

CLIENT UPDATE

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FEDERAL COURT ORDERS OFCCP TO RELEASE GOVERNMENT CONTRACTOR EEO-1 DATA; OFCCP HAS UNTIL FEBRUARY 20, 2024 TO APPEAL THE COURT ORDER OR DISCLOSE THE DATA

EXECUTIVE SUMMARY

On December 22, 2023, a federal court ordered OFCCP to release the remaining EEO-1 data sets that it previously withheld in response to government contractors' objections. The parties consented to an extension of the deadline to February 20, 2024 to give OFCCP and the Department of Labor an opportunity to decide whether to appeal the decision or produce the withheld data from contractors' 2016-2020 EEO-1 filings.

BACKGROUND

Between January 2019 and June 2022, The Center for Investigative Reporting (CIR) submitted four Freedom of Information Act (FOIA) (5 U.S.C. § 552) requests asking the Office of Federal Contract Compliance Programs (OFCCP) to disclose all government contractor EEO-1 reports

for 2016-2020. This request covered 75,000 reports from 24,355 federal contractors. Because OFCCP declined to produce the information, CIR filed a federal lawsuit in Northern California.

Recall that in August 2022, the OFCCP published a notice informing government contractors about CIR's FOIA request and gave each contractor a chance to object to OFCCP's turning over their EEO-1 information.

By April 2023, the OFCCP had released all EEO-1 requested reports for non-objecting contractors. Regarding objecting contractors, 4,769 contractors objected to the release of their EEO-1 records, including 621 employers who asserted that they were not government contractors for some or all of those years, and it was error for OFCCP to be in possession of their data. Also, in April 2023, the Court ordered the OFCCP/U.S. Department of Labor to select six representative objecting contractors for a "bellwether" summary judgment motion. The DOL selected DHL Global Business Services, Network Management Resources, Inc., Allied University Security Services, Brandenburg Industrial Service Co., and North Shore University Health System. The sixth bellwether objector no longer is proceeding in the case.

On December 22, 2023, the federal district court in Northern California ordered OFCCP to release the remaining EEO-1 data sets that were the subject of CIR's FOIA request within 28 days of the Court's order but denied CIR summary judgment on the 621 contractors who allegedly were not government contractors within OFCCP's jurisdiction. On December 27, 2023, the parties agreed to extend the deadline to February 20, 2024 to give OFCCP an opportunity to determine whether to appeal the decision.

LEGAL STANDARDS

Since the FOIA's intention is to ensure that the public has access to official information that may not otherwise be supplied on a voluntary basis, the law provides a process for requesting disclosure.

Once a FOIA request has been submitted to a federal agency, the agency has the right to disclose or withhold that information based on nine statutory exemptions. These exemptions must be "narrowly construed." If the government wants to withhold the information from disclosure, the government must prove that an exemption applies.

The Department of Labor argued that withholding disclosure of the EEO-1 reports should qualify under Exemption 4 of the FOIA. Exemption 4 of the FOIA "excuses mandatory disclosure for any **commercial** or **financial** information obtained from a person or by the government that is also privileged or confidential." The OFCCP stated that information regarding headcounts, staffing information and strategy, diversity components, demographic

data and company insights were a part of the EEO-1 reports; and, this information should be considered commercial data and therefore protected under Exemption 4.

CIR argued that the EEO-1 reports are “broad and non-specific” and “reveal commercially valuable information ‘by proxy’ but do not relate operational or financial information in a direct way.”

The court agreed with CIR and determined that the EEO-1 reports were not found to be commercial in nature and therefore did not qualify within the first requirement under Exemption 4.

The order DENIED that the EEO-1 reports are exempt as Trade Secrets under Exemption 4.

The DOL/OFCCP also argued that EEO-1 information would be protected under the Trade Secrets Act (18 U.S.C. § 1905) because the EEO-1 report is “confidential statistical data”.

The order DENIED that the EEO-1 reports diversity data is protected under the Trade Secrets Act and found OFCCP’s argument to be “superficial.”

Conclusion

Once we learn whether OFCCP intends to appeal or disclose, we will send another client update.

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About Roffman Horvitz

Roffman Horvitz, PLC was built from the ground up to provide a best-in-class outside counsel option for federal contractor employers in the areas of OFCCP compliance, affirmative action plan preparation and design, and employment data analytics.