



Issue Date: 19 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 IN PART AND DENYING IN PART
PLAINTIFF'S MOTION TO COMPEL ORACLE'S COMPENSATION ANALYSES**

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. Plaintiff Office of Federal Contract Compliance Programs ("OFCCP") filed the operative Second Amended Complaint ("SAC") on March 13, 2019. Defendant Oracle America, Inc. ("Oracle") answered the SAC ("DA") on April 2, 2019. Hearing is set to begin on December 5, 2019. On June 19, 2019, OFCCP filed a Motion to Compel Oracle's Compensation Analyses ("PM").¹ Oracle filed an Opposition to OFCCP's Motion to Compel Oracle's Compensation Analyses ("DO") on July 3, 2019.² OFCCP filed a permitted reply brief ("PR") on July 12, 2019. After considering the motion, on August 14, 2019, I ordered Oracle to file a more detailed privilege log. It filed a document by document privilege log ("DPL") on August 28, 2019. On September 6, 2019, OFCCP filed a brief in response to the privilege log ("PPLB").³ Oracle filed on responsive brief ("DPLB") on September 11, 2019.⁴

¹ OFCCP's motion is supported by a Declaration of Laura C. Bremer with 47 attached exhibits ("PX 1-47") and a Declaration of Norman E. Garcia with one attached exhibit ("PX 48"). On June 2, 2019, Oracle filed a motion to seal portions of PX 3 and PX 46. OFCCP opposed the motion on July 16, 2019. On August 9, 2019, I granted the motion to seal. The partially redacted portions of PX 3 and PX 46 are part of the public record. The sealed material is irrelevant to the disposition of the motion.

² Oracle's opposition is supported by a Declaration of Gary Siniscalco ("GD") and a Declaration of Warrington Parker with five exhibits ("DX A-E").

³ On August 29, 2019, OFCCP sought permission to file this brief on the grounds that the privilege log raised new issues that could not have been anticipated. By order of September 4, 2019, I permitted briefs of no more than 5 pages limited to new issues on an expedited schedule. OFCCP's brief is supported by a Declaration of Hailey McAllister. On

For the reasons set forth below, OFCCP's Motion to Compel Oracle's Compensation Analyses is granted in part and denied in part. Oracle is further ordered to file an updated privilege log, state a position on the record as to its compliance with the pertinent regulation, and show cause as to why one of its affirmative defenses should not be stricken.

I. LEGAL STANDARD

This proceeding is governed by the "Rules of Practice for Administrative Proceedings to Enforce Equal Opportunity under Executive Order 11246 contained in part 60-30." 41 C.F.R. § 60-1.26(b)(2). Where the regulations in 41 C.F.R. §§ 60-30.1 *et seq.* do not provide a rule, the Federal Rules of Civil Procedure apply. 41 C.F.R. § 60-30.1. Where a rule is needed and neither 41 C.F.R. Part 60-30.1 nor the Federal Rules supply one, the Rules of Practice and Procedure for Administrative Hearings Before OALJ in 29 C.F.R. Part 18, subpart A apply. *See* Pre-Hearing Order at 2 n.2.

The pending motion concerns requests for the production of documents:

(a) After commencement of the action, any party may serve on any other party a request to produce and/or permit the party, or someone acting on his behalf, to inspect and copy any unprivileged documents, phonorecords, and other compilations, including computer tapes and printouts which contain or may lead to relevant information and which are in the possession, custody, or control of the party upon whom the request is served. If necessary, translation of data compilations shall be done by the party furnishing the information.

41 C.F.R. § 60-30.10(a); *see also* Fed. R. Civ. P. 34. "Each request shall set forth with reasonable particularity the items to be inspected and shall specify a reasonable time and place for making the inspection and performing the related acts." 41 C.F.R. § 60-30.10(c). "An objection [to a request] must state whether any responsive materials are being withheld on the basis of that objection." Fed. R. Civ. P. 34(b)(2)(C).

A party may withhold documents subject to a claim of privilege.

When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial preparation material, the party must: (i) expressly make the claim; and (ii) describe the nature of the documents communications or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

Fed. R. Civ. P. 26(b)(5)(A). The party asserting the privilege "bear[s] the burden of showing that the privilege exists and applies." *Heathman v. United States Dist. Court for Cent. Dist.*, 503 F.2d 1032, 1033 (9th Cir. 1974). If a party believes that discovery responses have been inadequate, it may, after

September 9, 2019, OFCCP filed an errata along with an updated declaration and a CD containing OFCCP's analysis of the log.

⁴ Oracle's responsive brief is supported by a Declaration of Erin Connell with two attached exhibits.

conferring or attempting to confer in good faith, file a motion to compel discovery, including a motion to produce documents. 41 C.F.R. § 60-30.10(d); Fed R. Civ. P. 37(a)(1), 37(a)(3)(B)(iv).

II. BACKGROUND

In this enforcement action OFCCP alleges that Oracle engages in “widespread” discrimination at its headquarters facility against “women, Asians, and African Americas or Blacks in compensation.” SAC at ¶ 11. In this motion, OFCCP seeks compensation analyses that it contends are required of federal contractors. It avers here that such analyses are relevant, indeed “central,” to the allegations it has made and Oracle has denied. PM at 1. OFCCP represents that it has been seeking the analyses in question since the “first days” of the investigation and that Oracle has alternatively denied their existence or claimed that they are privileged. But OFCCP maintains that the analysis do exist and deems any claims of privilege “frivolous.” *Id.* at 1-2; *see also id.* at 2-7.

OFCCP’s argument is framed around the regulatory requirements regarding affirmative action programs that apply to federal contractors. It contends that the regulations require in-depth pay analyses and programs to correct problems that are identified, as well as internal auditing systems. It adds that the regulations require that compliance be documented. *Id.* at 7-8; *see also* 41 C.F.R. §§ 60-1.12(b), 1.40(a), 60-2.10(c), 60-2.17 (relevant regulations). OFCCP asserts that Oracle, as a federal contractor, was obliged to prepare these records and make them available for inspection and that it cannot evade inspection by delegating those duties to attorneys. PM at 12. OFCCP argues that the analyses cannot be protected by work product protection because Oracle had an independent duty, outside of any litigation, to create the documents in question. *Id.* at 13-14.

OFCCP further argues that attorney-client privilege cannot apply because “Oracle’s primary purpose in completing [the analyses] was not to seek legal advice—but to comply with their [sic] contractual and regulatory requirements.” *Id.* at 15. In addition, OFCCP contends that the analyses would not have been communicated in confidence because Oracle would have known that they could be compelled in a compliance audit. *Id.* at 15-16. It adds that even if the communications about the analyses were privileged, the analyses themselves would not. *Id.* at 16-17. Finally, OFCCP contends that any privilege has been waived because Oracle put its pay analyses at issue in its answer and because Oracle has failed to properly claim the privilege. *Id.* at 18-19.

Oracle presents a rather different version of the history. It maintains that compliance with 41 C.F.R. § 60-2.17 is not at issue and that even if it were, compliance does not require production of the sort of analyses OFCCP seeks. Oracle asserts that it did not perform *these* analyses to satisfy the regulation. As a result, Oracle contends that its claims of privilege, which it maintains were timely and consistently raised, are proper since the analyses were prepared at the direction of counsel. DO at 1-2; *see also id.* at 3-9. It asserts that OFCCP already has the underlying data and can conduct its own analyses, but that Oracle’s analyses are privileged and OFCCP’s claims otherwise are based on misstatements of the record and a failure to make important distinctions. *Id.* at 2, 10-13. It argues that such documents are not required by the regulations and that Oracle did not and has not represented that they were prepared for that purpose—instead they were prepared to seek legal advice. *Id.* at 13-15. In addition, Oracle argues that no privilege has been waived because it has not put these analyses at issue and “affirmatively is *not* relying on them to establish compliance with Section 2.17 or for any other purpose.” *Id.* at 2 (emphasis in original); *see also id.* at 18-19. Oracle further claims that ordering production would “waste time and confuse the issues at trial” and lead to “a sideshow into privileged, historic, and irrelevant analyses.” *Id.* at 3; *see also id.* at 19.

In reply, OFCCP accuses Oracle of failing to adhere to its obligations to “make and produce in-depth analyses of their compensation systems.” PR at 1. OFCCP deems the material in question “highly relevant” even if the affirmative action regulations are not at issue. *Id.* at 4-5. It contends that Oracle must establish its claim, but has not done so because Oracle failed to produce the analyses OFCCP contends it was required to keep, so the analyses at issue here must be those that Oracle produced for that purpose. *Id.* at 1-3. It asserts that deposition testimony and Oracle’s statements during the compliance review support this conclusion. *Id.* at 3-4. It adds that Oracle’s affirmative defense invoking privileges show that it is claiming that documents produced to satisfy the regulations are the very documents at issue here. *Id.* at 5-6.

OFCCP deems Oracle’s assertion otherwise “incredible” and the assertion inadequate because Oracle made a blanket claim of privilege. OFCCP contends that Oracle’s assertion that the documents were prepared other than to comply with the regulations “conclusory” and supported only by self-serving statements. It stresses that an earlier declaration linked the documents to OFCCP compliance. *Id.* at 6-8. OFCCP also argues that Oracle has waived the privilege by making only a blanket claim and providing inadequate privilege logs. *Id.* at 8-9. Finally, OFCCP contends that the privilege cannot protect facts and it should be entitled to the factual material contained in the documents. *Id.* at 10.

After reviewing the briefing, I agreed with OFCCP that Oracle’s categorical privilege log was insufficient, but I did not agree that this waived the privilege. On August 14, 2019, I ordered Oracle to file a more detailed, document-by-document privilege log. It did so on August 28, 2019, filing an 81 page, small-print privilege log cataloging documents between August 2013 and December 2016. *See* PL. In response, OFCCP argues that the privilege log is insufficient and raises additional issues. It contends that the descriptions are conclusory and generic. PPLB at 1-5. It asks that I conduct an *in camera* review of the material in question. *Id.* at 5. Oracle responds that this is not necessary and that the detailed log provides adequate information. DPLB at 1-5.

III. DISCUSSION

A. The Motion

At times, the parties frame the issue as focused on compliance with 41 C.F.R. § 60-2.17 and related regulations. However, while 41 C.F.R. § 60-2.17 is relevant to the question presented in this motion, this motion is not about whether or not Oracle met the exact requirements of that regulation or even what exactly that regulations requires. Even if these substantive questions were part of this case as it currently exists, it would be improper to decide that question in a discovery motion. 41 C.F.R. § 60-2.17 is relevant because it includes a component requiring compensation analyses of some sort. *See* 41 C.F.R. § 60-2.17(b)(3). This case is very much a case about alleged compensation discrimination. In the discovery context, OFCCP has an interest in any analyses that Oracle completed to comply with the regulation *and* any other compensation analyses Oracle may have completed separate and apart from the regulation.

This is a discovery motion and so must relate to some request for discovery. At the end of its motion and reply, OFCCP seeks to compel responses to “RFPs 71, 72, 80, 93, 95-98, 103-104, 148, 150-155, 158, 174”—a full 20 RFPs, plus an “order that Ms. Holman-Harries be recalled for questioning.” PM at 19-20; PR at 10. Not all of these requests are really at issue. Many are redundant and a result of the long pendency of the case. On September 11, 2017, Judge Christopher

Larsen issued an order dealing with RFPs # 71, 72, and 80, all of which were part of OFCCP's second request for the production of documents propounded in February 2017. *See also* PX 16; PX 17. RFPs 93, 95-98, and 103-04, were part of OFCCP's third set of RFPs propounded and answered in September 2017. *See* PX 23; PX 24. The remaining requests, 148, 150-155, 158-159, and 174 are part of OFCCP's fifth set of RFPs, which were propounded on January 30, 2019. *See* RX 2. RFPs 93 and 95-98 are repeated, with slight variations in RFPs 148 and 150-153. RFPs 154 and 155 are new, but represent slight variation of the prior two. RFPs 158-159 repeat, with slight variation, RFPs 103-104. RFP 174 is new, but again a slight variation on a recurring theme. Since the RFPs in the different sets repeat in large part, those from the fifth set are the focus here, along with RFP 71, which is relevant and does not get repeated in later sets.

Generally, OFCCP is requesting analyses and evaluations and audits of Oracle's compensation as well as derivative documents relating to actions taken in response to those analyses.⁵ In RFP 71, 148, and 174, the request is linked to a regulatory provision. In RFP 150-155, the request is more generally stated but linked to some statement in another part of the record. And in RFP 158-159, OFCCP explicitly seeks material as it relates to communications with outside counsel.

Though the exact constellation of objections shifts slightly, Oracle's responses to RFPs 150-155 are essentially the same. It claims attorney-client privilege and work-product protections but makes reference to prior productions with a general assertion that it will supplement responses if appropriate parameters can be established. For RFPs 158-159, Oracle objected primarily on the grounds of attorney-client privilege. Those objections were also made to RFP 174, as well as a catalogue of more general objections. No privilege log accompanied these requests, though a 74 page privilege log had been produced in October 2017. *See* PX 38.

On May 22, 2019, Oracle produced a "categorical" privilege log. It claims two categories of documents: 1) "Evaluations of Oracles [sic] compensation system related to HQCA employees conducted at the direction of counsel" dated between September 2013 and November 2016; and 2) "Communications with or at the direction of counsel regarding evaluations of Oracle's compensation system related to HQCA employees conducted at the direction of counsel" dated between August 2013 and November 2016. *See* PX 42. OFCCP's motion to compel followed.

The relevance of the documents in question is not seriously at issue. At several points Oracle does gesture at relevance objections, arguing that its compliance with 41 C.F.R. § 60-2.17 is not at issue in this case and is thus not relevant. DO at 1, 10. But as OFCCP properly observes, PR at 5, if this point is taken as a relevance objection to the analyses themselves, it is based on a confusion. Regardless of whether that regulation is relevant, the analyses themselves are quite relevant to claims of compensation discrimination, which very much are at issue in this case. The dispute over production, then, is really about, whether the privilege was properly claimed, whether or not the documents in question are privileged, and, if so, whether that privilege has been waived.

B. Have the Privileges Been Properly Claimed?

There is a preliminary dispute over the manner in which the privileges have been claimed.

⁵ OFCCP explains that it made the requests in various variants because it believed that Oracle was "dodging" the requests. *See* PM at 5. The requests all seek the same sort of thing—internal compensation analyses. Based on the responses at this point, it is manifest that Oracle understands what OFCCP is looking for.

When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial preparation material, the party must: (i) expressly make the claim; and (ii) describe the nature of the documents communications or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

Fed. R. Civ. P. 26(b)(5)(A). Boilerplate objections and blanket claims of privilege are insufficient. Failure to provide a proper assertion of a privilege, for instance via a privilege log, in a timely manner can in certain circumstances lead to waiver of the privilege. *See BNSF v. United States Dist. Court*, 408 F.3d 1142, 1149 (9th Cir. 2005).

Oracle acknowledges that it has prepared compensation analyses responsive to some of the RFPs in question, but maintains that they are privileged. Two privilege logs have been submitted, the 74 page, 649 line October 26, 2017, log and the one page, two line May 22, 2019, “categorical” privilege log. *See* PX 38; PX 42. The parties disputed whether the claim was adequate. PM at 19; PR at 8-9; DO at 9-10. The August 14, 2019, order found that in the context of the pending motion, the categorical log was insufficient to establish the privilege. But it declined to deem the privileges waived. Rather, it required Oracle to submit a document by document privilege log for further review. Oracle’s August 28, 2019, privilege log is 81 pages long, spans August 2013 through December 2016, and contains about 1,787 documents. It lists, “date”, “from”, “to”, “cc”, “bcc”, “privilege type”, “document type”, and “description.” There are no “bcc” entries. *See generally* DPL.

OFCCP argues that this new log is insufficient or otherwise problematic and requests that I order *in camera* review. PPLB at 1, 5. First, it argues that the document summaries on the privilege log are generic and conclusory to the point that they will not assist in the necessary determinations of the purposes of the documents and their privileged status. *Id.* at 1-2. OFCCP further argues that the log contains numerous claims of attorney client privilege over documents where no attorney is involved as a sender or direct recipient—it counts over 700 such documents.⁶ *Id.* at 2-3. As to the work product claims, OFCCP argues that the vague descriptions provided fail to make out any work product protection because they do not reveal the purpose of the documents. It also objects to the use of “and/or” locutions that prevent an understanding of the claim. *Id.* at 3-4. Further, OFCCP argues that the claim must fail because Oracle has not stated that the documents were created in anticipation of litigation, noting that the documents here were created prior to this litigation. *Id.* at 4. It adds for that 149 documents the author isn’t even provided. Finally, OFCCP complains that in the privilege log that Oracle has expanded the privileges being claimed to cover time periods beyond the categorical log and individuals not listed on the categorical log. *Id.* at 4-5.

Oracle gripes at what it deems “nitpicking” by OFCCP about the privilege log. DPLB at 1. It contends that *in camera* review is not necessary. *Id.* at 5. Oracle argues that its descriptions are proper for a privilege log and that it has already provided information about the purposes of these documents. It notes that it linked the documents here to providing advice relating to compensation at Oracle’s headquarters. *Id.* at 1-2. Oracle complains that an earlier privilege log submitted by OFCCP was worse in its listings and descriptions, which it believes should foreclose OFCCP from

⁶ OFCCP’s errata corrected the number of documents in this category.

challenging the adequacy of Oracle's listings.⁷ *Id.* at 2. As to the documents without attorneys listed, Oracle explains that these documents contain initially privileged communications involving attorneys where a response may not have included the attorney as a recipient. It contends such documents remain privileged. *Id.* at 3. In relation to its work product claims, Oracle points to prior evidence that the documents were prepared in anticipation of litigation. *Id.* 3. It further explains that where no author is listed, the documents were locally saved by a member of Oracle's compensation team, not sent or received at that time. *Id.* at 3-4. Finally, Oracle states that in compiling the document-by-document log, it discovered some documents that had been inadvertently omitted from the categorical log, but that are privileged for the same reasons. It argues that since OFCCP has not suffered any prejudice from this inadvertent error, the privilege was not waived. *Id.* at 4.

Some of OFCCP's arguments can be set aside as well. I do not find the inclusion of new dates and individuals problematic. I accept that Oracle made an honest mistake in its categorical log and has remedied it now. I see no prejudice to OFCCP in the limited additions and find no waiver of the privilege by Oracle. Further, the lack of an attorney sender or direct recipient and even the lack of any sender and recipient is not a *per se* insufficiency. Oracle's explanations are sensible and I agree that documents may be privileged even where an attorney was only "cced" or where the attorney's connection is beneath the surface.

But while OFCCP significantly overstates the deficiencies in the privilege log, I agree that it is not ideal. The descriptions could be more specific and less boilerplate. For most of the documents, Oracle claims both attorney-client privilege and work-product protections. By my rough count, approximately 359 of these have an attorney as the sender or a direct recipient. Roughly 876 of these documents do not have an attorney as a sender or direct recipient, but either 1) state in the document description *which* attorney or attorneys were involved; or 2) include an attorney as a "cc" recipient. A few have both. For all of these documents, the attorney *connection* has been given, lending substantive detail indicating that the document may be privileged or protected. *See generally* DPL.

However, for what I counted to be 312 documents, Oracle is making a claim of attorney client privilege and work product protection without any stated connection to a particular attorney. The descriptions for these documents are generalized boilerplate and, in contrast to most of Oracle's entries, do not state in the description which attorney may be connected to the correspondence in some manner—i.e. whose advice or request for information is being forwarded or responded to or who asked that the information be gathered. *If* the documents are in fact privileged, it should have been very easy to provide this information—Oracle did so for most of the documents in the log. Yet it has gone missing here. There is significant variance within the privilege log on this point. For instance, pages 52-53 and 76-77 contain numerous claims of privilege, all of which are connected to a particular attorney or attorneys. DPL at 52-53, 76-77. But pages 4-7, for example, mostly contain entries where there is no explicit connection to a particular attorney, just boilerplate. DPL at 4-7.

In addition, Oracle is claiming work-product protection, but not attorney-client privilege, over roughly 237 documents. But for none of these documents has Oracle provided a connection to an attorney—i.e., which attorney created the document or which attorney requested that the documents be created. For instance, looking just to the first two pages of the log, there are a series

⁷ Oracle's contention that OFCCP's log was worse misses the mark. This motion does not concern OFCCP's privilege log. If Oracle found that log insufficient and wanted to pursue the matter, it could have done so.

of work product claims on December 30, 2014, February 6, 2015, and then March 9, 2015. Later on March 9, 2015, it would appear that this gathered information, likely some sort of compensation analysis, was provided to outside counsel. DPL at 1-2. If this information was created at the direction of counsel, the protection would apply. But it is very difficult to make that determination. There are no communications listed that would seem to request such a log—the closest possible communication is an August 7, 2014, correspondence. *See id.* at 1. But it would be unlikely that counsel would request a compensation analysis and then Oracle would do nothing for months. There are, of course, other ways counsel may have requested that these documents this compensation analysis (or whatever these documents are) to be created. But since Oracle has declined to provide any stated attorney-connection in its description—instead resorting to boilerplate—my evaluation is made more difficult.

The purpose of a privilege log is to put a third party in a situation to evaluate the claim of privilege. Oracle's privilege log assists me in doing so in some ways, but is problematic in others. After review and consideration, I find that the privilege log provides me with enough information to evaluate the particular dispute at issue in this motion—the purpose of the compensation analyses being conducted. Importantly, the background already provided in the briefing fills in some information to complement the boilerplate descriptions. Given the nature of the log, I know that each of these documents has something to do with a compensation analysis. And Oracle has previously stated the purpose of those documents. I agree that repeating that point in each description would not be useful. Timing and patterns are more telling in terms of evaluating why the analyses were done. The privilege log thus adds information that was missing before.

At the same time, while Oracle's privilege log assists in answering some questions, its deficiencies raise others. I am particularly concerned about the documents where there is no connection to any particular attorney—a minority of the documents claimed, but a significant minority. These include the stand-alone work-product protection claims where almost no information is provided. If a document doesn't have a connection to an attorney—e.g. whose communication is being forwarded or responded to, who asked that the document be prepared, etc.—then it is not privileged. Oracle should be able to easily state that connection. Therefore, as part of the order below, Oracle must supplement the privilege log and, in particular, give a concrete attorney connection for the entries in which none is given. Oracle must file its supplemental log. Where no attorney connection can be ascertained, Oracle must produce the documents to OFCCP.

C. *Did Oracle Waive the Privilege by Putting the Compensation Analyses in Dispute?*

Despite the need to supplement, I am able to decide the disputed issues between the parties. I begin with the question of waiver, since if all privileges have been waived as to the documents in question, there is no need to decide if they were previously privileged. Both the attorney-client privilege and work-product protections can be waived. *Hernandez v. Tanninen*, 604 F.3d 1095, 1100 (9th Cir. 2010); *see also Untied States v. Nobles*, 422 U.S. 225, 239 (1975). Voluntary disclosure to third parties generally waives the privilege. *Pac. Pictures*, 679 F.3d at 1126-27. “Disclosing a privileged communication or raising a claim that requires disclosure of a protected communication results in waiver as to all other communications on the same subject.” *Hernandez*, 604 F.3d at 1100 (citing *Nobles*, 422, U.S. at 239-40; *Weil v. Inv./Indicators, Research & Mgmt.*, 647 F.2d 18, 24 (9th Cir. 1981); *Chevron Corp v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992)); *see also Williams & Connolly v. S.E.C.*, 662 F.3d 1240 (D.C. Cir. 2011).

The purpose of the doctrine of waiver “is to protect against the unfairness that would result from a privilege holder selectively disclosing privileged communications to an adversary, revealing those that support the cause while claiming the shelter of the privilege to avoid disclosing those that are less favorable.” *Tennenbaum v. Deloitte & Toche*, 77 F.3d 337, 340-41 (9th Cir. 1996); *see also Bittaker v. Woodford*, 331 F.3d 715, 720 (9th Cir. 2003); *Home Indemnity Co. v. Lane Powell Moss and Miller*, 43 F.3d 1322, 1326 (9th Cir. 1995); *Sedco Int’l S.A. v. Cory*, 683 F.2d 1201, 1206 (8th Cir. 1982). Privileges cannot be used as both a sword and a shield—a litigant may not assert claims, defenses, and arguments that are founded on the communications, but then prevent an opposing party from litigating the issue by preventing anything more than selective, advantageous disclosures. *See Bittaker*, 331 F.3d at 719; *United States v. Amlani*, 169 F.3d 1189, 1194-95 (9th Cir. 1999); *Chevron*, 974 F.2d at 1162.

OFCCP argues that Oracle has put the compensation analyses at issue in its Answer to the SAC and is attempting to use the privilege as a sword and shield. It argues that Oracle both denies the record-keeping and production allegations and asserts attorney-client privilege and work product protection as part of its 25th affirmative defense. Hence, OFCCP claims that Oracle is using privileges to shield the material from view and as a way to affirmatively defend against the allegations, resulting in waiver. PM at 2, 18-19. Oracle replies that it is not claiming that the privileged compensation analyses satisfied the affirmative action plan regulatory requirements and so has not put them at issue in this manner. Rather it represents that it has already “provided the documents underlying that assertion” and has “affirmatively stated that the analyses have nothing to do with its Section 2.17 compliance.” DO at 18-19.

Oracle’s 25th affirmative defense states: “As a separate defense to the Complaint and to each claim for relief therein, Oracle claims both attorney client privilege and the work product privilege for covered documents and records.” DA at 11. OFCCP argues that the affirmative defense relies on the compensation analyses to meet the regulatory requirements and maintains that they are privileged, thus putting them at issue. PR at 5-6. In a note it adds that they have also been put at issue by Oracle’s denial that it has engaged in compensation discrimination against women and minorities. *Id.* at 6 n.10.

This second sort of use might result in waiver in that if Oracle made claims in the litigation explicitly premised on these compensation analyses, it could not simultaneously shield them from discovery. But that is not what has happened here. Oracle simply denied the allegations. It can do that without doing any compensation analysis at all or relying them in any way. Waiver becomes an issue when a party brings an otherwise privilege material into a litigation as the basis for a claim or defense. As long as it keeps the compensation analyses outside of the litigation, there hasn’t been a waiver—it hasn’t contended that a conclusion of some sort should be accepted because of analysis that it at the same time refuses to produce.⁸

⁸ Relatedly, OFCCP at one point makes a brief argument to the effect that the privilege does not shield facts, drawing on an earlier order in this case concerning testimony about OFCCP’s statistical analysis. PR at 10. That order found limited waiver of the privilege based on OFCCP’s affirmative use of the analysis in the litigation. And it allowed questioning of a witness about the factual basis of the analyses. The situation here is different. Oracle has not proffered these compensation analyses as support for anything in this case and so they are not at issue in the same way. Facts are not privileged, but the “facts” here are the data at the base of the analyses. That has been provided in full, either voluntarily or by order.

Oracle has asserted an affirmative defense based on attorney-client privilege and work product protections. But this does not turn on any substantive aspect of the privileged material. The claim is much more categorical—it cannot be accused of violating the record keeping and production provisions because pursuing that question would require it to waive the privileges. Put otherwise, the affirmative defense reflects a very robust *claim* of the privileges, not a waiver of them. Waiver occurs when a party puts the substance of privileged material into play. That isn’t what Oracle is doing in this affirmative defense. However, Oracle’s affirmative defense raises problems but not one of waiver. Instead, it leads to a consistency problem to be addressed below—if the defense is genuinely meant and not boilerplate, it would tend to indicate that the analyses in question *were* produced to comply with the regulations, which would impact whether or not they were ever privileged to begin with (rather than whether any privilege was waived). It also creates questions about the continued viability of this affirmative defense.

D. Attorney-Client Privilege: The Legal Issue

The purpose of the attorney-client privilege “is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (internal citation omitted); *see also Fisher v. United States*, 435 U.S. 391, 403 (1976). The privilege protects both communications by the client providing information to the lawyer for the purpose of receiving professional advice and the giving of professional advice by the lawyer that would reflect on those confidences. *Upjohn*, 559 U.S. at 390. But it only protects communications with a lawyer in his or her capacity as a legal advisor. *See United States v. Chen*, 99 F.3d 1495, 1501-02 (9th Cir. 1996).

The party asserting privilege “has the burden of establishing the relationship and the privileged nature of the communication.” *United States v. Bauer*, 132 F.3d 504, 507 (9th Cir. 1997) (citing *Ralls v. United States*, 52 F.3d 223, 225 (9th Cir. 1995)). It “exists where: ‘(1) [] legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection be waived.’” *United States v. Richey*, 632 F.3d 559, 566 (9th Cir. 2011) (quoting *United States v. Graf*, 610 F.3d 1148, 1156 (9th Cir. 2010)); *see also United States v. Flores*, 628 F.2d 521, 526 (9th Cir. 1980) (collecting cases). “The claim of privilege must be made and sustained on a question-by-question or document-by-document basis” and “[t]he scope of the privilege should be ‘strictly confined within the narrowest possible limits.’” *United States v. Lawless*, 709 F.2d 485, 487 (9th Cir. 1983) (quoting 8 Wigmore, Evidence § 2291); *see also Pac Pictures Corp. v. United States Dist. Court*, 679 F.3d 1121, 1126 (9th Cir. 2012).

OFCCP argues that the compensation analyses in question cannot be privileged because they were completed in order to comply with the regulations and thus were neither completed as part of the process of giving or receiving legal advice and were not communications in confidence. It adds that even if separate communications with counsel about the analyses are privileged, the analyses themselves are not. PM at 14-16. While Oracle does contest some of the details of the cases OFCCP relies upon, *see* DO at 15-18, it does not contest the central point: if the analyses in question were produced to comply with the regulatory requirements, then they would not be subject to claims of attorney-client privilege. Oracle’s opposition, rather, is that the compensation analyses in question were not produced for that purpose and were produced at the direction of counsel separate

and apart from compliance with the Affirmative Action Program (“AAP”) regulations. *See id.* at 13-14. That is *how* Oracle distinguishes the cases OFCCP relies upon. *See id.* at 15-18.

OFCCP, in turn, does not challenge Oracle’s legal argument that if the documents in question were produced at the direction of counsel separate and apart from compliance with the AAP regulations, then they would be privileged (though it may have been waived). Rather, its argument is that this is simply not true—that the compensation analyses in question were conducted pursuant to regulatory mandate and so are not privileged in the way that Oracle argues. *See* PR at 1-4. Thus, the central dispute regarding the applicability of the attorney-client privilege is not legal. The parties do not disagree about the extent of attorney client privilege and how it might apply to various sorts of documents that might have been created. They disagree instead about a basic factual question: why were *these* compensation analyses created?

E. Attorney Work-Product Specific Issues

About 237 documents in the privilege log are subject to only a claim of attorney work-product protection. This protection applies to “documents and tangible things prepared by a party or his representative in anticipation of litigation.” *Admiral Ins. Co. v. U.S. Dist. Ct.*, 881 F.2d 1486, 1494 (9th Cir. 1989); *see also Hickman v. Taylor*, 329 U.S. 495 (1947). “To qualify for work-product protection, documents must: (1) be ‘prepared in anticipation of litigation or for trial’ and (2) be prepared ‘by or for another party or by or for that other party’s representative.’” *United States v. Richey*, 632 F.3d 559, 567 (9th Cir. 2011) (quoting *In re Grand Jury Subpoena, Mark Torf/Torf Envtl. Mgmt. (Torf)*, 357 F.3d 900, 907 (9th Cir. 2003)). In determining whether the document was prepared for the purposes of litigation, courts look to the context surrounding the creation and ask if its preparation was “because of” the litigation or its prospect. *Torf*, 357 F.3d at 907. The protection applies to material prepared by attorneys as well as agents of attorneys, such as investigators. *Id.* (citing *United States v. Nobles*, 422 U.S. 225, 239 (1975)). Generally, attorney work-product prepared in anticipation for litigation or trial is not subject discovery, but may be discoverable if it is otherwise discoverable and the party seeking discovery “shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.” Fed. R. Civ. P. 26(b)(3)(A).

The documents in the privilege log that are subject to work-product-only claims do not provide an attorney author or recipient and often do not list any author or recipient at all. *See* DPL. OFCCP argues that this is deficient and undermines that claim to work-product protection. PPLB at 4. As discussed above, I accept Oracle’s explanations for how the documents might be subject to protection. *See* DPLB at 3-4. Work product protection includes documents created at the direction of counsel. However, the information provided is deficient because it does not sufficiently identify the attorney connection to the document. As stated above, Oracle must provide that connection in an updated log, or produce the documents.

OFCCP also argues that the work protection claims fail because the protection only applies to documents made in anticipation of litigation, but the documents identified here preceded the litigation. *E.g.* PPLB at 4. Oracle responds that it has produced evidence that they were prepared in anticipation of the litigation in this case, even though it hadn’t formally begun. DPLB at 3; *see also* DO at 13. As discussed in prior orders, the compensation review in this case was contentious. Work product protection applies to documents prepared in *anticipation* of litigation or with the *prospect* of litigation in view, not just to those prepared in the litigation itself. Here, I accept Oracle’s

representations that during the course of the compliance review it was anticipating that the matter would continue to litigation and would prudently begin to prepare for the eventuality. The timing of the documents at issue, then, does not defeat a claim of work product protection.

The central dispute as to the attorney work product claims is identical to the dispute regarding the claims of attorney-client privilege. OFCCP contends that the compensation analyses in question were prepared, at least in part to comply with the regulations. PM at 13-14. Oracle contends that this is not so and that the material in question was produced for other purposes—at the direction of attorneys in anticipation of litigation. DO at 13-15. This is not a legal dispute. Based on the briefing, Oracle agrees that if the documents were prepared, at least in part, to fulfill Oracle’s obligations under the regulations, they could not be protected by the work product doctrine. And OFCCP does not contest the claim that if the documents were prepared in preparation for this litigation but not as a way to fulfill the regulatory requirements, they could be protected. The determination, then, turns on the same factual question that the attorney-claim privilege claims lead to.

Work product protection, in contrast to attorney-client privilege, is qualified—that is, it is defeasible where the requesting party shows substantial need for the information in the documents and undue hardship in procuring that information on its own. *See* Fed. R. Civ. P. 26(b)(3)(A). OFCCP has substantial need for some sort of compensation analyses—that is what the case is about—but it does not have a need for *Oracle’s* compensation analyses. In addition, OFCCP cannot show (and does not attempt to argue) undue hardship. OFCCP has been provided with all of the underlying data and is able to conduct any number of its own compensation analyses. It has done so. The dispute, then, turns solely on the factual question about the purpose of the compensation analyses contained and discussed in the documents at issue.

F. The Factual Issue: What Were the Purposes of the Compensation Analyses?

The compensation analyses and related documents subject to the various RFPs are not privileged if they were prepared as part of Oracle’s compliance with the regulations implementing EO 11246. But they are privileged if they were prepared at the direction of an attorney or concern communications with an attorney for the purposes of obtaining legal advice outside of Oracle’s compliance with the regulations. Answering the factual question about the purpose of the log will thus determine whether (and what) Oracle should be compelled to produce responsive documents.

Oracle is the party claiming the privilege and so bears the burden of establishing the claim. The declaration of Gary Siniscalco—outside counsel for Oracle—is submitted for that purpose. He has advised and represented Oracle on employment discrimination issues since 1990 and has been involved in 40 OFCCP compliance reviews since 2013. GD at ¶¶ 1, 3-4. Mr. Siniscalco states that

for many reasons, in addition to Oracle’s own non-discrimination policies, assessing compliance and legal risks is good corporate governance and human resource policy. In addition, Oracle[,] like other companies, regularly seeks advice and assistance from legal counsel to analyze employment decisions, policies and practices. Therefore, some pay equity analyses may be done internally as part of HR/compliance oversight.

Id. at ¶ 5. Mr. Siniscalco further declares that

All of the pay equity analyses sought by OFCCP's Motion were done at my direction for the purpose of offering legal advice to Oracle. These analyses were also done for the purposes of providing advice in matters that could lead to litigation. They were always intended to remain confidential and not be disseminated beyond Ms. Holman-Harries' team and Oracle's outside counsel, including myself.

Id. at ¶ 6. Additionally, “[n]one of the pay equity analyses that OFCCP seeks were conducted for the purpose of complying with 41 CFR 60-2.17.” *Id.* at ¶ 8.

If this is all true, then the responsive documents would be privileged (subject to any waiver). OFCCP doesn't challenge that conclusion—rather, and to put the point bluntly, it contends that what Mr. Siniscalco has declared is just not true and that documents must therefore be produced.

OFCCP's central line of argument is that the analyses in question are a regulatory requirement and so Oracle performed them to fulfill a regulatory requirement. *E.g.* PM at 1-2. This does not strictly follow. Even if the regulations require the analyses, Oracle may have failed to comply with the regulations. I understand OFCCP's point to be that Oracle's real purpose in conducting the analyses can be inferred from the regulatory context: if the regulations very plainly require taking an action and a party subject to the regulations took that action, it is reasonable to conclude that the party took the action *because of* the regulations, and not for some ancillary, unrelated reason.

The relevant regulation is at 41 C.F.R. § 60-2.17. Sub-section (b) requires a contractor to perform “in-depth analyses of its total employment process to determine whether and where impediments to equal employment opportunity exist.” This includes evaluation of whether there are problems in utilization/distribution within the contractor, selection disparities in personnel activities, “[c]ompensation system(s) to determine whether there are gender-, race- or ethnicity-based disparities,” and selection, recruitment, and referral procedures. 41 C.F.R. § 60-2.17(b)(1)-(4). Contractors are also required to develop and implement “action-oriented programs” and an internal auditing system. 41 C.F.R. § 60-2.17(c)-(d). And as OFCCP points out, PM at 8, contractors must document their compliance with the regulations and make that documentation available to OFCCP. 41 C.F.R. § 60-2.10(c).

While I can understand why OFCCP would conclude that any “compensation analysis” would be meant to satisfy 41 C.F.R. § 60-2.17(b)(3), the regulation is not precise as to what form the evaluation of compensation must take such that I am compelled to infer that any compensation analysis that a contractor completes is meant to comply with the regulation. A contractor might have adopted a good faith reading that pointed to another sort of evaluation as sufficient to comply. This is not to say that whatever Oracle says that it did to comply with the regulations was proper and actually *did* comply with the regulations—it could turn out that a detailed compensation analysis *is* required to comply and that Oracle failed to comply. Rather, the point here is that the regulations are not so crystal clear and precise that OFCCP's desired inference follows and *any* compensation analysis *must* have been done to comply.

OFCCP offers more—it claims that there is evidence of Oracle's intentions that favor its position. OFCCP argues that Oracle has acknowledged that the compensation analyses in question were produced to comply with the regulations. PM at 10-12. Oracle responds that OFCCP's arguments conflate the distinction at issue and that in fact the record consistently indicates that

Oracle has not deemed the compensation analyses as part of its regulatory compliance. DO at 10-13. OFCCP points to interview notes, seemingly from a different compliance review of a different facility in which Lisa Gordon and Shauna Holman-Harris acknowledged that Oracle conducts compensation self-audits and equity studies. *See* PX 13 at 14. The notes, however, do not state *why* the studies are done. Rather, they would indicate that the employees being interviewed believed that the studies were subject to attorney-client privilege and that they were not done on a regular basis. If anything, this would tend to support Oracle's claims that these studies were not done to satisfy a regulatory requirement—if they were so meant, they would most likely be done on a regular, recurring basis.

OFCCP also points to an email from Ms. Holman-Harris on June 2, 2015, in which she stated that “[w]ith regard to pay audits to assess legal compliance with Oracle’s non-discrimination obligations and to further ensure Oracle’s compensation policies and practices are carried out, those are conducted by our outside EEO compliance counsel at Orrick.” PX 9 at 1. In its reply, OFCCP stresses that the email generally related to compliance with the regulations. PR at 4. Though the email does link the analyses to compliance, it does not do so in the way that OFCCP suggests. The statement is *not* that the audits or analyses are done to secure compliance with Oracle’s affirmative action plan obligations, it is to assess compliance with the non-discrimination obligations. The two are not the same. A contractor may well do more than it thinks is required under the affirmative action plan regulations to assess compliance with non-discrimination and other regulations. At best, the email is ambiguous on the point.

OFCCP stresses an apparent admission by Ms. Holman-Harries at her deposition that her team conducted compensation analysis. Ms. Holman-Harries did acknowledge that her team had completed “audit reports” but “only” at the request of outside counsel and to be provided to outside counsel. She understood those compliance studies to be subject to privilege. In fact, the point was pursued repeatedly with Ms. Holman-Harries and she consistently maintained that the purpose of the any audits or analyses was to provide to Oracle’s attorneys, not comply with the affirmative action regulations. PX 2 at 107-10. Hence, OFCCP’s argument here begs the question. It makes much of the apparent admission that some analysis or audit was done. But Oracle hasn’t denied this and an “admission” in a deposition to that effect is inconsequential. Oracle denied that responsive analyses were done *for the purpose of complying with the regulations*—which is how the early RFPs and some of the later RFPs were worded. Admitting that studies were done for *other* purposes doesn’t create a contradiction. Moreover, it does not assist OFCCP’s claims here because it does not support—and in fact contradicts—the assertion that these studies were done in order to comply with the regulations and so cannot be privileged.

In subsequent testimony also cited by OFCCP, Ms. Holman-Harries seemed to point to other sorts of analyses that would be conducted at a lower level in order to comply with the regulations.⁹ But she consistently maintained in the face of repeated questioning that analyses that her team did were done not to comply with the regulations, but at the request of the attorneys. PX 2 at 114-117; *see also id.* at 97-100; DX B at 280-81. At the deposition, counsel for OFCCP repeatedly circled back to the point and continued to question Ms. Holman-Harries despite objections on the grounds of privilege, statements by the witness that the matter was privileged, and instructions from Oracle’s counsel not to answer. Ms. Holman-Harries was steadfast, even when

⁹ OFCCP represents that it isn’t interested in any low-level studies in this motion. PM at 10 n.4.

OFCCP's counsel attempted to force her to justify the claim of privilege as part of the deposition. PX 2 at 175-77.

Having reviewed the material that OFCCP points to, I find it more supportive of Oracle's contention—whatever “high-level” pay analyses were completed were not done to comply with any regulations but because Oracle's attorneys asked for information/analyses in the course of representing and advising Oracle. That is the substance of Ms. Holman-Harries statements from the compliance review through the deposition earlier this year. Later OFCCP contends that Ms. Holman Harries conducted some analyses and only later provided to the attorneys. PM at 16. I have read and re-read the portion of the deposition in question. *See* PX 2 at 107-09. I do not see that implication, unless the point is only that the attorneys asked them to complete an analysis, they did so, and then they sent it to the attorneys (which would not impugn any claim of privilege). Through this and other testimony, Ms. Holman-Harries was adamant that any studies her team completed were done for the attorneys, not for affirmative action plan regulatory compliance. OFCCP may conclude that this means that Oracle did not comply with the affirmative action plan regulations. But this motion does not turn on compliance questions. Oracle disagrees on the legal question as to what compliance requires. *E.g.* DO at 13-15. Though Oracle may be wrong, the question in this motion turns on Oracle's purposes.

Oracle's contention is further supported by the consistency of its position in this case and the *Jewett* matter. It has submitted exhibits showing that when the private plaintiff's sought this same information, it claimed privilege on the same grounds. *See* DX A; DX C at 5-6; DX D at 5-6; DX E at 2-3. OFCCP's position is that this is not genuine and that could be right—Oracle may have consistently misrepresented the purpose of these analyses. Consistency is not dispositive, but it is indicative. OFCCP's arguments for inconsistency in this action are unconvincing because they rely on different requests and questions and ignore the distinction Oracle has consistently maintained—it did prepare compensation analyses but did not prepare any compensation analyses to comply with the regulations. There is no contradiction here.

Even so, if there was no other good reason to produce the sorts of analyses in question, one might reasonably infer with OFCCP that they were done to comply with the regulations and so are not privileged. Pointing to the Siniscalco declaration, Oracle offers alternative explanations for the compensation analyses in question, including assessing its compliance and legal risks and for its own analysis of employment matters for oversight purposes. DO at 5, 13-14; SD at ¶ 5. OFCCP responds that the compensation analyses were required and that it “strains credulity” to think that the only compensation analyses that Oracle performed were done separate and apart from those requirements and that Oracle's claim is “incredible.” PR at 1-2, 6. But this is little more than argument by repetition. The regulations OFCCP relies on are not as clear as it wishes and the evidence of Oracle's purposes it points to is taken out of context and when read as a whole, supports Oracle's position.

As far as the “stand to reason” type of argument that there would be no other reason to complete a compensation analysis, I see ample reasons for any federal contractor to conduct privileged analyses. OFCCP's approach in the compliance review from the perspective of a federal contractor was discussed fully in the May 23, 2019, Order Denying OFCCP's Motion for Partial Summary Decision on Oracle's Affirmative Defenses Re: Conciliation. Based on its conduct, from the perspective of a contractor, OFCCP was not interested in working cooperatively to eliminate discrimination or sharing the information it has gathered. Any of OFCCP's compensation analyses,

conclusions, and rationales were kept as closely guarded secrets. From Oracle's perspective, OFCCP demanded that it produce rebuttal compensation analyses as a condition for even engaging in a dialogue about OFCCP's accusations and learning anything about their basis. I do not understand how OFCCP could have made such a demand in the compliance review and yet now deem it incredible to think that a contractor might create private, internal, and privileged analyses separate and apart from whatever it believes the regulations require. Given OFCCP's practice, a contractor might well need such analyses ready to hand so that it could understand what OFCCP might have concluded (and why) and have the sorts of information ready to engage in conciliation. The pertinent question in this motion is why Oracle prepared these analyses when it did. So it is Oracle's perspective that matters. Given that perspective and the long history of this matter, it is entirely reasonable that Oracle would do its own in-house compensation analyses in an attempt to understand what OFCCP might be up to and to redress compliance problems.

OFCCP's best evidence comes from Oracle's discovery responses and pleadings. In its initial response to RFP 71, Oracle objected on the grounds of attorney-client privilege. PX 17 at 54. That RFP specifically sought analyses completed to comply with the regulations. PX 16 at 16. After Judge Larsen indicated that he would overrule the objection, Oracle revised its response to add that there were no responsive documents. PX 22 at 1-2. But if there were no responsive documents, why didn't Oracle just say that to begin with? Why make an attorney-client privilege/work product objection? Communications that were never made are not protected by attorney-client privilege and work product protections do not extend to work that was never done.

Affirmative defense #25, which OFCCP argued represented waiver, presents the same issue. Oracle is claiming that the allegations must fail because material is protected by attorney-client privilege and work product protections. That makes no sense when taken as a defense to the compensation (and now-settled hiring) allegations. So it must relate to the record-keeping-related allegations. These allegations look to compliance with the regulations. If the responsive documents were in fact *not* created as part of compliance with the regulations, why did Oracle plead an affirmative defense that seems to implicate them in just that? Affirmative defense #25 doesn't waive the privilege, but it suggests that there was no privilege to begin with because the documents *do* represent efforts at regulatory compliance, something Oracle now recognizes would render them un-privileged.

The document-by-document privilege log can shed light on the situation in that it might indicate whether there was a regular pattern indicative of complying with regulations. I detect no such pattern. The privilege log is 81 pages, contains 1787 entries, and covers a period stretching from August 2013 through December 2016. DPL at 1, 81. Yet the first page alone covers the time period from August 2013 to March 2015—roughly a year and a half. *Id.* at 1. The first materials that look like they might be the nuts and bolts of a compensation analysis come in March 2015. *Id.* at 1-2. This is not suggestive of regulatory compliance. There is far too long a period in which Oracle was not doing the sort of work one would expect if it was trying to comply with regulations by completing compensation analyses. The rest of the log favors the same conclusion. There are periods where there are significant amount of responsive documents, but given the lack of regularity and the increases in documents as the prospect of litigation became more likely, Oracle's activity does not lead me to believe that it was attempting to comply with regulations. As a whole, it favors Oracle's rather than OFCCP's explanation.

The evidence that favors a conclusion that the responsive analyses were done to comply with the regulations is the initial response to RFP 71 and affirmative defense #25. But while suggestive, these are limited indications. If there were no responsive documents, the initial response and objection to RFP 71 was frivolous and obstructionist, but it is not unheard of that lawyers will make frivolous and obstructionist discovery responses in contentious cases. When Judge Larsen ruled on Oracle's objections to RFP 71, he found that this is what was going on. Once the objection was overruled, Oracle responded that there were no such documents—what it should have said to begin with. The discovery practice is frustrating and disappointing, but I am hesitant to attach any serious weight to what could be inferred from one in a series of boilerplate objections made in an obstructionist matter.

As to affirmative defense #25, it appears on a laundry list of affirmative defenses many of which could use some explaining. This appears to be another questionable tactic—multiply the issues in the hopes to benefit from the chaos and that maybe something will stick. Ironically, such a laundry list approach endangers a legitimate claim of privilege. On the balance, I find that affirmative defense #25 does not overcome the contrary evidence and point to a non-privilege purpose for the compensation analyses. The actual evidence presented favors the conclusion that these analyses were not part of Oracle's compliance. The timeline evident in the privilege log that correlates with reasonable anticipation of litigation as well as the point that counsel for Oracle had good reason to have such analyses done separate and apart from compliance settles the issue. I thus conclude that Oracle has established that the compensation analyses in question and the related documents were not created in order to comply with the affirmative action plan regulations, but were instead created at the direction of counsel for the purposes of assessing compliance and risk and providing legal advice in preparation for litigation. They are thus subject to attorney-client privilege and work-product protection.

G. Conclusion

However, given the above, it appears to me that Oracle's 25th affirmative defense should be stricken on the grounds both that Oracle has abandoned it in its positions in discovery and that it must fail as a matter of law. Oracle does not contest here that documentation of its regulatory compliance is not privileged. How then can it maintain that attorney-client privilege and work-product protections as an affirmative defense? If Oracle is going to maintain that some documents meet the regulatory requirements, it needs to produce those documents in discovery. In addition, if Oracle is going to maintain its 25th affirmative defense, it must explain what it is supposed to mean and how it is not inconsistent with its other positions. This affirmative defense appears to be simple boilerplate, much like the attorney-client privilege objections to RFP 71 when, as it turned out, there were no responsive documents.

In addition, though I sustain Oracle's claims of privilege as to the documents in question, this is contingent on Oracle's production of a supplemental privilege log that identifies particular attorney involvement with each document over which it is claiming a privilege or work product protection. Most of the entries are sufficient on this point, but many are not. The conspicuous absence of any detail in those entries raises a legitimate question as to whether the document is privileged at all. Oracle must supplement the log or produce the documents.

Further, Oracle must now be very clear about *how* it complied with the regulations at 41 C.F.R. § 60-2.17(b)(3). It has been consistent that the compensation analyses were not done for that

purpose and I have accepted that claim here. But it has been rather less helpful in stating what it contends is sufficient to comply with the requirement and what it did do to comply with the requirement. Hence, pursuant to 41 C.F.R. § 60-30.15(b), Oracle is required to state its position as to what is required to comply with 41 C.F.R. § 60.2.17(b)(3) and what it did to comply.

Last, though I sustain Oracle's claims of privilege and work product protection, I will grant OFCCP's motion to compel in part as to the RFPs that are particularly tied to the regulations: 71, 148, and 174. Though Oracle's position in the briefing here has been clarified, the discovery responses themselves are somewhat cluttered with boilerplate objections and protestations that have no merit. It is also unclear whether Oracle has issued a plain discovery response as to RFP 71. Judge Larsen overruled the attorney-client privilege objections in 2017, but the supplemental response came before that order and retained the objection. OFCCP should be able to rely on a straightforward response.

While I find that Oracle can validly claim attorney-client privilege over compensation analyses that were conducted at the direction of counsel for the purposes of assessing compliance and risk, it may not validly claim attorney-client privilege over any document that reflects its regulatory compliance. So if Oracle maintains that any of these compensation analyses are separate and apart from its compliance with the affirmative action regulations, it will be bound by that and will be estopped in the future from arguing that its performance of these analyses satisfied those requirements. While I have not found OFCCP's arguments as to the purpose of these analyses persuasive, I share OFCCP's conclusion that Oracle cannot have it both ways.

In sum, OFCCP's motion is granted as to RFPs 71, 148, and 174, each of which is tethered to the regulations in question. Oracle cannot maintain a claim of privilege to shield the steps it took to comply with the regulations. OFCCP's motion is otherwise denied. Oracle is ordered to supplement its privilege log to include particular connections to an attorney in each entry—or produce the responsive documents. Oracle must state a position as to its compliance with 41 C.F.R. § 60-2.17(b)(3). Finally, Oracle is ordered to show cause why its 25th affirmative defense should not be stricken. All production and responsive filings must be made within 14 days of this order.

ORDER

1. OFCCP's Motion to Compel Oracle's Compensation Analyses is granted in part and denied in part.
2. Oracle's claims of attorney-client privilege and work-product protection are generally sustained.
3. OFCCP's Motion to Compel Oracle's Compensation Analyses is granted as to RFPs 71, 148, and 174, which are written to link responsive documents to regulatory requirements.
4. OFCCP's Motion to Compel Oracle's Compensation Analyses is otherwise denied.
5. OFCCP's request to recall Ms. Holman-Harris for questioning is denied.

6. Oracle must supplement its document-by-document privilege log by providing the particular attorney connection for each document in which none has been provided. These include work product only claims justified only with boilerplate and other entries where the sender, recipient, and cc does not contain an attorney and the description does not explain the attorney involvement.
7. Oracle must state a position as to what it contends 41 C.F.R. § 60-2.17(b)(3) requires and how it met that requirements. This statement of position may not exceed 10 pages.
8. Oracle must show cause as to why its 25th affirmative defense should not be stricken. Oracle's response is limited to 10 pages.
9. All supplemental productions, responses, and filings must be made within 14 days of this order.
10. If Oracle opposes striking its 25th affirmative defense, OFCCP may file a responsive brief not to exceed 10 pages within 7 days of Oracle's filing.

SO ORDERED.

RICHARD M. CLARK
Administrative Law Judge