

COURT ORDERS OFCCP TO HAND OVER FEDERAL CONTRACTOR DATA DESPITE FOIA OBJECTIONS: 3 KEY CONSIDERATIONS ABOUT THE ONGOING SAGA

Insights
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If you are a federal contractor or first-tier subcontractor, you're likely aware of the government's 2022 request to turn over your EEO-1 demographic data to a news organization and the procedures you needed to follow to file an objection. However, even if you filed a timely objection by last year's deadline, a recent federal court ruling will now require the Office of Federal Contract Compliance Programs (OFCCP) to release your Type 2 Consolidated EEO-1 Reports by February 20. What do you need to know about the most recent developments? Here are the answers to your top three questions.

[Editor's Note: The Labor Department filed a notice of appeal on February 15, and the order to release the FOIA information has been paused while the appeal is pending.]

How Did We Get Here?

Private employers with at least 100 employees — and federal contractors with at least 50 employees — must file EEO-1 reports each year that include workforce demographic data sorted by employee job category, as well as sex and race/ethnicity.

Back in 2022, the OFCCP published a notice to contractors explaining that the agency needed to comply with a Freedom of Information Act (FOIA) request submitted by the Center for Investigative Reporting. A court ordered the agency to release all demographic data from Type 2 Consolidated EEO-1 Reports filed by federal contractors and first-tier subcontractors between 2016 and 2020.

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Covered businesses were able to file an objection to block this production if they followed precise procedures to preserve their rights. Federal officials extended the objection deadline several times and ultimately published the data for covered contractors and subcontractors that did not file an objection.

During recent court proceedings, however, a federal district court ordered the OFCCP to hand over the remaining reports for contractors even if they did file objections.

How Does the Court Order Impact Your Organization?

The U.S. Department of Labor, which oversees the OFCCP, argued that Type 2 EEO-1 reports are exempt from disclosure under FOIA Exemption 4 and the Trade Secrets Act. Specifically, FOIA Exemption 4 protects “commercial” or “financial” information obtained by the government that is privileged or confidential. But the Department failed to show “the inherently commercial nature of the diversity data,” according to the federal district court’s ruling on December 22, 2023.

The court said that “there is no commercial gain to be found in the headcount or demographic data within the EEO-1 report,” so there could be “no compounded effect by releasing five years’ worth of data to plaintiffs.” The court also reasoned that, even if the government could show that five years’ worth of data would reveal commercial information, “that data would probably be stale by the time it was disclosed.”

Additionally, the government failed to convince the court that the EEO-1 diversity data is protected under the Trade Secrets Act as “confidential statistical data.”

Thus, the court ordered the OFCCP to produce the remaining EEO-1 reports and ultimately set a deadline of February 20, 2024.

What Happens Next?

While the federal government could appeal the district court’s ruling, we’re currently waiting for the OFCCP to provide additional information. “OFCCP is currently evaluating the court decision and potential next steps and will provide further information or guidance once the

evaluation process has concluded," according to the agency.

In the meantime, you should note the following points:

- **The OFCCP has until the February 20 deadline to decide whether to file an appeal**, which could ultimately delay publication of the data either temporarily or permanently.
- Unless the ruling is successfully appealed, **the OFCCP will have to release demographic data from thousands of federal contractors and first-tier subcontractor** that objected.
- The case serves as a reminder to **carefully review your reports before they are submitted** and ensure you are not unintentionally providing additional confidential data or more information than necessary.
- **There are other potential FOIA exemptions**, such as national security interests, that may be applicable to some contractors. You should coordinate with your affirmative action counsel to review the nature of your objections to see if other exemptions are applicable to your organization.

Conclusion

We will continue to monitor developments on this topic. Make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information directly to your inbox. Please contact your Fisher Phillips attorney, the author of this insight, or any attorney in our [Affirmative Action and Federal Contract Compliance Practice group](#) with questions.