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: 17 March 2020

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 FOR ADDITIONAL BRIEFING ON MOTIONS 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"). Hearing was held between December 5, 2019, and December 17, 2019. Presently there are seven motions to seal pending related to various pre-hearing filings and the hearing exhibits. Through an extended meet and confer process, the parties were able to reach agreement on sealing/redacting the hearing exhibits. Those agreements, in turn, eliminate some of the prior disagreements about papers filed in the pre-hearing motion practice.

After reviewing the filings, including the proposed redactions and Oracle's Omnibus Motion to Seal the Hearing Exhibits with supporting declarations, I find that additional briefing is needed before I can fully address the motions to seal. The particular area of concern is a series of exhibits that Oracle contends should be sealed because they contain "internal employee demographic information."

DX 40, for instance, contains a portion of Oracle's 2012-14 EEO-1 forms, which provides a listing of the number of employees in broad "job categories" who fit into various demographic groups. The job categories are not Oracle's—they do not reflect the way Oracle has organized its workforce. The document contains no compensation information. It contains no individual information. The exhibit also includes a similar VETS100A for those three years in question, which provides aggregate data on the employment of veterans. It also contains some analysis of recruitment progress. The proposed redactions obscure all of the aggregate data in each set of forms/charts.

JX 15 and PX 46 contain Oracle's January 2014 Affirmative Action Plan. Oracle seeks to redact the aggregated analyses, i.e., the distribution of various demographic groups into job categories. JX 23 contains a similar job group analysis providing aggregate snapshots of Oracle's workforce, which Oracle again seeks to redact. In DX 17 most of the redactions are in the original, but Oracle proposes adding redactions that would obscure aggregate demographic data.

The parties reached agreement on the proposed redactions for these exhibits, but I have a duty to independently evaluate the motions to seal. I find the explanation for the redactions in these exhibits insufficient. This is not individualized information implicating privacy interests and it is not clear from what has been submitted how exactly this material qualifies as a legitimate confidential commercial information about Oracle.

I am particularly concerned about the Northern District of California's recent decision in *Center for Investigative Reporting v. United States DOL [CIR v. DOL]*, No. 4:19-cv-01843-KAW, 2019 U.S. Dist. LEXIS 213793, 2019 WL 6716352 (N.D. Cal. Dec. 10, 2019). EEO-1 data is collected by the EEOC and shared with OFCCP for federal contractors. The EEOC is prohibited, by statute, from releasing this information. *See* 42 U.S.C. § 2000e-8(e). OFCCP is not subject to this prohibition. *See Sears, Roebuck & Co. v. General Services Admin.*, 509 F.2d 527, 529 (D.C. Cir. 1974). The information may still be withheld, but only if it qualifies under an exception to the Freedom of Information Act.

CIR v. DOL involved a FOIA request for EEO-1 reports from a number of federal contractors. The Department withheld the information on the basis of FOIA Exemption 4. The district court, however, granted summary judgment for the plaintiff requester, CIR, and ordered the Department to produce the EEO-1 reports without redaction. In brief, the court found that the EEO-1 reports were not "commercial or financial" in the meaning of FOIA Exemption 4, and stated that even if the reports were commercial in nature, there was a "significant possibility" that some of the reports would not be confidential in the meaning of FOIA Exemption 4. The court also held that the Department did not carry its burden under the "foreseeable harm" standard to justify withholding the material.

The Northern District's decision in *CIR v. DOL* has, to my understanding, been stayed while an interested party seeks to intervene. *See Center for Investigative Reporting v. United States DOL*, 4:19-cv-01843-KAW, 2020 U.S. Dist. LEXIS 19166, 2020 WL 554001 (N.D. Cal. Feb. 4, 2020). The order staying the decision, as well as subsequent briefing in the case, indicate that the Department has decided not to appeal the case. The decision in *CIR v. DOL* is not binding precedent here, but it does have some persuasive value. I must decide whether to seal the portions of these exhibits requested under FOIA Exemption 4. *CIR v. DOL* addresses an at least closely related question and raises two particular areas of concern.

First, there were ten companies at issue in *CIR v. DOL*. One was Oracle. This raises the possibility that some of the data in these exhibits has already been made public or is set to be released soon. This would not apply to all of the information in these exhibits, some of which goes well beyond the basic EEO-1 framework. But this may mean that while some of the information in these exhibits can be redacted, the redactions should be narrower in scope than what is presently being requested. It could be the case that there are more significant differences between what is already public or soon to be made public and anything that is present here. If this is so, Oracle should offer further explanation of those differences.

Second, before the information in these exhibits is sealed, I must be satisfied that FOIA Exemption 4 applies. There seem to be facial similarities between what was at issue in *CIR v. DOL* and some of what is at issue in these exhibits. If I am to seal the exhibits as requested, I must either distinguish the case as factually different, i.e. involving quite different sorts of material, or must reach a different result on the merits of the decision. Since the parties here reached agreement and addressed the issue in the context of a large omnibus motion, the issue has not been adequately briefed and supported with declarations or other materials that would assist me in making the relevant determinations.

Accordingly, Oracle is ordered to file an additional brief relating to its omnibus motion to seal the hearing exhibits addressing the exhibits identified in this order and the impact, if any, of *CIR v. DOL*. Oracle must file a responsive brief within 14 days of this order. OFCCP may file a responsive brief as well. If it opts to do so, its brief must also be filed within 14 days of this order.

SO ORDERED.

RICHARD M. CLARK
Administrative Law Judge