

ALERT

OFCCP Announces FOIA Request for Certain Contractor EEO-1 Reports

August 23, 2022

WHAT: The U.S. Department of Labor's Office of Federal Contract Compliance Programs announced that it has received a request under the Freedom of Information Act for all consolidated "Type 2" EEO-1 reports for federal contractors and first-tier subcontractors for the years 2016 to 2020. These Type 2 reports provide summary-level "demographic data for all employees at headquarters as well as all establishments, categorized by race/ethnicity, sex, and job category."

The notice announces that OFCCP is evaluating whether the reports fit within FOIA's so-called Exemption 4 for "trade secrets and commercial or financial information obtained from a person and privileged or confidential." The notice invites objections to release within 30 days and includes questions targeted at Exemption 4 for responding contractors. The notice further advises that contractors not responding will be deemed to have no objection to release of their reports.

WHEN: OFCCP's notice appeared in the Federal Register on August 19, 2022. Contractors have until September 19, 2022 to submit objections.

HOW TO SUBMIT OBJECTIONS: Contractors may submit objections either through an online portal OFCCP established for this request or by email to OFCCPSubmitterResponse@dol.gov. OFCCP has encouraged using the portal and noted that contractors with longer objections can use the portal for most of the submission and send any attachments to the email address.

WHAT DOES THIS MEAN FOR INDUSTRY: The request covers a broad swath of the federal contractor community and up to five years of Type 2 EEO-1 submissions for each such contractor; OFCCP itself

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estimates that the request covers around 15,000 unique contractors. (Contractors can log into the Government's EEO-1 Online Filing System to check for these reports.) Those contractors that do not make the data contained in its Type 2 EEO-1 report available publicly through some other means may have concerns about the data's release through this request. Indeed, it is not difficult to envision the issues that can arise from release of this type of data as a general matter and any analysis of the data without accompanying contractor-specific context.

OFCCP advises that it will consider contractors' written objections setting out in detail why their Type 2 EEO-1 reports are not releasable under FOIA. The notice does caution that OFCCP might still determine that objecting contractors' reports are releasable, though OFCCP will notify contractors for which it makes such a determination before releasing the data. But although objecting to release might not guarantee OFCCP declines to release a contractor's reports, the notice makes plain that not objecting makes it all but certain that a contractor's reports will be released.

OFCCP explains in the Federal Register notice that it "has reason to believe that the information requested may be protected from disclosure under FOIA Exemption 4, which protects disclosure of confidential commercial information, but has not yet determined whether the requested information is protected from disclosure under that exemption."

The notice further explains that just a few years ago, the Government litigated with the party making the FOIA request here over whether the Type 2 EEO-1 reports (for a much smaller subset of contractors) are releasable under FOIA. *See Center for Investigative Reporting v. U.S. Dep't of Labor*, 424 F. Supp. 3d 771 (N.D. Cal. 2019). In the Federal Register notice, OFCCP summarized the litigation's outcome as follows:

After reviewing the evidence before it, including an extended discussion of declarations from several of the objecting submitters, many of which the court described as "conclusory" and containing "verbatim rationale," the district court held that the evidence did not support a finding that the EEO-1 reports were commercial, and thus the 10 Type 2 EEO-1 Reports at issue could not be withheld under FOIA Exemption 4.

For the current, much broader FOIA request, OFCCP's questions for contractors objecting to release appear aimed at developing a more robust response on the question of Exemption 4's applicability:

1. What specific information from the EEO-1 Report does the contractor consider to be a trade secret or commercial or financial information?
2. What facts support the contractor's belief that this information is commercial or financial in nature?
3. Does the contractor customarily keep the requested information private or closely-held? What steps have been taken by the contractor to protect the confidentiality of the requested data, and to whom has it been disclosed?
4. Does the contractor contend that the government provided an express or implied assurance of confidentiality? If no, were there express or implied indications at the time the information was submitted that the government would publicly disclose the information?

5. How would disclosure of this information harm an interest of the contractor protected by Exemption 4 (such as by causing foreseeable harm to the contractor's economic or business interests)?

OFCCP's portal for submitting objections organizes and words these questions differently, but they cover the same general issues, while adding a question as to whether OFCCP should be aware of any other legal considerations. Wiley attorneys will continue to analyze potential responses to these questions that may assist OFCCP in evaluating FOIA Exemption 4's application and recommend that affected contractors carefully consider whether they need to submit an objection to OFCCP.