.3d 870, 884-85 (9th Cir. 2018); *see also Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995). Further, a record may be sealed if it contains “business information that might harm a litigant’s competitive standing.” *Nixon*, 435 at 598; *see also Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 662 (3d Cir. 1991).

For documents attached to dispositive motions or produced at trial, “compelling reasons” are required to justify sealing. *Kamakana*, 447 F.3d at 1179-81. “A party seeking to seal a judicial record [ ] bears the burden of overcoming th[e] strong presumption [of public access] by meeting the ‘compelling reasons’ standard.” *Id.* at 1178. To justify sealing confidential financial information and trade secrets, a party must specifically identify where the material is found in the records. *Foltz*, 331 F.3d at 1137. Hence, to procure an order sealing a document, Oracle (or OFCCP) must be prepared to specifically identify the material to be sealed and articulate the rationale for sealing that material. This is something that has generally been done in past motions. A party advocating sealing a document must also establish “compelling reasons” for sealing the document. What suffices as compelling reasons will, again, be determined with reference to federal law.

A “trade secret” in this context<sup>2</sup> is:

A formula, formula, process, device, or other business information that is kept confidential to maintain an advantage over competitors; information — including a formula, pattern, compilation, program, device, method, technique, or process — that (1) derives independent economic value, actual or potential, from not being generally known or readily ascertainable by others who can obtain economic value from its disclosure or use, and (2) is the subject of reasonable efforts, under the circumstances, to maintain its secrecy.

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<sup>2</sup> FOIA more narrowly defines trade secrets, so some trade secrets in the “usual” sense discussed above might end up, for FOIA purposes, as privileged or confidential commercial or financial information.

Black's Law Dictionary (11th ed. 2019), trade secret; *see also* Unif. Trade Secrets Act § 1(4); Cal. Civ. Code § 3426.1(d); *Imax Corp. v. Cinema Techs., Inc.*, 152 F.3d 1161, 1165 (9th Cir. 1998). Documents can contain confidential business information that are not trade secrets, but confidential information receives less protection than a trade secret. *Littlejohn v. BIC Corp.*, 851 F.2d 673, 685 (3d Cir. 1988). If Oracle (or OFCCP) contends that material in the exhibits or filings is a trade secret in this sense, it should be prepared to articulate and provide evidence how it meets this definition.

There are seven, quite large, motions to seal pending or on their way. They are voluminous and involve myriad disputes. The November 12, 2019, order attempted to cajole the parties into reaching sensible agreements on what has become a time-consuming sideshow. The parties have narrowed some of their disagreement, but large gaps remain and the parties have not framed discrete well-defined disputes for adjudication. As to the hearing exhibits, the agreement appears to be small, with *perhaps* roughly 15% of the exhibits to be submitted subject to some agreement, leaving potentially around 900 exhibits in dispute and in need of eventual adjudication. Both parties encourage a version of a categorical approach and accuse the other of inconsistency. The underlying difficulty appears to be that the parties cannot agree on what sort of categorical approach should be used or what a categorical approach would mean. Oracle is seeking categorical rules of confidentiality. OFCCP is seeking categorical exceptions to confidentiality. Neither seems to have considered a hybrid approach, e.g., if the information contains a trade secret, it should be sealed, but if the information has been publically disclosed, it is not a trade secret.

It would be a significant waste of judicial resources to adjudicate the same questions repeatedly and I am not satisfied that the parties have narrowed and defined their disputes as much as possible. Reviewing the submissions evidencing the parties' meet and confer, it appears that the parties are still posturing and attempting to maneuver for tactical advantage. It is past time for this sort of gamesmanship to end. Both parties are represented by large teams of very capable attorneys who should be able to work together as professionals to resolve or define their disagreements. More meet and confers are thus required and the motions to seal will not be adjudicated until the parties engage in further good faith negotiation.

The default on documents submitted to an adjudicator is public access. Sealing information should be exceptional. Nonetheless there are legitimate interests in personal privacy and commercial confidentiality in play in this case. There is a significant public interest in the adjudication of the case, but the core issues do not turn on any personal details about individuals or proprietary information of Oracle. Instead, the central disputes will involve determination of general policies and practices as well as the proper *analysis* of the underlying data. General policies, information about the general organization of Oracle, information Oracle has publically disclosed, and analysis of underlying data are not confidential. Some of the underlying details and data likely are confidential, as are details about Oracle's strategies for recruitment and retention of employees. I conclude that there should be common ground between the parties on the appropriate balance. Cooperative determination of that common ground is more efficient than and preferable to an imposed solution on a document by document and redaction by redaction basis. I will thus provide directions below for further meet and confers, status updates, and briefing of an omnibus motion to seal with respect to the hearing exhibits.

There remain concerns about the hearing—both as to the use of potentially confidential documentary evidence during the hearing and the possibility of testimony concerning confidential information. Oracle has installed computer monitors in the courtroom, which resolves some of the worries about the use and publication of potentially confidential documents at the hearing. I will provide instructions below for the handling of potentially confidential documents and testimony. However, issues of confidentiality should intrude upon the hearing only rarely. Again, the presumption is public access and the disputed issues in this case do not turn on private personal information about an individual or the proprietary information/trade secrets of Oracle. There should be little need for the hearing to stray into potentially confidential areas with any regularity.

If I determine that counsel is using the hearing to broadcast confidential material or that the testimony of a witness calls for repeated testimony on confidential material, I may close the courtroom for parts of a witnesses testimony. *See* 29 C.F.R. § 18.81(a); *see also* 29 C.F.R. § 18.22(d)(4). If I determine that counsel is abusing objections based on confidentiality to delay, disrupt, or impede the presentation of evidence, I may find all objections based on confidentiality waived. *See* 29 C.F.R. § 18.22(d)(3)-(4). More serious sanctions may be imposed as well. *See* 29 C.F.R. § 18.81(b); *see also* 29 C.F.R. § 18.23(a)(1)(iii).

### **ORDER**

1. The parties shall continue to meet and confer, in person, to discuss which submissions and exhibits are confidential and should be sealed.
2. All briefing on the motions to seal materials submitted in support of or opposition to the prior motion practice in the case must be completed by December 20, 2019.
3. The parties shall file a joint status update on December 20, 2019, regarding the hearing exhibits stating listing three categories of exhibits:
  - a. Exhibits the parties agree do not contain any private or confidential material and can be made available to the public. The parties shall provide electronic copies of these exhibits at that time.
  - b. Exhibits the parties agree contain private or confidential material and agree on the appropriate redactions. The parties shall provide electronic copies of the exhibits with the agreed redactions at that time.
  - c. Exhibits that remain subject to disagreements between the parties.
4. For the exhibits in category 3(c) and prior submissions subject to a motion to seal where agreement has not been reached, the parties shall continue to meet and confer in person to review each document.
5. The parties shall file a second joint status update on January 13, 2019, regarding the hearing exhibits in category 3(c) and the disputed materials subject to a motion to seal, again listing three categories:

- a. Documents the parties agree do not contain any private or confidential material and can be made available to the public. The parties shall provide electronic copies of these documents at that time.
  - b. Documents the parties agree contain private or confidential material and agree on the appropriate redactions. The parties shall provide electronic copies of the documents with the agreed redactions at that time.
  - c. Documents that remain subject to disagreements between the parties.
6. In reference to the exhibits in categories 5(b) and 5(c), the party advocating sealing the exhibit or advocating greater redactions shall file an omnibus motion to seal by January 17, 2020. In reference to the exhibits in category 5(c), the party opposing sealing the exhibit or advocating lesser redactions shall file an omnibus opposition to sealing by January 17, 2020. The omnibus motions and oppositions are limited to 20 pages and should be accompanied by a chart or table identifying the exhibits subject to the motion and the location of the same underlying document in prior filings subject to a motion to seal, if any. The omnibus motions and oppositions do not need to address documents already subject to a motion to seal that are not hearing exhibits, since those documents are addressed in other motions to seal and oppositions. Both parties shall provide electronic copies of their proposed redactions with their omnibus motions and oppositions. Both parties may file reply briefs limited to 7 pages no later than January 22, 2020.
  7. During the hearing, if counsel believes that a confidential document is being used or discussed, a timely objection should be made. Objections may be addressed at the hearing or taken under submission, to be resolved in the omnibus motion to seal.
  8. If a question calls for confidential information, or a witness begins providing confidential information, counsel must make a timely objection. If the objection is sustained or taken under submission, the testimony will be provided on the record but not broadcast in open court, with the transcript marked to indicate that confidentiality is at issue.
  9. After the transcript is released to OALJ and the parties, a redacted version will be prepared for publication, redacting only those portions subject to a sustained or pending objection based on confidentiality.
  10. Within one week of the receipt of the transcript, the parties may file briefs supporting or opposing the objections on the record under submission.
  11. After those objections are resolved, an updated version of the transcript will be prepared and published.

12. This schedule may be adjusted based on developments at the hearing.

SO ORDERED.

RICHARD M. CLARK  
Administrative Law Judge