

# Alert

November 26, 2024



## Deadline for Federal Contractors to Object to New OFCCP FOIA Requests: December 10, 2024

The U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) published a notice in the Federal Register on October 29, 2024, notifying federal contractors of its receipt of two new requests under the Freedom of Information Act (FOIA) for 2021 Type 2 Consolidated Employer Information Reports, Standard Form 100 (EEO-1 Report).<sup>1</sup> EEO-1 Reports include data for all employees of the company, categorized by race/ethnicity, sex, and job category. The requests also seek 2022 reports, but OFCCP currently has access only to the 2021 reports.

The requests came from the University of Utah and a nonprofit organization, As You Sow, which promotes social corporate responsibility through shareholder advocacy. OFCCP released a list of contractors subject to the requests on its website, but arguably, any federal contractor who filed a 2021 Type 2 EEO-1 Report can be covered by the FOIA requests even if they are not on the list published by OFCCP.<sup>2</sup> In a nutshell, these FOIA requests are seeking race, ethnicity, gender and job-related information from federal contractors who filed EEO-1 Reports as required by law – data that many feel is both confidential and competitive or trade secret in nature. This is the second such instance in which a mass-FOIA request has been issued to OFCCP for EEO-1 Reports, as discussed below. Clients and friends of the firm are recommended to verify if their company is on the list of contractors and to contact counsel for guidance and next steps to be taken before the deadline.

OFCCP has created a Submitter Notice Response Portal to collect responses from contractors and their representatives who wish to object to the release of the data. While objections to the new requests originally were due by December 9, 2024, as set forth in the Federal Register notice, OFCCP has extended the deadline to **December 10, 2024**, to account for the Thanksgiving holiday. If OFCCP does not receive a written objection, the agency will assume that the responding company has **no objection** to disclosure and will begin the process of sending the EEO-1 Report data to the FOIA requesters. It is vital that each responding company understand its legal position, whether to object, and how to object.

### Changes in the Legal Landscape

OFCCP has routinely taken the position that EEO-1 Reports cannot be released because they contain confidential commercial information and fall within Exemption 4 of the FOIA. Exemption 4 protects against the disclosure of "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential."<sup>3</sup> However, two recent cases, *Food Marketing Institute v. Argus Leader*<sup>4</sup> and *Center for Investigative Reporting v. United States Department of Labor*,<sup>5</sup> have weakened OFCCP's position.

In *Food Marketing Institute*, the Supreme Court explained that "confidential" for Exemption 4 purposes means that the company actually and customarily kept the information private. Prior to this decision, the standard for evaluating confidentiality came from *National Parks & Conservation Association v. Morton*: commercial or financial matter data was "confidential" for purposes of Exemption 4 if "disclosure of the information [wa]s likely to have either of the following effects: (1)



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to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained."<sup>6</sup> In other words, *Food Marketing Institute* eroded the prior precedent by raising the standard and placed a higher burden on contractors to prove confidentiality.

In *Center for Investigative Reporting*, the U.S. District Court for the Northern District of California evaluated whether the August 25, 2022, FOIA requests by the Center for Investigative Reporting, which sought EEO-1 Type 2 Reports for the 2016-2020 reporting years, were exempt from disclosure under Exemption 4. The District Court held that contractor EEO-1 Reports were not commercial information within the definition of FOIA Exemption 4. The District 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.

This ruling may impact OFCCP's analysis of confidentiality and contractors' rights moving forward. However, the Department of Labor filed a notice of appeal to the Ninth Circuit Court of Appeals on February 15, 2024. Oral argument has not been scheduled yet and is anticipated to take place in February 2025.

## Objecting to the FOIA Request

The two new FOIA requests are separate from the previous August 25, 2022, requests, for which litigation is ongoing in the Ninth Circuit. Even if a responding company objected to the prior requests, a covered contractor must separately respond to the two new requests.

To properly object to the FOIA request, the contractor must show that the information meets the Supreme Court's definition of confidential information in *Food Marketing Institute* by providing evidence of policies and practices in confidentiality, including that the company has not previously disclosed the information.

OFCCP noted that objections must include the contractor's name, address, and contract information for the contractor. In addition, the objection should address the following questions, so that OFCCP may evaluate the objection in consideration of Exemption 4:<sup>7</sup>

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 contractors' economic or business interests)?

Some companies do not consider the underlying data confidential or proprietary while other contractors do. It is highly recommended that federal contractors reach out to legal counsel for guidance in determining whether to object, and, if so, for any assistance in preparing their objections.

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<sup>1</sup> 89 Fed. Reg. 85,986 (Oct. 29, 2024), <https://www.federalregister.gov/documents/2024/10/29/2024-24381/notice-of-request-under-the-freedom-of-information-act-for-federal-contractors-type-2-consolidated>.

<sup>2</sup> <https://www.dol.gov/agencies/ofccp/foia/library/Employment-Information-Reports>.

<sup>3</sup> 5 U.S.C. § 552(b)(4).

<sup>4</sup> 139 S. Ct. 2356 (2019).

<sup>5</sup> Case No. 3:22-cv-07182-WHA, 2023 WL 8879244 (N.D. Cal. Dec. 22, 2023).

<sup>6</sup> 498 F.2d 765, 770 (D.C. Cir. 1974).

<sup>7</sup> 89 Fed. Reg. 85,986, at 85,988 (Oct. 29, 2024), <https://www.federalregister.gov/documents/2024/10/29/2024-24381/notice-of-request-under-the-freedom-of-information-act-for-federal-contractors-type-2-consolidated>.