

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 12 November 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

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 has been pending at the Office of Administrative Law Judges (“OALJ”) since January 17, 2017. Hearing is set to begin on December 5, 2019. The parties have now completed briefing cross-motions for summary judgment and cross-motions to exclude expert testimony. Along with the motions, oppositions, and replies, both parties have filed voluminous supporting exhibits.

This has been accompanied by an increasing number of motions to seal. When Oracle filed its motion for summary decision and motion to exclude the evidence of OFCCP’s expert, it also filed a large “Motion to Seal Portions of the Evidence Submitted in Support of Oracle’s Motion for Summary Judgment or in the Alternative, for Partial Summary Judgment and Motion to Exclude the Testimony of Janice Fanning Madden, Ph.D.” The motion is supported by multiple declarations and 22 exhibits. OFCCP responded on October 31, 2019, with an opposition and a declaration attaching 8 exhibits. On November 6, 2019, Oracle filed a motion to file a reply brief—something that OFCCP would not agree to unless it was given an opportunity to file a sur-reply if it found doing so proper.

On October 31, 2019, Oracle filed a “Motion to Exclude or, in the Alternative Motion to Seal Limited Portions of the Evidence Submitted in Support of OFCCP’s Opposition to Oracle’s Motion for a Protective Order.” The underlying motion is already decided. The papers submitted with the motion to seal exceed the volume of papers submitted in support of *and* in opposition to the underlying motion. OFCCP has not yet responded.

Then on November 1, 2019, Oracle filed a “Motion to Seal Limited Portions of OFCCP’s Motion for Summary Judgment, OFCCP’s Motion to Exclude the Expert Testimony of Dr. Ali

Saad, Oracle’s Opposition to OFCCP’s Motion for Summary Judgment, and Oracle’s Opposition to OFCCP’s Motion to Exclude the Expert Reports and Testimony of Ali Saad, Ph.D.” Although the redactions might be “limited,” the supporting papers are not—Oracle again submits multiple declarations along with 48 exhibits in 8 volumes standing roughly a foot and a half high.

This is not the end. OFCCP filed its oppositions to Oracle’s motion for summary judgment and motion to exclude expert evidence on November 1, 2019. On November 6, 2019, Oracle filed a letter indicating that it would be filing another motion to seal portions of OFCCP’s filings. And when Oracle filed its reply briefs on November 8, 2019, it filed an accompanying “Motion to Seal Limited Portions of its Reply in Support of Motion for Summary Judgment or, in the Alternative, for Partial Summary Judgment.” OFCCP also made filings on November 8, 2019, so it is likely that yet another motion to seal will be forthcoming. Motions in limine are still to be filed and briefed and it seems that the parties intend to make voluminous hearing submissions. If past is prologue, that will lead to still further rounds of motions to seal, oppositions, disputes over replies, etc.

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. 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 in this case. *See* No. 2017-MIS-00006 (Chief ALJ July 28, 2017). Chief Judge Henley emphasized that OALJ conducts public hearings and that documents submitted to this office are subject to public disclosure. He stressed to the parties the importance of clearing up public access issues *before* making any submission to this office and encouraged them to consider the privacy interests of third parties in making submissions.

To facilitate their exchange of information, the parties agreed to a protective order that was entered by Judge Christopher Larsen on May 26, 2017. Despite some grumblings over the order, neither party has withdrawn its agreement and the order continues to be in force. I note as well that the government’s disclosure of private personal or confidential commercial information is subject to federal statutes and regulations, including OFCCP regulations. *See* 41 C.F.R. § 60-1.20(g). So far as I can tell, OFCCP’s filings contain significant amounts of documents marked as confidential and even charts/databases providing compensation figures for employees by name¹, yet do not contain redactions. OFCCP has not filed motions to seal its submissions, apparently leaving it to Oracle (and me) to figure out, subject to OFCCP objection, what should have been redacted.

Reasonable parties are apt to disagree about what should or should not be sealed. But reviewing the motion to seal that is briefed by both parties, it is unclear to me how great the disagreement really is—or at least would be if the parties worked cooperatively on the issue. Per Exhibit 1 to its October 31, 2019, opposition to Oracle’s October 21, 2019, motion to seal, OFCCP agrees that significant portions of the filings contain private personal information or confidential commercial information that should be sealed. The same appears likely to occur with the remaining motions since they concern largely the same sorts of documents, and sometimes the same documents.

¹ For example, Exhibit 88 to OFCCP’s Motion for Summary Decision contains unredacted compensation data.

The parties should be talking and cooperating about issues of public access. Voluminous, disputed motions to seal should be the exception, not the rule, and any disputes should be narrow. The law has been set out in prior orders. Both sides are represented by capable attorneys—large teams of capable attorneys. Whatever animus has developed between the parties and counsel, this devolution into protracted litigation over sealing documents should not be happening among professionals. It does not advance the case and does a disservice to both Oracle’s shareholders and the U.S. taxpayers who must fund these ongoing skirmishes.

The current practice is no longer working and immediate changes are necessary to address the expanding motions to seal. The parties are ordered to do the following:

1. Prior to filing a motion or response, Oracle and OFCCP must review all proposed submissions to ascertain whether material that may be subject to a motion to seal needs to be submitted at all, or can be submitted in redacted form. If private or confidential information in the documents is entirely immaterial to the issues, there is no reason it needs to be submitted in unredacted form.
2. Prior to filing a motion or response, Oracle and OFCCP must review all submissions to determine if parts should be sealed under governing law. If so, they must file a motion to seal with the submission. All submissions must contain a declaration from counsel of record stating that the documents were reviewed and that under existing law none of the submissions should be sealed except those subject to a contemporaneous motion to seal.
3. After a party gives notice that it intends to file a motion to seal documents already filed, the parties must meet and confer face to face within five business days to discuss the proposed motion and make good faith efforts to reach agreement on any disputes. Subsequent motions to seal should state the areas of agreement and disagreement.
4. After a party files a motion to seal contemporaneous with the submission of the documents subject to the motion to seal, the parties must meet and confer face to face within five business days to discuss the motion and make good faith efforts to reach agreement on any disputes. Subsequent oppositions should state the areas of agreement and disagreement.
5. The parties may continue to file motions to seal as before and the time to oppose remains as before. All motions to seal must contain the moving party’s proposed redactions of all documents subject to the motion seal. *In addition*, all oppositions to a motion to seal must contain the opposing party’s proposed redactions to the same documents. An opposing party need not file proposed redactions if the party agrees or disagrees with *all* of the redactions of the moving party—doing so is only necessary where a different set of redactions is proposed.
6. Reply briefs to motions to seal are permitted, but are limited to five pages and may only address newly raised issues in oppositions. Reply briefs must be filed within three business days of the opposition, or for motions where an opposition is already filed, within three business days of this order. A reply brief is *not* a venue to repeat prior arguments and cast aspersions on the opposing party or counsel.

7. Although there are multiple, and multiplying, motions to seal, it appears that many of the same documents are involved in the different motions. Oracle must prepare a chart, index, or table that provides the name of each document in question and the different locations of that document in the underlying papers subject to a motion to seal. This chart, index, or table must be filed within 14 days of this order.
8. Regarding all pending motions to seal, the parties are ordered to conduct an in person meet and confer to review areas of agreement and disagreement with regard to every document subject to the motions. The parties must engage in good faith efforts to reach agreement or at least crystallize the discrete disputes that remain. This meet and confer must occur within 10 days of this order. Within 14 days of this order the parties must file a joint status report regarding their meeting and the areas of agreement and disagreement.
9. If through the meet and confer Oracle agrees to reduce the proposed redactions in its pending motions to seal, it must file updated copies of its proposed redactions within 14 days of this order.
10. If OFCCP and Oracle do not reach agreement on all of the proposed redactions in the pending motions to seal, OFCCP must prepare copies of its proposed redactions for each motion to seal. OFCCP's proposed redactions must be filed within 14 days of this order.
11. Subsequent motions to seal, by either party, must contain a chart, index, or table that indicates the other locations of the same document in the record and the other motions to seal involving that document.
12. After the exchange of hearing exhibits, OFCCP and Oracle must meet and confer, in person, to discuss portions of exhibits that may be subject to a motion to seal. The parties must engage in a good faith effort to reach agreement and narrow their disputes to discrete points of disagreement. The parties must file a joint status report regarding the hearing exhibits by close of business on November 25, 2019, stating their areas of agreement and remaining disputes.

SO ORDERED.

RICHARD M. CLARK
Administrative Law Judge