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Issue Date: 04 June 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 May 10, 2019, Plaintiff filed a Motion to Compel Deposition of Oracle America, Inc. Pursuant to 41 § C.F.R. 60-30.11 and Federal Rule of Civil Procedure 30(b)(6). That motion remains pending. On May 14, 2019, Defendant filed notice that it would be filing a motion to seal portions of an attached exhibit it designated confidential trade secret information. On May 24, 2019, Defendant filed an Unopposed Motion to Seal Limited Portions of Plaintiff's Motion to Compel Deposition of Oracle America, Inc. Pursuant to 41 § C.F.R. 60-30.11 and Federal Rule of Civil Procedure 30(b)(6).

Defendant seeks to seal training information related to the use of specific HR, budgeting, and compensation software, as well as screenshots thereof, from twenty-seven pages of one of the exhibits submitted with Plaintiff's Motion to Compel. It also seeks to seal a portion of a screenshot that was copied into one page of Plaintiff's memorandum supporting the motion. It argues that the particular information in question is confidential commercial information that would cause Oracle substantial competitive harm if disclosed—and so is protected by Freedom of Information Act ("FOIA") Exemption 4—*and* that its release would create the potential for data breaches of information that would impinge on employee privacy rights—and so is also protected by FOIA Exemption 6. Defendant has filed a copy of the exhibit and page in question with proposed redactions. The redactions obscure only screenshots of the software, proprietary information about the specific software used, and technical instructions for its use. General descriptions of the software and its use remain unredacted. Defendant also proposes redactions to page 14 of Plaintiff's supporting memorandum that removes only portions of a screenshot that was copied into the brief. 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 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, 4 and 6, are potentially 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

[1] No FOIA request is pending, so considering the applicability of exemptions is arguably premature. Here, however, 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)).

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).

Exemption 4 applies to the proposed redactions submitted by Defendant.[3] It was submitted by Oracle, a "person" in the meaning of FOIA, and constitutes commercial information. It was submitted with an expectation of confidentiality. 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. In this common sense approach, the Agency does not need to perform an economic analysis of the harm that may result. *Id.* (citing *G.C. Micro*, 33 F.3d at 1115).

The Declaration of Victoria Thrasher is persuasive in explaining the competitive harm that would flow from disclosure. It shows that Oracle derives an economic advantage from the efficiency that comes from the configuration and integration of its proprietary internal systems, which would be harmed were the information to become public. Ms. Thrasher's declaration is also persuasive that release of this information could risk compromising Oracle's internal networks, which would result in substantial competitive injury to Oracle if it occurred. If competitors were to copy Oracle's configuration of their internal systems, Oracle's efficiency advantage would be diminished, and if a data breach were to occur as a result of this information being released, Oracle would face economic consequences not shared by their unbreached competitors.

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 only obscure images of software as well as specific technical instructions and references to proprietary information I find that the proposed redactions are appropriate and minimal and enable the agency to release a reasonably segrable portion while still protecting the legitimate interests in Exemption 4.

Therefore, the unopposed motion to seal is granted. The redacted copy of the exhibit in question as well as the redacted page of the memorandum that copies a screenshot from that exhibit 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 copies of the exhibit and page in question be sealed and "placed in a clearly marked, separate part of the record." 29 C.F.R. § 18.85(b)(2).

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,

[3] Since I conclude that Exemption 4 justifies sealing the unredacted material, I do not reach the applicability of Exemption 6.

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 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