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Issue Date: 22 March 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 ADDRESSING PROTECTIVE ORDER
AND
ORDER MODIFYING PRE-HEARING ORDER

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 26, 2017, Judge Christopher Larsen entered an agreed Protective Order ("the Protective Order") governing the use of information and items produced in discovery. The parties engaged in discovery under the guidance of and in reliance on the Protective Order. Recently, disputes have arisen regarding the continuing applicability of the Protective Order and various changes the parties may wish to make. On February 20, 2019, I issued an Order Granting Temporary Protective Order affirming the applicability of the Protective Order for the time-being and directing the parties to meet and confer about their disputes and difficulties and to negotiate a solution. They were directed to file a joint status update setting out their agreements and disagreements by March 6, 2019. This deadline was subsequently extended one week. The parties timely filed a status update on March 13, 2019. OFCCP also filed proposed changes.

I temporarily "re-instated" the Protective Order issued by Judge Larsen in order to preserve the status quo. The parties had reached an agreement previously, and until such time as one party or the other clearly withdraws from that agreement, it should govern. Though a number of revisions have been proposed and disputed, there still appears to be a core agreement around the essential provisions of the Protective Order. It does not appear that either party wishes to withdraw from the Protective Order going forward. Therefore, I will leave Judge Larsen's Protective Order in place, with a slight revision to the Pre-Hearing Order discussed below.

I am offering my comments on the status update and encourage the parties to continue to work towards a mutually agreed-upon revised protective order. It was unclear if, after reading the

update and the attachments, the parties expected me to take the matter under submission and enter what I believed to be the best protective order. Neither party made that specific request nor was it readily apparent that was the intention of the update. I do not see it as my role to impose an agreement on the parties on this matter at this time. To serve its purpose of enabling the parties to engage in cooperative discovery, a protective order is one that the parties need to reach together in a manner that will permit them to move forward in discovery and case preparation. Its force and usefulness come from the agreement of the parties, and their ability to rely on that agreement. An adjudicator has an interest in a mutually agreed protective order because it assists the parties in their discovery without the need for judicial supervision and minimizes the need for litigation. But if there is no mutual agreement, that interest cannot be served.

Area of Agreement and Modification of Pre-Hearing Order

The parties have a number of disputes about the terms of the Protective Order. They have come to one agreed change relating to the actions of OALJ and add a paragraph to Section 12.3 on "Filing Protected Material." As originally agreed, Section 12.3 required giving notice before material marked confidential was filed with OALJ, which would allow the other party to pursue a motion to seal. The parties retain this provision, but they then add another:

> The notice procedure above is not applicable to filings with the OALJ that do not include material marked "CONFIDENTIAL." The OALJ will not disclose filings for four business days, giving the non-filing party four business days to notify the OALJ and filing party that it intends to file a motion to seal under 29 C.F.R. § 18.85(b) within ten business days of the filing that it contends contains Protected Material. A filing will remain undisclosed until resolution of any motion to seal.

This addition is meant to address a situation where the filing party does not believe that the material in question is covered by the Protective Order, but the designating party believes otherwise. By creating a "waiting period" before filings are "disclosed" by OALJ, it allows the designating party to signal its objection and then have it meaningfully heard and addressed prior to disclosure.[1]

Though I am amenable to the aim of the parties, there are some difficulties they do not appear to have considered. OALJ does not make filings readily available to the public in the ordinary course of business. Unlike most adjudicatory bodies, OALJ has no electronic filing system. Usually filings do not even exist in a format that could be made readily available to the public. Generally filings can be accessed by filing a Freedom of Information Act ("FOIA") request. Given the high level of public interest in this particular case, however, on July 28, 2017, Chief Judge Stephen Henley issued an "Administrative Notice of Proactive Disclosure of Frequently Requested Records Under the Freedom of Information Act."[2] This informed the parties that OALJ would be regularly and proactively posting all documents received in this case on the OALJ website.

FOIA matters are distinct from the particular motion practice and disputes that arise *in* a particular case. FOIA imposes requirements on OALJ as an administrative agency, which are entirely within the purview of the agency chief judge. An ALJ presides over the case as a judge, but Chief Judge Henley presides over the agency. Hence, Chief Judge Henley issued an *administrative*

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[1] It does not address whether the parties may make independent release of documents filed with OALJ, and so may not actually address the potential problem it is designed to cure.
[2] No. 2017-MIS-00006 (July 28, 2017).

notice in a distinct case number. As the assigned hearing judge, I am not in a position to direct how the OALJ agency complies with FOIA or makes proactive disclosures.[3]

The Administrative Notice does not provide for any particular timeline in proactively posting documents. In reality, it is not instantaneous—posting involves getting the document in the proper electronic format and actively adding it to OALJ's web-content. There is always a delay, which varies with administrative contingencies. To facilitate timely posting of material of public interest, in the February 6, 2019, Notice of Hearing and Pre-Hearing Order, I directed the parties to email their filings to a provided email address simultaneous with the actual filing with OALJ. This allows for easy transfer of documents to OALJ's Washington, DC headquarters, which then makes postings to the FOIA proactive disclosure page.

In order to address the potential issue identified by the parties in their agreed alteration of the Protective Order, the February 6, 2019, Pre-Hearing Order is modified as follows: when the parties file papers, they must provide electronic copies to the same OALJ email address previously given within four business days of filing.[4] After the electronic copies are received, they will be provided to the relevant FOIA disclosure officers in the normal course. If any objection to disclosure or motion to seal is filed, this will also be provided to the relevant FOIA disclosure officers, along with any responses, oppositions, and orders related to such filings. The point here is that the OALJ agency makes FOIA determinations separate from the hearing judge and the parties cannot use their protective order to change the way the agency does business.

By giving the parties additional time to provide OALJ with electronic copies of filings, they can be assured of a limited "window" within which to lodge objections to disclosure. The parties may still wish to modify Section 12.3 of the Protective Order, but in doing so should be mindful to reach agreements on *their* conduct, not the conduct of OALJ. If they find it necessary, the parties may wish to pursue agreements about refraining from providing OALJ with electronic copies until the fourth business day, or refraining from their own independent release of papers until the fourth business day. The parties may also opt to use the meet and confer process before filing motions to discuss whether the filing contains confidential information. I leave those discussions to the parties.

Areas of Disagreement

The parties have not yet reached agreement on other changes to the protective order, though based on a review of the filings, both remain largely committed to the Protective Order entered by Judge Larsen. Some of the disputes outlined really concern questions about whether one party or the other in some way violated the Protective Order in letter or in spirit. There is no need to adjudicate these disputes at present, and those arguments really are not helpful at this point. The Second Amended Complaint has been filed and the action is moving forward.

The current disputes might suggest that adjustments to the Protective Order that would assist in avoiding future misunderstandings or misuses. So, for instance, OFCCP proposes

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[3] It is important for the parties to realize the limitations of a protective order in this context. OFCCP and the Solicitor's office are administrative agencies subject to FOIA regardless of any agreement the parties might otherwise reach. If there is a FOIA request, it will be evaluated with reference to FOIA and its exemptions—not the terms of the protective order and independently of the current litigation.

[4] If for some reason the filing contains information that the parties believe would be insecure to transmit via email, they may provide CD copies instead.

expanding the definition of "CONFIDENTIAL" in two ways. First, it proposes adding statements of law related to FOIA Exemptions 4 and 6. Oracle resists doing so. It may not really matter. The Protective Order as it exists (and as OFCCP proposes) acknowledges that FOIA applies and that the parties cannot alter its requirements by private agreement. It thus defines "CONFIDENTIAL" by reference to the potentially relevant FOIA Exemptions. The substantive law of FOIA will be applied in construing the Protective Order regardless of whether statements of law are included in the text. It may be helpful for the parties to set out some of those statements in their agreement for their mutual understanding, but they do not control how OALJ or any other adjudicator will interpret FOIA.

The second proposed alteration is to include several exclusions. Some of these make more explicit what the parties already agree—analyses completed by OFCCP are not confidential. Others state apparent truisms—a document that Oracle has publically released already is not confidential, which is already included in Section 3 of the Protective Order. The proposed additions appear in part to be an attempt to pre-litigate disputes over confidentiality. Those sorts of additions may be helpful to the parties, if they can reach some sort of agreement. However, I do not intend to attempt to pre-determine disputes that may arise in the future, or give either party a rationale to independently "resolve" those disputes by claiming that it has already been adjudicated.

OFCCP also proposes a definition for "Summaries or Complications of Protected Material." This might be helpful, depending on whether the parties can find some shared understanding that will assist their conduct. Relatedly, OFCCP seeks an addition to Section 3, "Scope," that summaries and compilations of protected materials are only protected if they meet the definition of "CONFIDENTIAL." It is unclear what this adds, but OFCCP suggests this may be a way to draw the line between protected "summary" and unprotected "analysis." It does not appear, however, that this alone will provide significant clarity—it is a difficult distinction that is inherently susceptible to dispute. The change may mean to alter the "who decides" issue and permit a disclosing party to unilaterally remove a confidential designation when it determines that the material is not confidential. That is what Oracle appears to suspect. This could be the intent of the expanded definition of "CONFIDENTIAL" as well. If this is the intent of the proposals, they should be revised to more clearly make that transformation. However, if Oracle can independently remove confidential designations from OFCCP productions and OFCCP can independently do the same, the purpose of the protective order is unclear because only meager protection is provided.

A further proposed modification is to add a requirement in Section 5 of the Protective Order requiring a sort of privilege log. Oracle opposes this as overly burdensome and an exercise in "make-work", given the volume of documents to be produced and the likelihood that the same rationale applies to broad swathes of documents containing, for instance, individual pay data. Again, this is something that could be useful in some form, but in others might serve little purpose. Something of the sort would be required if a challenge needed to be adjudicated.

Concluding Comments

Oracle and OFCCP are encouraged to continue to confer about issues they have with the protective order and work towards mutually agreed-upon changes. Sometimes communicating in person or via the telephone rather than email, some of which appear to be mini-briefs at times, can be more conducive to a candid exchange and achieving mutual understanding. If a consensus is reached, the parties should file a joint request to modify the protective order. If one party or the

other concludes that the Protective Order as it exists is no longer workable and wishes to unilaterally withdraw, that party should file a clear and unequivocal motion to vacate the Protective Order.

Protective orders are useful tools and should help alleviate the need for litigation and, if necessary, focus the questions to be decided if a request to seal information is presented. It should not be viewed as a litigation tactic, trial strategy, or a means to shift the parties' responsibilities in discovery to this agency and or the hearing judge. The need to litigate alleged protective order violations should be infrequent and narrow, and are discouraged. A revised protective order should bear those principles in mind.

In summary:

1) The Protective Order as originally agreed continues to govern;
2) The Pre-Hearing Order in this case is modified such that electronic submissions must be made within four business days of filing, giving the parties an opportunity to lodge objections before OALJ completes posting;
3) The parties are encouraged to continue to meet and confer about potential modifications to the Protective Order that would best serve their needs in this case;
4) If the parties reach any agreements, they should file a joint motion to modify the Protective Order.

SO ORDERED.

RICHARD M. CLARK
Administrative Law Judge