

Federal Contractors Have Until September 19th to Object to Disclosure of Their Type 2 Consolidated EEO-1 Report

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Background

The Equal Employment Opportunity Commission's (EEOC) regulations require employers with 100 or more employees to file an EEO-1 Report with the EEOC. In addition, the Office of Federal Contract Compliance Programs' (OFCCP) regulations require federal contractors and first-tier subcontractors (a subcontractor that holds a subcontract with a prime contractor) that are covered by Executive Order 11246 and have 50 or more employees to also file EEO-1 Reports. All multi-establishment companies must submit a Type 2 Consolidated Report. The Type 2 Report must include data for all employees of the company (i.e., all employees at headquarters as well as all establishments) categorized by race/ethnicity, sex, and job.

The OFCCP has received a Freedom of Information Act (FOIA) request from an investigative reporter for all Type 2 Consolidated Employer Information Reports, Standard Form 100 (EEO-1 Report), filed by federal contractors from 2016-2020. Although the OFCCP has reason to believe the requested information may be protected from disclosure under FOIA Exemption 4 (which protects disclosure of confidential commercial information), it has not yet determined whether the requested information is protected from disclosure under that exemption.

Practice Areas

EEO and Other Corporate Investigations

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On August 19, 2022, the OFCCP issued a notice regarding the potential disclosure of the requested information and is giving federal contractors until September 19, 2022, to submit written objections. Written objections may be submitted via a web form, which can be found at <https://www.dol.gov/agencies/ofccp/submitter-notice-response-portal>. Written objections may also be submitted via email at OFCCPSubmitterResponse@dol.gov, or by mail to OFCCP contact Candice Spalding, Deputy Director, Division of Management and Administrative Programs, Office of Federal Contract Compliance Programs, 200 Constitutional Avenue NW, Room C-3325, Washington, DC 20210.

Information to Include in a Written Objection

The OFCCP recommends that contractors that decide to file a written objection should include the first and last name of the company's point of contact (POC); the POC's phone number and email address; the company's name and address and the parent company's EEO-1 unit number. In addition, the OFCCP recommends that contractors provide as much information as possible addressing why they believe their Type 2 EEO-1 Report data should not be released under FOIA, including whether the information is commercial/financial and confidential.

The OFCCP also suggests that at a minimum, a written objection address the following questions:

- Does the contractor consider information from its EEO-1 Report to be a trade secret or commercial information? If yes, explain why.
- Does the contractor customarily keep the requested information private or closely held? If yes, explain the steps that have been taken to protect data contained in the reports and to whom the data has been disclosed.
- Does the contractor contend that the government provided an express or implied assurance of confidentiality? If yes, explain.
- If the contractor answered "No" to the previous question, were there expressed or implied indications at the time the information was submitted that the government would publicly disclose the information? If yes, explain.
- Does the contractor believe that disclosure of this information could cause harm to an interest protected by Exemption 4 (such as by causing genuine harm to the contractor's economic or business interests)? If yes, explain.

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A contractor that submits a written objection will receive a response from the OFCCP via email or mail acknowledging receipt.

The OFCCP will independently evaluate a submitted written objection and make a determination as to whether the information can be properly withheld under FOIA Exemption 4 based on the information provided in the written objection. If the OFCCP determines that the contractor's EEO-1 Report Type 2 data can be withheld from disclosure, the OFCCP will notify the contractor and the FOIA requester of the OFCCP's determination to withhold the data. However, if the OFCCP determines that the EEO-1 Report Type 2 data must be disclosed, the OFCCP will provide written notice to the contractor of the reasons the disclosure objections were not sustained, a description of the information that will be disclosed, and a specified disclosure date that is a reasonable time after the contractor receives notice of the OFCCP's determination.

Contractors That Do Not Submit a Written Objection by the Deadline

If a contractor does not submit a written objection by the September 19, 2022 deadline, the OFCCP will assume the contractor has no objection to disclosure and will begin the process of sending the contractor's Type 2 EEO-1 Report data to the FOIA requester.

Additional Questions

A contractor may submit specific questions to the OFCCP at OFCCPSubmitterResponse@dol.gov or call the Help Desk at 1-877-680-0971.