

## Is Your EEO-1 Report At Risk of Disclosure?

The U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) published a notice on August 19 in the *Federal Register* informing all federal contractors that it had received a Freedom of Information Act (FOIA) request from an individual associated with the Center for Investigative Reporting (CIR). That request apparently seeks disclosure of Type 2 Consolidated EEO-1 Report (EEO-1) data submitted by *all* federal contractors and first-tier subcontractors (collectively, contractors) between 2016 and 2020. We have received a number of inquiries on this situation, which is not your standard FOIA request, both as to data and breadth of scope. The type of data contained in EEO-1 reports can include sensitive, secret, and business or competition sensitive information that you may wish to protect. EEO-1s are required by Federal Acquisition Regulation (FAR) Subparts 22.8 and 52.222-26, which provide that certain multi-establishment employers annually file reports containing certain demographic data for all of the businesses' employees at headquarters, categorized by various elements, including race or ethnicity, sex, and job category.

The notice informs all contractors that they have 30 days from August 19 (a deadline of September 19) to submit any objections they have to the OFCCP's disclosure of their EEO-1 information and to provide justification therefor. Failure to object may result in the disclosure of some or all of your EEO-1 information. While it is conceivable that additional time will be granted to submit an objection, at this time, that is unlikely. Contractors must assume that no extensions will be provided.

The OFCCP states that it believes the information *may* be protected from disclosure under FOIA exemption 4, which precludes the disclosure/release of confidential commercial or trade secret information. However, as of the August 19 notice, it has not made any definitive determination as to the applicability of exemption 4 (or presumably any other basis for withholding). In support of that determination effort, this notice asks for input and insight from contractors.

The notice cites not only the FOIA request but also Section 709(e) of Title VII of the Civil Rights Act of 1964 and other provisions relating to this consideration. Furthermore, the notice makes reference to various cases that may influence the OFCCP's decision, including, by way of example, *Food Marketing Ins. v. Argus Leader Media*, 139 S. Ct. 2356 (2019), where the Supreme Court discussed what the term "confidential" meant in regard to FOIA Exemption 4. In contrast, it also cites *Center for Investigative Reporting v. U.S. Dep't of Labor*, 424 F. Supp. 3d 771 (N.D. Cal. 2019), where the same FOIA requester, CIR, received similarly requested documents, finding that the EEO-1 reports were purportedly not commercial. This is an opportunity to gain OFCCP support in refuting the CIR decision.

In deliberating how it intends to respond and whether the requested data is confidential, the OFCCP has requested that contractors objecting to the release of the EEO-1 data respond to the following questions:

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? [If so, w]hat 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 [to the subject data/information]? If not, were there express or implied indications at the time the information was submitted that the government would publicly



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disclose the information?

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

Interested contractors must file their written objections to disclosure of their EEO-1 data by Monday, September 19, 2022 (30 days falls on Sunday, September 18) in order to attempt to protect their EEO-1 information. That submission can be made via the identified online response portal (via online form) (<https://www.dol.gov/agencies/ofccp/submitter-notice-response-portal>); email to [OFCCPSubmitterResponse@dol.gov](mailto:OFCCPSubmitterResponse@dol.gov) or by mail.

This FOIA request seeks huge volumes of data that can have an impact on your firm's privacy and compliance protocols. Contractors failing to timely submit objections will be deemed to have no objection to such a disclosure, potentially acting as a waiver of your further rights. The OFCCP states that it will review each individual contractor's objection and decide how to proceed. The time that this may take is likely extensive. Presumably, in order to comply with the Administrative Procedures Act, the objecting contractor's due process rights, as well as the requirements of the FOIA request, the OFCCP states that it intends to provide written notice to each objecting contractor (a), including identifying any bases for not sustaining the filed objections, (b) describing the information the OFCCP intends on disclosing, and (c) identifying the specific disclosure date (that will be reasonably after the notice, presumably to allow any appeal or judicial action to be taken to a negative response).

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***Our team is helping contractors consider options for responding to this notice and assisting them in drafting objections. If you have questions or need assistance in your deliberations or drafting efforts, please don't hesitate to contact us.***