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September 13, 2017

VIA EMAIL TO OFCCP_NO_FOIA@DOL.GOV and FEDEX

FOIA Coordinator
Office of Federal Contract Compliance Programs
U.S. Department of Labor
200 Constitution Avenue, NW, Room C3325
Washington, DC 20210

**Re: **Objection on Behalf of Oracle Corporation to Disclosure Pursuant to
Freedom of Information Act Request No. 838133****

Dear Sir/Madam:

This letter responds to the letter of D. Lissette Geán, Special Assistant, Office of Federal Contract Compliance Programs (“OFCCP”), U.S. Department of Labor, to Dorian Daley, General Counsel, Senior Vice President and Secretary, Oracle Corporation, (“Oracle”) dated August 17, 2017. I am responding on behalf of Oracle.

D. Lissette Geán’s letter informed Oracle that OFCCP received a request under the Freedom of Information Act (“FOIA”) from Mr. Will Evans of The Center for Investigative Reporting for Equal Employment Opportunity Employer Information Reports (“EEO-1 Reports”) submitted by Oracle for the years 2015 and 2016 (“Requested Information”). Although OFCCP has not provided Oracle with a copy of the information it proposes to release pursuant to Mr. Evans’ request, Oracle understands the Requested Information consists of all EEO-1 consolidated, headquarters, and establishment reports submitted by Oracle for 2015 and 2016 (“2015 and 2016 EEO-1 Reports”). We understand that OFCCP is not planning to release any other reports.



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This submission is timely given that Oracle received D. Lissette Geán's letter on August 25, 2017, and was given 30 days from receipt of the letter to submit an objection.

Oracle objects to release of the Requested Information. The Requested Information falls within the exemption set forth at FOIA section 552(b)(6), which protects certain privacy interests of third parties and within the exemption set forth at FOIA section 552(b)(4), which protects trade secrets and confidential commercial information on the grounds that release of such information could reasonably be expected to cause substantial competitive harm. As you may recall, Oracle successfully objected to: 1) a FOIA request made in 2008 seeking disclosure of full copies of the EEO-1 reports submitted by Oracle for the years 2000 to 2005, 2) a FOIA request made in 2013 seeking disclosure of full copies of the EEO-1 reports submitted by Oracle for the years 2011 and 2012, 3) a FOIA request made in 2013 seeking disclosure of EEO-1 reports regarding total female employees by job category and total employees by job category as reported by Oracle for the years 2005, 2009 and 2010 or any of these years during which Oracle self-identified as a federal contractor; 4) a FOIA request made in 2014 seeking disclosure of full copies of the EEO-1 reports submitted by Oracle for the years 2007 and 2012; 5) a FOIA request made in 2015 seeking full disclosure of the EEO-1 reports submitted by Oracle in 2012; 6) a FOIA request made in 2015 seeking full disclosure of EEO-1 reports submitted by Oracle in 2004, 2009, 2012 and 2013, and 7) a FOIA request made in 2017 seeking full disclosure of EEO-1 reports submitted by Oracle from 2004-2015.¹

¹ Letter from Al Laich, Director, Division of Management and Administrative Programs, U.S. Department of Labor, to Gary R. Siniscalco of Orrick, Herrington & Sutcliffe, LLP (Feb. 12, 2008) concurring with Oracle's position that EEO-1 summary data are exempt from mandatory disclosure pursuant to Exemption 4 and Exemption 6 of the FOIA; Email from Forrest Horak, Program Analyst, OFCCP, U.S. Department of Labor, to Elizabeth Zane of Orrick, Herrington & Sutcliffe LLP (August 20, 2013) concurring with Oracle's position that EEO-1 summary data are exempt from mandatory disclosure pursuant to Exemption 4 of the FOIA; Email from Forrest Horak, Program Analyst, OFCCP, U.S. Department of Labor, to Elizabeth Zane of Orrick, Herrington & Sutcliffe LLP (August 20, 2013) concurring with Oracle's position that EEO-1 summary data are exempt from mandatory disclosure pursuant to Exemption 4 of the FOIA; Email from Herman Narcho, National Office FOIA Coordinator, OFCCP, U.S. Department of Labor, to Elizabeth Zane of Orrick, Herrington & Sutcliffe LLP (March 4, 2015) confirming that based on Oracle's objections, OFCCP withheld the requested data; Email from Herman Narcho, Branch Chief, Enforcement, OFCCP, U.S. Department of Labor to Elizabeth Zane of Orrick, Herrington & Sutcliffe LLP (August 3, 2015) confirming that based on Oracle's objections OFCCP withheld the requested data; Email from Herman Narcho, Branch Chief, Enforcement, OFCCP, U.S. Department of Labor to Elizabeth Zane of Orrick, Herrington & Sutcliffe LLP (August 3, 2015) confirming that based on Oracle's objections OFCCP withheld the requested data; Letter from OFCCP to Oracle confirming that based on Oracle's objections OFCCP withheld the requested data (April 2017).



A. Given Personal Privacy Interests, Section 552(b)(6) Bars Release of the Requested Information

Oracle objects to release of the Requested Information because its release “would constitute a clearly unwarranted invasion of personal privacy” under the Section 552(b)(6) exemption to the FOIA. In order for this exemption to protect against disclosure, the information proposed to be released must fall within the category of “personnel and medical files and similar files.” 5 U.S.C. § 552(b)(6) (emphasis added). The Supreme Court has held that this term must be interpreted broadly, confirming that protection of an individual’s privacy “surely was not intended to turn upon the label of the file which contains the damaging information.” *United States Department of State v. Washington Post Co.*, 456 U.S. 595, 601 (1982) (citing H.R. Rep. No. 89-1497, at 11 (1966)). Thus, this threshold is met if the information applies to any particular, identifiable individual. *Id.* at 602.

The Requested Information reveals the identity and self-reported race and gender of specific individuals. Certain job categories have few employees of the specified gender and races. Where numbers in the categories are in the single digits, individuals may be discernible since Oracle is such a highly visible employer in a very competitive industry. Where there is only one person in a given category, especially if the individual is an Executive/Senior Level Official or Manager, it is very easy to deduce the person’s identity.

Oracle’s 2015 and 2016 EEO-1 headquarters reports contain categories with employees in the single digits as do Oracle’s 2015 and 2016 EEO-1 consolidated reports. For example, the 2016 headquarters report indicates that there were two Hispanic or Latino males and one Asian female in the Executive/Senior Level Official or Managers category, one Native Hawaiian or other Pacific Islander male in the First/Mid Level Officials and Managers category, four Black males in the Administrative Support Workers category, and three Black males and one Black female in the Technicians category. The 2015 consolidated report indicates that there are two Black males in the Executive/Senior Level Official or Managers category, one Native Hawaiian or Pacific Islander female and five Hispanic females in the Technician category, and one American Indian or Alaskan Native in the Administrative Support category. The identities of these individuals can be easily discovered, particularly in categories containing only one person of a gender identified as a certain race. The establishment reports make it even easier to identify individuals as many categories in the reports contain only one person. Since the race and gender data in the 2015 and 2016 EEO-1 Reports facilitate identification of specific individuals, the privacy interests of these individuals must be protected through nondisclosure.

The self-reported race and gender information contained in the 2015 and 2016 EEO-1 Reports implicates personal privacy interests, and an individual’s control of such personal



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information concerning his or her person must be respected. First, the data are self-reported. Therefore, the racial and gender data do not merely reflect biological categories that are known to the public; the data in these reports reveal a person's self-identification with a particular racial, ethnic, or gender group. Self-identification with racial, ethnic, or gender categories is an extremely personal and private matter. Information regarding a person's self-identification is not public information, and may be something that identifiable individuals do not wish to share with the public.

It is not relevant that Oracle's employees voluntarily self-identified with a particular racial, ethnic, or gender category. The government has explicitly promised in many sources that the information reported in EEO-1 forms will be kept confidential and that individuals will not be identified.² Individuals who may have otherwise refused to disclose the racial or ethnic group with which they self-identify may have identified themselves under this promise of confidentiality.

Finally, this FOIA request seeks information on employees who may reside in states that have unique personal protections under their privacy laws.³ In California, for example, such information is protected by the privacy rights guaranteed by article I, section 1 of the California Constitution. Oracle and the United States Government have a duty to protect from release to the general public confidential information obtained from Oracle's employees. To the extent that information appearing in the 2015 and 2016 EEO-1 Reports is linked to specific, identifiable individuals, Oracle believes that it must not be disclosed to members of the public. This California privacy right, similar to the privacy rights in other states, is consistent with the FOIA section 552(b)(6) exemption, and disclosure of the Requested Information would clearly be an unwarranted invasion of personal privacy under the exemption and the California Constitution.

Because Oracle's employees disclosed private information while relying on the government's assurances of confidentiality, the OFCCP should be extra cautious when deciding whether to disclose these records containing this personal private information. An explicit privacy guarantee under the California Constitution and other, similar, state statutes shows that California

² *E.g.*, Instruction Booklet for the EEO-1 Employer Information Report, *available at* <http://www.eeoc.gov/employers/eo1survey/2007instructions.cfm> ("When reported, data will not identify any specific individual.").

³ Some states that enforce personal privacy protections are: Arizona, A.R.S. Const. Art. 2 § 8 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law"); Florida, F.S.A. Const. Art. 1 § 23 ("Every natural person has the right to be let alone and free from governmental intrusion into the person's private life. . ."); Illinois, ILCS Const. Art. 1, §§ 6, 12; Washington, RCWA Const. Art. 1, § 7 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law").



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employees enjoy an enhanced privacy interest in the kind of information at issue that cannot be overcome by the ordinary interest in disclosure established by the FOIA.

For all the foregoing reasons, Oracle requests that the OFCCP protect the personal privacy interests of Oracle employees by withholding the Requested Information from disclosure.

B. Requested Information Constitutes Trade Secrets under Section 552(b)(4)

The Requested Information encompasses data on the size and structure of Oracle's workforce. Competitors could use the Requested Information in conjunction with industry knowledge to gain substantial insight into the organizational structure of Oracle's workforce. In addition, the Requested Information would, as discussed above, facilitate identification of key minority or female employees. These pieces of information are trade secrets under the section 552(b)(4) exemption to the FOIA.

Oracle understands that the Requested Information includes limited information regarding its workforce, but believes that because of the size, constituency and competitive nature of its market and the constituency of its own workforce, there is a very real threat to its competitive position.

Oracle is a highly visible technology company in the very competitive computer hardware and software industries. These industries are constantly and quickly evolving, and the competition among the companies is fierce. For example, in 2014, Oracle and competitor SAP reached a \$356.7 million settlement based on findings that SAP was pirating Oracle's software and reselling it in the marketplace.⁴

The organizational structure of Oracle's workforce is a private, commercially valuable plan for Oracle. The way that Oracle organizes its workforce is a direct result of its substantial effort and innovation in devising ways to make the company run effectively with the changing times. The Requested Information conveys more than just the number of employees in each job category; it communicates Oracle's experience and expertise in the field of how to structure the workforce to have a well-run, profitable, and efficient company.

The Requested Information provides a detailed breakdown of how Oracle stratifies its workforce. It provides commercially valuable information such as how many support staff are required for Oracle to efficiently function, how many employees Oracle needs to effectively sell its products, and how many top level managers are required to oversee Oracle's business functions.

⁴ See Jim Finkle and Dan Levine, *Oracle, SAP Settle Long-Running TomorrowNow Lawsuit*, Reuters (Nov. 13, 2014) available at <http://www.reuters.com/article/2014/11/13/us-oracle-sap-se-settlement-idUSKCN0IX2RJ20141113>.



In addition, even though the Requested Information contains general job categories, specific job titles of Oracle's employees can potentially be deduced with the aid of the EEO-1 Job Classification Guide, which lists job titles that belong in each of the general job categories. With this guide, Oracle's competitors can easily consider the job titles in the context of the software and hardware industries and gain an even more detailed picture concerning the current composition of Oracle's workforce. If competitors can see how Oracle stratifies its workforce, it will cause competitive harm by providing insight into Oracle's successful workforce strategy. Because release of this information would allow competitors to deduce various aspects of Oracle's business strategy, it is critical to Oracle that its trade secrets be protected.

Allowing Oracle's competitors to grow and restructure with the help of the Requested Information would give them a competitive advantage. The release of private commercial information which sheds light on Oracle's workforce and business practices would allow Oracle's competitors to use that information without incurring any of the costs that Oracle bore in developing such practices. And because these industries are quickly evolving, any advantage that Oracle's competitors gain can potentially have an extremely large effect in the competitive positions of industry peers. Since the computer software industry is intensely competitive, any advantage Oracle's competitors gain may have a very significant and detrimental impact on Oracle's business.

In addition, the Requested Information, if obtained by one of Oracle's competitors, can enable that firm to identify key minority or female employees who now work at Oracle and solicit these employees for employment. This is especially true in job categories in which there are few employees of a specified race and gender. Because a high proportion of Oracle's employees are highly trained and skilled professionals, officials and managers, this could put Oracle at precisely the kind of competitive disadvantage contemplated by exemption 552(b)(4) to the FOIA.

For positions for which Oracle has a large number of minority or female employees, the information would be helpful to competitors because they will know which areas they can specifically target to recruit talented minority or female employees with that particular skill set. If information that could lead to the identification and raiding of minority or female employees is released, and such a raid does occur, Oracle will suffer substantial competitive injury. Maintaining a diverse workforce is not only important to Oracle, which has made significant efforts to recruit and retain talented minority and female employees, but also to many of Oracle's clients and business associates. Losing highly talented diverse staff would be a costly and huge competitive disadvantage to Oracle. This result is very likely given the level of talent of Oracle's employees and the competitive nature of the high technology industry. The computer hardware and software industries are populated nationally by a small number of firms. A number of these firms are



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headquartered in two counties in Northern California (San Mateo and Santa Clara Counties). Competition remains fierce for qualified individuals in these geographic areas.

Accordingly, to protect the identities of Oracle's employees and the details of Oracle's workforce structure, Oracle requests that the OFCCP not disclose the Requested Information.

C. Requested Information is Confidential Commercial Information under Section 552(b)(4)

Information regarding the size and structure of Oracle's workforce and information that can identify key minority and female employees is also confidential commercial information under the section 552(b)(4) exemption to the FOIA.

As previously discussed, Oracle clearly has a commercial interest in the requested information. First, the organizational structure of Oracle's workforce can provide competitors with valuable commercial information as to how to effectively and efficiently organize the workforce of a large and profitable high technology company. It will reveal how Oracle stratifies its workforce and endanger the significant investment and effort Oracle has levied to create and refine a workforce structure to efficiently serve its needs as a high technology company. Second, Oracle's talented and diverse workforce is sought after by many other high technology companies, and revealing information that could allow Oracle's competitors to raid key minority or female employees can have a profound effect on Oracle's commercial interests. Because a large proportion of Oracle's employees are highly trained and skilled professionals, officials and managers, this could put Oracle at precisely the kind of competitive disadvantage envisioned in exemption 552(b)(4) to the FOIA.

Given the intensely competitive nature of these industries and among high technology companies, and the frequent raiding of competitors' employees, Oracle has been careful in protecting the identities of its employees and its personnel activities. Oracle has never publicly released in any format the kind of information contained in the Requested Information. Accordingly, Oracle requests that the OFCCP similarly protect the identities of Oracle's employees and the details of Oracle's workforce structure.



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In sum, the Requested Information is exempt from disclosure pursuant to FOIA sections 552(b)(6) and (b)(4). Consequently, Oracle urges that the Department of Labor reject the request for this information.

Sincerely,

A handwritten signature in blue ink, appearing to be "Elizabeth Zane", written over the printed name.

Elizabeth Zane
Harry Clark