



The U.S. Department of Labor’s Office of Federal Contracting Compliance Programs (OFCCP) may release federal contractors’ Type 2 Consolidated Employer Information Report (aka Standard Form 100) data (EEO-1 Report) in response to two requests under the Freedom of Information Act (FOIA).

To avoid release of their EEO-1 Reports, contractors have until December 9, 2024, to file objections.

The pending release of EEO-1 data emanates from a technical loophole in federal regulations and cross-agency practices. Federal law requires employers with more than 100 employees to submit EEO-1 forms detailing the demographics of their workplaces. For federal contractors, the obligation is triggered for those with 50 or more employees. The Equal Employment Opportunity Commission (EEOC) and OFCCP jointly collect employers’

EEO-1 submissions. While Title VII requires that EEOC keep the EEO-1 Reports confidential, at least one court has determined that these restrictions do not apply to the OFCCP. *See Sears, Roebuck & Co. v. General Servs. Admin.*, 509 F.2d 527, 529 (D.C. Cir. 1974). Accordingly, EEO-1 Reports can be subject to FOIA requests.

## **Changes in the Legal Landscape**

FOIA requestors have often sought to exploit the legal loophole to obtain EEO-1 data from federal contractors, but OFCCP has routinely taken the position that the reports cannot be released because they contain confidential commercial information and fall within Exemption 4 of FOIA. However, a recent Supreme Court of the United States case and a federal district court decision in San Francisco have weakened OFCCP's position. *See Food Marketing Instit. v. Argus Leader*, 139 S. Ct. 2356 (2019); *Ctr. for Investigative Reporting v. United States Dep't of Labor*, No. 3:22-cv-07182-WHA, 2023 WL 8879244 (December 22, 2023); *Carlson*, 504 F.3d at 1129 (9th Cir. 2007). In *Ctr. for Investigative Reporting*, the U.S. District Court for the Northern District of California held that contractor EEO-1 Reports are not commercial information within the definition of FOIA Exemption 4. The court reasoned that the information contained in EEO-1 Reports is akin to employee background information and that such information does not speak to the "commercial contributions" of a company's workforce to warrant protection from disclosure under FOIA. OFCCP has appealed this decision to the U.S. Court of Appeals for the Ninth Circuit, where oral argument is scheduled for February.

## **The Two FOIA Requests**

Two current FOIA requests have brought this FOIA issue back into the forefront. OFCCP received two FOIA requests for 2021 EEO-1 Reports submitted by all federal contractors from the University of Utah and a social impact organization called "As You Sow." In response, OFCCP issued a "Notice of Request under the Freedom of Information Act for Federal Contractors' Type 2 Consolidated EEO-1 Report Data" in the *Federal Register* on October 29, 2024. 89 F.R. 85986. The notice advises federal contractors of the request for EEO-1 Reports and provides the opportunity for federal contractors to object to the disclosure. The agency set December 9, 2024, as the deadline for contractors to object. Contractors who fail to object will face imminent release of their EEO-1 submissions to the two requestors.

## **Filing Considerations**

When considering whether to file an objection, federal contractors should take a balanced approach. Some contractors feature demographic information on their websites as part of their diversity, equity, and inclusion efforts. For those contractors, objecting to the disclosure of EEO-1 data could likely appear contradictory. On the other hand, some contractors should consider the implications of a public disclosure of their EEO-1 Report data. Investigative reporters have used EEO-1 Reports obtained from federal contractors to imply that the raw numbers reflect discrimination or bias within some industries and specific companies.<sup>[1]</sup> For example, when Reveal for the Center for Investigative Reporting received EEO-1 Report information from large technology companies, it concluded that bias existed within the ranks of their executive positions. Those raw numbers taken on a one-day snapshot routinely fail to tell the entire story regarding a contractor's hiring, promotion, or other employment practices. In addition, contractors have raised concerns that releasing EEO-1 Report data could allow competitors to gain insights into their workforce or possibly even poach talent.

## **Action Items**

Employers should reach out to counsel to weigh the broad considerations that come into play when considering whether to object and, if so, assist in preparing strong objections that highlight the specific nuances of their

businesses and industries.

## Endnote

[1]See [“Oracle and Palantir Said Diversity Figures Were Trade Secrets. The Real Secret: Embarrassing Numbers,”](#) [“How Momentum Around EEO-1 Report Disclosure Took Off and Why Companies Should Disclose the Form To Help Advance Racial Equity,”](#) and [“We Sued the Government for Silicon Valley Diversity Data.”](#)

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