



March 8, 2023

The Honorable Virginia Foxx
Committee on Education and the Workforce
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, DC 20515-6100

Dear Chairwoman Foxx:

Thank you for your letter dated February 10, 2023, regarding a Freedom of Information Act (FOIA) request from the Center of Investigative Reporting (CIR) for federal contractor EEO-1 data. We appreciate the opportunity to clarify and explain the numerous steps that the Office of Federal Contract Compliance Programs (OFCCP) has taken to notify federal contractors of this voluminous and unprecedented FOIA request and allow them an opportunity to object to disclosure, as well as further safeguards the agency has established to ensure that contractors' EEO-1 data are not improperly disclosed.¹

As amended in June 2022, CIR's FOIA request seeks Type 2 Consolidated EEO-1 Reports for all multi-establishment contractors for the EEO-1 filing years 2016-2020 (Request). The Request covers more than 24,000 unique contractors and 75,000 unique Type 2 EEO-1 reports. Additionally, as you may be aware, on November 15, 2022, CIR filed a lawsuit to compel OFCCP to promptly release all records responsive to the Request.²

OFCCP has devoted significant resources to implement a process to review the voluminous amount of material relevant to the Request and to satisfy the legal requirements of responding to the Request as expeditiously as possible.³ Department of Labor (Department) regulations promulgated to implement the requirements of Executive Order 12,600 provide that when voluminous material that may be commercial or confidential in nature is sought by a FOIA requester, Department agencies must notify private entities by "posting and publishing the

¹ We note that your correspondence asserts that "OFCCP may not have the authority to" disclose EEO-1 information, citing EEOC's statutory prohibition from disclosing this information at 42 U.S.C. § 2000e-8(e). However, courts that have considered the issue have held that this statutory prohibition on the EEOC does not apply to OFCCP, such that OFCCP cannot rely on this statute to withhold disclosure of EEO-1 information in response to a FOIA request. See, e.g., *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190, 1199 (4th Cir. 1976), cert. denied sub nom., *Brown v. Westinghouse Elec. Corp.*, 413 U.S. 924 (1977); *Sears, Roebuck and Co. v. General Services Admin.*, 509 F.2d 527, 529 (D.C. Cir. 1974).

² *Center for Investigative Reporting v. U.S. Department of Labor*, Case No: 3:22-cv-07182-WHA (N.D. Cal. Nov. 15, 2022).

³ See generally 5 U.S.C. § 552(a)(6).

notice in a place reasonably calculated to accomplish notification.”⁴ Agencies are not required to provide individualized notice to each submitter.⁵ OFCCP has met and exceeded this requirement through its numerous actions over the past six months to notify submitters in locations reasonably calculated to provide them with notice of the Request, including multiple postings on its website, publication in the Federal Register, distribution to hundreds of thousands of relevant stakeholders through its GovDelivery listserv, and repeated individual notice through emails to thousands of affected contractors.⁶ In addition, OFCCP has addressed contractor concerns regarding the deadline for objections by providing multiple extensions to that deadline and by allowing late-filed objections for good cause.

Although mailed notice is not legally required, and creates a significant cost to the agency, given the unique circumstances of this request, OFCCP has decided to take the extraordinary step of mailing a final notice by U.S. Mail to the addresses of contractors that have not submitted an objection or response to prior notifications. We will soon send this letter to the address contractors provided in their EEO-1 filings and via their registration in OFCCP’s Contractor Portal. In addition, the agency is notifying contractors of the need to register for OFCCP’s notification listserv and provide up-to-date email contact information to the agency to receive important notifications from the agency. This notice will provide a final response date of March 31, 2023. The non-objectors’ data is anticipated to be released sometime in April.

OFCCP’s numerous actions to post, publish, and otherwise disseminate notice of the Request through a variety of methods and to provide additional time to object are detailed below:

- **August 18, 2022:** OFCCP published its original notice of the Request in the Federal Register,⁷ providing contractors with information regarding the Request, detailing the ways in which contractors could submit written objections, and noting the specific questions relevant to FOIA Exemption 4 that contractors should address in submitting objections. This notice also provided a link to a web portal that OFCCP developed specifically to facilitate the submission of written objections. It further provided contractors 30 days, until September 19, 2022, to submit written objections. In addition to the Federal Register publication, this notice was disseminated via the following methods:

⁴ Executive Order 12,600 (1987); 29 C.F.R. § 70.26(j).

⁵ Executive Order 12,600 (1987); 29 C.F.R. § 70.26(j).

⁶ See generally Executive Order 12,600 (1987); 29 C.F.R. § 70.26. For multiple reasons, including the historical nature of the data requested and the failure of some contractors to register in the OFCCP Contractor Portal, OFCCP does not possess current e-mail addresses for all federal contractors covered by the Request. However, the many measures taken by the agency to effectuate notice go beyond that required by relevant legal authorities. See 29 C.F.R. § 70.26(j) (“Where notification of a voluminous number of submitters is required, such notification may be accomplished by posting and publishing the notice in a place reasonably calculated to accomplish notification.”); Executive Order 12,600 § 1 (same).

⁷ [Notice of Request Under the Freedom of Information Act for Federal Contractors’ Type 2 Consolidated EEO-1 Report Data, 87 Fed. Reg. 51145 \(August 19, 2022\).](#)

- publication on OFCCP’s website, and
 - email distribution to OFCCP’s GovDelivery mailing list, which includes over 370,000 OFCCP stakeholder subscribers.⁸
- **September 15, 2022:** OFCCP published updated guidance on its website, in the form of Frequently Asked Questions, providing detailed answers to contractors’ questions regarding the Request, including: the scope of the Request; how contractors could determine if their EEO-1 information was subject to the Request;⁹ the information that contractors should include in any written objections they submit; how objections could be submitted to OFCCP; and how OFCCP would review the objections submitted. Notice of this guidance was disseminated via:
 - publication on OFCCP’s website, and
 - email distribution to OFCCP’s GovDelivery mailing list; this distribution also notified recipients that OFCCP was extending the September 19, 2022, response deadline to October 19, 2022.¹⁰
 - **September 21-28, 2022:** OFCCP sent individualized email notice of the Request to all email addresses the agency had available from OFCCP’s Contractor Certification Portal and the EEO-1 report filings, further explaining that the deadline for submitting written objections was being extended to October 19, 2022. These emails also included links to the guidance regarding the Request that the agency published on September 15, 2022. OFCCP sent this notice to federal contractors for which it had email addresses, using the following sources:
 - On September 21 and 28, 2022, to all e-mail addresses contractors provided on their Type 2 EEO-1 reports filed during the 2016-2020 reporting years (notice sent to approximately 14,100 unique recipients).¹¹
 - On September 23, 2022, to all email addresses contractors provided as part of their registration for OFCCP’s Contractor Portal (approximately 11,400 recipients).¹²

⁸ See GovDelivery notice available at: [OFCCP publishes notice providing contractors an opportunity to object to the release of EEO-1 reports requested under FOIA](#)

⁹ Your correspondence asserts that “OFCCP has not provided information to all relevant employers about what data will be disclosed in response to the FOIA request” and that “these employers could not determine whether to submit objections because they did not know what information OFCCP would turn over.” OFCCP respectfully submits that the FAQs posted by the agency, and linked to in subsequent notices, provide detailed information on the scope of the Request and how contractors could determine if they had submitted EEO-1 reports that were covered by the Request. See [Submitter Notice Response Portal Frequently Asked Questions, FAQs #3–5](#).

¹⁰ See GovDelivery notice at: [Office of Federal Contract Compliance Programs grants extension of time for contractors to object to the release of EEO-1 reports requested under the Freedom of Information Act](#)

¹¹ See GovDelivery notices available at: [Notice of Extension of Deadline - 09/21/2022](#) and [Notice of Extension of Deadline - 09/28/2022](#), respectively.

¹² This list included all contractors that registered in the OFCCP Contractor Portal as of September 23, 2022. See GovDelivery notice available at [Notice of Extension of Deadline to Object to Disclosure of EEO-1 Data – 9/23/2022](#).

- **September 27, 2022:** OFCCP published an additional notice extending the time for contractors to submit written objections until October 19, 2022. This notice was disseminated via:
 - a Federal Register Notice,¹³ and
 - publication on OFCCP’s website.

- **November 22, 2022:** OFCCP provided additional notice directed to those entities that did not object to disclosure of their EEO-1 information by the October 19, 2022, deadline, notifying them that because they did not object, their information was subject to release. This notice allowed recipients additional time, until January 3, 2023, to submit objections based either on their belief that they were not federal contractors during the period of the Request, or to submit new objections so long as they provided good cause for why they had not previously objected. This notice was disseminated via:
 - publication on OFCCP’s website, and
 - individualized emails to email addresses provided in EEO-1 filings from 2016-2020.¹⁴

- **February 2, 2023:** OFCCP issued notice that it had posted a list of contractors on its website that it believed had not objected, and thus whose EEO-1 data was subject to release.¹⁵ The purpose of this notice and posting of the list was to provide contractors an opportunity to notify OFCCP if they believed they were improperly listed, in order to provide additional assurance that EEO-1 information would not be improperly released. This notice was disseminated via:
 - publication on OFCCP’s website, and
 - individualized emails to email addresses provided in EEO-1 filings from 2016-2020.¹⁶

- **February 7, 2023:** OFCCP issued a notice extending the deadline for contractors on the non-objectors list to respond to OFCCP from February 7, 2023 to February 17, 2023. This notice was disseminated via:
 - publication on OFCCP’s website, and

¹³ [Notice of Request Under the Freedom of Information Act for Federal Contractors’ Type 2 Consolidated EEO-1 Report Data; Correction, 87 Fed. Reg. 58534 \(September 27, 2022\).](#)

¹⁴ See GovDelivery notice available at: [Notice to Federal Contractors of Disclosure of EEO-1 Data](#)

¹⁵ This notice originally provided a deadline of February 7, 2023, for response, which has since been extended, as discussed later in this correspondence.

¹⁶ See GovDelivery notice available at: [List of Contractors for which OFCCP Intends to Release Type 2 EEO-1 Data – Action Needed](#)

- individualized emails to email addresses provided in EEO-1 filings from 2016-2020.¹⁷
- **February 10, 2023:** OFCCP issued an updated notice regarding the February 17, 2023 deadline to clarify the grounds in which OFCCP may consider late-filed objections. Contractors were required to provide a good cause explanation as to why the objection was not filed in response to the previous notices issued by the agency. This notice was disseminated via:
 - publication on OFCCP’s website, and
 - individualized emails to email addresses provided in EEO-1 filings from 2016-2020.¹⁸
- **February 14, 2023:** OFCCP issued a notice extending the deadline to object to disclosure from February 17, 2023 to March 3, 2023. This notice was disseminated via:
 - publication on OFCCP’s website, and
 - individualized emails to email addresses provided in EEO-1 filings from 2016-2020.¹⁹
- **February 16, 2023:** OFCCP posted an updated, corrected list of contractors for which it had not received objections and provided notice via the methods discussed above. This updated list removed contractors that OFCCP had identified as incorrectly included on the February 2, 2023 list. It also removed all contractors that submitted objections after the publication of the February 2, 2023 list through February 10, 2023, while OFCCP evaluates these objections. This notice was disseminated via:
 - publication on OFCCP’s website, and
 - individualized emails to email addresses provided in EEO-1 filings from 2016-2020.²⁰
- **February 27, 2023:** OFCCP issued a notice to remind contractors of the March 3, 2023, deadline. This notice was disseminated via:
 - publication on OFCCP’s website,
 - individualized emails to email addresses provided in EEO-1 filings from 2016-2022, and
 - individualized emails to all email addresses contractors provided as part of their registration for OFCCP’s Contractor Portal.²¹

¹⁷ See GovDelivery notice available at: [OFCCP Extends Deadline to February 17, 2023](#)

¹⁸ See GovDelivery notice available at: [Updated Notice Regarding February 17, 2023, Deadline](#)

¹⁹ See GovDelivery notice available at: [Notice of Extension of Deadline to March 3, 2023](#)

²⁰ See GovDelivery notice available at: [Updated List of Non-Objectors](#)

²¹ See GovDelivery notice available at: [Reminder Notice Providing Opportunity for Federal Contractors to Assert EEO-1 Type 2 Data Should Not be Released](#)

Despite OFCCP's best efforts to manage the processing of this unprecedented and voluminous request, the list of non-objector contractors published on February 2, 2023 included some entities that submitted objections to release. In response, OFCCP has undertaken a comprehensive review of its process leading to the publication of the original list and has taken several actions to ensure accuracy, address the challenges identified, and provide contractors with sufficient time to submit responses to the agency. Specifically, OFCCP is taking the following steps:

- OFCCP assigned additional staff members with database and data analytic training to conduct a comprehensive review of the information OFCCP has received and to ensure maximum accuracy in our data before any EEO-1 information is disclosed in response to the Request.
- OFCCP extended the time for contractors to respond to their inclusion on the list until **March 3, 2023**. OFCCP has provided notice of this extension via its website, GovDelivery mailing list, and via individualized emails to contractors' email addresses provided in EEO-1 filings from 2016-2020 and OFCCP's Contractor Portal.
 - If a contractor wishes to object for the first time to the disclosure on any other grounds aside from claiming they are not a federal contractor and were improperly included on the list, the objection must include an explanation as to why the contractor did not object in response to previous notices that OFCCP has issued, and why there is good cause for OFCCP to accept the objection at this point. If OFCCP determines that there is good cause for why the objection was not filed in response to the previous notices provided by the agency, OFCCP may, at its discretion, consider the substance of the late-filed objection.
- OFCCP has announced on its website and in its February 16, 2023 notice, that after the close of the response period on March 3, 2023, OFCCP will publish a second updated list by March 10, 2023, which will remove contractors that submitted objections between February 10, 2023, and March 3, 2023, while OFCCP evaluates these objections. Contractors will then have an opportunity to contact OFCCP no later than March 17, 2023, if they believe their company is improperly listed on the March 10 list.
- Finally, as discussed above, to account for contractors that may not have received the several notices described above, OFCCP will soon send a final notice by U.S. Mail to the physical mailing addresses contractors provided in their EEO-1 filings and their registration in OFCCP's Contractor Portal and will provide these contractors additional time to respond. Since OFCCP received three or more FOIA requests for the same information, OFCCP is required to make the data publicly available on its website at the [FOIA Library](#).

OFCCP provided a partial response to the Request on March 2, 2023, disclosing EEO-1 data for 21 contractors who provided written consent. Pursuant to its legal obligations under FOIA, this data was also posted on OFCCP's FOIA reading room on its website.²²

We hope that this response provides greater understanding and clarity regarding OFCCP's process. If you have additional questions, please contact the Office of Congressional and Intergovernmental Affairs at (202) 693-4600.

Sincerely,

A handwritten signature in blue ink, appearing to read "J.R. Yang", with a horizontal line extending to the right.

Jenny R. Yang
Director

²² FOIA requires that agencies make available in electronic format any records that are eligible for release and have been requested more than three times. 5 U.S.C. § 552(a)(2)(D)(ii)(II). Visit [OFCCP's FOIA Reading Room Library](#).