

# In the United States Court of Federal Claims

No. 10-743C

Filed: April 15, 2011

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GOOGLE, INC., *et al*,

Plaintiff,

v.

THE UNITED STATES,

Defendant,

and

SOFTCHOICE CORPORATION,

Defendant-Intervenor.

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**Timothy Sullivan**, Thompson Coburn, LLP, Washington D.C., Counsel for Plaintiff.

**Christopher L. Krafchek**, United States Department of Justice, Commercial Litigation Division, Washington, D.C., Counsel for Defendant.

**Steven J. Rosenbaum**, Covington & Burling, LLP, Washington, D.C., and **William A. Shook**, Shook, Doran, Koehl LLP, Washington, D.C., Counsel for Defendant-Intervenor.

## ORDER

On November 19, 2010, the Government filed an Opposition to Plaintiff’s Motion for a Preliminary Injunction, under seal, pursuant to a November 5, 2010 Protective Order. On Friday, April 8, 2011 at 5:19 p.m. EST, however, the Government decided to place a redacted version of this brief on the public record via the Case Management/Electronic Case Filing System (“CM/ECF System”).

On December 17, 2010, the Government filed a Cross-Motion for Judgment Upon the Administrative Record and Response To Plaintiff’s Motion for Judgment Upon the Administrative Record, under seal, pursuant to a November 5, 2010 Protective Order. On Friday, April 8, 2011, at 5:16 p.m. EST, the Government also decided to place a redacted version of this brief on the public record via the CM/ECF System. During an April 14, 2011 telephone

conference, the court learned that on Friday, April 8, 2011, at 5:52 p.m. EST, counsel for Softchoice Corp. forwarded a copy of these briefs to Mr. David Howard, Corporate Vice President & Deputy General Counsel of Microsoft Corp., that is represented by the same law firm.

On Monday, April 11, 2011, at 9:00 a.m., Mr. Howard issued a press release/blog post<sup>1</sup> stating: “Last Friday afternoon, I learned that a batch of *court documents had been unsealed* and had revealed one particularly striking development: the United States Department of Justice had rejected Google’s claim that Google Apps for Government, Google’s cloud-based suite for government customers, has been certified under the Federal Information Security Management Act (FISMA).” David Howard, *Google’s Misleading Security Claims to the Government Raise Serious Questions*, MICROSOFT ON THE ISSUES (Apr. 11, 2011, 9:00 AM), [http://blogs.technet.com/b/microsoft\\_on\\_the\\_issues/archive/2011/04/11/google-s-misleading-security-claims-to-the-government-raise-serious-questions.aspx](http://blogs.technet.com/b/microsoft_on_the_issues/archive/2011/04/11/google-s-misleading-security-claims-to-the-government-raise-serious-questions.aspx) (emphasis added). This-1,054 word blog post concluded with the following statement:

The Department of Justice has concluded squarely that Google Apps for Government does not have FISMA certification. Open competition should involve accurate competition. It’s time for Google to stop telling governments something that is not true. Google Apps for Government does not have FISMA certification. Open competition should involve accurate competition.

*Id.*<sup>2</sup>

The next day, on April 12, 2011, Senator Tom Carper, Chairman of the Senate Committee on Homeland Security and Governmental Affairs’ Subcommittee on Federal Financial Management, convened a hearing on “Examining the President’s Plan For Eliminating Wasteful Spending in Information Technology.” Matt Rosoff, *Google in Trouble Over Lying About Security of Apps to the Government*, BUSINESS INSIDER (Apr. 12, 2011, 4:56 PM), <http://www.businessinsider.com/government-agrees-with-microsoft-google-lied-2011-4>. One of the witnesses was Mr. David McClure, Associate Administrator of the Office of Citizen Services and Innovative Technologies, United States General Services Administration. *Id.* During the hearing, the following exchange took place:

SENATOR CARPER: According to press reports the Department of Justice notified Google in December of 2010 that its Apps for Government was not in fact FISMA compliant. To help provide some greater clarity on this issue, I'd like

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<sup>1</sup> This blog post was brought to the court’s attention by a librarian for the United States Court of Appeals for the Federal Circuit.

<sup>2</sup> Mr. Howard’s comments have been widely reported in the media. The Google search engine returns over 100,000 hits for the terms "Google Microsoft FISMA" in the period following Mr. Howard's April 11, 2011 blog post.

to ask both of you if you would to comment on these recent reports and discuss how OMB and GSA are addressing the concerns that are raised by them.

MR. MCCLURE: Sure, I'd be glad to bring some clarity to it. In July 2010, GSA did a FISMA security accreditation for 'Google Apps Premier.' That's what the Google product was called, and it passed our FISMA accreditation process. We actually did that so other agencies could use the Google product. If we do one accreditation, it's leveraged across many agencies. Since that time, Google has introduced what they're calling 'Google Apps for Government.' It's a subset of Google Apps Premier, and as soon as we found out about that, as with all the other agencies, we have what you would normally do when a product changes, you have to re-certify it. So that's what we're doing right now, we're actually going through a re-certification based on those changes that Google has announced with the 'Apps for Government' product offering.

*Id.*

Based on Mr. McClure's Senate testimony, it appears that Google received FISMA accreditation from GSA for the "Google Apps Premier" product in July 2010, and that GSA is currently reviewing the "Google Apps for Government" "subset" product.

To the extent that the April 11, 2011 blog post by Microsoft Corp.'s Deputy General Counsel was intended to convey the impression that the court, *sua sponte*, decided to "unseal" portions of the Administrative Record that bear on the status of GSA's FISMA certification of Google's products, that did not happen. Instead, the Commercial Litigation Branch of the Civil Division of the Department of Justice decided to place selected portions of these two briefs on the public record that present their views about this issue. The court, however, has made no decision about the merits of the Government's arguments, and emphasizes that no substantive judgment has been made regarding the pending motions or arguments therein.

The Government's December 17, 2010 Cross Motion, now on the public record, argues:

[Google] place[s] great weight on Google's FISMA certification by GSA . . . . Yet that certification merely means that Google Apps for Government, assuming it even has FISMA certification, is secure enough *for GSA*. This fact has no direct impact upon whether the cloud's security is sufficient for [the Department of the Interior]. Contrary to Google's suggestion, its FISMA certification is *not* a blanket endorsement of Google Apps across the entire Federal government. [The Department of the Interior] acted rationally in refusing to treat it as such.

December 17, 2010 Gov't Cross Motion at 38 (emphasis in original).

In a footnote therein, the Government further states:

There is now serious question whether Google Apps for Government is actually certified by GSA at all. In fact, all evidence suggests that GSA certified Google Apps Premier (Google's public cloud) and *not* Google Apps for Government.

*Id.* at 38 n.13 (emphasis in original). Further on in the Government's brief, the court is informed that "the *absence* of FISMA certification is not a glaring weakness in Microsoft BPOS-Federal . . . ; rather, it is a necessary step in acquiring a dedicated cloud. *The terms of the solicitation require the winning contractor to comply with FISMA mandates after award.*" *Id.* at 39-40 (citation omitted) (emphasis added).

Contrary to the Government's argument, whether or not Google Apps Premier and/or Google Apps for Government are FISMA certified is central to resolve the issues presented in this case. The RFQ requires FISMA certification in addition to DOI-specific security requirements:

At all times, the contractor shall comply and the Contractor shall cause Microsoft to agree to comply with the Federal Information Security Management Act (FISMA) and OMB Circular A-130. This compliance shall be shown through the completion and the maintaining of a Certification and Accreditation (C&A) of the Microsoft BPOS-Federal service and adherence to DOI Policies on IT Security Management. The Maintenance of the C&A is a requirement of the business relationship between DOI, the Contractor and Microsoft.

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Google's December 30, 2010 Amended Complaint ("Am. Compl.") alleges that the Department of the Interior acted arbitrarily and capriciously in selecting Microsoft BPOS-Federal over Google Apps, based on security concerns. Am. Compl. ¶ 62. The thrust of Google's argument is that the Department of the Interior's determination that Google lacked adequate security features was arbitrary and capricious in light of the fact that its product was FISMA certified, while Microsoft BPOS-Federal was not FISMA certified or tested, and appears to be dependent on software that contains a number of security vulnerabilities. Am. Compl. ¶¶ 19, 21, 23, 49-53.

The Administrative Record proffered by the Government does not clearly reflect the current status of GSA's FISMA certification of the Microsoft and Google products nominally being considered by the Department of the Interior in this procurement. Therefore, the court has determined that supplementation of the record as to these issues is "necessary in order not 'to frustrate effective judicial review.'" *Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374,

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<sup>3</sup> Although this portion of the RFQ was initially placed under seal, it is discussed in the Government's April 8, 2010 redacted Cross-Motion For Judgment Upon The Administrative Record and therefore is now in the public record. December 17, 2010 Gov't Cross Motion at 14-15, 28, 37-40.

1381 (Fed. Cir. 2009) (citation omitted); *see also id.* (“The focus of jurisdictional review of agency action remains the administrative record, which should be supplemented only if the existing record is insufficient to permit necessary review consistent with the APA.”).

Accordingly, on or before Friday, April 22, 2011, the Government will submit a sworn statement by Mr. McClure addressing the status of Google’s FISMA certification. If Plaintiff wishes to cross-examine Mr. McClure, the court will schedule a hearing to provide this opportunity. At present, the Government and Softchoice have requested additional time to file reply briefs. The Government and Softchoice should file these briefs on or before Friday, April 22, 2011.

**IT IS SO ORDERED.**

s/Susan G. Braden  
**SUSAN G. BRADEN**  
**Judge**