



Issue Date: 10 September 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 MOTION TO SEAL IN PART AND
RETURNING DOCUMENTS TO OFCCP**

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”). On July 30, 2019, Oracle filed a Motion to Compel OFCCP to Comply with the Court’s Discovery Orders Regarding Redacted Interview Memoranda and 30(b)(6) Testimony (“Oracle’s Motion to Compel”). OFCCP filed an Opposition to Oracle’s Motion to Compel Compliance on August 13, 2019. On August 27, 2019, Oracle filed a “Motion to Seal Limited Portions of Exhibit 3 to the declaration of Abigail Daquiz, and Motion to Exclude, or in the alternative, Motion to Seal Exhibits 10 and 15 to the Declaration of Abigail Daquiz” submitted with OFCCP’s Opposition to Oracle’s Motion to Compel (“DM” or “Oracle’s Motion to Seal”).¹ OFCCP filed an Opposition to Oracle’s Motion to Seal (“PO” or “OFCCP’s Opposition”) on August 28, 2019.²

For the reasons set forth below, Oracle’s Motion to Seal is granted in part. In addition, several documents are returned to OFCCP.

Background

Oracle seeks to seal portions of three exhibits to the Declaration of Abigail Daquiz, which I refer to as PX 3, PX 10, and PX 15. PX 3 contains portions of an internal powerpoint presentation. Oracle argues that some of the information should be redacted consistent with Freedom of Information Act (“FOIA”) Exemption 4. DM at 5-6. Oracle has submitted a proposed redacted

¹ Oracle’s Motion to Seal is supported a Declaration of Jonathan Riddell (“RD”), a Declaration of Kate Waggoner (“WD”) with one exhibit (“DWX A”) and a Declaration on Anje Dodson (“DD”) with two exhibits (“DDX A-B”).

² The opposition is supported by a Declaration of Laura C. Bremer (“BD”) with one attached exhibit (“PBX A”).

copy of the exhibit for the public record. *See* DWX A. PX 10 and PX 15 are deposition transcripts from Michael Brunetti and Tamerlane Baxter, respectively. Oracle first argues that this evidence should be excluded because it is no longer relevant. In particular, it avers that the evidence went to a part of its Motion to Compel that was subsequently withdrawn after OFCCP came into compliance. DM at 6-7. In the alternative, Oracle argues that portions of PX 10 and PX 15 should be sealed as protected by FOIA Exemption 6. DM at 7-10. It has submitted proposed redactions of those exhibits as well. *See* DDX A; DDX B.

OFCCP does not oppose Oracle's Motion to Seal as it pertains to PX 3 and PX 10. It also does not oppose the motion to seal PX 15 as it pertains to the names of individuals mentioned in the deposition. PO at 1-2. It opposes sealing additional information in PX 15 on the grounds that FOIA Exemption 6 does not apply since the privacy interest is fully protected when the names are redacted. *Id.* at 2-4. As to the motion to exclude PX 10 and PX 15, OFCCP contends that it would not achieve the relief that Oracle desires and so should not be granted. *Id.* at 4.

Discussion

“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, but is 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).

FOIA Exemption 4 and PX 3

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)).

The presentation in PX 3 was submitted to OFCCP by Oracle, and Oracle is a person in the meaning of FOIA. The information at issue also concerns Oracle’s classification of its employees, which qualifies as commercial and financial information. The question, then is whether the material is “privileged or confidential.” On June 4, 2019, the Supreme Court issued *Food Mktg. Inst. v. Argus Leader Media*, ___ U.S. ___, 139 S. Ct. 2356 (2019), which 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.* Since in the case presented there were such assurances, the Court reasoned that it did not need to decide the issue to resolve the case. *Id.*

Oracle has submitted a declaration that establishes that the small portion of PX 3 that it seeks to redact is treated by Oracle as confidential and proprietary information related to the way that it structures its workforce. WD at ¶¶ 4-6. Another declaration establishes that when the internal powerpoint presentation was provided to OFCCP, it was designated as “confidential.” RD at ¶ 2. The regulations pertaining to information obtained during compliance evaluations, *see* 41 C.F.R. § 1-20(g), and the protective order in this case governing the treatment of material designated as confidential indicate that, in this particular case, assurances of confidentiality were provided to Oracle by OFCCP when it submitted the material in PX 3. Thus, as in *Argus Leader*, both senses of “confidential” are present and Exemption 4 applies. OFCCP agrees that the material should be sealed.

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 redacted portions of PX 3 are minimal, obscuring only the particular information in a portion of one slide. *See* DWX A at 4. I

find that Oracle has properly segregated the exempt material. Oracle's motion to seal PX 3 is thus granted.

Motion to Exclude PX 10 and PX 15

In addition to its motion to seal, Oracle argues that PX 10 and PX 15 are no longer relevant and so should be excluded. DM at 6-7. Oracle's Motion to Compel concerned two prior orders. One dealt with depositions under Rule 30(b)(6). Oracle alleged that OFCCP had refused to answer questions on the grounds of privilege even where the questions had been determined to be permissible in the prior order. OFCCP/the Solicitor of Labor originally defended this course of conduct and PX 10 and PX 15 were part of the argument attempting to defend the seeming non-compliance. However, at a subsequent Rule 30(b)(6) deposition, OFCCP opted to comport itself differently and answered the relevant questions. Oracle then withdrew this aspect of its motion.

OFCCP does not disagree that PX 10 and PX 15 are no longer relevant. But it argues that given the way FOIA functions and the way that proactive disclosures are being made in this case, Oracle is incorrect to think that excluding the evidence will provide it any relief. DO at 4. In *United States DOJ v. Tax Analysts*, 492 U.S. 136 (1989), the Supreme Court explained that to be an "agency record" in the meaning of FOIA, the record must be created or obtained by the agency and must be under the control of the agency at the time that the request is made. The material in PX 10 and PX 15 was obtained by OALJ when it was filed in the case and is currently under OALJ's control. But there is no pending FOIA request.

Per Chief Judge Stephen Henley's July 28, 2017, OALJ is making pro-active FOIA disclosures in this case. The result is that FOIA-related questions in this case arise when a filing is made, rather than at some time later as in most other cases. But that does not alone lead to the conclusion that anything a party happens to submit must be posted. If the document was improperly submitted or should have been withdrawn or has no business being part of the case file, then the material could be stricken and returned to the submitting party.

Where an exhibit is excluded over the objection of a submitting party, the excluded exhibit remains part of the administrative file, which might be reviewed in any appeal of the evidentiary determination. But that is not this situation. OFCCP makes no argument that PX 10 and PX 15 have any bearing whatsoever on the pending motion. Any relevance they had was mooted shortly after they were submitted. OFCCP speculates that Oracle really wants to seal the material in question because it is embarrassing. *See* BD, Ex. A. I don't know if that is true, but, regardless, the point can be turned—since everyone agrees that the material is now irrelevant, it would seem that the only reason not to withdraw it would be as part of an effort to embarrass Oracle. That's not a proper reason for an exhibit to be included with a motion.

It is a waste resources to litigate and adjudicate motions to seal material that has no business being part of the record at all. If OFCCP is keen on releasing this material, it can do so itself. If the public has a desire to view the material, it can submit a FOIA request to OFCCP and/or the Solicitor of Labor. But there is no reason at this point that this material should remain part of OALJ's file in this case. PX 10 and PX 15 are thus stricken and will be returned to OFCCP with its copy of this order. The redacted copies of PX 10 and PX 15 submitted as DDX A and DDX B will be returned to Oracle with its copy of this order.

Order

1. PX 10 and PX 15 are stricken as irrelevant to any dispute. Those exhibits are returned to OFCCP with its copy of this order. The redacted copies of those exhibits are returned to Oracle with its copy of this order.
2. Oracle's Motion to Seal is granted in part and denied in part. It is granted as to the portions of PX 3 at issue. It is denied as moot as to the portions of PX 10 and PX 15 at issue.
3. The redacted copy of PX 3 will be placed in the public case file and transmitted for proactive FOIA disclosure. *See* 29 C.F.R. § 18.85(b)(1). The unredacted page from PX 3 will be sealed and "placed in a clearly marked, separate part of the record." 29 C.F.R. § 18.85(b)(2).
4. Although the unredacted copies will not be transmitted for proactive disclosure, "no assurances of confidentiality can be given in advance of a FOIA request. *See* 29 C.F.R. § 18.85(b)(2). Any FOIA requests will be handled in the usual course of agency business.
5. The sealed and separate envelope containing the unredacted page of PX 3 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