



March 9, 2023

Via Electronic Mail

David J. Goldstein
Littler Mendelson, P.C.
1300 IDS Center
80 South 8th Street
Minneapolis, MN 55402-2136

Re: Center for Investigative Reporting FOIA Request for Type 2 EEO-1 Data of Federal Contractors

Dear David:

The Office of Federal Contract Compliance Programs (“OFCCP”) is in receipt of your correspondence of February 7, 2023, in which you raised concerns regarding OFCCP’s processing of the FOIA request from the Center for Investigative Reporting (“CIR” or “Requester”) for Type 2 EEO-1 Report data of all federal contractors for filing years 2016-2020 (“Request”). We appreciate you taking the time to express these concerns, which the agency takes seriously.

Before addressing your specific concerns, we believe it is helpful to provide some background for context. As amended in June 2022, the Request seeks Type 2 EEO-1 reports for all multi-establishment contractors over a five-year period — this covers over 24,000 unique contractors and 75,000 unique reports. Given the unprecedented scope of the Request, OFCCP has devoted significant resources to its processing in order to review a voluminous amount of material and satisfy the legal requirements of responding to the FOIA request as expeditiously as possible¹ while posting and publishing the notice in a place reasonably calculated to provide contractors with notice in compliance with DOL regulations.²

To this end, OFCCP provided multiple avenues by which contractors may object to disclosure of their information, including submission to a web-based portal that OFCCP newly developed for contractors in response to the Request. OFCCP also provided numerous notices regarding the Request. Our initial notice was published and disseminated on August 18, 2022, through multiple

¹ See generally 5 U.S.C. § 552(a)(6). Additionally, as you are aware, the Department has now been sued by the Requester, demanding that OFCCP immediately release all records and information responsive to the Request. *Center for Investigative Reporting v. Department of Labor*, Case No: 3:22-cv-07182-WHA (N.D. Cal. Nov. 15, 2022).

² As DOL’s regulations provide, “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.” 29 C.F.R. § 70.26(j); see also Executive Order 12,600 § 1 (1987) (same).

channels: (1) the Federal Register; (2) on the OFCCP website, with a landing page created specifically for the Request; and (3) via its GovDelivery mailing list, which is sent to over 370,000 OFCCP stakeholder subscribers. A second notice was published on September 27, in which OFCCP extended the time for contractors to provide written objections. Additional individualized notice was sent on September 21, 2022 (to the email addresses provided by contractors in Type 2 EEO-1 reports filed from 2018-2020), September 23, 2022 (to the email addresses for contractors that had registered in the OFCCP Contractor Portal), and September 28, 2022 (to the email addresses provided by contractors in Type 2 EEO-1 reports filed from 2016-2017).³

After the extended period for objections concluded, on November 22, 2022, OFCCP disseminated another notice to employers for whom it had not received objections and had e-mail addresses, providing an additional period of time for these employers to submit objections. After OFCCP had completed the tabulation of the objections received and created the list of what it believed to be all non-objecting contractors for each of the five years of the Request, on February 2, 2023, OFCCP posted the list and provided individualized notice to all contractors on the list for whom it had e-mail addresses. The purpose of this notice was to allow contractors to consult the list and submit objections regarding its contents prior to any disclosure, to provide further assurance that EEO-1 information would not be disclosed improperly. Finally, on February 16, 2023, OFCCP posted an updated list of non-objectors. 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 until February 10, 2023, while OFCCP evaluates these objections.

As your correspondence notes, despite OFCCP's best efforts to manage the processing of this unprecedented and voluminous Request, upon publishing the list on February 2 and hearing from contractors, the agency quickly realized that the list included entities that had previously submitted objections to release. As a result, OFCCP extended its deadline to February 17⁴ to undertake a comprehensive review of its process to ensure accuracy, address the challenges identified, and provide contractors with sufficient time to submit responses to the agency.

We appreciate your assertion that earlier publication of the list of non-objectors may have alleviated some of these issues. OFCCP was not in a position to publish this list until it had completed the notification and objection process, reviewed the information submitted, and made

³ For multiple reasons, including the age 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 goes 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). Accordingly, we disagree with the contention on page 2 of your correspondence that OFCCP has “provided no opportunity for employers to submit objections.”

⁴ As we discuss below, OFCCP has since extended this deadline further to March 3, 2023.

initial determinations regarding the information that it intended to disclose. OFCCP published its list as soon as it completed these steps.

In the interim, for contractors that contacted OFCCP seeking assistance in determining whether they were subject to the Request, OFCCP developed a form response encouraging employers to log in to the EEO-1 Online Filing System, through which they could access their previously filed EEO-1 reports.⁵ The form response went on to state that “[i]f submitters answered yes to ‘‘Question 3’’, the box confirming to be a federal contractor, and filed between the years requested in the FOIA, then their data is subject to the request.’’ The agency also posted guidance in the form of updated Frequently Asked Questions on September 15, 2022, providing the same information.⁶

To further ensure that contractors have sufficient time to respond, and that contractors’ EEO-1 data is not disclosed improperly, OFCCP is taking the following steps⁷:

- OFCCP has announced 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 after February 10, 2023, and by March 3, 2023, while OFCCP evaluates these objections. Contractors will then have one final opportunity to contact OFCCP no later than March 17, 2023, if they believe their company was improperly listed.
- 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 provide these contractors additional time to respond. While this extraordinary step is not legally required, and creates a significant cost to the agency, it further demonstrates that OFCCP has made a tremendous effort to notify contractors of the pending Request given concerns about the sensitivity of this data.

⁵ We take seriously your assertion that “in most cases,” OFCCP “ignored” requests from contractors asking OFCCP to identify the data it was proposing to produce. We have looked into the matter, and do not believe this assertion to be accurate. Our search of e-mail records indicates that in most instances OFCCP responded to such requests with the form letter described above, or a variation thereof. OFCCP ultimately received hundreds of these requests, eventually leading the agency to publish specific guidance for contractors on its website regarding the scope of the information requested and how to determine if an entity’s data was included within that scope. *See* n.6, *infra*.

⁶ *See* Submitter Notice Response Portal Frequently Asked Questions, Questions 4-5, available at <https://www.dol.gov/agencies/ofccp/faqs/submitter-notice-response#g4> and <https://www.dol.gov/agencies/ofccp/faqs/submitter-notice-response#g5> (updated Sept. 15, 2022). Accordingly, we disagree with your assertion that “many employers did not know if their data was being included and could not determine whether to object.”

⁷ These steps are drawn from notice that OFCCP published and disseminated on February 14, 2023. *See* <https://content.govdelivery.com/accounts/USDOLOFCCP/bulletins/348c069>.

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Finally, we acknowledge your request that OFCCP refrain from producing “any Type 2 report that covers fewer than 150 employees or where small numbers in any one EEO-1 Job Category make it possible to identify the sex, race, or ethnicity, or individual employees.” Now that OFCCP has taken the significant steps detailed above to provide additional notice to the federal contractors implicated by the Request, these contractors may submit objections on the basis you raise if they desire, and OFCCP will consider them in determining whether the information must be withheld under relevant law.

We appreciate you taking the time to bring your concerns to our attention. We hope that this response provides greater understanding and transparency regarding OFCCP’s process to date, and going forward, in response to the Request.

Sincerely,

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

Jenny R. Yang
Director