



## Objection Guide to OFCCP Release of EEO-1 Data

### **Preliminary Notes:**

If your organization filed a Type 1 report (as a Single Establishment EEO-1 filer) in the period 2016-2020, your EEO-1 reports will not be released to the news organization, and you need not file objections. The FOIA request pertains only to Type 2 Consolidated reports for multi-establishment employers. More info can be found [here](#).

If your organization

- disclosed the 2016-2020 Type 2 EEO-1 reports on your external or internal website,
- have published them to shareholders, or
- have published them to your employees,

you probably have waived your right to object. It will be very difficult for your organization to claim that the information is confidential, now.

### **The FOIA Objection Portal May be Accessed here:**

<https://ofccp-apps.dol.gov/form/foia-evaluation-form#no-back>

### **POC First Name, Last Name, Title, Phone Number, Email Address**

This seems self-explanatory. We recommend inserting the person who files the EEO-1 for your organization as the Point of Contact (POC) for the OFCCP's FOIA objection form.

### **Do you have Legal Counsel?**

You do not have to click yes.

If you click "yes," you will be prompted to enter your attorney's name, phone number, and email address.

- If you click yes, that you are represented by counsel, OFCCP will contact your attorney about these objections.
- It is possible that the POC could be notified, too, but typically it is OFCCP's practice to communicate with a party's attorney if the party is represented by counsel.

You can insert an in-house attorney's name, with permission from that attorney.

If you have outside employment counsel, you can list their name, with permission from that attorney.

### **OFCCP's FOIA Objection Prompts**

1. **Do you consider information from your EEO-1 report to be a trade secret or commercial information? If yes, please explain why.**

- a. Click yes and insert the following suggested text:

Our Type 2 EEO-1 report is commercial information. Information is commercial if it relates to a business or trade. Moreover, commercial information includes records revealing business operations, such as those that are instrumental for legal compliance. The EEOC requires employers to furnish the composition of their workforce during a selected payroll period within the EEOC's prescribed date range, with counts of employees divided into the ten EEO-1 categories, displaying those counts in intersectional fields of race and gender. The submission also includes the employer's EEOC-assigned company number, Tax Identification

Number, DUNS number, North American Industrial Classification System (NAICS) code, name and job title of the executive who certified the reports, and the name, title, email and telephone number of the person who uploaded the data into the EEOC's portal. The requestor has asked for Type 2 reports from 2016-2020. By obtaining five years of EEO-1 reports, the requestor will be able to establish each organization's race and gender employment trends and staffing patterns over time. Thus, these records contain information related to our business or trade, and the information across five years will reveal business operations, such as those that are instrumental for our compliance with OFCCP's regulations.

- b. If your organization includes Top Secret/Black Box sites, or the count of your organization's personnel could reveal the existence of employees at Top Secret/Black Box sites, consider adding this objection:

By mass-releasing our headcount and not affording us the right to a separate, individual objection, OFCCP ignores that revelation of our organization's headcount also may implicate FOIA Exemption 1. Our organization has employees at [top secret/Black Box] locations, and their existence is classified information relevant to national security.

- c. If your organization's Type 2 report includes very low headcount in any one EEO-1 category, consider adding this objection:

Because we have low headcount in [one/two] of our EEO-1 categories, even a summary, consolidated Type 2 report will reveal the gender and race self-identification chosen by the employees in those categories because there are so few of them in our organization. Revelation of individually-identifying information violates privacy and confidentiality promises because these employees did not expect their gender and race/ethnicity information to be shared when they self-identified.

**2. Do you customarily keep the requested information private or closely-held? If yes, please explain what steps have been taken to protect data contained in your reports, and to whom it has been disclosed.**

- a. Click "yes."
- b. Here, you need to provide examples that are directly relevant to your organization's efforts to keep this information confidential. If any of these statements is true for your organization, consider inserting them in the text box, or consider developing your own factual statements that illustrate the steps your organization has taken to keep your Type 2 reports confidential:
- i. We do not publish our Type 2 Consolidated EEO-1 report on any internal or external websites.
  - ii. We do not include the EEO-1 Type 2 report in any Diversity, Equity, or Inclusion internal company reports.
  - iii. We do not publicize the EEO-1 company number that EEOC assigns us.
  - iv. Only xx number of employees in our organization have access to the data that is extracted from our Human Resources Information System and used to file the Type 2 reports.
  - v. Our EEO-1 reports are not accessible on a shared drive where they can be viewed by anyone outside HR.
  - vi. The only executive who has access to our EEO-1 report is the official who is required to certify the data on the EEOC's website.
  - vii. When we have received internal or external requests for our race and gender data, we have provided it under different rubrics, narrowly-tailored to the specific request, not for our entire United States domestic operations, and not for five consecutive years.

**3. Do you contend that the government provided an express or implied assurance of confidentiality? If yes, please explain. If no, skip to question 4.**

- a. Click “yes,” and insert the following language in the text box:

According to archived website pages from [www.eeoc.gov](http://www.eeoc.gov), EEOC’s EEO-1 survey website on August 22, 2016 (2016 filing deadline was Sept 30), May 2, 2018 (2017 filing deadline was extended to June 1, 2018), April 30, 2019 (2018 filing deadline was May 31, 2019) and July 22, 2021 (2019 and 2020 deadline to file was August 23, 2021), contained the following representation to employers before they submitted their demographic data: “This information is shared with other authorized federal agencies in order to avoid duplicate collection of data and reduce the burden placed on employers. Although the data is confidential, aggregated data is available to the public.” We contend the federal government provided us an express assurance of confidentiality when we filed our demographic data to EEOC. We understood that EEOC had authority to share that data with OFCCP, but it labeled our data as confidential. We object to OFCCP revealing our individual organization data in a non-aggregated form. Moreover, OFCCP’s regulations at 41 CFR Section 1.7(c) state that “[EEO-1] Reports filed pursuant to this section shall be used only in connection with the administration of the Order, the Civil Rights Act of 1964, or in furtherance of the purposes of the order and said Act.” Disclosing our Type 2 reports in response to the FOIA request is not for any of these stated purposes.

**4. If you answered “no” to question 3, were there expressed or implied indications at the time the information was submitted that the government would publicly disclose the information?**

- a. Even though we recommend answering “yes” to #3, implying that you don’t need to answer #4, too, we encourage you to click “yes” to number 4 and include the following text:

Based on the EEOC’s website statements (see response to #3), there were express assurances that our individual employer data would be maintained confidentially and that our data only could be released in an aggregated form. In 2018, EEOC revealed its database, where it aggregates data from all employers with the same first 2 digits, first 3 digits, or first 4 digits of the NAICS code. This aggregated data enables individual employers to compare their data counts with other employers in their industry, but under no circumstances did EEOC make it clear that it or OFCCP ever would reveal an individual employer’s demographic counts by initial NAICS digits or full NAICS codes.

**5. Do you believe that disclosure of this information could cause harm to an interest protected by Exemption 4 (such as by causing genuine harm to your economic or business interests)? If yes, please explain.**

- a. If any of these statements is true for your organization, consider including them.
- i. The requestor has made it clear that it wants the information for public embarrassment purposes. <https://revealnews.org/article/we-forced-the-government-to-share-corporate-diversity-data-its-giving-companies-an-out-instead/> It seeks to use this information to compare and critique our demographic data to other employers. This public excoriation exposes us to reputational harm.
  - ii. Once the information is sent to the requestor, it will be in the public domain for other businesses to use to try to disparage us in competition for future government contracts or in bid protests.
  - iii. We are a private company. We are not a public company. We do not have shareholders, and we do not publicize the total number of domestic employees we employ in the United States.
  - iv. [Depending on how you responded to prompt #1 above:] Because we have EEO-1 categories with only 1 or 2 employees in them, across our US organization, revealing this information could cause harm to the promises of privacy and confidentiality that we made to our

employees when we represented that their self-identification information would not be disclosed other than to the federal agencies that require us to collect it.

**6. Are there other legal issues OFCCP should be aware of? If yes, please explain.**

- a. If your Type 2 Consolidated EEO-1 form tallies data from legal entities and subsidiaries that are not government contractors or subcontractors (if you filed Type 4 or Type 8 reports for legal entities that are not federal contractors or subcontractors), then you should respond as follows:

Our Type 2 Consolidated EEO-1 report includes data on legal entities that are not government contractors or subcontractors. The EEOC's filing format compels us to indicate "yes" in response to the prompt that asks whether any legal entity is a covered government contractor, and it imputes that yes answer to all legal entities, even if they are not government contractors. By releasing our Type 2 report, the OFCCP will be releasing co-mingled data on legal entities that are not federal contractors or subcontractors. It has no authority to release the information on legal entities that are not federal contractors or subcontractors.

- b. Consider reiterating:

OFCCP required us to use our EEOC company number in its new AAP Verification Portal. By releasing our Type 2 report, it also is disclosing our EEOC company number, our Employer Identification Number, our DUNS number, our NAICS codes, and our EEOC point of contact, which is the same POC as we used in the portal. By putting our EEOC company number and other authenticating information that we used to create accounts in OFCCP's Contractor Portal into the public domain, we are concerned that OFCCP will be compromising the privacy, security, and confidentiality of the affirmative action [establishment/functional] AAP information we uploaded to the AAP verification portal.

*This guide was provided by [Alissa Horvitz](#) of the law firm [Roffman Horvitz](#). Ms. Horvitz focuses her practice on representing clients in various matters before the OFCCP, preparing for and defending OFCCP audits and onsite visits, responding to OFCCP information requests, and conducting live and in-person training seminars on OFCCP compliance. This guide should not be relied on as legal advice and consultation with counsel is advised.*