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Think Your EEO-1 Reports are Safe From Public Release? Think Again!

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Contractors That Have Filed EEO-1 Reports Have Until Mid-December to File Objections to the Release of Their Information Under the FOIA

In 2022, the Office of Federal Contract Compliance Programs ("OFCCP") received a Freedom of Information Act ("FOIA") seeking 2016-2020 Type 2 Consolidated EEO-1 reports. Given the large number of contractors that had submitted such reports, the OFCCP published a notice in the Federal Register rather than notifying each contractor individually. That Notice set forth a procedure and timing for contractors to submit objections to the release of their report. We reported on that issue at the time, and the requests and objections for 2016–2020 EEO-1 Consolidated Reports are still in active litigation. As such, the outcome of contractors' previous requests and any submitted objections remains uncertain. Even though that outcome is still pending, on October 29, 2024, the OFCCP published a new Notice in the Federal Register relating to another FOIA request seeking additional EEO-1 Report data. The University of Utah and a non-profit organization named "As You Sow," requested the disclosure of Type 2 Consolidated EEO-1 Report data submitted by all federal contractors and first-tier subcontractors ("Covered Contractors") for the years 2021 and 2022. However, since the OFCCP only possesses the EEO-1 data for the 2021 reporting year, it limited the notice to just 2021 for now. Type 2 EEO-1 reports are one of several types of reports multi-establishment employers must file annually, which provide a consolidated report of demographic data for all employees at headquarters as well as all establishments, categorized by race/ethnicity, sex, and job category.

The OFCCP has reason to believe that the information may be protected from disclosure under FOIA Exemption 4, which protects disclosure of confidential commercial information, but has not yet determined whether that exemption is applicable. In order to determine whether the information is protected from disclosure, the OFCCP has requested that federal contractors whose information would otherwise be subject to this request submit objections to the OFCCP by December 10, 2024.

Exemption 4 to the FOIA protects against the disclosure of "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." 5 U.S.C. § 552(b)(4). In *Food Marketing Ins. v. Argus Leader Media*, 139 S. Ct. 2356 (2019), the Supreme Court held that "where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is 'confidential' within the meaning of Exemption 4."

In order to evaluate the objections from Covered Contractors and determine whether Exemption 4 applies to their EEO-1 filings, the OFCCP has asked the contractors with objections to address the following questions:

1. What specific information from the 2021 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)?

Contractors have until December 10, 2024 to submit to the OFCCP a written objection to the disclosure of its EEO-1 data. The OFCCP strongly encourages Covered Contractors to submit their objections through the online response portal, but the contractors may also submit their written objections via email to OFCCPSubmitterResponse@dol.gov or by mail. A list of the contractors subject to the Type 2 EEO-1 data request for the 2021 reporting year, created and published by the OFCCP, can be found here.

Covered Contractors who do not timely submit their objections will be considered to have no objections to disclosure. For those who do timely object, the OFCCP will independently evaluate the objections. In the event that it decides to disclose information, the OFCCP will provide written notice to Covered Contractors of their objections, including the reasons for not sustaining the objections, a description of the information to be disclosed, and specified disclosure date that is a reasonable time subsequent to the notice.

If you need assistance evaluating whether you should file objections, please contact one of the authors or your regular Kilpatrick point of contact.