

CLIENT ALERT

Federal Contractors Have Until September 19, 2022 to Object to Disclosure of EEO-1 Data Subject to Pending FOIA Request

August 23, 2022

On August 19, 2022, the Office of Federal Contract Compliance Programs (the “OFCCP”) published a [Notice](#) in the Federal Register to federal contractors of a Freedom of Information Act (“FOIA”) request from Will Evans of the Center for Investigative Reporting (“CIR”) for disclosure of Type 2 Consolidated EEO-1 Report data submitted by all federal contractors and first-tier subcontractors from 2016 until 2020. In order to determine whether this information is protected from disclosure under FOIA Exemption 4, which protects disclosure of confidential commercial information, the OFCCP requested that federal contractors whose information would otherwise be subject to this request submit objections to the OFCCP by September 19, 2022. Type 2 EEO-1 reports are one of the mandatory submissions that multi-establishment employers file annually, consistent with their obligations under Title VII of the Civil Rights Act of 1964 and the OFCCP’s regulations. They consist of a consolidated report of demographic data for all employees by employer establishment, categorized by race/ethnicity, sex and EEO-1 job category. Notably, the FOIA request at issue does not seek production of Component 2 compensation data included in the EEO-1 reports submitted by federal contractors and subcontractors in 2017 and 2018.

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\(b\)\(4\)](#). The leading Supreme Court decision, *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019), provides “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.” To that end, the OFCCP has asked federal contractors with objections to address the following questions to assist the OFCCP in determining whether Exemption 4 applies as to their EEO-1 filings:

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)?

Contractors are strongly encouraged to submit their written objections through this [Portal](#) and may also submit written objections via email to OFCCPSubmitterResponse@dol.gov or by mail. Contractors who do not timely submit their objections will be considered to have no objection to disclosure. For those who do timely object, the OFCCP will independently evaluate the objections and provide written notice to contractors in the event it decides to disclose information 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.

The request from Mr. Evans and the OFCCP's across-the-board Notice to all prime contractors and first-tier subcontractors are the latest chapter in a long-running saga involving FOIA requests to the OFCCP seeking contractor EEO-1 submissions. Prior FOIA requests, some of which have triggered litigation regarding the extent to which EEO-1 Reports are protected by Exemption 4, have been aimed at particular, identified contractors. The August 19 notice suggests the OFCCP will take an individualized approach as to contractors who file an objection, but may otherwise disclose the EEO-1 reports of those who fail to object by September 19.

Crowell & Moring LLP is available to assist federal contractors with questions regarding submission of objections prior to the September 19, 2022 deadline.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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