

Evans FOIA Correspondence since 2019

FOIA Evans 872421 2019-01-10 req unredacted.pdf
FOIA Evans 872421 2019-01-24 ack Redacted.pdf
FOIA Evans 872421 2019-03-12 correspondence Redacted.pdf
FOIA Evans 872421 2019-06-15 correspondence unredacted.pdf
FOIA Evans 872421 2019-07-18 toll Redacted.pdf
FOIA Evans 872421 2019-08-08 correspondence Redacted.pdf
FOIA Evans 872421 2020-12-18 correspondence unredacted.pdf
FOIA Evans 872421 2021-01-07 correspondence Redacted.pdf
FOIA Evans 872421 2022-05-10 correspondence Redacted.pdf
FOIA Evans 872421 2022-05-11 correspondence Redacted.pdf
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FOIA Evans 872421 2022-06-02 correspondence Redacted.pdf
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FOIA Evans 875877 2019-03-25 request unredacted.pdf
FOIA Evans 875877 2019-03-26 closure Redacted.pdf
FOIA Evans 881537 2019-08-14 request unredacted.pdf
FOIA Evans 881537 2020-02-18 closure Redacted.pdf
FOIA Evans 887177 2020-01-14 correspondence Redacted.pdf
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FOIA Evans 887177 2020-11-19 18.18 correspondence Redacted.pdf
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FOIA Evans 887177 2021-09-29 closure unredacted.pdf
FOIA Evans 897123 2020-09-11 req unredacted.pdf
FOIA Evans 897123 2020-10-02 ack unredacted.pdf
FOIA Evans 897123 2020-10-30 correspondence Redacted.pdf
FOIA Evans 897123 2020-11-07 correspondence Redacted.pdf
FOIA Evans 897123 2020-12-11 correspondence Redacted.pdf
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FOIA Evans 897123 2021-05-10 correspondence Redacted.pdf
FOIA Evans 897123 2021-05-21 correspondence Redacted.pdf
FOIA Evans 2021-F-05573 2021-03-02 request Redacted.pdf
FOIA Evans 2021-F-05573 2021-03-05 ack unredacted.pdf
FOIA Evans 2021-F-05573 2021-04-19 closure unredacted.pdf

42 Files

From: Will Evans <wevans@revealnews.org>
Sent: Thursday, January 10, 2019 7:13 PM
To: FOIARequests
Cc: Victoria Baranetsky
Subject: FOIA request - OFCCP

Dear FOIA Officer,

Under the Freedom of Information Act, I am requesting a copy of the following records from OFCCP:

*** A spreadsheet of all consolidated (Type 2) EEO-1 reports for all federal contractors for 2016.**

I am requesting this data in electronic format, by email.

There is an exception to the notice requirements of 29 CFR 70.26 and Executive Order 12600 that applies here, as will be explained below. Notice to the contractors is not required.

Under 29 CFR 70.2(G)(5) and Executive Order 12600 Sec.8(e), the notice requirements **need not be followed** if the information has not been designated by the submitter, unless OFCCP "has reason to believe that disclosure of the information would result in substantial competitive harm."

Under 29 CFR 70.2(G)(6) and Executive Order 12600 Sec.8(f), the notice requirements **need not be followed** the designation made by the submitter "appears obviously frivolous."

There is no substantial reason to believe that disclosure of the information would result in competitive harm, so the information should be released without notice for any contractor. Even if a contractor has designated it as confidential, that designation should be considered "obviously frivolous," as OFCCP has already determined that Type 2 EEO-1 reports are not subject to Exemption 4 of the Freedom of Information Act. (see CIR v USDOL, Case No. 3:18-cv-2008 JCS)

I am a representative of the news media as a reporter with Reveal from The Center for Investigative Reporting, a non-profit investigative journalism organization. This request is made as part of news gathering and not for a commercial use. I respectfully ask that you waive fees related to this request. Please notify me of any charges before fulfilling this request.

Please contact me with any questions at [510-809-2209](tel:510-809-2209) or wevans@revealnews.org

Thank you for your attention to this request.

Sincerely,
Will Evans
Reveal / The Center for Investigative Reporting
1400 65th, Suite 200
Emeryville, CA 94608

--
Will Evans
reporter
o: 510-809-2209

U.S. Department of Labor

Office of Federal Contract Compliance Programs
200 Constitution Avenue, N.W.
Washington, D.C. 20210



JAN 24 2019

Will Evans
The Center for Investigative Reporting
1400 65th Street, Suite 200
Emeryville, CA 94608

RE: Freedom of Information Act Request Acknowledgement – Tracking No. 872421

Dear Mr. Evans:

This letter is to acknowledge receipt of your Freedom of Information Act (FOIA) request submitted to foiarequest@dol.gov. The Office of the Solicitor assigned your request to the Office of Federal Contract Compliance Programs (OFCCP) on January 15, 2019. Please refer to the above-referenced FOIA tracking number in any future correspondence regarding your FOIA request.

You requested a spreadsheet of all consolidated (Type 2) EEO-1 reports for all federal contractors for 2016.

We consider you to be a representative of the news media as defined by the U.S. Department of Labor FOIA regulations at 29 CFR § 70.40(c)(3), therefore, only reproduction costs will be assessed, excluding charges for the first 100 pages. You will receive written notification if the total estimated fee for processing your request exceeds \$25.00.

OFCCP's National Office will process your request for EEO-1 data. Once the data is compiled, we will send a letter to the submitters requesting permission to release the requested EEO-1 data.

In accordance with 29 CFR § 70.26, OFCCP is required to notify submitters that their business information has been requested under the FOIA to give them an opportunity to object in writing to disclosure of any specified portion of the requested information. OFCCP will evaluate, on a case-by-case basis, any objections to the release of the requested EEO-1 data. We will send a final response to your request for EEO-1 data after the deadline expires for the company to object.

Due to the volume and complexity of the FOIA requests in receipt of this agency, we anticipate that providing a full response will take longer than 20 business days to fulfill. Accordingly, OFCCP will take an additional 10 business days to fulfill your request as afforded by the FOIA at 5 U.S.C. § 552(a)(6)(B)(i). We will contact you if we are unable to fulfill your request in 30 business days.

Should you have questions regarding your request, please contact this office at (202) 693-0101 or by email at OFCCP_NO_FOIA@dol.gov.

If you need further assistance or would like to discuss any aspect of your request, please do not hesitate to contact the DOL FOIA Public Liaison, Thomas Hicks, at (202) 693-5427.

Alternatively, you may contact the Office of Government Information Services within the National Archives and Records Administration (OGIS) to inquire about the mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740-6001. You can also reach that office by e-mail at ogis@nara.gov, by phone at (202) 741-5770, by fax at (202) 741-5769, or by calling toll-free at (877) 684-6448.

If you are not satisfied with the response to this request, you may administratively appeal by writing to the Solicitor of Labor within 90 days from the date of this letter. The appeal must state in writing the grounds for the appeal, and it may include any supporting statements or arguments, but such statements are not required. In order to facilitate processing of the appeal, please include your mailing address and daytime telephone number, as well as a copy of the initial request and copy of this letter. The envelope and letter of the appeal should be clearly marked "Freedom of Information Act Appeal." Any amendment to the appeal must be made in writing and received prior to a decision. The appeal should be addressed to the Solicitor of Labor, Division of Management and Administrative Legal Services, U.S. Department of Labor, 200 Constitution Avenue, NW, Room N2420, Washington, DC 20210. Appeals may also be submitted by email to foiaappeal@dol.gov. Appeals submitted to any other email address will not be accepted.

Using the tracking number above, you may query the status of your request online at <http://www.dol.gov/foia>.

Sincerely,

(b) (6)

D. Lissette Geán
Special Assistant



MAR 12 2019

Will Evans
The Center for Investigative Reporting
1400 65th Street, Suite 200
Emeryville, CA 94608

RE: Freedom of Information Act Request Acknowledgement – Tracking No. 872421

Dear Mr. Evans:

This letter is a follow-up to your Freedom of Information Act (FOIA) request submitted to the Office of Federal Contract Compliance Programs (OFCCP). Please refer to the above-referenced FOIA tracking number in any future correspondence regarding your FOIA request. You requested a spreadsheet of all consolidated (Type 2) EEO-1 reports for all federal contractors for 2016.

On January 11, 2019, the Supreme Court granted a writ of certiorari in *Food Marketing Institute v. Argus Leader Media*, 889 F.3d 914 (8th Cir. 2018), *cert. granted*, 2019 WL 166877 (U.S. Jan. 11, 2019) (No. 18-841). The questions presented in *Argus Leader* include the appropriate definition of “confidential” in the Freedom of Information Act’s Exemption 4, and in the alternative whether the “substantial competitive harm” test recognized by some circuit courts under Exemption 4 will be retained or altered. Given that the Court’s answer to those questions may affect how OFCCP would address the request at issue, we are delaying a final determination regarding disclosure until we have the benefit of the Court’s decision in *Argus Leader*.

Though your request is reasonably described, we have determined that there are more than 100,000 responsive records. Reaching out to each of the companies affected by your voluminous request would overwhelm the OFCCP FOIA unit for the foreseeable future, and that the cost in sending more than 100,000 letters would be unduly burdensome. Even though we are delaying a final determination regarding disclosure, this office is discussing the best way to answer your request. If you wish to narrow the scope of your request, please send a revised request to the address referenced above or send an e-mail to OFCCP_NO_FOIA@dol.gov. We would be happy to discuss a narrower request.

Should you have questions regarding your request, please contact this office at (202) 693-0101 or by email at OFCCP_NO_FOIA@dol.gov.

If you need further assistance or would like to discuss any aspect of your request, please do not hesitate to contact the DOL FOIA Public Liaison, Thomas Hicks, at (202) 693-5427.

Alternatively, you may contact the Office of Government Information Services within the National Archives and Records Administration (OGIS) to inquire about the mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740-6001. You can also reach that office by e-mail at ogis@nara.gov, by phone at (202) 741-5770, by fax at (202) 741-5769, or by calling toll-free at (877) 684-6448.

If you are not satisfied with the response to this request, you may administratively appeal by writing to the Solicitor of Labor within 90 days from the date of this letter. The appeal must state in writing the grounds for the appeal, and it may include any supporting statements or arguments, but such statements are not required. In order to facilitate processing of the appeal, please include your mailing address and daytime telephone number, as well as a copy of the initial request and copy of this letter. The envelope and letter of the appeal should be clearly marked "Freedom of Information Act Appeal." Any amendment to the appeal must be made in writing and received prior to a decision. The appeal should be addressed to the Solicitor of Labor, Division of Management and Administrative Legal Services, U.S. Department of Labor, 200 Constitution Avenue, NW, Room N2420, Washington, DC 20210. Appeals may also be submitted by email to foiaappeal@dol.gov. Appeals submitted to any other email address will not be accepted.

Sincerely,



D. Lissette Geán
Special Assistant



June 15, 2022

Via Electronic Mail: vbaranetsky@revealnews.org

Victoria D. Barenetsky
General Counsel
The Center for Investigative Reporting
1400 65th, Suite 200
Emeryville, CA 94608

RE: Freedom of Information Act Request – Tracking No. 872421

Dear Ms. Baranetsky:

We are in receipt of your correspondence of May 23, 2022, (hereinafter “Baranetsky Correspondence”) to Secretary Walsh, Solicitor Nanda, and Director Yang regarding FOIA Request #872421 from Will Evans of the Center for Investigative Reporting (CIR) to the Office of Federal Contract Compliance Programs (OFCCP) for consolidated Type 2 EEO-1 reports for all federal contractors from 2016-2018.¹ This correspondence has been referred to the undersigned for response.

As an initial matter, the Department of Labor (Department) continues to strongly disagree with CIR’s assertion that the Department is in “direct contravention of law” by not immediately disclosing the thousands of EEO-1 reports from 2016-2020 (hereinafter “EEO-1 reports”) responsive to FOIA Request #872421. The recent Northern District of California decision referenced in your letter² addressed only 10 EEO-1 reports of select companies from 2016 and does not have any binding effect as to the other EEO-1 reports for which CIR now demands immediate disclosure. Furthermore, the subsequent Ninth Circuit decisions³ were limited to purely jurisdictional issues and explicitly did not reach the merits of the district court decision.

We also disagree with CIR’s position that OFCCP can proactively publish the requested EEO-1 reports without providing submitters an opportunity to object to disclosure. The Department’s disclosure regulations at 29 C.F.R. part 70, consistent with Executive Order 12600, require the Department to provide notice to submitters “whenever it has reason to believe that the information requested under the FOIA may be protected from disclosure under Exemption 4, but

¹ Within the last month, CIR sent a new FOIA request to the Department for Type 2 EEO-1 reports for all federal contractors for the years 2019 and 2020 as well. As agreed to by Mr. Evans, OFCCP has combined this request with FOIA Request #872421 for processing.

² *Ctr. For Investigative Reporting v. Dep’t of Labor*, 424 F. Supp. 3d 771 (N.D. Cal. 2019).

³ *Evans v. Synopsis*, 34 F.4th 762 (9th Cir. 2022); *Synopsis v. Dep’t of Labor*, Nos. 20-16414 and 20-16416, Dkt. No. 53-1 (9th Cir. May 12, 2022).

has not yet determined whether the information is protected from disclosure...,”⁴ and to provide submitters with a reasonable period of time to object to the disclosure and state their grounds for doing so. Indeed, were the Department to immediately release all Type 2 EEO-1 reports as CIR recommends, it would be at risk of substantial liability in reverse FOIA actions if the reviewing court(s) found that Exemption 4 did apply to the EEO-1 records, and that in releasing them to the public the Department had violated its own regulations and improperly disclosed the confidential commercial information of thousands of federal contractors.

We do, however, agree with CIR that the Department may effectuate notice to all federal contractors via “posting and publishing the notice in a place reasonably calculated to accomplish notification.”⁵ The Department will publish a notice in the Federal Register and on the Department’s public-facing website that it has received FOIA requests seeking Type 2 EEO-1 records from all federal contractors that filed them from 2016-2020, and pursuant to its regulations,⁶ the Department will provide an opportunity for the submitters to respond.

If you have any questions, please contact us via email at OFCCP_NO_FOIA@dol.gov, or by telephone at (202) 693-0101.

Sincerely,

KELECHI

AHAGHOTU

Kelechi Ahaghotu

Branch Chief of Information Services

Division of Management and Administrative Programs

Digitally signed by
KELECHI AHAGHOTU

Date: 2022.06.15
15:21:27 -04'00'

⁴ 29 C.F.R. § 70.26(d)

⁵ 29 C.F.R. § 70.26(j)

⁶ *Id.* at § 70.26(e) (“A component will allow a submitter a reasonable time to respond to the notice described in [29 C.F.R. § 70.26(c)]....”)

U.S. Department of Labor

Office of Federal Contract
Compliance Programs
200 Constitution Avenue, N.W.
Washington, D.C. 20210



JUL 18 2019

Will Evans
The Center for Investigative Reporting
1400 65th Street, Suite 200
Emeryville, CA 94608

RE: Freedom of Information Act Request Acknowledgement – Tracking No. 872421

Dear Mr. Evans:

This letter is a follow-up to your Freedom of Information Act (FOIA) request submitted to the Office of Federal Contract Compliance Programs (OFCCP). Please refer to the above-referenced FOIA tracking number in any future correspondence regarding your FOIA request.

You requested a spreadsheet of all consolidated (Type 2) EEO-1 reports for all federal contractors for 2016. As you know from your earlier requests, in accordance with 29 CFR § 70.26, OFCCP is required to notify submitters that their business information has been requested under the FOIA to give them an opportunity to object in writing to disclosure of any specified portion of the requested information.

Though your request is reasonably described, we have determined that there are more than 100,000 responsive records. Reaching out to each of the companies affected by your voluminous request would overwhelm the OFCCP FOIA unit for the foreseeable future, and the cost in sending more than 100,000 letters would be unduly burdensome. If you wish to narrow the scope of your request, please send a revised request to the address referenced above or send an e-mail to OFCCP_NO_FOIA@dol.gov. In the event that we do not receive a response from you within thirty (30) days from the date of this letter, we will administratively close your request.

Should you have questions regarding your request, please contact this office at (202) 693-0101 or by email at OFCCP_NO_FOIA@dol.gov. If you need further assistance or would like to discuss any aspect of your request, please do not hesitate to contact the DOL FOIA Public Liaison, Thomas Hicks, at (202) 693-5427.

Alternatively, you may contact the Office of Government Information Services within the National Archives and Records Administration (OGIS) to inquire about the mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740-6001. You can also reach that office by e-mail at ogis@nara.gov, by phone at (202) 741-5770, by fax at (202) 741-5769, or by calling toll-free at (877) 684-6448.

If you are not satisfied with the response to this request, you may administratively appeal by writing to the Solicitor of Labor within 90 days from the date of this letter. The appeal must state in writing the grounds for the appeal, and it may include any supporting statements or arguments, but such statements are not required. In order to facilitate processing of the appeal, please include your mailing address and daytime telephone number, as well as a copy of the initial request and copy of this letter. The envelope and letter of the appeal should be clearly marked "Freedom of Information Act Appeal." Any amendment to the appeal must be made in writing and received prior to a decision. The appeal should be addressed to the Solicitor of Labor, Division of Management and Administrative Legal Services, U.S. Department of Labor, 200 Constitution Avenue, NW, Room N2420, Washington, DC 20210. Appeals may also be submitted by email to foiaappeal@dol.gov. Appeals submitted to any other email address will not be accepted.

Sincerely,

(b) (6)

D. Lissette Geán
Special Assistant

From: [Will Evans](#)
To: [Andersen, Bruce - OFCCP](#)
Cc: [Victoria Baranetsky](#)
Subject: re FOIA 872421
Date: Thursday, August 08, 2019 4:16:20 PM
Attachments: [OFCCP FOIA 872421.pdf](#)

Dear FOIA Officer,

This is in regards to your July 18, 2019 letter requesting that I narrow my original request because it would be unduly burdensome to notify all affected companies. The notification requirements, however, do not apply here because no exemption applies. The agency, in fact, has previously determined that no exemption applies and has released Type 2 EEO-1 reports in response to previous FOIA requests. Because the agency does not need to notify any companies, providing a spreadsheet is not unduly burdensome, and there is no need to narrow the request.

Thank you for your work on this request.

Best,

Will Evans

--

Will Evans
reporter
o: 510-809-2209



www.revealnews.org

U.S. Department of Labor

Office of Federal Contract
Compliance Programs
200 Constitution Avenue, N.W.
Washington, D.C. 20210



JUL 18 2019

Will Evans
The Center for Investigative Reporting
1400 65th Street, Suite 200
Emeryville, CA 94608

RE: Freedom of Information Act Request Acknowledgement – Tracking No. 872421

Dear Mr. Evans:

This letter is a follow-up to your Freedom of Information Act (FOIA) request submitted to the Office of Federal Contract Compliance Programs (OFCCP). Please refer to the above-referenced FOIA tracking number in any future correspondence regarding your FOIA request.

You requested a spreadsheet of all consolidated (Type 2) EEO-1 reports for all federal contractors for 2016. As you know from your earlier requests, in accordance with 29 CFR § 70.26, OFCCP is required to notify submitters that their business information has been requested under the FOIA to give them an opportunity to object in writing to disclosure of any specified portion of the requested information.

Though your request is reasonably described, we have determined that there are more than 100,000 responsive records. Reaching out to each of the companies affected by your voluminous request would overwhelm the OFCCP FOIA unit for the foreseeable future, and the cost in sending more than 100,000 letters would be unduly burdensome. If you wish to narrow the scope of your request, please send a revised request to the address referenced above or send an e-mail to OFCCP_NO_FOIA@dol.gov. In the event that we do not receive a response from you within thirty (30) days from the date of this letter, we will administratively close your request.

Should you have questions regarding your request, please contact this office at (202) 693-0101 or by email at OFCCP_NO_FOIA@dol.gov. If you need further assistance or would like to discuss any aspect of your request, please do not hesitate to contact the DOL FOIA Public Liaison, Thomas Hicks, at (202) 693-5427.

Alternatively, you may contact the Office of Government Information Services within the National Archives and Records Administration (OGIS) to inquire about the mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740-6001. You can also reach that office by e-mail at ogis@nara.gov, by phone at (202) 741-5770, by fax at (202) 741-5769, or by calling toll-free at (877) 684-6448.

If you are not satisfied with the response to this request, you may administratively appeal by writing to the Solicitor of Labor within 90 days from the date of this letter. The appeal must state in writing the grounds for the appeal, and it may include any supporting statements or arguments, but such statements are not required. In order to facilitate processing of the appeal, please include your mailing address and daytime telephone number, as well as a copy of the initial request and copy of this letter. The envelope and letter of the appeal should be clearly marked "Freedom of Information Act Appeal." Any amendment to the appeal must be made in writing and received prior to a decision. The appeal should be addressed to the Solicitor of Labor, Division of Management and Administrative Legal Services, U.S. Department of Labor, 200 Constitution Avenue, NW, Room N2420, Washington, DC 20210. Appeals may also be submitted by email to foiaappeal@dol.gov. Appeals submitted to any other email address will not be accepted.

Sincerely,

(b) (6)

D. Lissette Geán
Special Assistant

From: Office of Federal Contract Compliance Programs <ofccp_no_foia@DOL.GOV>
Sent: Friday, December 18, 2020 12:32 PM
To: agutierrez@revealnews.org
Cc: vbaranetsky@revealnews.org; wevans@revealnews.org
Subject: Freedom of Information Act Requests – Tracking Nos. 872421 and 897123

Via Electronic Mail

Dear Ms. Gutierrez:

We have received your December 11, 2020, e-mail inquiring about outstanding FOIA requests that, combined, seek two years (2016 and 2018) of EEO-1 consolidated (Type 2) reports for all federal contractors.

As you are aware, we have complied with the district court's order and released the 2016 reports of the individual submitters who have not appealed the court's decision in the matter of *Ctr. for Investigative Reporting v. U.S. Dep't of Labor*, 424 F. Supp. 3d 771, 779 (N.D. Cal. 2019). Your outstanding FOIA requests seek the EEO-1, Type 2 reports of well over 15,000, and possibly over 20,000 submitters from countless industries whose reports are not subject to that court order.

We continue to be subject to Executive Order 12600 and are obligated to notify submitters of requests for their potentially confidential commercial information. See 29 C.F.R. § 70.26. Under Executive Order 12600, we must afford submitters a reasonable period of time to object to the disclosure of any portion of the information and to state all grounds upon which disclosure is opposed. The submitters that are the subject of your request have not had the opportunity to demonstrate whether their EEO-1, Type 2 reports contain confidential commercial information. Moreover, while we do not believe that the Northern California's District Court's decision in *Center for Investigative Reporting* has precedential effect on all EEO-1, Type 2 reports, we note that this matter is currently on appeal before the U.S. Court of Appeals for the Ninth Circuit and there is still a chance that the district court's holding may be overturned.

Sincerely,

D. Lissette Geán
FOIA Manager

From: Alexandra Gutierrez <agutierrez@revealnews.org>
Sent: Thursday, January 7, 2021 12:13 PM
To: OFCCP NO FOIA
Cc: Victoria Baranetsky; Will Evans; Hicks, Thomas - SOL
Subject: Re: Freedom of Information Act Requests – Tracking Nos. 872421 and 897123

CAUTION - The sender of this message is external to the DOL network. Please use care when clicking on links and responding with sensitive information. Send suspicious email to spam@dol.gov.

VIA E-MAIL

Doris Lissette Geán
FOIA Manager
Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210
OFCCP_NO_FOIA@dol.gov

Re: Freedom of Information Act Request Acknowledgement – Tracking No. 897123

Dear Ms. Geán,

We are following up on your December 18, 2020 e-mail. While we are considering are options as to the Department of Labor's current position as to our reporter's request, we seek answers to the following questions:

1. When did the Department provide E.O. 12600 notices to submitters?
2. Have any submitters responded, either objecting or consenting?
3. For those submitters who have consented or have waived their opportunity to object due to the passage of a reasonable amount of time, would the Department be able to provide their submitted reports on a rolling basis.

We appreciate your attention to these inquiries.

Sincerely,
Alexandra M. Gutierrez

cc: D. Victoria Baranetsky, General Counsel, Center for Investigative Reporting
Will Evans, Reporter, Center for Investigative Reporting
Thomas Hicks, DOL FOIA Public Liaison

On Fri, Dec 18, 2020 at 9:32 AM Office of Federal Contract Compliance Programs <ofccp_no_foia@dol.gov> wrote:

Via Electronic Mail
Dear Ms. Gutierrez:

We have received your December 11, 2020, e-mail inquiring about outstanding FOIA requests that, combined, seek two years (2016 and 2018) of EEO-1 consolidated (Type 2) reports for all federal contractors.

As you are aware, we have complied with the district court's order and released the 2016 reports of the individual submitters who have not appealed the court's decision in the matter of *Ctr. for Investigative Reporting v. U.S. Dep't of Labor*, 424 F. Supp. 3d 771, 779 (N.D. Cal. 2019). Your outstanding FOIA requests seek the EEO-1, Type 2 reports of well over 15,000, and possibly over 20,000 submitters from countless industries whose reports are not subject to that court order.

We continue to be subject to Executive Order 12600 and are obligated to notify submitters of requests for their potentially confidential commercial information. *See* 29 C.F.R. § 70.26. Under Executive Order 12600, we must afford submitters a reasonable period of time to object to the disclosure of any portion of the information and to state all grounds upon which disclosure is opposed. The submitters that are the subject of your request have not had the opportunity to demonstrate whether their EEO-1, Type 2 reports contain confidential commercial information. Moreover, while we do not believe that the Northern California's District Court's decision in *Center for Investigative Reporting* has precedential effect on all EEO-1, Type 2 reports, we note that this matter is currently on appeal before the U.S. Court of Appeals for the Ninth Circuit and there is still a chance that the district court's holding may be overturned.

Sincerely,

D. Lissette Geán

FOIA Manager

--

Alexandra M. Gutierrez
First Amendment Fellow

(b) (6) [REDACTED]



From: Will Evans <wevans@revealnews.org>
Sent: Monday, May 10, 2021 1:02 PM
To: OFCCP NO FOIA
Subject: amendment request

CAUTION - The sender of this message is external to the DOL network. Please use care when clicking on links and responding with sensitive information. Send suspicious email to spam@dol.gov.

Dear FOIA Officer,

I would like to amend my FOIA request #872421 to include a spreadsheet of all consolidated (Type 2) EEO-1 reports for all federal contractors for 2017 and 2018 as well as 2016.

If you agree to this amendment, I will withdraw my separate FOIA #897123 for the 2018 data.

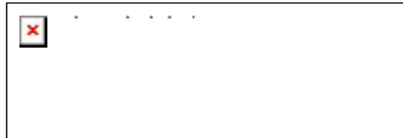
Please let me know.

Thank you very much.

Best,
Will Evans

--

Will Evans
reporter
office: 510-809-2209
cell: (b) (6)



www.revealnews.org

From: OFCCP NO FOIA
Sent: Tuesday, May 11, 2021 12:06 PM
To: 'Will Evans'
Subject: RE: amendment request

Dear Mr. Evans,

We have modified request 872421 to include a spreadsheet of the consolidated (Type 2) EEO-1 reports for all federal contractors for the years 2016 through 2018.

We will administratively close request 897123.

Cordially,

Bruce Andersen
The OFCCP FOIA Team

From: Will Evans <wevans@revealnews.org>
Sent: Monday, May 10, 2021 1:02 PM
To: OFCCP NO FOIA <OFCCP_NO_FOIA@DOL.GOV>
Subject: amendment request

CAUTION - The sender of this message is external to the DOL network. Please use care when clicking on links and responding with sensitive information. Send suspicious email to spam@dol.gov.

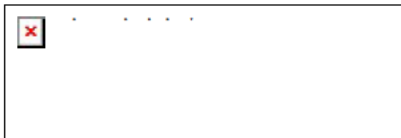
Dear FOIA Officer,

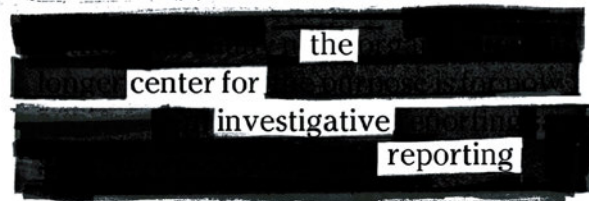
I would like to amend my FOIA request #872421 to include a spreadsheet of all consolidated (Type 2) EEO-1 reports for all federal contractors for 2017 and 2018 as well as 2016.

If you agree to this amendment, I will withdraw my separate FOIA #897123 for the 2018 data.

Please let me know.
Thank you very much.
Best,
Will Evans

--
Will Evans
reporter
office: 510-809-2209
(b) (6)





Secretary of Labor Martin J. Walsh
Office of the Secretary of Labor
200 Constitution Ave, NW
Room C-2318
Washington, DC 20210

Solicitor of Labor Seema Nanda
Office of the Solicitor of Labor
200 Constitution Ave, NW
Washington, DC 20210

Director Jenny R. Yang
Office of Federal Contract Compliance Programs
200 Constitution Ave, NW
Room C-3325
Washington, DC 20210

May 23, 2022

VIA ELECTRONIC DELIVERY

Re: FOIA Request No. 872421 and DOL's Wrongful Withholding of EEO-1 Type 2 Forms That Should be Released and Published Prospectively

To Whom It May Concern:

The Center for Investigative Reporting ("CIR") writes to object to the agency's withholding of records requested under the Freedom of Information Act ("FOIA") by our reporter, Mr. Will Evans. Mr. Evans's FOIA request, which has been pending for *more than three years*, seeks disclosure of aggregate workforce diversity data submitted by federal contractors to the Department of Labor ("DOL")'s Office of Federal Contract Compliance Programs ("OFCCP"). This withholding is in contravention of legal authority.

According to OFCCP, the agency's extensive delay in responding to this request is due to its need to consult with thousands of federal contractors to ascertain whether they object to

disclosure of their diversity data. It is unclear whether OCFPP has attempted to initiate that process. Nevertheless, CIR disputes that such consultation is appropriate or necessary in the first instance. The agency's withholding is in direct contravention of law in light of recent court decisions, including a federal district court ordering disclosure of diversity data, an opinion which the DOL did not appeal and which the U.S. Ninth Circuit Court of Appeals left undisturbed, as discussed below. These records should be disclosed immediately. Regardless, even if the agency wanted to formalize this disclosure process moving forward, by proactively publishing these records on its website, it could provide a broad notice to companies, instead of reaching out to federal contractors individually. According to agency rules, DOL has the authority to expedite its consultation process by publishing notices in the Federal Register.

In light of its obligations under FOIA, CIR demands DOL disclose the requested records and prospectively publish these records online. If DOL fails to act and continues to withhold these records, CIR will be required to file suit under FOIA, yet a third time.

I. Background on EEO-1 Reports

Since 1966, certain federal contractors have been required to submit workforce demographic data to the U.S. Equal Opportunity Commission on an annual basis.¹ OFCCP uses these diversity reports, the EEO-1 Consolidated Reports (Type 2) ("EEO-1 Type 2 reports") to evaluate contractors' compliance with anti-discrimination laws, particularly Executive Order 11246.² For decades, momentum has been growing to make the diversity data in EEO-1 Type 2 reports accessible and keep federal contractors accountable to the public. As far back as 1974, courts have required EEO-1 Type 2 reports to be disclosed under FOIA.³ Many companies now post their reports online as part of their own social responsibility commitments.⁴ Members of

¹ See 41 C.F.R. § 60-1.7(a).

² See 30 Fed. Reg. 12,319 (Sept. 28, 1965).

³ As OFCCP explains on its website, "[C]ourts have ruled that the Title VII prohibition against disclosure does not apply to OFCCP's collection of EEO-1 data." OFCCP, *Freedom of Information Act (FOIA) Frequently Asked Questions*, <https://www.dol.gov/agencies/ofccp/faqs/foia> (citing *Sears Roebuck & Co. v. Gen. Servs. Admin.*, 509 F.2d 527, 529 (D.C. Cir. 1974) as one such ruling).

⁴ For example, Intel proactively began posting diversity reports online in 2008. Intel, *Workforce Demographics*, 2008, <http://web.archive.org/web/20081224004419/http://www.intel.com/intel/diversity/divpractice.htm>. Google began posting its diversity data in 2014 after a similar FOIA lawsuit, and Microsoft followed suit in 2015. Murrey Jacobson, *Google finally discloses its diversity record, and it's not good*, PBS NEWSHOUR, May 28, 2014, <https://www.pbs.org/newshour/nation/google-discloses-workforce-diversity-data-good>; Laura Lorenzetti, *Microsoft releases diversity stats: How the tech giant sizes up*, FORTUNE, Jan. 5, 2015, <https://fortune.com/2015/01/05/microsoft-eeo-1-diversity-tech>.

Congress⁵ and legislative commissions,⁶ civil rights activists,⁷ and scholars have been calling for this data to be more accessible, including in response to CIR's reporting. In March 2019, after CIR sued DOL for diversity data the first time, Representative Emanuel Cleaver II wrote to the DOL stating this data should not be withheld under Exemption 4, as EEO-1 reports "enumerate the diversity of firms accepting the taxpayer money."⁸

As part of his reporting for CIR over the last decade, Mr. Evans has submitted numerous FOIA requests to OFCCP for EEO-1 Type 2 reports and data. In addition to the FOIA request addressed herein, Mr. Evans has previously requested EEO-1 Type 2 reports regarding specific companies and CIR has previously sued DOL twice over its refusal to release these reports on the basis of Exemption 4. The first of these lawsuits was voluntarily dismissed in 2018 after DOL reversed its prior determination that five companies' reports were exempt.⁹ In the second lawsuit, the court granted summary judgment to CIR, ruling in December 2019, "the Government failed to make a showing that the demographic information contained in the EEO-1 reports is commercial."¹⁰ As a result, the Government was not justified in applying Exemption 4 to the EEO-1 reports, and the court ruled they "must be produced unredacted."¹¹ The government chose not to appeal that ruling and the U.S. Ninth Circuit Court of Appeals recently

⁵ Members of Congress have called for greater access to diversity reports, both via companies' proactive disclosures and via OFCCP's disclosures under FOIA. *See, e.g.*, Jessica Guyun, *Barbara Lee calls on Apple, tech holdouts to release diversity data*, USA TODAY, Aug. 4, 2015, <https://www.usatoday.com/story/tech/2015/08/04/barbara-lee-black-caucus-federal-diversity-data-apple/31128479>.

⁶ The Federal Glass Ceiling Commission, created by the Civil Rights Act of 1991, stated in its 1995 report that the government should "explore the possibility of mandating public release of EEO-1 forms for Federal contractors and publicly-traded corporations." GLASS CEILING COMM'N, *A Solid Investment: Making Full Use of the Nation's Human Capital* 42-43, Nov. 1, 1995, <https://ecommons.cornell.edu/handle/1813/79349>.

⁷ For example, civil rights activist Rev. Jesse Jackson has called on companies to release diversity statistics. *See* Salvador Rodriguez, *Jesse Jackson Gives Uber a Diversity Deadline*, INC.COM, Jan. 5, 2017, <https://www.inc.com/salvador-rodriguez/uber-diversity-jesse-jackson.html>.

⁸ Letter from Emanuel Cleaver II, Member of Congress, U.S. House of Representatives, to Alexander Acosta, Secretary, U.S. Department of Labor (Mar. 6, 2019), https://cleaver.house.gov/sites/cleaver.house.gov/files/DOL_FOIA.pdf.

⁹ *Ctr for Investigative Reporting v. Dep't of Labor*, No. 3:18-cv-02008 (N.D. Cal. Dec. 21, 2018).

¹⁰ *Ctr. for Investigative Reporting v. Dep't of Labor*, 424 F. Supp. 3d 771, 779 (N.D. Cal. Dec. 10, 2019).

¹¹ *Id.*

left it undisturbed following a belated challenge by the single holdout company whose data was at issue.¹²

OFCCP asserts that DOL regulations and Executive Order 12600 require notification to individual submitters to consult if this information qualifies as “confidential commercial information.”¹³ First, the very same DOL regulations allow such notification “by posting or publishing notice reasonably likely to accomplish such notification” in cases where “notification to a voluminous number of submitters is required.”¹⁴ Second, either time-consuming and burdensome notification process directly contradicts a federal court opinion requiring disclosure. Now that EEO-1 Type 2 reports have been ruled as outside the scope of Exemption 4, any such consultation is in contravention of a federal court decision. The agency’s own prior actions confirm this conclusion. In a similar context, DOL released data online regarding workplace injuries and illnesses for tens of thousands of employers — without consulting with each company individually — after courts ruled this data is outside the scope of Exemption 4.¹⁵

II. Procedural History

Mr. Evans submitted the requested EEO-1 Type 2 data for all federal contractors more than three years ago, in January 2019. He initially submitted three separate requests for annual data for the years 2016, 2017, and 2018. *See* Exhibits A, B, and C.¹⁶ In May 2021, at OFCCP’s request, Mr. Evans agreed to combine these requests into one FOIA request for all three years’ worth of data. *See* Exhibit D. That combined request has been assigned OFCCP tracking number 872421. *Id.*

On numerous occasions, OFCCP indicated that Mr. Evans’s request required company-by-company consultation which posed logistical challenges due to the volume of federal contractors who might object to disclosure of their diversity data. For example, in July 2019, the OFCCP FOIA office estimated that there were “more than 100,000 responsive records”

¹² *Evans v. Synopsys*, No. 20-16416 (9th Cir. May 12, 2022), <https://cdn.ca9.uscourts.gov/datastore/opinions/2022/05/12/20-16416.pdf> (dismissing company’s untimely appeal for lack of jurisdiction).

¹³ 29 C.F.R. § 70.26; *see also* OFCCP FOIA website, *supra* note 3.

¹⁴ 29 C.F.R. § 70.26(c); *see also* 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.”)

¹⁵ DOL, *U.S. Department of Labor Releases Work-Related Injury and Illness Data*, Sept. 4, 2020, <https://www.dol.gov/newsroom/releases/osha/osha20200904>; *see also* *Ctr. for Investigative Reporting v. Dep’t of Labor*, No. 4:18-cv-02414, 2020 WL 2995209 (N.D. Cal. June 4, 2020); *Public Citizen Foundation v. Dep’t of Labor*, No. 1:18-cv-00117 (D.D.C. June 23, 2020).

¹⁶ The FOIA request for the 2016 EEO-1 Type 2 data was submitted on January 10, 2019, and assigned tracking number 872421. Ex. A. The FOIA request for the 2017 data was submitted on March 25, 2019, and assigned tracking number 875877. Ex. B. The FOIA request for the 2018 data was submitted on September 11, 2020, and assigned tracking number 897123. Ex. C.

pertaining to the 2016 data, and that “the cost in sending more than 100,000 letters would be unduly burdensome.” *See* Exhibit E. Following the December 2019 ruling in CIR’s favor, OFCCP suggested the court’s ruling did not have any “precedential effect” and that it was obligated to consult individual federal contractors in response to Mr. Evans’s request for aggregate data. *See* Exhibit F at 2. In December 2020, for example, OFCCP estimated that this request involved “the EEO-1, Type 2 reports of well over 15,000, and possibly over 20,000 submitters from countless industries.” *Id.*

Since January 2021, OFCCP has not answered CIR’s questions about what steps, if any, the agency has taken to date to consult with companies whose data is at issue in Mr. Evans’s request. *Id.* at 1.

III. Discussion

The Freedom of Information Act seeks “to ensure an informed citizenry, vital to the functioning of a democratic society.” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). Under FOIA, “each agency . . . shall make the records promptly available.” 5 U.S.C. § 552(a)(3)(A). “Congress underscored the importance it attached to prompt responses by allowing judicial recourse, bypassing administrative exhaustion, if an agency fails to meet statutory timetables for disclosure or to justify its delay in making nonexempt records available upon request.” *Jud. Watch, Inc. v. Dep’t of Homeland Sec.*, 895 F.3d 770, 775–76 (D.C. Cir. 2018). “[A]n agency’s compliance with FOIA depends upon its good faith effort and due diligence to comply with all lawful demands for records in as short a time as is possible.” *Id.* at 781 (cleaned up).

Here, more than *three years* after receiving Mr. Evans’s initial request, OFCCP has failed to fulfill it. OFCCP has justified this extensive delay based on its suggestion that the federal court’s decision in the Northern District of California did not have precedential effect and the difficulty of notifying thousands of companies whose data is at issue. Ex. F at 2. CIR asserts that this position is faulty and to remedy the circumstances the agency should: 1) immediately disclose the requested records and 2) proactively notify all companies moving forward that these records will be disclosed.

A. OFCCP is Bound by Court Decisions Requiring Disclosure of EEO-1 Type 2 Reports.

By continuing to withhold the long-overdue diversity data, OFCCP is acting outside the bounds of law. Contrary to the agency’s suggestion, Judge Westmore’s ruling that diversity data is outside Exemption 4 does, in fact, have “precedential effect,” particularly since the Ninth Circuit left that decision undisturbed. The plain text of FOIA “vests jurisdiction in federal district courts to enjoin an ‘agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant,’” and agencies must comply with court disclosure orders. *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 139 (1980) (quoting 5 U.S.C. § 552(a)(4)(B)). Under the “law of the circuit doctrine, a published decision of [a federal appellate] court constitutes binding authority which must be

followed unless and until overruled by a body competent to do so.” *In re Zermeno-Gomez*, 868 F.3d 1048, 1052 (9th Cir. 2017) (cleaned up).

Here, both the district court and the appeals court decisions create binding law on the agency. Just two years ago, Judge Westmore ruled on CIR’s request for 2016 EEO-1 report data and concluded that the “Government was not justified in applying Exemption 4” to this information, requiring the EEO-1 reports to “be produced unredacted.” *Ctr. for Investigative Reporting v. Dep’t of Labor*, 424 F. Supp. 3d 771, 779 (N.D. Cal. 2019). DOL elected not to appeal that decision, and subsequently the U.S. Ninth Circuit Court of Appeals found it lacked jurisdiction to disturb Judge Westmore’s order. *Evans v. Synopsys*, No. 20-16416 (9th Cir. May 12, 2022). The December 10, 2019 order generally remains in effect, as the parties, including the Government, stipulated that it would only be stayed as to the “disclosure of the requested Synopsys information.” *Ctr. for Investigative Reporting*, No. 4:19-cv-01843, ECF No. 87, ¶¶ 2-3 (N.D. Cal. July 28, 2020). Given that the December 10, 2019 order remains in force, that the Government chose not to appeal it, and that the Government opposed the company’s attempt to intervene for the sole purpose of appealing it, CIR is perplexed by DOL’s current plan of action as to FOIA Request No. 872421. According *Kissinger* and *In re Zermeno*, DOL must disclose the records and the agency has not presented any other to the contrary. We hope this clarifies any remaining confusion and that the agency will disclose the requested records immediately to avoid needless, repetitive litigation – for a third time.

B. OFCCP Should Proactively Publish the Requested Records on Its Website.

The same DOL regulation OFCCP invokes to justify its delay also offers a solution for future requests involving EEO-1s: To mitigate the burden and expense of notifying a “voluminous number of submitters,” OFCCP can notify all companies simultaneously by posting a notice on its website before proactively publishing these records on its website. 29 C.F.R. § 70.26(c); *see also* 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.”).

OFCCP has various options for notifying companies by publication. It could publish a notice in the Federal Register, as DOL previously did to alert companies about a FOIA lawsuit and underlying request.¹⁷ Another agency with similar regulations about “voluminous” notifications recently published notices in the Federal Register.¹⁸ Alternatively, OFCCP could

¹⁷ 71 Fed. Reg. 20,732 (April 21, 2006), *available at* <https://www.federalregister.gov/documents/2006/04/21/06-3795/freedom-of-information-act-notice-of-lawsuit> (notice from the Occupational Health and Safety Administration regarding air sampling data). *See also Finkel v. Dep’t of Lab.*, No. CIV A 05-5525, 2007 WL 1963163, at *2 (D.N.J. June 29, 2007).

¹⁸ 81 Fed. Reg. 75,838 (Nov. 1, 2016), *available at* <https://www.federalregister.gov/documents/2016/11/01/2016-26412/freedom-of-information-act-notice-of-lawsuit> (notice from the U.S. Fish and Wildlife Service regarding FOIA request and lawsuit for data about import and export of wildlife specimens); 81 Fed. Reg. 85,255 (Nov. 25,

issue a press release, as DOL did regarding disclosure of its workplace injury data.¹⁹ Whatever the venue, DOL should avail itself of its regulatory authority to notify the “voluminous” number of companies – and begin to proactively publishing these records online, as other DOL components such as OSHA have done with comprehensive datasets after courts ruled that they could not be withheld.

IV. Conclusion

Rather than continue to delay Mr. Evans’s long-overdue request for EEO-1 Type 2 data, DOL should disclose the requested records. Moving forward it should exercise its authority to notify companies and begin proactive publication. We request that OFCCP respond to this letter **within two weeks of receipt** to discuss any clarifying points and the agency’s intended course of action to resolve this matter. You may reach me at vbaranetsky@revealnews.org or (201) 306-4831.

Sincerely,



Victoria D. Baranetsky
General Counsel
The Center for Investigative Reporting

cc: Will Evans, Senior Reporter and Producer, The Center for Investigative Reporting
Shawn Musgrave, First Amendment Fellow, The Center for Investigative Reporting

2016), *available at* <https://www.federalregister.gov/documents/2016/11/25/2016-28379/freedom-of-information-act-notice-of-lawsuit> (same). *See also* 43 C.F.R. § 2.27(b) (“If a voluminous number of submitters are involved, [a bureau of the Department of the Interior] may publish a notice in a manner reasonably calculated to reach the attention of the submitters (for example, in newspapers or newsletters, the bureau’s Web site, or the Federal Register) instead of providing a written notice to each submitter.”).

¹⁹ *Supra* note 15.

Exhibit A



Shawn Musgrave <smusgrave@revealnews.org>

Fwd: Acknowledgment

Will Evans <wevans@revealnews.org>
To: Shawn Musgrave <smusgrave@revealnews.org>

Thu, Oct 14, 2021 at 2:41 PM

----- Forwarded message -----

From: **FOIARequests** <FOIARequests@dol.gov>
Date: Tue, Jan 15, 2019 at 2:35 PM
Subject: Acknowledgment
To: Will Evans <wevans@revealnews.org>
Cc: Oliver, Ramona - SOL (b) (6) @dol.gov, OFCCP NO FOIA <OFCCP_NO_FOIA@dol.gov>

Hello:

Your request has been assigned to OFCCP with tracking number **872421**. When they begin processing it, you will be able to track its progress at www.dol.gov/foia. If you need to contact them about it for any reason, please submit your inquiry through ofccp_no_foia@dol.gov or phone 202-693-0101. In addition, it would be helpful to include the tracking number in the Subject line of any submission to the agency or to have it available at the time of a call.

Sincerely,

Arginia Karamoko

Government Information Specialist, Office of Information Services
Office of the Solicitor | Management & Administrative Legal Services
U.S. DEPARTMENT OF LABOR
200 Constitution Ave., N.W., N-2420 | Washington, DC 20210
T: (202) (b) (6) | F: (202) 693-5389 | E: (b) (6) @dol.gov

From: Will Evans <wevans@revealnews.org>
Sent: Thursday, January 10, 2019 7:13 PM
To: FOIARequests <FOIARequests@dol.gov>
Cc: Victoria Baranetsky <vbaranetsky@revealnews.org>
Subject: FOIA request - OFCCP

Dear FOIA Officer,

Under the Freedom of Information Act, I am requesting a copy of the following records from OFCCP:

*** A spreadsheet of all consolidated (Type 2) EEO-1 reports for all federal contractors for 2016.**

I am requesting this data in electronic format, by email.

There is an exception to the notice requirements of 29 CFR 70.26 and Executive Order 12600 that applies here, as will be explained below. Notice to the contractors is not required.

Under 29 CFR 70.2(G)(5) and Executive Order 12600 Sec.8(e), the notice requirements **need not be followed** if the information has not been designated by the submitter, unless OFCCP "has reason to believe that disclosure of the information would result in substantial competitive harm."

Under 29 CFR 70.2(G)(6) and Executive Order 12600 Sec.8(f), the notice requirements **need not be followed** the designation made by the submitter "appears obviously frivolous."

There is no substantial reason to believe that disclosure of the information would result in competitive harm, so the information should be released without notice for any contractor. Even if a contractor has designated it as confidential, that designation should be considered "obviously frivolous," as OFCCP has already determined that Type 2 EEO-1 reports are not subject to Exemption 4 of the Freedom of Information Act. (see CIR v USDOL, Case No. 3:18-cv-2008 JCS)

I am a representative of the news media as a reporter with Reveal from The Center for Investigative Reporting, a non-profit investigative journalism organization. This request is made as part of news gathering and not for a commercial use. I respectfully ask that you waive fees related to this request. Please notify me of any charges before fulfilling this request.

Please contact me with any questions at 510-809-2209 or

wevans@revealnews.org

Thank you for your attention to this request.

Sincerely,
Will Evans
Reveal / The Center for Investigative Reporting
[1400 65th, Suite 200](#)
Emeryville, CA 94608

--

Will Evans

reporter

o: 510-809-2209



www.revealnews.org

--

Will Evans

reporter

Reveal from The Center for Investigative Reporting

office: 510-809-2209

(b) (6)

www.revealnews.org

Exhibit B



Shawn Musgrave <smusgrave@revealnews.org>

Fwd: Acknowledgment

Will Evans <wevans@revealnews.org>
To: Shawn Musgrave <smusgrave@revealnews.org>

Thu, Oct 14, 2021 at 2:38 PM

----- Forwarded message -----

From: **Karamoko, Arginia - SOL** <(b) (6)@dol.gov>
Date: Mon, Mar 25, 2019 at 1:32 PM
Subject: Acknowledgment
To: Will Evans <wevans@revealnews.org>
Cc: Oliver, Ramona - SOL <(b) (6)@dol.gov>, OFCCP NO FOIA <OFCCP_NO_FOIA@dol.gov>

Hello:

Your request has been assigned to OFCCP with tracking number **875877**. When they begin processing it, you will be able to track its progress at www.dol.gov/foia. If you need to contact them about it for any reason, please submit your inquiry through ofccp_no_foia@dol.gov or phone 202-693-0101. In addition, it would be helpful to include the tracking number in the Subject line of any submission to the agency or to have it available at the time of a call.

Sincerely,

Arginia Karamoko

Government Information Specialist, Office of Information Services
Office of the Solicitor | Management & Administrative Legal Services
U.S. DEPARTMENT OF LABOR
200 Constitution Ave., N.W., N-2420 | Washington, DC 20210
T: (202) (b) (6) | F: (202) 693-5389 | E: (b) (6)@dol.gov

From: Will Evans <wevans@revealnews.org>
Sent: Monday, March 25, 2019 1:57 PM
To: FOIARequests <FOIARequests@dol.gov>
Subject: FOIA request - OFCCP

Dear FOIA Officer,

Under the Freedom of Information Act, I am requesting a copy of the following records from OFCCP:

*** A spreadsheet of all consolidated (Type 2) EEO-1 reports for all federal contractors for 2017.**

I am requesting this data in electronic format, by email. Fulfilling this request is not unduly burdensome because there is no need to notify federal contractors.

There is an exception to the notice requirements of 29 CFR 70.26 and Executive Order 12600 that applies here, as will be explained below. Notice to the contractors is not required.

Under 29 CFR 70.2(G)(5) and Executive Order 12600 Sec.8(e), the notice requirements **need not be followed** if the information has not been designated by the submitter, unless OFCCP "has reason to believe that disclosure of the information would result in substantial competitive harm."

Under 29 CFR 70.2(G)(6) and Executive Order 12600 Sec.8(f), the notice requirements **need not be followed** the designation made by the submitter "appears obviously frivolous."

There is no substantial reason to believe that disclosure of the information would result in competitive harm, so the information should be released without notice for any contractor. Even if a contractor has designated it as confidential, that designation should be considered "obviously frivolous," as OFCCP has already determined that Type 2 EEO-1 reports are not subject to Exemption 4 of the Freedom of Information Act. (see CIR v USDOL, Case No. 3:18-cv-2008 JCS)

I am a representative of the news media as a reporter with Reveal from The Center for Investigative Reporting, a non-profit investigative journalism organization. This request is made as part of news gathering and not for a commercial use. I respectfully ask that you waive fees related to this request. Please notify me of any charges before fulfilling this request.

Please contact me with any questions at 510-809-2209 or

wevans@revealnews.org

Thank you for your attention to this request.

Sincerely,
Will Evans
Reveal / The Center for Investigative Reporting
[1400 65th, Suite 200](#)
Emeryville, CA 94608

--

Will Evans

reporter

o: 510-809-2209

10/14/21, 3:38 PM

Center for Investigative Reporting Mail - Fwd: Acknowledgment



www.revealnews.org

--

Will Evans
reporter

Reveal from The Center for Investigative Reporting
office: 510-809-2209

(b) (6)
www.revealnews.org

Exhibit C



Shawn Musgrave <smusgrave@revealnews.org>

Fwd: Acknowledgment

1 message

Will Evans <wevans@revealnews.org>
To: Shawn Musgrave <smusgrave@revealnews.org>

Fri, Oct 15, 2021 at 6:51 PM

----- Forwarded message -----

From: **Karamoko, Arginia - SOL** <(b) (6)@dol.gov>
Date: Fri, Sep 18, 2020 at 12:50 PM
Subject: Acknowledgment
To: Will Evans <wevans@revealnews.org>
Cc: Oliver, Ramona - SOL <(b) (6)@dol.gov>, OFCCP NO FOIA <OFCCP_NO_FOIA@dol.gov>

Hello:

Your request has been assigned to the Office of Federal Contract Compliance Programs (OFCCP) with tracking number **897123**. When they begin processing it, you will be able to track its progress at www.dol.gov/foia. If you need to contact them about it for any reason, please submit your inquiry through ofccp_no_foia@dol.gov or phone 202-693-0101. In addition, it would be helpful to include the tracking number in the Subject line of any submission to the agency or to have it available at the time of a call.

Sincerely,

Arginia Karamoko

Government Information Specialist, Office of Information Services
Office of the Solicitor | Management & Administrative Legal Services

U.S. DEPARTMENT OF LABOR

200 Constitution Ave., N.W., N-2420 | Washington, DC 20210

T: (202) (b) (6) | F: (202) 693-5389 | E: (b) (6)@dol.gov

From: Will Evans <wevans@revealnews.org>
Sent: Friday, September 11, 2020 8:26 PM
To: FOIARequests <FOIARequests@dol.gov>
Subject: FOIA request - OFCCP

Dear FOIA Officer,

Under the Freedom of Information Act, I am requesting a copy of the following records from OFCCP:

*** A spreadsheet of all consolidated (Type 2) EEO-1 reports for all federal contractors for 2018.**

I am requesting this data in electronic format, by email. Fulfilling this request is not unduly burdensome because there is no need to notify federal contractors.

There is an exception to the notice requirements of 29 CFR 70.26 and Executive Order 12600 that applies here, as will be explained below. Notice to the contractors is not required.

Under 29 CFR 70.2(G)(5) and Executive Order 12600 Sec.8(e), the notice requirements **need not be followed** if the information has not been designated by the submitter, unless OFCCP "has reason to believe that disclosure of the information would result in substantial competitive harm."

Under 29 CFR 70.2(G)(6) and Executive Order 12600 Sec.8(f), the notice requirements **need not be followed** the designation made by the submitter "appears obviously frivolous."

There is no substantial reason to believe that disclosure of the information would result in competitive harm, so the information should be released without notice for any contractor. Even if a contractor has designated it as confidential, that designation should be considered "obviously frivolous," **as federal contractor EEO-1s have been determined to be public records that must be disclosed, not confidential commercial information.** Please see the Dec. 10, 2019 ruling by Judge Kandis Westmore in U.S. District Court for the Northern District of California, 4:19-cv-01843-KAW (attached).

I am a representative of the news media as a reporter with Reveal from The Center for Investigative Reporting, a non-profit investigative journalism organization. This request is made as part of news gathering and not for a commercial use. I respectfully ask that you waive fees related to this request. Please notify me of any charges before fulfilling this request.

Please contact me with any questions at 510-809-2209 or

wevans@revealnews.org

Thank you for your attention to this request.

Sincerely,
Will Evans
Reveal / The Center for Investigative Reporting
1400 65th, Suite 200
Emeryville, CA 94608



www.revealnews.org

--

Will Evans
reporter

Reveal from The Center for Investigative Reporting
office: 510-809-2209

(b) (6)

www.revealnews.org



October 2, 2020

Via Electronic Mail

Will Evans
The Center for Investigative Reporting
1400 65th Street, Suite 200
Emeryville, CA 94608

RE: Freedom of Information Act Request Acknowledgement – Tracking No. 897123

Dear Mr. Evans:

This letter is to acknowledge receipt of your Freedom of Information Act (FOIA) request submitted to foiarequest@dol.gov. The Office of the Solicitor assigned your request to the Office of Federal Contract Compliance Programs (OFCCP) on September 18, 2020. Please refer to the above-referenced FOIA tracking number in any future correspondence regarding your FOIA request.

You requested a spreadsheet of all consolidated (Type 2) EEO-1 reports for all federal contractors for 2018.

We consider you to be a representative of the news media as defined by the U.S. Department of Labor FOIA regulations at 29 CFR § 70.40(c)(3), therefore, only reproduction costs will be assessed, excluding charges for the first 100 pages. You will receive written notification if the total estimated fee for processing your request exceeds \$25.00.

OFCCP's National Office will process your request for EEO-1 data. Once we compile the data, we will send a letter to the submitters notifying them of the request for their EEO-1 data.

In accordance with 29 CFR § 70.26 and Executive Order 12600, because your request covers information that may be protected from disclosure under FOIA Exemption 4, OFCCP is required to notify submitters that their information has been requested under the FOIA to give them an opportunity to object in writing to disclosure of any specified portion of the requested information. For those submitters who do not object, we will provide the information with any necessary redactions consistent with FOIA. For those submitters who do object, OFCCP will evaluate any response provided by the submitter as to why the requested information should be withheld and make its own determination as to whether the specific facts and relevant law warrant disclosure or withholding of the requested information.

Due to the volume and complexity of the FOIA requests we have received, we anticipate that providing a full response will take longer than 20 business days to fulfill. Accordingly, OFCCP will take an additional 10 business days to fulfill your request as afforded by the FOIA at 5 U.S.C. § 552(a)(6)(B)(i). We will contact you if we are unable to fulfill your request in 30 business days.

We consider you a “news media” type of requestor. As a “news media” requestor, we charge you for photocopying after the first 100 pages in accordance with the U.S. Department of Labor FOIA regulations at 29 CFR § 70.40(c)(4). DOL’s FOIA regulations at 29 CFR § 70.42(a) deem that the filing of a FOIA constitutes an agreement by the requestor to pay all fees up to \$25.00.

If you need further assistance or would like to discuss any aspect of your request, please do not hesitate to contact this office at (202) 693-0101 or by email at OFCCP_NO_FOIA@dol.gov. Alternatively, you may wish to contact the DOL FOIA Public Liaison, Thomas Hicks, at (202) 693-5427 or by email at hicks.thomas@dol.gov.

You may also contact the Office of Government Information Services (OGIS), within the National Archives and Records Administration (NARA), to inquire about the mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740-6001. You can also reach that office by email at ogis@nara.gov, by phone at (202) 741-5770, by fax at (202) 741-5769, or by calling toll-free at (877) 684-6448.

If you are not satisfied with the response to this request, you may administratively appeal by writing to the Solicitor of Labor within 90 days from the date of this letter. In the appeal, you must state in writing the grounds for the appeal, and may include any supporting statements or arguments, but such statements are not required. To facilitate processing of the appeal, please include your mailing address and daytime telephone number, as well as a copy of the initial request and copy of this letter. Clearly mark “Freedom of Information Act Appeal” on the envelope and letter of the appeal. You must make any amendment to the appeal in writing and we must receive it prior to a decision. Address the appeal to the Solicitor of Labor, Division of Management and Administrative Legal Services, U.S. Department of Labor, 200 Constitution Avenue, NW, Room N2420, Washington, DC 20210. You may submit your appeal by email to foiaappeal@dol.gov. The Department does not accept appeals submitted to any other email address.

Sincerely,

DORIS GEAN Digitally signed
by DORIS GEAN

Doris Lissette Geán
FOIA Manager

Exhibit D



Shawn Musgrave <smusgrave@revealnews.org>

Fwd: amendment request

Will Evans <wevans@revealnews.org>
To: Shawn Musgrave <smusgrave@revealnews.org>

Thu, Sep 30, 2021 at 10:28 PM

----- Forwarded message -----
From: **OFCCP NO FOIA** <OFCCP_NO_FOIA@dol.gov>
Date: Tue, May 11, 2021 at 9:05 AM
Subject: RE: amendment request
To: Will Evans <wevans@revealnews.org>

Dear Mr. Evans,

We have modified request 872421 to include a spreadsheet of the consolidated (Type 2) EEO-1 reports for all federal contractors for the years 2016 through 2018.

We will administratively close request 897123.

Cordially,

Bruce Andersen
The OFCCP FOIA Team

From: Will Evans <wevans@revealnews.org>
Sent: Monday, May 10, 2021 1:02 PM
To: OFCCP NO FOIA <OFCCP_NO_FOIA@DOL.GOV>
Subject: amendment request

CAUTION - The sender of this message is external to the DOL network. Please use care when clicking on links and responding with sensitive information. Send suspicious email to spam@dol.gov.

Dear FOIA Officer,

I would like to amend my FOIA request #872421 to include a spreadsheet of all consolidated (Type 2) EEO-1 reports for all federal contractors for 2017 and 2018 as well as 2016.

If you agree to this amendment, I will withdraw my separate FOIA #897123 for the 2018 data.

Please let me know.
Thank you very much.
Best,

Will Evans

--

Will Evans

reporter

office: 510-809-2209

cell: (b) (6)



www.revealnews.org

--

Will Evans

reporter

Reveal from The Center for Investigative Reporting

office: 510-809-2209

cell: (b) (6)

www.revealnews.org

Exhibit E

U.S. Department of Labor

Office of Federal Contract
Compliance Programs
200 Constitution Avenue, N.W.
Washington, D.C. 20210



JUL 18 2019

Will Evans
The Center for Investigative Reporting
1400 65th Street, Suite 200
Emeryville, CA 94608

RE: Freedom of Information Act Request Acknowledgement – Tracking No. 872421

Dear Mr. Evans:

This letter is a follow-up to your Freedom of Information Act (FOIA) request submitted to the Office of Federal Contract Compliance Programs (OFCCP). Please refer to the above-referenced FOIA tracking number in any future correspondence regarding your FOIA request.

You requested a spreadsheet of all consolidated (Type 2) EEO-1 reports for all federal contractors for 2016. As you know from your earlier requests, in accordance with 29 CFR § 70.26, OFCCP is required to notify submitters that their business information has been requested under the FOIA to give them an opportunity to object in writing to disclosure of any specified portion of the requested information.

Though your request is reasonably described, we have determined that there are more than 100,000 responsive records. Reaching out to each of the companies affected by your voluminous request would overwhelm the OFCCP FOIA unit for the foreseeable future, and the cost in sending more than 100,000 letters would be unduly burdensome. If you wish to narrow the scope of your request, please send a revised request to the address referenced above or send an e-mail to OFCCP_NO_FOIA@dol.gov. In the event that we do not receive a response from you within thirty (30) days from the date of this letter, we will administratively close your request.

Should you have questions regarding your request, please contact this office at (202) 693-0101 or by email at OFCCP_NO_FOIA@dol.gov. If you need further assistance or would like to discuss any aspect of your request, please do not hesitate to contact the DOL FOIA Public Liaison, Thomas Hicks, at (202) 693-5427.

Alternatively, you may contact the Office of Government Information Services within the National Archives and Records Administration (OGIS) to inquire about the mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740-6001. You can also reach that office by e-mail at ogis@nara.gov, by phone at (202) 741-5770, by fax at (202) 741-5769, or by calling toll-free at (877) 684-6448.

If you are not satisfied with the response to this request, you may administratively appeal by writing to the Solicitor of Labor within 90 days from the date of this letter. The appeal must state in writing the grounds for the appeal, and it may include any supporting statements or arguments, but such statements are not required. In order to facilitate processing of the appeal, please include your mailing address and daytime telephone number, as well as a copy of the initial request and copy of this letter. The envelope and letter of the appeal should be clearly marked "Freedom of Information Act Appeal." Any amendment to the appeal must be made in writing and received prior to a decision. The appeal should be addressed to the Solicitor of Labor, Division of Management and Administrative Legal Services, U.S. Department of Labor, 200 Constitution Avenue, NW, Room N2420, Washington, DC 20210. Appeals may also be submitted by email to foiaappeal@dol.gov. Appeals submitted to any other email address will not be accepted.

Sincerely,

(b) (6)

D. Lissette Gean
Special Assistant

Exhibit F



Shawn Musgrave <smusgrave@revealnews.org>

Fwd: Freedom of Information Act Requests – Tracking Nos. 872421 and 897123

Will Evans <wevans@revealnews.org>
To: Shawn Musgrave <smusgrave@revealnews.org>

Thu, Sep 30, 2021 at 10:30 PM

----- Forwarded message -----

From: **Alexandra Gutierrez** <(b) (6) @revealnews.org>

Date: Thu, Jan 7, 2021 at 9:13 AM

Subject: Re: Freedom of Information Act Requests – Tracking Nos. 872421 and 897123

To: Office of Federal Contract Compliance Programs <ofccp_no_foia@dol.gov>

Cc: Victoria Baranetsky <vbaranetsky@revealnews.org>, Will Evans <wevans@revealnews.org>, Hicks, Thomas - SOL <(b) (6) @dol.gov>

VIA E-MAIL

Doris Lissette Geán
FOIA Manager
Department of Labor
[200 Constitution Avenue, N.W.](#)
[Washington, D.C. 20210](#)
OFCCP_NO_FOIA@dol.gov

Re: Freedom of Information Act Request Acknowledgement – Tracking No. 897123

Dear Ms. Geán,

We are following up on your December 18, 2020 e-mail. While we are considering are options as to the Department of Labor's current position as to our reporter's request, we seek answers to the following questions:

1. When did the Department provide E.O. 12600 notices to submitters?
2. Have any submitters responded, either objecting or consenting?
3. For those submitters who have consented or have waived their opportunity to object due to the passage of a reasonable amount of time, would the Department be able to provide their submitted reports on a rolling basis.

We appreciate your attention to these inquiries.

Sincerely,

Alexandra M. Gutierrez

cc: D. Victoria Baranetsky, General Counsel, Center for Investigative Reporting
Will Evans, Reporter, Center for Investigative Reporting
Thomas Hicks, DOL FOIA Public Liaison

On Fri, Dec 18, 2020 at 9:32 AM Office of Federal Contract Compliance Programs <ofccp_no_foia@dol.gov> wrote:
Via Electronic Mail

Dear Ms. Gutierrez:

We have received your December 11, 2020, e-mail inquiring about outstanding FOIA requests that, combined, seek two years (2016 and 2018) of EEO-1 consolidated (Type 2) reports for all federal contractors.

As you are aware, we have complied with the district court's order and released the 2016 reports of the individual submitters who have not appealed the court's decision in the matter of *Ctr. for Investigative Reporting v. U.S. Dep't of Labor*, 424 F. Supp. 3d 771, 779 (N.D. Cal. 2019). Your outstanding FOIA requests seek the EEO-1, Type 2 reports of well over 15,000, and possibly over 20,000 submitters from countless industries whose reports are not subject to that court order.

We continue to be subject to Executive Order 12600 and are obligated to notify submitters of requests for their potentially confidential commercial information. *See* 29 C.F.R. § 70.26. Under Executive Order 12600, we must afford submitters a reasonable period of time to object to the disclosure of any portion of the information and to state all grounds upon which disclosure is opposed. The submitters that are the subject of your request have not had the opportunity to demonstrate whether their EEO-1, Type 2 reports contain confidential commercial information. Moreover, while we do not believe that the Northern California's District Court's decision in *Center for Investigative Reporting* has precedential effect on all EEO-1, Type 2 reports, we note that this matter is currently on appeal before the U.S. Court of Appeals for the Ninth Circuit and there is still a chance that the district court's holding may be overturned.

Sincerely,

D. Lissette Geán

FOIA Manager

--
Alexandra M. Gutierrez
First Amendment Fellow
(c) (b) (6)



--

Will Evans

reporter

Reveal from The Center for Investigative Reporting

office: 510-809-2209

cell: (b) (6)

www.revealnews.org

From: [Will Evans](#)
To: [FOIARequests](#)
Cc: [OFCCP NO FOIA](#)
Subject: FOIA request- OFCCP
Date: Thursday, June 2, 2022 4:45:14 PM

CAUTION - The sender of this message is external to the DOL network. Please use care when clicking on links and responding with sensitive information. Send suspicious email to spam@dol.gov.

Dear FOIA Officer,

Under the Freedom of Information Act, I am requesting a copy of the following records from OFCCP:

*** A spreadsheet of all consolidated (Type 2) EEO-1 reports for all federal contractors for 2019 and 2020.**

I am requesting this data in electronic format, by email.

I am a representative of the news media as a reporter with Reveal from The Center for Investigative Reporting, a non-profit investigative journalism organization. This request is made as part of news gathering and not for a commercial use. I respectfully ask that you waive fees related to this request. Please notify me of any charges before fulfilling this request.

Please contact me with any questions at [510-809-2209](tel:510-809-2209) or wevans@revealnews.org

Thank you for your attention to this request.

Sincerely,
Will Evans
Reveal / The Center for Investigative Reporting
PO Box 8307
Emeryville, CA 94608

--

Will Evans
reporter
Reveal from The Center for Investigative Reporting
cell: 510-[REDACTED]
www.revealnews.org

From Email : ofccp_no_foia@DOL.GOV

To Email : wevans@revealnews.org

Cc Email : vbaranetsky@revealnews.org

Bcc Email : ofccp_no_foia@DOL.GOV

Subject : RE: FOIA 872421 - Amendment

Date Sent : 6/3/2022 1:53:52 PM

Email Body : Dear Mr. Evans, We have received your latest email. We will modify request 872421 to include both the 2019 and 2020 data. Your request is now for the consolidated (Type 2) EEO-1 reports for all federal contractors for the years 2016 through 2020. Cordially,
Bruce Andersen The OFCCP FOIA Team
From: Will Evans wevans@revealnews.org Sent: Thursday, June 2, 2022 4:45 PM To: FOIARequests FOIARequests@dol.gov Cc: OFCCP NO FOIA OFCCP_NO_FOIA@DOL.GOV Subject: FOIA request- OFCCP CAUTION - The sender of this message is external to the DOL network. Please use care when clicking on links and responding with sensitive information. Send suspicious email to spam@dol.gov. Dear FOIA Officer, Under the Freedom of Information Act, I am requesting a copy of the following records from OFCCP: * A spreadsheet of all consolidated (Type 2) EEO-1 reports for all federal contractors for 2019 and 2020. I am requesting this data in electronic format, by email. I am a representative of the news media as a reporter with Reveal from The Center for Investigative Reporting, a non-profit investigative journalism organization. This request is made as part of news gathering and not for a commercial use. I respectfully ask that you waive fees related to this request. Please no charges before fulfilling this request. Please contact me with any question -2209 or wevans@revealnews.org Thank you for your attention to this request ll Evans Reveal / The Center for Investigative Reporting PO Box 8307 Emery -- Will Evans reporter Reveal from The Center for Investigative Reporting cell: (b) (6), (b) (7)(C) www.revealnews.org

From: Victoria Baranetsky <vbaranetsky@revealnews.org>
Sent: Thursday, June 16, 2022 1:13 PM
To: OFCCP NO FOIA
Cc: wevans@revealnews.org; smusgrave@revealnews.org
Subject: Re: FOIA 872421 OFCCP Response to CIR

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Dear OFCCP,

Thank you for your email. CIR was disappointed the Office did not provide a production timeline or more concrete idea of when these records would be released - given how much time has elapsed since the request was filed. CIR also strongly disagrees with the agency's interpretation of the case law in the Ninth Circuit.

To avoid needless next steps, please let me know your when you and counsel are available to speak early next week to provide a clearer timeline on this matter.

Kind regards,
Victoria

On Wed, Jun 15, 2022 at 12:48 PM Office of Federal Contract Compliance Programs <ofccp_no_foia@dol.gov> wrote:

June 15, 2022

Via Electronic Mail: vbaranetsky@revealnews.org

Victoria D. Barenetsky

General Counsel

The Center for Investigative Reporting

1400 65th, Suite 200

Emeryville, CA 94608

RE: Freedom of Information Act Request – Tracking No. 872421

Dear Ms. Baranetsky:

We are in receipt of your correspondence of May 23, 2022, (hereinafter “Baranetsky Correspondence”) to Secretary Walsh, Solicitor Nanda, and Director Yang regarding FOIA Request #872421 from Will Evans of the Center for Investigative Reporting (CIR) to the Office of Federal Contract Compliance Programs (OFCCP) for consolidated Type 2 EEO-1 reports for all federal contractors from 2016-2018.[1] This correspondence has been referred to the undersigned for response.

As an initial matter, the Department of Labor (Department) continues to strongly disagree with CIR’s assertion that the Department is in “direct contravention of law” by not immediately disclosing the thousands of EEO-1 reports from 2016-2020 (hereinafter “EEO-1 reports”) responsive to FOIA Request #872421. The recent Northern District of California decision referenced in your letter[2] addressed only 10 EEO-1 reports of select companies from 2016 and does not have any binding effect as to the other EEO-1 reports for which CIR now demands immediate disclosure. Furthermore, the subsequent Ninth Circuit decisions[3] were limited to purely jurisdictional issues and explicitly did not reach the merits of the district court decision.

We also disagree with CIR’s position that OFCCP can proactively publish the requested EEO-1 reports without providing submitters an opportunity to object to disclosure. The Department’s disclosure regulations at 29 C.F.R. part 70, consistent with Executive Order 12600, require the Department to provide notice to submitters “whenever it has reason to believe that the information requested under the FOIA may be protected from disclosure under Exemption 4, but has not yet determined whether the information is protected from disclosure...,”[4] and to provide submitters with a reasonable period of time to object to the disclosure and state their grounds for doing so. Indeed, were the Department to immediately release all Type 2 EEO-1 reports as CIR recommends, it would be at risk of substantial liability in reverse FOIA actions if the reviewing court(s) found that Exemption 4 did apply to the EEO-1 records, and that in releasing them to the public the Department had violated its own regulations and improperly disclosed the confidential commercial information of thousands of federal contractors.

We do, however, agree with CIR that the Department may effectuate notice to all federal contractors via “posting and publishing the notice in a place reasonably calculated to accomplish notification.”[5] The Department will publish a notice in the Federal Register and on the Department’s public-facing website that it has received FOIA requests seeking Type 2 EEO-1 records from all federal contractors that filed them from 2016-2020, and pursuant to its regulations,[6] the Department will provide an opportunity for the submitters to respond.

If you have any questions, please contact us via email at OFCCP_NO_FOIA@dol.gov, or by telephone at (202) 693-0101.

Sincerely,

Kelechi Ahaghotu

Branch Chief of Information Services
Division of Management and Administrative Programs

[1] Within the last month, CIR sent a new FOIA request to the Department for Type 2 EEO-1 reports for all federal contractors for the years 2019 and 2020 as well. As agreed to by Mr. Evans, OFCCP has combined this request with FOIA Request #872421 for processing.

[2] *Ctr. For Investigative Reporting v. Dep’t of Labor*, 424 F. Supp. 3d 771 (N.D. Cal. 2019).

[3] *Evans v. Synopsis*, 34 F.4th 762 (9th Cir. 2022); *Synopsis v. Dep’t of Labor*, Nos. 20-16414 and 20-16416, Dkt. No. 53-1 (9th Cir. May 12, 2022).

[4] 29 C.F.R. § 70.26(d)

[5] 29 C.F.R. § 70.26(j)

[6] *Id.* at § 70.26(e) (“A component will allow a submitter a reasonable time to respond to the notice described in [29 C.F.R. § 70.26(c)]....”

--

Victoria D. Baranetsky
General Counsel
(w) 510-982-2890

(b) (6)



From: Victoria Baranetsky <vbaranetsky@revealnews.org>
Sent: Wednesday, June 22, 2022 5:33 PM
To: OFCCP NO FOIA; Bickerstaffe, Keir - SOL; Whitten, Emily S - SOL
Cc: wevans@revealnews.org; smusgrave@revealnews.org
Subject: Re: FOIA 872421 OFCCP Response to CIR

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Hello,

I'd like to follow up and again, request if there is a time we can speak about this matter.

Regards,
Victoria

On Thu, Jun 16, 2022 at 10:12 AM Victoria Baranetsky <vbaranetsky@revealnews.org> wrote:
Dear OFCCP,

Thank you for your email. CIR was disappointed the Office did not provide a production timeline or more concrete idea of when these records would be released - given how much time has elapsed since the request was filed. CIR also strongly disagrees with the agency's interpretation of the case law in the Ninth Circuit.

To avoid needless next steps, please let me know your when you and counsel are available to speak early next week to provide a clearer timeline on this matter.

Kind regards,
Victoria

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June 15, 2022

Via Electronic Mail: vbaranetsky@revealnews.org

Victoria D. Barenetsky

General Counsel

The Center for Investigative Reporting

1400 65th, Suite 200

Emeryville, CA 94608

RE: Freedom of Information Act Request – Tracking No. 872421

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As an initial matter, the Department of Labor (Department) continues to strongly disagree with CIR’s assertion that the Department is in “direct contravention of law” by not immediately disclosing the thousands of EEO-1 reports from 2016-2020 (hereinafter “EEO-1 reports”) responsive to FOIA Request #872421. The recent Northern District of California decision referenced in your letter[2] addressed only 10 EEO-1 reports of select companies from 2016 and does not have any binding effect as to the other EEO-1 reports for which CIR now demands immediate disclosure. Furthermore, the subsequent Ninth Circuit decisions[3] were limited to purely jurisdictional issues and explicitly did not reach the merits of the district court decision.

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If you have any questions, please contact us via email at OFCCP_NO_FOIA@dol.gov, or by telephone at (202) 693-0101.

Sincerely,

Kelechi Ahaghotu

Branch Chief of Information Services
Division of Management and Administrative Programs

[1] Within the last month, CIR sent a new FOIA request to the Department for Type 2 EEO-1 reports for all federal contractors for the years 2019 and 2020 as well. As agreed to by Mr. Evans, OFCCP has combined this request with FOIA Request #872421 for processing.

[2] *Ctr. For Investigative Reporting v. Dep't of Labor*, 424 F. Supp. 3d 771 (N.D. Cal. 2019).

[3] *Evans v. Synopsis*, 34 F.4th 762 (9th Cir. 2022); *Synopsis v. Dep't of Labor*, Nos. 20-16414 and 20-16416, Dkt. No. 53-1 (9th Cir. May 12, 2022).

[4] 29 C.F.R. § 70.26(d)

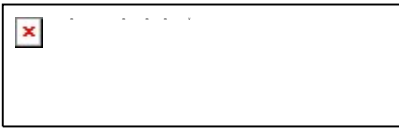
[5] 29 C.F.R. § 70.26(j)

[6] *Id.* at § 70.26(e) (“A component will allow a submitter a reasonable time to respond to the notice described in [29 C.F.R. § 70.26(c)]....”

--

Victoria D. Baranetsky
General Counsel
(w) 510-982-2890

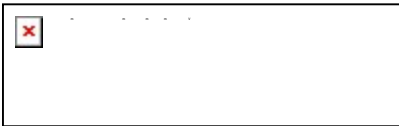
(b) (6)



--

Victoria D. Baranetsky
General Counsel
(w) 510-982-2890

(b) (6)



From Email : ofccp_no_foia@DOL.GOV

To Email : vbaranetsky@revealnews.org

Cc Email : wevans@revealnews.org; smusgrave@revealnews.org

Bcc Email : ofccp_no_foia@DOL.GOV

Subject : RE: FOIA 872421 OFCCP Response to CIR

Date Sent : 6/27/2022 5:36:23 PM

Email Body : By Electronic Mail Dear Ms. Baranetsky, This email responds to yours of June 16, 2022, and specifically your request for a clearer timeline regarding FOIA #872421, which, as revised, requests that OFCCP disclose Type 2 EEO-1 data for all federal contractors from 2015-2020. In July, the Department anticipates publishing a notice in the Federal Register to inform contractors of the FOIA request for contractors' EEO-1 data. This notice will provide contractors with 30 days to submit written objections to the disclosure of their EEO-1 data pursuant to Exemption 4 of FOIA. At the conclusion of that 30 days, OFCCP will ascertain which contractors have objected to disclosure, and which have not. As soon as possible thereafter, OFCCP will disclose to CIR the EEO-1 data for all contractors that have not objected to disclosure. In addition to the Federal Register notice, OFCCP will also announce this FOIA request through other means, such as its GovDelivery listserv, which includes a large number of federal contractors. For those contractors that have submitted written objections, OFCCP will review the objections submitted and make an independent assessment for each as to whether the information should be withheld under FOIA Exemption 4. At this time, we cannot estimate how long this process will take. We do not know how many contractors will object, but given that there were approximately 25,000 unique filers of Type 2 EEO-1 data from 2015-2020, we anticipate that the number of objectors will be in the thousands. OFCCP will devote significant resources to review and assess these objections as quickly as possible, but we note that the scope of this request, and the number of objections that OFCCP will receive and need to evaluate, is unprecedented. We hope that this clarifies for CIR the agency's timeline with regard to this matter. If you have any questions, please contact us via email at OFCCP_NO_FOIA@dol.gov, or by telephone at (202) 693-0101.

Sincerely, Kelechi Ahaghotu Branch Chief of Information Services Division of Management and Administrative Programs

From: Victoria Baranetsky <vbaranetsky@revealnews.org>
Sent: Thursday, June 30, 2022 2:38 PM
To: OFCCP NO FOIA
Cc: wevans@revealnews.org; smusgrave@revealnews.org
Subject: Re: FOIA 872421 OFCCP Response to CIR

CAUTION - The sender of this message is external to the DOL network. Please use care when clicking on links and responding with sensitive information. Send suspicious email to spam@dol.gov.

Thank you for your response. I would like to confirm: (1) when in July does the agency anticipate publishing this announcement on the federal register?; (2) will the agency be producing the records on a rolling basis?; and, (3) can the agency please point to the agency regulations it is using for guidance on its procedure in this case.

While we appreciate the attention and resources now allocated to this matter, I will note that this request is now *multiple years old*. And given the decision from N.D. Cal is on point, we are dismayed and confused by the agency's decision to withhold these records claiming that they have no "binding effect." See OFCCP Letter to CIR, dated June 15, 2022 (stating N.D. Cal. "addressed only 10 EEO-1 reports of select companies from 2016 and does not have any binding effect as to the other EEO-1 reports"). The agency has provided absolutely no reasoning as to why identical forms should not be released simply because they are more numerous and from a different calendar year than those at issue in Judge Westmore's order. I cannot imagine the Northern District of California would find a meaningful distinction, but instead would only see this decision as the agency ignoring the law of the circuit. See *Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012) (en banc), *aff'd sub nom. Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013) (discussing law of the circuit); *see also Barapind v. Enomoto*, 400 F.3d 744, 751 (9th Cir. 2005) (en banc).

Regards,
Victoria

On Mon, Jun 27, 2022 at 2:34 PM Office of Federal Contract Compliance Programs <ofccp_no_foia@dol.gov> wrote:

By Electronic Mail

Dear Ms. Baranetsky,

This email responds to yours of June 16, 2022, and specifically your request for a clearer timeline regarding FOIA #872421, which, as revised, requests that OFCCP disclose Type 2 EEO-1 data for all federal contractors from 2015-2020.

In July, the Department anticipates publishing a notice in the Federal Register to inform contractors of the FOIA request for contractors' EEO-1 data. This notice will provide contractors with 30 days to submit written objections to the disclosure of their EEO-1 data pursuant to Exemption 4 of FOIA. At the conclusion of that 30 days, OFCCP will ascertain which contractors have objected to disclosure, and which have not. As soon as possible thereafter, OFCCP will disclose to CIR the EEO-1 data for all contractors that have not objected to disclosure. In addition to the Federal Register notice, OFCCP will also announce this FOIA request through other means, such as its GovDelivery listserv, which includes a large number of federal contractors.

For those contractors that have submitted written objections, OFCCP will review the objections submitted and make an independent assessment for each as to whether the information should be withheld under FOIA Exemption 4. At this time, we cannot estimate how long this process will take. We do not know how many contractors will object, but given that there were approximately 25,000 unique filers of Type 2 EEO-1 data from 2015-2020, we anticipate that the number of objectors will be in the thousands. OFCCP will devote significant resources to review and assess these objections as quickly as possible, but we note that the scope of this request, and the number of objections that OFCCP will receive and need to evaluate, is unprecedented.

We hope that this clarifies for CIR the agency's timeline with regard to this matter. If you have any questions, please contact us via email at OFCCP_NO_FOIA@dol.gov, or by telephone at (202) 693-0101.

Sincerely,

Kelechi Ahaghotu

Branch Chief of Information Services

Division of Management and Administrative Programs

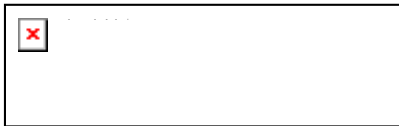
--

Victoria D. Baranetsky

General Counsel

(w) 510-982-2890

(c) (b) (6)
PGP



From Email : ofccp_no_foia@dol.gov

To Email : vbaranetsky@revealnews.org

Cc Email : wevans@revealnews.org; smusgrave@revealnews.org

Bcc Email : ofccp_no_foia@dol.gov

Subject : RE: FOIA 872421 OFCCP Response to CIR

Date Sent : 7/6/2022 11:49:04 AM

Email Body : Dear Ms. Baranetsky, Thank you for your email dated June 30, 2022. We write to address the questions you raised. We plan to publish our announcement on the Federal Register by the end of July. The Federal Register controls its own publication schedule, so it is difficult to provide more precision than that. We anticipate beginning production on a rolling basis starting 30 days after publication of the Federal Register notice. However, until we see how many objections we receive and whether they are from individual submitters or trade associations on behalf of their members, we cannot provide precise details on what the rolling production will look like. As we indicated in our earlier email, we will begin production of the Type 2 reports of those EEO-1 submitters who do not object, or do not have objections raised on their behalf within 30 days of the publication of the notice in the Federal Register. For submitters that do object, as we said in our email, OFCCP will need to do individualized analyses of the objections. If OFCCP determines that the objections do not meet the standards for FOIA Exemption 4, OFCCP will notify the submitter that it intends to disclose. At that point, submitters may file reverse FOIA actions against OFCCP to prevent disclosure. The relevant agency regulations regarding these procedures are found at 29 C.F.R. § 70.26. If you have any questions, please contact us via email at OFCCP_NO_FOIA@dol.gov, or by telephone at (202) 693-0101. Sincerely, Kelechi Ahaghotu Branch Chief of Information Services Division of Management and Administrative Programs

From Email : ofccp_no_foia@DOL.GOV

To Email : wevans@revealnews.org;

Cc Email : smusgrave@revealnews.org; vbaranetsky@revealnews.org

Bcc Email : ofccp_no_foia@DOL.GOV

Subject : FOIA 872421 Evans - Clarification

Date Sent : 7/20/2022 2:23:59 PM

Email Body : Dear Will, Per my phone call, I am seeking a bit of clarification. EEO-1 filers indicate on the EEO-1 form whether they are a "prime contractor or first-tier subcontractor." Your request asked for EEO-1 data from "contractors." Can you confirm that your request intended to seek all Type 2 EEO-1 data from 2016-2020 in OFCCP's possession, that is, for prime contractors and first-tier subcontractors? If so, can you please send us confirmation in writing (i.e., email)? This will help expedite publishing the notice in the Federal Register. Many thanks, Bruce

From: Will Evans <wevans@revealnews.org>
Sent: Friday, July 22, 2022 2:03 AM
To: OFCCP NO FOIA
Cc: smusgrave@revealnews.org; vbaranetsky@revealnews.org
Subject: Re: FOIA 872421 Evans - Clarification

Follow Up Flag: Follow up
Flag Status: Completed

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Hi Bruce,

Thank you for reaching out and clarifying. Yes, my request is for all Type 2 EEO-1 data from 2016-2020 in OFCCP's possession (including both prime contractors and first-tier subcontractors).

Let me know if you have any other questions.

Best,
Will

On Wed, Jul 20, 2022 at 11:21 AM Office of Federal Contract Compliance Programs <ofccp_no_foia@dol.gov> wrote:

Dear Will,

Per my phone call, I am seeking a bit of clarification. EEO-1 filers indicate on the EEO-1 form whether they are a "prime contractor or first-tier subcontractor." Your request asked for EEO-1 data from "contractors." Can you confirm that your request intended to seek all Type 2 EEO-1 data from 2016-2020 in OFCCP's possession, that is, for prime contractors **and** first-tier subcontractors? If so, can you please send us confirmation in writing (i.e., email)? This will help expedite publishing the notice in the Federal Register.

Many thanks,

Bruce

--

Will Evans
reporter
Reveal from The Center for Investigative Reporting
cell: 510- (b) (6)
Signal: 510- (b) (6)
www.revealnews.org

From: Will Evans <wevans@revealnews.org>
Sent: Monday, March 25, 2019 1:57 PM
To: FOIARequests
Subject: FOIA request - OFCCP

Dear FOIA Officer,

Under the Freedom of Information Act, I am requesting a copy of the following records from OFCCP:

*** A spreadsheet of all consolidated (Type 2) EEO-1 reports for all federal contractors for 2017.**

I am requesting this data in electronic format, by email. Fulfilling this request is not unduly burdensome because there is no need to notify federal contractors.

There is an exception to the notice requirements of 29 CFR 70.26 and Executive Order 12600 that applies here, as will be explained below. Notice to the contractors is not required.

Under 29 CFR 70.2(G)(5) and Executive Order 12600 Sec.8(e), the notice requirements **need not be followed** if the information has not been designated by the submitter, unless OFCCP "has reason to believe that disclosure of the information would result in substantial competitive harm."

Under 29 CFR 70.2(G)(6) and Executive Order 12600 Sec.8(f), the notice requirements **need not be followed** the designation made by the submitter "appears obviously frivolous."

There is no substantial reason to believe that disclosure of the information would result in competitive harm, so the information should be released without notice for any contractor. Even if a contractor has designated it as confidential, that designation should be considered "obviously frivolous," as OFCCP has already determined that Type 2 EEO-1 reports are not subject to Exemption 4 of the Freedom of Information Act. (see CIR v USDOL, Case No. 3:18-cv-2008 JCS)

I am a representative of the news media as a reporter with Reveal from The Center for Investigative Reporting, a non-profit investigative journalism organization. This request is made as part of news gathering and not for a commercial use. I respectfully ask that you waive fees related to this request. Please notify me of any charges before fulfilling this request.

Please contact me with any questions at [510-809-2209](tel:510-809-2209) or wevans@revealnews.org

Thank you for your attention to this request.

Sincerely,
Will Evans
Reveal / The Center for Investigative Reporting
1400 65th, Suite 200
Emeryville, CA 94608

--

Will Evans
reporter
o: 510-809-2209

The logo for Reveal, featuring the word "Reveal" in a white serif font inside a black rectangular box with a white border.

from The Center for Investigative Reporting

www.revealnews.org

U.S. Department of Labor

Office of Federal Contract
Compliance Programs
200 Constitution Avenue, N.W.
Washington, D.C. 20210



MAR 26 2019

Will Evans
The Center for Investigative Reporting
1400 65th Street, Suite 200
Emeryville, CA 94608

RE: Freedom of Information Act Request Acknowledgement Tracking No. 875877

Dear Mr. Evans:

This letter is to acknowledge receipt of, and a final response to, your Freedom of Information Act (FOIA) request submitted to foiarequest@dol.gov. The Office of the Solicitor assigned your request to the Office of Federal Contract Compliance Programs (OFCCP) on March 22, 2019. Please refer to the above-referenced FOIA tracking number in any future correspondence regarding your FOIA request.

You requested a spreadsheet of all consolidated (Type 2) EEO-1 reports for all federal contractors for 2017. OFCCP conducted a search that was reasonably calculated to uncover all responsive documents or information described in your FOIA request. Our search yielded no responsive records.

We consider you to be a representative of the news media as defined by the U.S. Department of Labor FOIA regulations at 29 CFR § 70.40(c)(3), therefore, only reproduction costs will be assessed, excluding charges for the first 100 pages. We determined that the costs were de minimis and are not charging you for this request.

Should you have questions regarding your request, please contact this office at (202) 693-0101 or by email at OFCCP_NO_FOIA@dol.gov.

If you need further assistance or would like to discuss any aspect of your request, please do not hesitate to contact the DOL FOIA Public Liaison, Thomas Hicks, at (202) 693-5427. Alternatively, you may contact the Office of Government Information Services within the National Archives and Records Administration (OGIS) to inquire about the mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740-6001. You can also reach that office by e-mail at ogis@nara.gov, by phone at (202) 741-5770, by fax at (202) 741-5769, or by calling toll-free at (877) 684-6448.

If you are not satisfied with the response to this request, you may administratively appeal by writing to the Solicitor of Labor within 90 days from the date of this letter. The appeal must state in writing the grounds for the appeal, and it may include any supporting statements or arguments, but such statements are not required. In order to facilitate processing of the appeal, please include your mailing address and daytime telephone number, as well as a copy of the initial request and copy of this letter. The envelope and letter of the appeal should be clearly marked "Freedom of Information Act Appeal." Any amendment to the appeal must be made in writing and received prior to a decision. The appeal should be addressed to the Solicitor of Labor, Division of Management and Administrative Legal Services, U.S. Department of Labor, 200 Constitution Avenue, NW, Room N2420, Washington, DC 20210. Appeals may also be submitted by email to foiaappeal@dol.gov. Appeals submitted to any other email address will not be accepted.

Sincerely,

(b) (6), (b) (7)(C)

D. Lissette Geán
Special Assistant

From: Will Evans <wevans@revealnews.org>
Sent: Wednesday, August 14, 2019 2:23 PM
To: FOIARequests
Subject: FOIA request

Dear FOIA Officer,

Under the Freedom of Information Act, I am requesting a copy of the following DOL records:

The report assessing the potential economic impact and competitive harm of releasing EEO-1 reports, conducted in response to FOIA request 838133 and the lawsuit CIR v USDOL, Case No. 3:18-cv-2008 JCS.

The responsive records may be kept by OFCCP and/or SOL.

I am a representative of the news media as a reporter with Reveal from The Center for Investigative Reporting, a non-profit investigative journalism organization. This request is made as part of news gathering and not for a commercial use. I respectfully ask that you waive fees related to this request. Please notify me of any charges before fulfilling this request.

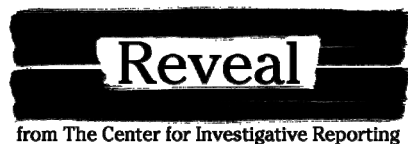
Please contact me with any questions at [510-809-2209](tel:510-809-2209) or wevans@revealnews.org

Thank you for your attention to this request.

Sincerely,
Will Evans
Reveal / The Center for Investigative Reporting
[1400 65th, Suite 200](#)
[Emeryville, CA 94608](#)

--

Will Evans
reporter
o: 510-809-2209



www.revealnews.org



FEB 18 2020

Will Evans
The Center for Investigative Reporting
1400 65th Street, Suite 200
Emeryville, CA 94608

RE: Freedom of Information Act Request Acknowledgement – Tracking No. 881537

Dear Mr. Evans:

This letter is a final response to your Freedom of Information Act (FOIA) request submitted to foiarequest@dol.gov. The Office of the Solicitor assigned your request to the Office of Federal Contract Compliance Programs (OFCCP) on August 14, 2019. Please refer to the above-referenced FOIA tracking number in any future correspondence regarding your FOIA request. You requested:

... the report assessing the potential economic impact and competitive harm of releasing EEO-1 reports, conducted in response to FOIA request 838133 and the lawsuit *CIR v USDOL*, Case No. 3:18-cv-2008 JCS.

OFCCP conducted a reasonably calculated search for all responsive documents or information described in your FOIA request. Our search yielded seven documents. We are withholding the seven documents in their entirety under FOIA Exemption 5 (5 U.S.C. § 552(b)(5)).

We consider you to be a representative of the news media as defined by the U.S. Department of Labor FOIA regulations at 29 CFR § 70.40(c)(3), therefore, only reproduction costs will be assessed, excluding charges for the first 100 pages. We determined that the costs were de minimis and are not charging you for this request.

If you need further assistance or would like to discuss any aspect of your request, please do not hesitate to contact this office at (202) 693-0101 or by email at OFCCP_NO_FOIA@dol.gov. Alternatively, you may wish to contact the DOL FOIA Public Liaison, Thomas Hicks, at (202) 693-5427 or by email at hicks.thomas@dol.gov.

You may also contact the Office of Government Information Services (OGIS), within the National Archives and Records Administration (NARA), to inquire about the mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740-6001. You can also reach that office by email at ogis@nara.gov, by phone at (202) 741-5770, by fax at (202) 741-5769, or by calling toll-free at 1(877) 684-6448.

If you are not satisfied with the response to this request, you may administratively appeal by writing to the Solicitor of Labor within 90 days from the date of this letter. In the appeal, you

must state in writing the grounds for the appeal, and may include any supporting statements or arguments, but such statements are not required. To facilitate processing of the appeal, please include your mailing address and daytime telephone number, as well as a copy of the initial request and copy of this letter. Clearly mark "Freedom of Information Act Appeal" on the envelope and letter of the appeal. You must make any amendment to the appeal in writing and we must receive it prior to a decision. Address the appeal to the Solicitor of Labor, Division of Management and Administrative Legal Services, U.S. Department of Labor, 200 Constitution Avenue, NW, Room N2420, Washington, DC 20210. You may submit your appeal by email to foiaappeal@dol.gov. The Department does not accept appeals submitted to any other email address.

Sincerely,

(b) (6), (b) (7)(C)

D. Lissette Geán
FOIA Manager

From: [OFCCP NO FOIA](#)
To: ["Will Evans"](#)
Cc: [Victoria Baranetsky](#)
Bcc: [Spalding, Candice - OFCCP](#); [Gean, Lissette - OFCCP](#)
Subject: RE: Acknowledgment 887177
Date: Tuesday, January 14, 2020 4:10:00 PM
Attachments: [FOIA Evans 887177 request.pdf](#)
[image001.png](#)

Dear Will,

We anticipate having your acknowledgement letter in the mail this week.

Cordially,

Bruce

From: Will Evans <wevans@revealnews.org>
Sent: Tuesday, January 14, 2020 2:58 PM
To: OFCCP NO FOIA <OFCCP_NO_FOIA@DOL.GOV>
Cc: Victoria Baranetsky <vbaranetsky@revealnews.org>
Subject: Fwd: Acknowledgment

Hi Bruce,

Could you please give us the estimated date of completion for this one? It shouldn't have to go through the contractor notification/objection process since contractor EE0-1s have been determined to be public records in federal court.

Thanks!

Best,

Will

----- Forwarded message -----

From: **Dodson, Aretha A. - SOL** <[\(b\) \(6\), \(b\) \(7\)\(C\)@dol.gov](mailto:(b) (6), (b) (7)(C)@dol.gov)>
Date: Fri, Jan 10, 2020 at 1:04 PM
Subject: Acknowledgment
To: Will Evans <wevans@revealnews.org>
Cc: Oliver, Ramona - SOL <[\(b\) \(6\), \(b\) \(7\)\(C\)@dol.gov](mailto:(b) (6), (b) (7)(C)@dol.gov)>, OFCCP NO FOIA <OFCCP_NO_FOIA@dol.gov>

Good Day:

Your request has been assigned to OFCCP with tracking number **887177**. When they begin processing it, you will be able to track its progress at www.dol.gov/foia. If you need to contact them about it for any reason, please submit your inquiry through ofccp_no_foia@dol.gov or phone 202-693-0101. In addition, it would be helpful to include the tracking number in the Subject line of

From: [Will Evans](#)
To: [FOIARequests](#)
Subject: FOIA request - for OFCCP
Date: Wednesday, January 8, 2020 5:31:49 PM
Attachments: [Judge Westmore decision Dec 10 2019.pdf](#)

Dear FOIA Officer,

Under the Freedom of Information Act, I am requesting a copy of the following records from OFCCP:

* Type 2 consolidated EEO-1 reports, from the most recent year available, for the following federal contractors:

1. Lockheed Martin
2. Boeing
3. General Dynamics
4. Raytheon
5. Northrop Grumman
6. McKesson
7. United Technologies
8. L-3 Communications
9. Huntington Ingalls
10. BAE Systems
11. Humana
12. SAIC
13. Booz Allen Hamilton
14. UnitedHealth Group
15. Aecom Technology
16. Honeywell
17. General Electric
18. Merck
19. Pfizer
20. Royal Dutch Shell
21. Exxon Mobil
22. Fedex
23. Valero Energy
24. AT&T
25. Glaxosmithkline

26. Berkshire Hathaway
27. Rolls-Royce
28. IBM
29. GEO Group
30. SpaceX
31. CoreCivic

These are public records that must be disclosed. Please see the Dec. 10, 2019 ruling by Judge Kandis Westmore in U.S. District Court for the Northern District of California, 4:19-cv-01843-KAW (attached).

I am a representative of the news media as a reporter with Reveal from The Center for Investigative Reporting, a non-profit investigative journalism organization. This request is made as part of news gathering and not for a commercial use. I respectfully ask that you waive fees related to this request. Please notify me of any charges before fulfilling this request.

Please contact me with any questions at [510-809-2209](tel:510-809-2209) or wevans@revealnews.org

Thank you for your attention to this request.

Sincerely,
Will Evans
Reveal / The Center for Investigative Reporting
[1400 65th, Suite 200](#)
[Emeryville, CA 94608](#)

--

Will Evans
reporter
o: 510-809-2209



www.revealnews.org



JAN 16 2020

Will Evans
The Center for Investigative Reporting
1400 65th Street, Suite 200
Emeryville, CA 94608

RE: Freedom of Information Act Request Acknowledgement – Tracking No. 887177

Dear Mr. Evans:

This letter is to acknowledge receipt of your Freedom of Information Act (FOIA) request submitted to foiarequest@dol.gov. The Office of the Solicitor assigned your request to the Office of Federal Contract Compliance Programs (OFCCP) on January 13, 2020. Please refer to the above-referenced FOIA tracking number in any future correspondence regarding your FOIA request. Your request is detailed in Attachment A.

We consider you to be a representative of the news media as defined by the U.S. Department of Labor FOIA regulations at 29 CFR § 70.40(c)(3), therefore, only reproduction costs will be assessed, excluding charges for the first 100 pages. You will receive written notification if the total estimated fee for processing your request exceeds \$25.00.

OFCCP's National Office will process your request for EEO-1 data. Once we compile the data, we will send a letter to the submitters requesting permission to release the requested EEO-1 data. OFCCP requires that when a requestor asks for EEO-1 data, they must specify the exact address of the company requested and the scope of the data requested. Please submit to us the exact addresses of the companies listed in Attachment A. If we do not hear from you within thirty (30) days of this letter, we will administratively close this FOIA.

In accordance with 29 CFR § 70.26, OFCCP is required to notify submitters that their business information has been requested under the FOIA to give them an opportunity to object in writing to disclosure of any specified portion of the requested information. We will send a final response to your request for EEO-1 data after the deadline expires for the company to object. OFCCP will evaluate, on a case-by-case basis, any objections to the release of the requested EEO-1 data.

Due to the volume and complexity of the FOIA requests in receipt of this agency, we anticipate that providing a full response will take longer than 20 business days to fulfill. Accordingly, OFCCP will take an additional 10 business days to fulfill your request as afforded by the FOIA at 5 U.S.C. § 552(a)(6)(B)(i). We will contact you if we are unable to fulfill your request in 30 business days.

If you need further assistance or would like to discuss any aspect of your request, please do not hesitate to contact this office at (202) 693-0101 or by email at OFCCP_NO_FOIA@dol.gov. Alternatively, you may wish to contact the DOL FOIA Public Liaison, Thomas Hicks, at (202) 693-5427 or by email at hicks.thomas@dol.gov.

You may also contact the Office of Government Information Services (OGIS), within the National Archives and Records Administration (NARA), to inquire about the mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740-6001. You can also reach that office by email at ogis@nara.gov, by phone at (202) 741-5770, by fax at (202) 741-5769, or by calling toll-free at 1(877) 684-6448.

If you are not satisfied with the response to this request, you may administratively appeal by writing to the Solicitor of Labor within 90 days from the date of this letter. In the appeal, you must state in writing the grounds for the appeal, and may include any supporting statements or arguments, but such statements are not required. To facilitate processing of the appeal, please include your mailing address and daytime telephone number, as well as a copy of the initial request and copy of this letter. Clearly mark "Freedom of Information Act Appeal" on the envelope and letter of the appeal. You must make any amendment to the appeal in writing and we must receive it prior to a decision. Address the appeal to the Solicitor of Labor, Division of Management and Administrative Legal Services, U.S. Department of Labor, 200 Constitution Avenue, NW, Room N2420, Washington, DC 20210. You may submit your appeal by email to foiaappeal@dol.gov. The Department does not accept appeals submitted to any other email address.

Using the tracking number above, you may query the status of your request online at <http://www.dol.gov/foia>.

Sincerely,

(b) (6)

D. Lissette Geán
FOIA Manager

Attachment

Attachment A

Type 2 consolidated EEO-1 reports, from the most recent year available, for the following federal contractors:

- Aecom Technology
- AT&T
- BAE Systems
- Berkshire Hathaway
- Boeing
- Booz Allen Hamilton
- CoreCivic
- Exxon Mobil
- Fedex
- General Dynamics
- General Electric
- GEO Group
- Glaxosmithkline
- Honeywell
- Humana
- Huntington Ingalls
- IBM
- L-3 Communications
- Lockheed Martin
- McKesson
- Merck
- Northrop Grumman
- Pfizer
- Raytheon
- Rolls-Royce
- Royal Dutch Shell
- SAIC
- SpaceX
- United Technologies
- UnitedHealth Group
- Valero Energy

From: [Will Evans](#)
To: [OFCCP NO FOIA](#)
Subject: re FOIA 887177
Date: Thursday, November 19, 2020 5:11:59 PM

CAUTION - The sender of this message is external to the DOL network. Please use care when clicking on links and responding with sensitive information. Send suspicious email to spam@dol.gov.

Dear Mr. Anderson,
Could you please let me know the status of FOIA request #887177 (Type 2 EEO-1 reports for 31 companies)?
Thank you very much for your work on this.
Best,
Will

--

Will Evans
reporter
office: 510-809-2209
cell: (b) (6)



www.revealnews.org

From: [OFCCP NO FOIA](#)
To: [Will Evans](#)
Bcc: [Gean, Lissette - OFCCP](#)
Subject: RE: FOIA 887177
Date: Thursday, November 19, 2020 6:18:00 PM
Attachments: [FOIA Evans 887177 request.pdf](#)
[FOIA Evans 887177 list.csv](#)

Dear Mr. Evans,

After we wrote you earlier in the year, we never heard back from you. This request has been tolled and pending closure. I am forwarding your original request, and a file of addresses based on what you first asked.

Could you please confirm that you still want us to proceed? If you no longer want this request we can close it. Otherwise, please go through your list and confirm the addresses of the companies you requested.

Cordially,

Bruce Andersen

From: Will Evans <wevans@revealnews.org>
Sent: Thursday, November 19, 2020 5:11 PM
To: OFCCP NO FOIA <OFCCP_NO_FOIA@DOL.GOV>
Subject: re FOIA 887177

CAUTION - The sender of this message is external to the DOL network. Please use care when clicking on links and responding with sensitive information. Send suspicious email to spam@dol.gov.

Dear Mr. Andersen,
Could you please let me know the status of FOIA request #887177 (Type 2 EEO-1 reports for 31 companies)?
Thank you very much for your work on this.
Best,
Will

--
Will Evans
reporter
office: 510-809-2209
cell: (b) (6)



From: [Will Evans](#)
To: [FOIARequests](#)
Subject: FOIA request - for OFCCP
Date: Wednesday, January 8, 2020 5:31:49 PM
Attachments: [Judge Westmore decision Dec 10 2019.pdf](#)

Dear FOIA Officer,

Under the Freedom of Information Act, I am requesting a copy of the following records from OFCCP:

* Type 2 consolidated EEO-1 reports, from the most recent year available, for the following federal contractors:

1. Lockheed Martin
2. Boeing
3. General Dynamics
4. Raytheon
5. Northrop Grumman
6. McKesson
7. United Technologies
8. L-3 Communications
9. Huntington Ingalls
10. BAE Systems
11. Humana
12. SAIC
13. Booz Allen Hamilton
14. UnitedHealth Group
15. Aecom Technology
16. Honeywell
17. General Electric
18. Merck
19. Pfizer
20. Royal Dutch Shell
21. Exxon Mobil
22. Fedex
23. Valero Energy
24. AT&T
25. Glaxosmithkline

26. Berkshire Hathaway
27. Rolls-Royce
28. IBM
29. GEO Group
30. SpaceX
31. CoreCivic

These are public records that must be disclosed. Please see the Dec. 10, 2019 ruling by Judge Kandis Westmore in U.S. District Court for the Northern District of California, 4:19-cv-01843-KAW (attached).

I am a representative of the news media as a reporter with Reveal from The Center for Investigative Reporting, a non-profit investigative journalism organization. This request is made as part of news gathering and not for a commercial use. I respectfully ask that you waive fees related to this request. Please notify me of any charges before fulfilling this request.

Please contact me with any questions at [510-809-2209](tel:510-809-2209) or wevans@revealnews.org

Thank you for your attention to this request.

Sincerely,
Will Evans
Reveal / The Center for Investigative Reporting
[1400 65th, Suite 200](#)
[Emeryville, CA 94608](#)

--

Will Evans
reporter
o: 510-809-2209



www.revealnews.org

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THE CENTER FOR INVESTIGATIVE
REPORTING, et al.,
Plaintiffs,
v.
U.S. DEPARTMENT OF LABOR,
Defendant.

Case No. [4:19-cv-01843-KAW](#)

**ORDER ON CROSS-MOTIONS FOR
SUMMARY JUDGMENT**

Re: Dkt. Nos. 24, 29

On August 23, 2019, the U.S. Department of Labor filed a motion for summary judgment on the grounds that the Government was justified in withholding documents under the Freedom of Information Act’s Exemption 4. On September 30, 2019, Plaintiffs, The Center for Investigative Reporting and Will Evans, filed a cross-motion for summary judgment.

On December 5, 2019, the Court held a hearing, and after careful consideration of the parties’ arguments and the applicable legal authority, for the reasons set forth below, DENIES Defendant’s motion for summary judgment, and GRANTS Plaintiffs’ cross-motion for summary judgment.

I. BACKGROUND

Plaintiff the Center for Investigative Reporting (“CIR”) is a nonprofit, investigative news organization that publishes *Reveal*, an online news site, and has a weekly public radio show with approximately one million listeners per week. (Compl., Dkt. No. 1 ¶ 13.) Plaintiff, Will Evans, is a staff reporter for *Reveal* and an employee of CIR. (Compl. ¶ 14.) Defendant U.S. Department of Labor (“DOL”) oversees the Office of Federal Contract Compliance Programs (“OFCCP”). (Compl. ¶ 15.)

On January 4, 2018, Plaintiffs submitted a Freedom of Information Act (“FOIA”) request

1 to DOL’s OFCCP seeking disclosure of federal contractors’ employment diversity reports (known
2 as EEO-1 reports). (*See* Compl. ¶ 2; Decl. of D. Lissette Geán, “Geán Decl.,” Dkt. No. 24-11 at ¶
3 13, Ex. 1.) The request explicitly sought the 2016 EEO-1 Consolidated Report (Type 2) for 55
4 named companies. (Geán Decl. ¶ 13.)

5 Companies with 50 or more employees that contract with the federal government must
6 submit annual reports using Standard Form 100, commonly known as “EEO-1 report,” to the Joint
7 Reporting Committee (“JRC”). 41 C.F.R. § 60-1.7(a). Companies that do business at two or more
8 physical addresses (i.e. establishments) must file an EEO-1 Consolidated Report (Type 2) to that
9 web portal. U.S. EQUAL EMP’T OPPORTUNITY COMM’N, Fact Sheet for EEO-1 Survey Filers,
10 https://www.eeoc.gov/employers/eeo1survey/fact_sheet_filers.cfm (last visited Dec. 4, 2019).
11 EEO-1 Type 2 reports require companies to report the total number of employees across all their
12 establishments by race/ethnicity, gender, and job category. U.S. EQUAL EMP’T OPPORTUNITY
13 COMM’N, Memorandum from EEO-1 Joint Reporting Committee on Computer Printed EEO-1
14 Reports- Required Format (Rev 3/2007) to Multi-establishment Private Employers (July 2007),
15 <https://www.eeoc.gov/employers/eeo1survey/upload/compfiling-multi.pdf> (last visited Dec. 4,
16 2019). These reports help OFCCP monitor the contracting companies’ compliance with Executive
17 Order No. 11,246 which prohibits employment discrimination by government contractors. (Geán
18 Decl. ¶ 5.)

19 The Equal Employment Opportunity Commission (“EEOC”) collects similar data for
20 employers with 100 or more employees. (Geán Decl. ¶ 8.) To avoid duplication of efforts and
21 reduce the administrative burden on companies, EEOC and OFCCP formed the JRC to administer
22 the EEO-1 reporting system in a manner that establishes a single data collection to meet the
23 statistical needs of both agencies. *See id.* The JRC web portal is managed by the EEOC, which
24 collects the information and shares with OFCCP the reports from the companies subject to the
25 OFCCP’s jurisdiction. (Geán Decl. ¶ 9.)

26 On March 13, 2018, then-Special Assistant to the Deputy Director, D. Lissette Geán,
27 informed Plaintiffs that OFCCP identified only 36 of the named 55 companies as federal
28

1 contractors subject to OFCCP’s jurisdiction. (Geán Decl. ¶ 15, Ex. 3.)¹ On March 14, 2018, Ms.
2 Geán, notified those 36 federal contractors of the plaintiffs’ FOIA request for their EEO-1, Type 2
3 information. (Geán Decl. ¶ 16.) The notice was sent out pursuant to the notice requirement for
4 confidential commercial information as described in DOL’s duly promulgated regulation, 29
5 C.F.R. § 70.26. (Geán Decl. ¶ 16.) The letters informed the companies that they had 30 days from
6 receipt of the letter to object in writing, and that their failure to respond would result in the release
7 of their EEO-1, Type 2 data to Plaintiffs. (Geán Decl. ¶¶ 17-19, Ex. 4.)

8 On April 18, 2018, Ms. Geán sent a second notice to submitters who had not objected
9 within the initial 30 days. (Geán Decl. ¶ 20, Ex. 5.) The April 18, 2018 letters referenced the
10 March 14, 2018 letters, and informed those submitters that if they failed to object by close of
11 business on May 31, 2018, their EEO-1 Type 2 data will be released to the plaintiff-requesters.
12 (Geán Decl. ¶ 21, Ex. 5.) Also on April 18, 2018, Ms. Geán separately informed Plaintiffs that, as
13 of the date of that letter, 14 of the 36 companies objected to the release of their data on the
14 grounds of FOIA Exemption 4. (Geán Decl. ¶ 22, Ex. 6.)

15 By May 31, 2018, a total of 20 of the 36 companies submitted written objections to DOL.
16 (Geán Decl. ¶ 23.) On April 18, 2018 and on July 5, 2018, DOL sent each of the 20 objecting
17 submitters a letter informing them that DOL “concurred with their assertions that their EEO-1
18 reports were exempt from mandatory disclosure pursuant to Exemption 4 of FOIA.” (Geán Decl. ¶
19 24, Ex. 7.) As such, DOL informed these objectors that it would not release their EEO-1 Type 2
20 data to Plaintiffs. *Ids.*

21 On August 14, 2018, Ms. Geán, sent a letter to Plaintiffs confirming that one of companies
22 in the original FOIA request, Trimble Navigation, had been removed from the request. (Geán
23 Decl. ¶ 25, Ex. 8.) In addition, by the date of the letter, Ms. Geán informed Plaintiffs that 15
24 submitters had not objected to the release of their EEO-1 Type 2 data. (Geán Decl. ¶ 26.)
25 Subsequently, on August 16, 2018, via e-mail, OFCCP released the EEO-1 Type 2 data for those
26

27 ¹ The Court finds that the declaration makes a sufficient showing that DOL performed a proper
28 search to identify those companies that were currently federal contractors, so the Court will not
address Plaintiffs argument that a proper search was not performed.

1 15 submitters who failed to timely object to the release of their EEO-1 data by May 31, 2018.
2 (Geán Decl. ¶ 27, Ex. 9.)

3 On February 22, 2019, OFCCP informed Plaintiffs that it would delay issuing a final
4 response to this FOIA request pending the outcome of the Supreme Court decision in *Argus*
5 *Leader*. (Geán Decl. ¶ 28, Ex. 10.)

6 On March 1, 2019, Plaintiffs submitted an administrative appeal pursuant to 29 C.F.R. §
7 70. (Geán Decl. ¶ 29, Ex. 11.) On March 21, 2019, DOL acknowledged receipt of the appeal.
8 (Geán Decl. ¶ 30.)

9 On April 9, 2019, Plaintiffs filed this action. After the case was filed, additional
10 companies decided to release the information. (Geán Decl. ¶ 32.) As a result, the pending motions
11 only pertains to DOL's decision to withhold the EEO-1 Type 2 data for the following companies:
12 Xilinx, Applied Materials, Inc., Equinix, Gilead Sciences, Inc., Synopsys, Inc., Docusign, Inc.,
13 Agilent Technologies, Box, and Oracle America, Inc., and Fitbit, Inc. (Def.'s Mot. at 6.)

14 On August 23, 2019, Defendant filed a motion for summary judgment. (Def.'s Mot., Dkt.
15 No. 24.) On September 30, 2019, Plaintiffs filed an opposition to the motion for summary
16 judgment and cross-motion for summary judgment. (Pls.' Opp'n, Dkt. No. 29.) Also on
17 September 30, 2019, the Reporters Committee for Freedom of the Press filed an amicus curiae
18 brief. (Amicus Br., Dkt. No. 28-1.) On October 28, 2019, Defendant filed an opposition to the
19 cross-motion and a reply in support of its motion for summary judgment. (Def.'s Reply, Dkt. No.
20 34.) On November 12, 2019, Plaintiffs filed a surreply to Defendant's motion for summary
21 judgment and a reply in support of the cross-motion. (Pl.'s Surreply, Dkt. No. 35.)

22 II. LEGAL STANDARD

23 A. The Freedom of Information Act ("FOIA")

24 "Congress enacted FOIA to overhaul the public-disclosure section of the Administrative
25 Procedure Act (APA). . . ." *Milner v. Dep't of Navy*, 562 U.S. 562, 565 (2011). The intent behind
26 the FOIA was to "clos[e] the loopholes which allow agencies to deny legitimate information to the
27 public." *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 150 (1989) (citations and quotations
28 omitted). Its purpose was to "ensure an informed citizenry, vital to the functioning of a

1 democratic society, needed to check against corruption and to hold the governors accountable to
2 the governed.” *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152, (1989) (citations and
3 quotations omitted). Accordingly, FOIA mandates a “strong presumption in favor of disclosure,”
4 with “disclosure, not secrecy, [being its] . . . dominant objective” *U.S. Dep’t of State v. Ray*,
5 502 U.S. 164, 173 (1991).

6 “At the same time, the FOIA contemplates that some information can legitimately be kept
7 from the public through the invocation of nine ‘exemptions’ to disclosure.” *Yonemoto v. Dep’t of*
8 *Veterans Affairs*, 686 F.3d 681, 687 (9th Cir. 2012) (citing 5 U.S.C. § 552(b)(1)-(9)); *see also Tax*
9 *Analysts*, 492 U.S. at 150-51 (agency must disclose records unless the records may be withheld
10 pursuant to one of the enumerated exemptions listed in § 552(b)); *Lion Raisins, Inc. v. U.S. Dep’t*
11 *of Agriculture*, 354 F.3d 1072, 1079 (9th Cir. 2004) (the FOIA requires full agency disclosure
12 except where specifically exempted).

13 **B. Motion for Summary judgment**

14 Summary judgment is the proper avenue for resolving a FOIA case. *See, e.g., Nat’l*
15 *Wildlife Fed’n v. U.S. Forest Service*, 861 F.2d 1114, 1115 (9th Cir. 1988). Summary judgment is
16 appropriate when “there is no genuine dispute as to any material fact and the movant is entitled to
17 judgment as a matter of law.” Fed. R. Civ. P. 56(a).

18 To prevail on a motion for summary judgment in a FOIA case, an agency must
19 demonstrate that, drawing all reasonable inferences in the light most favorable to the requester,
20 there is no genuine issue of material fact with regard to the agency’s compliance with FOIA, both
21 in terms of conducting a search reasonably calculated to uncover all relevant documents and
22 withholding only those documents or pieces of information that fall within one of the specified
23 exemptions. *Lahr v. Nat’l Transp. Safety Bd.*, 569 F.3d 964, 986 (9th Cir. 2009); *Kamman v. IRS*,
24 56 F.3d 46, 49 (9th Cir. 1995); *Steinberg v. Dep’t of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994).

25 **III. DISCUSSION**

26 The instant motion pertains to DOL’s decision to withhold ten EEO-1 reports pursuant to
27 FOIA’s Exemption 4. (*See* Def.’s Mot. at 6.)

1 **A. Whether the Diversity Reports are Exempt from Disclosure under Exemption 4.**

2 “Exemption 4 shields from mandatory disclosure ‘commercial or financial information
3 obtained from a person and privileged or confidential.’” *Food Mktg. Inst. v. Argus Leader Media*,
4 139 S. Ct. 2356, 2362 (2019) (“*Argus Leader*”) (quoting 5 U.S.C. § 552(b)(4)). There is no
5 dispute that the submitting companies constitute persons under FOIA, as the definition includes
6 corporations. 5 U.S.C. § 551(2). Thus, the Court will address whether the information sought is
7 commercial or financial in nature and whether it is privileged or confidential.

8 **i. Commercial or Financial**

9 Defendant argues that the documents sought are commercial in nature, because it relates to
10 the contractors’ respective business strategies, and could cause financial harm to the companies if
11 the information is released. (*See* Def.’s Mot. at 10.) Plaintiffs argue that the information sought is
12 not commercial or financial, rendering Exemption 4 inapplicable. (Pls.’ Opp’n at 12.)

13 Courts “have consistently held that the terms ‘commercial’ and ‘financial’ in the
14 exemption should be given their ordinary meanings.” *Pub. Citizen Health Research Grp. v. Food*
15 *& Drug Admin.*, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (citations omitted). Generally, information
16 is deemed commercial if it relates to the commercial activity of a business, but “not every bit of
17 information submitted to the government by a commercial entity qualifies for protection under
18 Exemption 4[.]” *Id.* at 1290; *see also Bd. of Trade of City of Chicago v. Commodity Futures*
19 *Trading Comm’n*, 627 F.2d 392, 403 n. 78 (D.C. Cir. 1980), abrogated on other grounds by *U. S.*
20 *Dep’t of State v. Washington Post Co.*, 456 U.S. 595, 102 S. Ct. 1957, 72 L. Ed. 2d 358 (1982).
21 Indeed, a list of names and addresses of employees, which the employer was required to submit to
22 the Government, was not considered financial or commercial under Exemption 4. *Getman v.*
23 *N.L.R.B.*, 450 F.2d 670, 673 (D.C. Cir. 1971).

24 Here, the EEO-1 reports require federal contractors to furnish the composition of their
25 workforce broken down by gender, race/ethnicity, and general job category. *See* U.S. EQUAL
26 EMP’T OPPORTUNITY COMM’N, Sample EEO-1 Report,
27 <https://www.eeoc.gov/employers/eo1survey/upload/eo1-2-2.pdf> (last visited Dec. 3, 2019).
28 There is no salary information, sales figures, departmental staffing levels, or other identifying

1 information in these reports. Rather, the diversity reports merely disclose the workforce
2 composition to ensure compliance with Executive Order 11,246, which prohibits employment
3 discrimination by federal contractors.

4 Even so, the Government contends that the information is “commercial.” In support of this
5 assertion, Defendant submitted supporting declarations from several of the objecting submitters.
6 For example, Julie Crane of Applied Materials, contends that the information furnished in the
7 EEO-1 concerns

8 its labor strategy, demographics, recruiting, and allocations of
9 resources across its segments. Disclosing the EEO-1 information
10 would provide its competitors insights into its strategy, operations,
11 recruiting, and labor costs, creating substantial competitive harm.
This would only grow over time if EEO-1 information were regularly
released, as it would allow competitors to discern shifts and strategies
for the business going forward, in a highly competitive field.

12 (Decl. of Julie Crane, “Crane Decl.,” Dkt. No. 24-2 at ¶ 6.) Similarly, Kelly Kayser, of Equinix,
13 also stated that Equinix’s EEO-1 concerns

14 its labor strategy, demographics, recruiting, and allocations of
15 resources across its segments. Disclosing the EEO-1 information
16 would provide its competitors insights into its strategy, operations,
17 recruiting, and labor costs, creating substantial competitive harm.
This would only grow over time if EEO-1 information were regularly
released, as it would allow competitors to discern shifts and strategies
for the business going forward, in a highly competitive field.

18 (Decl. of Kelly Kayser, “Kayser Decl.,” Dkt. No. 24-3 at ¶ 6.) The Court notes that these
19 conclusory declarations have other similarities beyond the verbatim rationale that the requested
20 information are commercial. The Court, however, notes that the EEO-1 form does not ask
21 submitting companies to explain how resources are allocated across a company’s “segments.”
22 Rather, the report is organized by job category, such as “Professionals,” “Sales Workers,”
23 “Operatives,” “Craft Workers,” “Laborers and Helpers,” etc. It does not request demographic
24 information by division, department, or “segment.” The data sought is companywide.

25 Another declaration claims that the workforce data provided could make the company
26 vulnerable to having its “diverse talent” poached by its competitors. (Decl. of Tania Barrios,
27 “Barrios Decl.,” Dkt. No. 24-1 ¶ 4.) Ms. Barrios attests that, when employees are lured away by
28 other companies, her employer, Xilinx, “lose[s] the talent and experience of the departing

1 employees and it would lose the significant investment it has made in training those employees.”
2 *Id.* at 4. Additionally, Xilinx would incur substantial cost in attempting to fill the positions
3 vacated by those departed employees. *Id.* While lost talent costs companies money, there is a
4 significant disconnect between access to workforce composition and poaching “diverse talent.”
5 The Court finds the claim that the EEO-1 reports would make it easier for competitors to lure
6 away talent to be dubious, since the job categories are so general. For example, the “Professionals”
7 category includes most jobs that require a bachelors or graduate degree, including “accountants
8 and auditors; airplane pilots and flight engineers; architects; artists; chemists; computer
9 programmers; designers; dieticians; editors; engineers; lawyers; librarians; mathematical
10 scientists; natural scientists; registered nurses; physical scientists; physicians and surgeons; social
11 scientists; teachers; and surveyors.” U.S. EQUAL EMP’T OPPORTUNITY COMM’N, EEO-1 Survey
12 Fact Sheet for Filers, <https://www.eeoc.gov/employers/eeo1survey/2007instructions.cfm> (last
13 visited Dec. 4, 2019). Since there is no breakdown by department, the total number of
14 professionals reported not only includes the company’s computer programmers and engineers, but
15 also its lawyers and accountants. Moreover, even without access to general demographic
16 information, there is nothing stopping competitors from recruiting highly coveted female and
17 minority employees via headhunters or networking websites, such as LinkedIn or Dice. (*See*
18 *Barrios Decl.* ¶ 4.) Regardless, concerns regarding poaching go more to the confidentiality
19 element of the exemption than the commercial one.

20 Without addressing every declaration submitted by the Government, the Court notes that
21 other declarations misrepresent the breadth of information contained in the EEO-1 reports. For
22 example, the declaration of Nancy Lewis-Treolo, Senior Director of HR Operations at Docusign,
23 states that the “EEO-1 report contains highly sensitive commercial information, including the
24 number of its employees, the types of positions they hold, the span of managerial control, and the
25 distribution of those employees within various teams.” (*Decl.* of Nancy Lewis-Treolo, “Lewis
26 Treolo Decl.,” Dkt. No. 24-6 at ¶ 6.) As discussed above, the report does not provide information
27 regarding the distribution of employees within various divisions, departments, segments or
28 “teams.” Rather, the information sought is general job categories and the data provided is

1 companywide.

2 In its reply, Defendant cites to *100Reporters LLC v. United States Dep't of Justice*, 248 F.
3 Supp. 3d 115, 137 (D.D.C. 2017), in support of its contention that the demographic information is
4 commercial because “[i]nformation that is instrumental to a commercial interest is sufficiently
5 commercial for the purpose of Exemption 4.” (Def.’s Reply at 2.) In *100Reporters*, the court
6 found that the Three Year Work Plan documents were commercial because they “set forth the
7 steps the Monitor planned to take to evaluate Siemens' compliance programs... [and] reflect[ed]
8 ‘Siemens’ business operations, structure, and compliance controls.’” *Id.* at 137. “For example, the
9 Monitor’s first work plan describes ‘the number of Siemens employees in each country, new
10 orders, new government orders, joint ventures and business partnerships, and Siemens’ business
11 development strategy across different sectors of the economy.’” *Id.*² In sum, the documents found
12 to be commercial in *100Reporters* reflect a level of detail not contained in the EEO-1 reports at
13 issue here. Thus, the Government’s reliance on *100Reporters* is misplaced.

14 Finally, the Government argues that “[t]he various job categories as well as the number of
15 people hired in each category contained in the EEO-1, Type 2 reports is instrumental to each
16 submitter’s ability to carry out its commercial interests. Businesses cannot engage in commerce
17 without the sufficient personnel in specified job categories, which is thus related to the businesses’
18 commercial enterprise.” (Def.’s Reply at 2.) Essentially, the Government is asking the Court find
19 exempt any statistical information pertaining to employees simply because the business is a
20 commercial enterprise. This expansive interpretation has been rejected. *See Getman*, 450 F.2d at
21 673. At the hearing, the Court asked the Government how the demographic information was

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23
24 ² The Court notes that, after an *in camera* review to determine segregability, the district court
25 found that most of the documents withheld were not exempt, because they “consist[ed] mostly of
26 general descriptions of the Monitor’s past and future activities with very few details about
27 Siemens’ business operations.” *100Reporters LLC v. United States Dep't of Justice*, 316 F. Supp.
28 3d 124, 140 (D.D.C. 2018). The district court did, however, find the “Countries of Interest”
section, which included “the number of Siemens employees in each country” to be exempt, but
that section also included information pertaining to “new orders, new government orders, joint
ventures and business partnerships, and Siemens' business development strategy across different
sectors of the economy,” so it is possible that the labor information was not easily segregated from
the commercial information. *See id.* at 141 (internal quotations omitted). Nevertheless, the
undersigned is not bound by the district court’s decision.

1 commercial, and the Government argued that the information would reveal each submitting
2 company's organization chart, corporate structure, and how it allocates resources. As discussed
3 above, it is impossible to discern a corporation's structure given the EEO-1's general job
4 categories, and the furnished information is companywide rather than by department.

5 Accordingly, in light of the absence of information pertaining to specific positions or
6 departments, the Court finds that the Government has failed to make a showing that the
7 demographic information contained in the EEO-1 reports is commercial. As a result, the
8 Government was not justified in applying Exemption 4 to the EEO-1 reports, and they must be
9 produced unredacted.

10 **ii. Confidentiality**

11 Since the information sought is not commercial in nature, the Court need not address
12 whether the information is confidential under *Argus Leader*.

13 Nonetheless, the Court is not convinced that the information sought would be confidential.
14 In *Argus Leader*, the Supreme Court found that uncontested testimony established that the
15 information was not disclosed, or made "publicly available 'in any way[,]'" suggested that it was
16 confidential. 139 S. Ct. at 2363. To the contrary, here, at least one of the objecting companies,
17 Gilead, published a summary of the EEO-1 data in its annual report, and included a notation that
18 the information was based on the company's 2016 EEO-1 filing. (*See* Suppl. Decl. of D. Lissette
19 Geán, Dkt. No. 34-1 ¶¶ 13-15; Gilead Sciences, 2016 Year in Review report at 24,
20 <http://investors.gilead.com/static-files/33588c5a-7f81-437a-b35a-379514d49eff> (last visited Dec.
21 6, 2019).) While the Year in Review's demographic information did not provide all data points
22 from the EEO-1 report, the information disclosed was substantial enough to undermine the
23 Government's claim of confidentiality, and call into doubt the supporting declaration from
24 Gilead's corporate representative that the company treats this information as private and "does not
25 release its EEO-1 reports to the general public...." (Decl. of Mirelle King, Dkt. No. 24-4 at ¶ 5.)

26 Thus, while the Court need not determine whether the information sought is confidential,
27 there is a significant possibility that at least some of the reports may not be.

1 **B. Whether the Foreseeable Harm Standard is Satisfied.**

2 Even if the information was exempt, the Government has failed to carry its burden of
3 showing that foreseeable harm would result should the documents be released.

4 In 2016, Congress passed the FOIA Improvement Act of 2016 (“FIA”), which amended
5 FOIA to limit the circumstances under which an agency may withhold records from the public.
6 Among other things, the FIA introduced the foreseeable harm standard, which agencies must
7 satisfy for all FOIA requests filed **after** the bill’s enactment (June 30, 2016). P.L. 114-185, 130
8 Stat. 538 (2016) (emphasis added). The foreseeable harm standard prohibits agencies from
9 withholding information unless (1) the agency reasonably foresees that disclosure of the record
10 would harm an interest protected by an exemption, or (2) the disclosure is prohibited by law. 5
11 U.S.C. § 552(a)(8)(A)(i). Consequently, even if information falls within the scope of a
12 discretionary exemption, it cannot be withheld from the public unless the agency also shows that
13 disclosure will harm the interest protected by that exemption. *Id.*; see also *Judicial Watch, Inc. v.*
14 *U.S. Dep’t of Commerce*, 375 F. Supp. 3d 93, 98 (D.D.C. 2019).

15 Here, Plaintiffs argue that even if the reports would be otherwise exempt under Exemption
16 4, the Government has failed to meet its burden under the FIA, because it has not shown that
17 foreseeable harm would result if the records were released. (Pl.’s Opp’n at 13; Amicus Br. At 4.)

18 Defendant argues that to impose the foreseeable harm standard would render *Argus Leader*
19 meaningless. (Def.’s Reply at 7.) The Court disagrees. The substantial competitive harm test set
20 forth in *National Parks & Conservation Association v. Morton*, 498 F.2d 765, 768 (D.C. Cir.
21 1974), was fashioned from legislative history, rather than statute, which was the grounds for its
22 abrogation. *Argus Leader*, 139 S. Ct. at 2364. Post-FIA, the foreseeable harm standard applies to
23 all exemptions, and is not restricted to Exemption 4. As discussed at the hearing, the FOIA
24 request in *Argus Leader* was filed before FIA was enacted, so the foreseeable harm standard was
25 not applicable. In fact, the Supreme Court did not address the validity of the foreseeable harm
26 standard. Today, FIA codifies the requirement that the agency articulate a foreseeable harm to an
27 interest protected by an exemption that would result from disclosure. Here, the Government does
28 not attempt to make such a showing, and instead relies on *Argus Leader* as the reason why it need

United States District Court
Northern District of California

1 not do so.

2 Accordingly, the Court finds that the Government has failed to carry its burden under the
3 FIA's foreseeable harm standard.

4 **C. Segregation**

5 Finally, if the agency determines that full disclosure is not possible, it is required to
6 consider whether partial disclosure is possible and to "take reasonable steps necessary to segregate
7 and release nonexempt information[.]" 5 U.S.C. § 552(a)(8)(ii). Even if the Government showed
8 that its application of Exemption 4 was justified, and there was some foreseeable harm, it would
9 have to take reasonable steps to redact the documents. It made no such attempt.

10 At the hearing, the Court asked Defendant why it could not, at the very least, redact the
11 documents and produce the total numbers. The Government did not have a response, and asked if
12 it could "look into" that. The Government is free to look into the feasibility of segregation;
13 however, it had an obligation to segregate and release nonexempt information when the request
14 was made, which it did not do.

15 Accordingly, the Court declines to delay its ruling for that purpose, and finds that the
16 Government did not attempt to segregate nonexempt information as required by statute.

17 **IV. CONCLUSION**

18 In light of the foregoing, the Court DENIES the Government's motion for summary
19 judgment and GRANTS Plaintiffs' cross-motion for summary judgment. The Government shall
20 produce the 10 remaining EEO-1 reports within 30 days of this order, and shall do so without
21 redaction.

22 IT IS SO ORDERED.

23 Dated: December 10, 2019

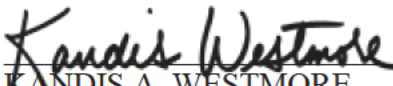
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KANDIS A. WESTMORE
United States Magistrate Judge

Contractor	Address 1	Address 2	City	State	Zip
Aecom Tec	1999 Avenue of the S		Los Angeles	CA	90067
AT&T	208 South Akard Stre		Dallas	TX	75202
BAE Syster	1101 Wilsr Suite 2000		Arlington	VA	22209
Berkshire I	3555 Farnam Street		Omaha	NE	68131
Boeing	100 North Riverside		Chicago	IL	60606
Booz Allen	8283 Greensboro Dri		McLean	VA	22102-3830
CoreCivic	5501 Virginia Way, Su		Brentwood	TN	37027
Exxon Mol	5959 Las Colinas Boul		Irving	TX	75039
Fedex					
General D	2941 Fairv Suite 100		Falls Churc	VA	22042-4541
General El	5 Necco Street		Boston	MA	2210
Geo Group	621 NW 5: Suite 700		Boca Rato	FL	33487
Glaxosmitl	5 Crescent Drive		Philadelph	PA	19112
Honeywell	300 South Tryon Stre		Charlotte	NC	28202
Humana	500 West Main Street		Louisville	KY	40202
Huntingto	4101 Washington Ave		Newport N	VA	23607
IBM Corpo	1 New Orchard Road		Armonk	NY	10504
L-3 Comm	600 Third Avenue		New York	NY	10016-1901
Lockheed I	6801 Rockledge Drive		Bethesda	MD	20817-1877
McKesson	6555 State Hwy 161		Irving	TX	75039
Merck & C	2000 Galloping Hill Rc		Kenilwort	NJ	7033
Northrop C	2980 Fairview Park D		Falls Churc	VA	22042
Pfizer Inc.	235 East 42nd Street		New York	NY	10017
Raytheon I	870 Winter Street		Waltham	MA	02451-1449
Rolls-Royc	62 Buckingham Gate		London, Er	UK	SW1E 6AT
Royal Dutc	P.O. Box 2463		Houston	TX	77252
SAIC	12010 Sunset Hills Ro		Reston	VA	20190
SpaceX	1 Rocket Road		Hawthorn	CA	90250
United Tec	United Tec One Finan		Hartford	CT	06103-2607
UnitedHea	9900 Bren Road East		Minneton	MN	55343
Valero Ene	1 Valero Way		San Antoni	TX	78249

From: OFCCP NO FOIA <OFCCP_NO_FOIA@DOL.GOV>
Sent: 11/24/2020 11:48:13 AM
To: Will Evans <wevans@revealnews.org>
Subject: Re: FOIA 887177

Dear Mr. Evans,

We have received your email. Due to Covid related restrictions, the processing of this request may be delayed.

We will move forward as soon as we are able.

Cordially,

Bruce Andersen

P.S. Happy Thanksgiving!

From: Will Evans <wevans@revealnews.org>
Sent: Friday, November 20, 2020 8:00 PM
To: OFCCP NO FOIA <OFCCP_NO_FOIA@DOL.GOV>
Subject: Re: FOIA 887177

CAUTION - The sender of this message is external to the DOL network. Please use care when clicking on links and responding with to spam@dol.gov.

Dear Mr. Andersen,

Thank you very much for providing this address file. I would like to proceed with the request, with the addresses as they are in the file. FedEx's address I have as 3875 Airways, Memphis, TN 38116. Thank you very much, and Happy Thanksgiving.

Best,
Will

On Thu, Nov 19, 2020 at 3:18 PM OFCCP NO FOIA <OFCCP_NO_FOIA@dol.gov> wrote:

Dear Mr. Evans,

After we wrote you earlier in the year, we never heard back from you. This request has been tolled and pending closure. I am forwarding your original request, and a file of addresses based on what you first asked.

Could you please confirm that you still want us to proceed? If you no longer want this request we can close it. Otherwise, please go through your list and confirm the addresses of the companies you requested.

Cordially,

Bruce Andersen

From: Will Evans <wevans@revealnews.org>

Sent: Thursday, November 19, 2020 5:11 PM

To: OFCCP NO FOIA <OFCCP_NO_FOIA@DOL.GOV>

CAUTION - The sender of this message is external to the DOL network. Please use care when clicking on links and responding with to spam@dol.gov.

Subject: re FOIA 887177

Dear Mr. Andersen,

Could you please let me know the status of FOIA request #887177 (Type 2 EEO-1 reports for 31 companies)?

Thank you very much for your work on this.

Best,

Will



September 29, 2021

Via Electronic mail

Will Evans
Senior Reporter and Producer
The Center for Investigative Reporting
1400 65th Street, Suite 200
Emeryville, CA 94608

RE: Freedom of Information Act Request – Tracking No. 887177

Dear Mr. Evans:

This letter is a final response to your Freedom of Information Act (FOIA) request submitted to the Office of Federal Contract Compliance Programs (OFCCP). Please refer to the above-referenced FOIA tracking number in any future correspondence regarding your FOIA request. You requested the data representing (Type 2) EEO-1 reports for facilities with 31 companies for the three most recent year available (2018).

Pursuant to Executive Order 12,600 and the Department's regulations for disclosure of records under FOIA at 29 CFR part 70, OFCCP must notify submitters when it receives a FOIA request for information that may be considered confidential commercial information, and give them an opportunity to present objections to the disclosure of the information under Exemption 4 of the FOIA, 5 U.S.C. § 522(b)(4). This exemption protects "...trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." If the agency receives an objection to disclosure, it reviews the objection and makes a determination as to whether the objection has merit. If the agency finds that the requested information is commercial confidential information, and "the agency reasonably foresees that disclosure would harm an interest protected by an exemption," *see* 5 U.S.C. § 552(a)(8)(A)(i)(I), the agency shall withhold the requested information.

Of the 31 companies you listed, one (1) was not a federal contractor under OFCCP's jurisdiction. From the remaining 30 companies, 26 companies have objected to the release of the data you have requested. OFCCP has reviewed these objections and, in light of all available facts and the relevant legal authorities, has determined that disclosure is not permissible under FOIA Exemption 4. We will send the data of the four companies that did not object. Please refer to Attachment A.

We consider you to be a "media" requestor as defined by the U.S. Department of Labor FOIA regulations at 29 CFR § 70.38(f). We assess "media" requestors for reproduction costs after the

first 100 pages, in accordance with 29 CFR § 70.40(c)(4). We determined that the costs were *de minimis* and are not charging you for this request.

If you need further assistance or would like to discuss any aspect of your request, please do not hesitate to contact this office at (202) 693-0101 or by email at OFCCP_NO_FOIA@dol.gov. Alternatively, you may wish to contact the DOL FOIA Public Liaison, Thomas Hicks, at (202) 693-5427 or by email at hicks.thomas@dol.gov.

You may also contact the Office of Government Information Services (OGIS), within the National Archives and Records Administration (NARA), to inquire about the mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740-6001. You can also reach that office by email at ogis@nara.gov, by phone at (202) 741-5770, by fax at (202) 741-5769, or by calling toll-free at (877) 684-6448.

If you are not satisfied with the response to this request, you may administratively appeal by writing to the Solicitor of Labor within 90 days from the date of this letter. In the appeal, you must state in writing the grounds for the appeal, and may include any supporting statements or arguments, but such statements are not required. To facilitate processing of the appeal, please include your mailing address and daytime telephone number, as well as a copy of the initial request and copy of this letter. Clearly mark “Freedom of Information Act Appeal” on the envelope and letter of the appeal. You must make any amendment to the appeal in writing and we must receive it prior to a decision. Address the appeal to the Solicitor of Labor, Division of Management and Administrative Legal Services, U.S. Department of Labor, 200 Constitution Avenue, NW, Room N2420, Washington, DC 20210. You may submit your appeal by email to foiaappeal@dol.gov. The Department does not accept appeals submitted to any other email address.

Sincerely,

**DORIS
GEAN**  Digitally signed
by DORIS GEAN
Date: 2021.09.29
11:51:42 -04'00'

Doris Lissette Geán
FOIA Manager

Attachments

Attachment A

Contractors Who Have Objected Under Exemption 4 (25)	Contractors Who Have Not Objected Under Exemption 4 (5)
Aecom Technology	Boeing
AT&T	Booz Allen Hamilton
BAE Systems	L3Harris Technologies
CoreCivic	Merck
Exxon Mobil	Rolls-Royce
Fedex	
General Dynamics	Non-contractors (1)
General Electric	Berkshire Hathaway
GEO Group	
Glaxosmithkline	
Honeywell	
Humana	
Huntington Ingalls	
SpaceX	
IBM	
Lockheed Martin	
McKesson	
Northrop Grumman	
Pfizer	
Raytheon Technologies	
Raytheon Technologies fka United Technologies Corporation	
SAIC	
Shell Oil Company	
UnitedHealth Group	
Valero Energy	

From: [Will Evans](#)
To: [FOIARequests](#)
Subject: FOIA request - OFCCP
Date: Friday, September 11, 2020 8:27:30 PM
Attachments: [Judge Westmore decision Dec 10 2019.pdf](#)

Dear FOIA Officer,

Under the Freedom of Information Act, I am requesting a copy of the following records from OFCCP:

*** A spreadsheet of all consolidated (Type 2) EEO-1 reports for all federal contractors for 2018.**

I am requesting this data in electronic format, by email. Fulfilling this request is not unduly burdensome because there is no need to notify federal contractors.

There is an exception to the notice requirements of 29 CFR 70.26 and Executive Order 12600 that applies here, as will be explained below. Notice to the contractors is not required.

Under 29 CFR 70.2(G)(5) and Executive Order 12600 Sec.8(e), the notice requirements **need not be followed** if the information has not been designated by the submitter, unless OFCCP "has reason to believe that disclosure of the information would result in substantial competitive harm."

Under 29 CFR 70.2(G)(6) and Executive Order 12600 Sec.8(f), the notice requirements **need not be followed** the designation made by the submitter "appears obviously frivolous."

There is no substantial reason to believe that disclosure of the information would result in competitive harm, so the information should be released without notice for any contractor. Even if a contractor has designated it as confidential, that designation should be considered "obviously frivolous," **as federal contractor EEO-1s have been determined to be public records that must be disclosed, not confidential commercial information.** Please see the Dec. 10, 2019 ruling by Judge Kandis Westmore in U.S. District Court for the Northern District of California, 4:19-cv-01843-KAW (attached).

I am a representative of the news media as a reporter with Reveal from The Center for Investigative Reporting, a non-profit investigative journalism organization. This request is made as part of news gathering and not for a commercial use. I respectfully ask that you waive fees related to this request. Please notify me of any charges before fulfilling this request.

Please contact me with any questions at [510-809-2209](tel:510-809-2209) or

wevans@revealnews.org

Thank you for your attention to this request.

Sincerely,
Will Evans
Reveal / The Center for Investigative Reporting
1400 65th, Suite 200
Emeryville, CA 94608



www.revealnews.org

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THE CENTER FOR INVESTIGATIVE
REPORTING, et al.,

Plaintiffs,

v.

U.S. DEPARTMENT OF LABOR,

Defendant.

Case No. [4:19-cv-01843-KAW](#)

**ORDER ON CROSS-MOTIONS FOR
SUMMARY JUDGMENT**

Re: Dkt. Nos. 24, 29

On August 23, 2019, the U.S. Department of Labor filed a motion for summary judgment on the grounds that the Government was justified in withholding documents under the Freedom of Information Act’s Exemption 4. On September 30, 2019, Plaintiffs, The Center for Investigative Reporting and Will Evans, filed a cross-motion for summary judgment.

On December 5, 2019, the Court held a hearing, and after careful consideration of the parties’ arguments and the applicable legal authority, for the reasons set forth below, DENIES Defendant’s motion for summary judgment, and GRANTS Plaintiffs’ cross-motion for summary judgment.

I. BACKGROUND

Plaintiff the Center for Investigative Reporting (“CIR”) is a nonprofit, investigative news organization that publishes *Reveal*, an online news site, and has a weekly public radio show with approximately one million listeners per week. (Compl., Dkt. No. 1 ¶ 13.) Plaintiff, Will Evans, is a staff reporter for *Reveal* and an employee of CIR. (Compl. ¶ 14.) Defendant U.S. Department of Labor (“DOL”) oversees the Office of Federal Contract Compliance Programs (“OFCCP”). (Compl. ¶ 15.)

On January 4, 2018, Plaintiffs submitted a Freedom of Information Act (“FOIA”) request

1 to DOL’s OFCCP seeking disclosure of federal contractors’ employment diversity reports (known
2 as EEO-1 reports). (*See* Compl. ¶ 2; Decl. of D. Lissette Geán, “Geán Decl.,” Dkt. No. 24-11 at ¶
3 13, Ex. 1.) The request explicitly sought the 2016 EEO-1 Consolidated Report (Type 2) for 55
4 named companies. (Geán Decl. ¶ 13.)

5 Companies with 50 or more employees that contract with the federal government must
6 submit annual reports using Standard Form 100, commonly known as “EEO-1 report,” to the Joint
7 Reporting Committee (“JRC”). 41 C.F.R. § 60-1.7(a). Companies that do business at two or more
8 physical addresses (i.e. establishments) must file an EEO-1 Consolidated Report (Type 2) to that
9 web portal. U.S. EQUAL EMP’T OPPORTUNITY COMM’N, Fact Sheet for EEO-1 Survey Filers,
10 https://www.eeoc.gov/employers/eeo1survey/fact_sheet_filers.cfm (last visited Dec. 4, 2019).
11 EEO-1 Type 2 reports require companies to report the total number of employees across all their
12 establishments by race/ethnicity, gender, and job category. U.S. EQUAL EMP’T OPPORTUNITY
13 COMM’N, Memorandum from EEO-1 Joint Reporting Committee on Computer Printed EEO-1
14 Reports- Required Format (Rev 3/2007) to Multi-establishment Private Employers (July 2007),
15 <https://www.eeoc.gov/employers/eeo1survey/upload/compfiling-multi.pdf> (last visited Dec. 4,
16 2019). These reports help OFCCP monitor the contracting companies’ compliance with Executive
17 Order No. 11,246 which prohibits employment discrimination by government contractors. (Geán
18 Decl. ¶ 5.)

19 The Equal Employment Opportunity Commission (“EEOC”) collects similar data for
20 employers with 100 or more employees. (Geán Decl. ¶ 8.) To avoid duplication of efforts and
21 reduce the administrative burden on companies, EEOC and OFCCP formed the JRC to administer
22 the EEO-1 reporting system in a manner that establishes a single data collection to meet the
23 statistical needs of both agencies. *See id.* The JRC web portal is managed by the EEOC, which
24 collects the information and shares with OFCCP the reports from the companies subject to the
25 OFCCP’s jurisdiction. (Geán Decl. ¶ 9.)

26 On March 13, 2018, then-Special Assistant to the Deputy Director, D. Lissette Geán,
27 informed Plaintiffs that OFCCP identified only 36 of the named 55 companies as federal
28

1 contractors subject to OFCCP’s jurisdiction. (Geán Decl. ¶ 15, Ex. 3.)¹ On March 14, 2018, Ms.
2 Geán, notified those 36 federal contractors of the plaintiffs’ FOIA request for their EEO-1, Type 2
3 information. (Geán Decl. ¶ 16.) The notice was sent out pursuant to the notice requirement for
4 confidential commercial information as described in DOL’s duly promulgated regulation, 29
5 C.F.R. § 70.26. (Geán Decl. ¶ 16.) The letters informed the companies that they had 30 days from
6 receipt of the letter to object in writing, and that their failure to respond would result in the release
7 of their EEO-1, Type 2 data to Plaintiffs. (Geán Decl. ¶¶ 17-19, Ex. 4.)

8 On April 18, 2018, Ms. Geán sent a second notice to submitters who had not objected
9 within the initial 30 days. (Geán Decl. ¶ 20, Ex. 5.) The April 18, 2018 letters referenced the
10 March 14, 2018 letters, and informed those submitters that if they failed to object by close of
11 business on May 31, 2018, their EEO-1 Type 2 data will be released to the plaintiff-requesters.
12 (Geán Decl. ¶ 21, Ex. 5.) Also on April 18, 2018, Ms. Geán separately informed Plaintiffs that, as
13 of the date of that letter, 14 of the 36 companies objected to the release of their data on the
14 grounds of FOIA Exemption 4. (Geán Decl. ¶ 22, Ex. 6.)

15 By May 31, 2018, a total of 20 of the 36 companies submitted written objections to DOL.
16 (Geán Decl. ¶ 23.) On April 18, 2018 and on July 5, 2018, DOL sent each of the 20 objecting
17 submitters a letter informing them that DOL “concurred with their assertions that their EEO-1
18 reports were exempt from mandatory disclosure pursuant to Exemption 4 of FOIA.” (Geán Decl. ¶
19 24, Ex. 7.) As such, DOL informed these objectors that it would not release their EEO-1 Type 2
20 data to Plaintiffs. *Ids.*

21 On August 14, 2018, Ms. Geán, sent a letter to Plaintiffs confirming that one of companies
22 in the original FOIA request, Trimble Navigation, had been removed from the request. (Geán
23 Decl. ¶ 25, Ex. 8.) In addition, by the date of the letter, Ms. Geán informed Plaintiffs that 15
24 submitters had not objected to the release of their EEO-1 Type 2 data. (Geán Decl. ¶ 26.)
25 Subsequently, on August 16, 2018, via e-mail, OFCCP released the EEO-1 Type 2 data for those
26

27 ¹ The Court finds that the declaration makes a sufficient showing that DOL performed a proper
28 search to identify those companies that were currently federal contractors, so the Court will not
address Plaintiffs argument that a proper search was not performed.

United States District Court
Northern District of California

1 15 submitters who failed to timely object to the release of their EEO-1 data by May 31, 2018.
2 (Geán Decl. ¶ 27, Ex. 9.)

3 On February 22, 2019, OFCCP informed Plaintiffs that it would delay issuing a final
4 response to this FOIA request pending the outcome of the Supreme Court decision in *Argus*
5 *Leader*. (Geán Decl. ¶ 28, Ex. 10.)

6 On March 1, 2019, Plaintiffs submitted an administrative appeal pursuant to 29 C.F.R. §
7 70. (Geán Decl. ¶ 29, Ex. 11.) On March 21, 2019, DOL acknowledged receipt of the appeal.
8 (Geán Decl. ¶ 30.)

9 On April 9, 2019, Plaintiffs filed this action. After the case was filed, additional
10 companies decided to release the information. (Geán Decl. ¶ 32.) As a result, the pending motions
11 only pertains to DOL’s decision to withhold the EEO-1 Type 2 data for the following companies:
12 Xilinx, Applied Materials, Inc., Equinix, Gilead Sciences, Inc., Synopsys, Inc., Docusign, Inc.,
13 Agilent Technologies, Box, and Oracle America, Inc., and Fitbit, Inc. (Def.’s Mot. at 6.)

14 On August 23, 2019, Defendant filed a motion for summary judgment. (Def.’s Mot., Dkt.
15 No. 24.) On September 30, 2019, Plaintiffs filed an opposition to the motion for summary
16 judgment and cross-motion for summary judgment. (Pls.’ Opp’n, Dkt. No. 29.) Also on
17 September 30, 2019, the Reporters Committee for Freedom of the Press filed an amicus curiae
18 brief. (Amicus Br., Dkt. No. 28-1.) On October 28, 2019, Defendant filed an opposition to the
19 cross-motion and a reply in support of its motion for summary judgment. (Def.’s Reply, Dkt. No.
20 34.) On November 12, 2019, Plaintiffs filed a surreply to Defendant’s motion for summary
21 judgment and a reply in support of the cross-motion. (Pl.’s Surreply, Dkt. No. 35.)

22 **II. LEGAL STANDARD**

23 **A. The Freedom of Information Act (“FOIA”)**

24 “Congress enacted FOIA to overhaul the public-disclosure section of the Administrative
25 Procedure Act (APA). . . .” *Milner v. Dep’t of Navy*, 562 U.S. 562, 565 (2011). The intent behind
26 the FOIA was to “clos[e] the loopholes which allow agencies to deny legitimate information to the
27 public.” *U.S. Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 150 (1989) (citations and quotations
28 omitted). Its purpose was to “ensure an informed citizenry, vital to the functioning of a

1 democratic society, needed to check against corruption and to hold the governors accountable to
2 the governed.” *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152, (1989) (citations and
3 quotations omitted). Accordingly, FOIA mandates a “strong presumption in favor of disclosure,”
4 with “disclosure, not secrecy, [being its] . . . dominant objective” *U.S. Dep’t of State v. Ray*,
5 502 U.S. 164, 173 (1991).

6 “At the same time, the FOIA contemplates that some information can legitimately be kept
7 from the public through the invocation of nine ‘exemptions’ to disclosure.” *Yonemoto v. Dep’t of*
8 *Veterans Affairs*, 686 F.3d 681, 687 (9th Cir. 2012) (citing 5 U.S.C. § 552(b)(1)-(9)); *see also Tax*
9 *Analysts*, 492 U.S. at 150-51 (agency must disclose records unless the records may be withheld
10 pursuant to one of the enumerated exemptions listed in § 552(b)); *Lion Raisins, Inc. v. U.S. Dep’t*
11 *of Agriculture*, 354 F.3d 1072, 1079 (9th Cir. 2004) (the FOIA requires full agency disclosure
12 except where specifically exempted).

13 **B. Motion for Summary judgment**

14 Summary judgment is the proper avenue for resolving a FOIA case. *See, e.g., Nat’l*
15 *Wildlife Fed’n v. U.S. Forest Service*, 861 F.2d 1114, 1115 (9th Cir. 1988). Summary judgment is
16 appropriate when “there is no genuine dispute as to any material fact and the movant is entitled to
17 judgment as a matter of law.” Fed. R. Civ. P. 56(a).

18 To prevail on a motion for summary judgment in a FOIA case, an agency must
19 demonstrate that, drawing all reasonable inferences in the light most favorable to the requester,
20 there is no genuine issue of material fact with regard to the agency’s compliance with FOIA, both
21 in terms of conducting a search reasonably calculated to uncover all relevant documents and
22 withholding only those documents or pieces of information that fall within one of the specified
23 exemptions. *Lahr v. Nat’l Transp. Safety Bd.*, 569 F.3d 964, 986 (9th Cir. 2009); *Kamman v. IRS*,
24 56 F.3d 46, 49 (9th Cir. 1995); *Steinberg v. Dep’t of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994).

25 **III. DISCUSSION**

26 The instant motion pertains to DOL’s decision to withhold ten EEO-1 reports pursuant to
27 FOIA’s Exemption 4. (*See* Def.’s Mot. at 6.)

1 **A. Whether the Diversity Reports are Exempt from Disclosure under Exemption 4.**

2 “Exemption 4 shields from mandatory disclosure ‘commercial or financial information
3 obtained from a person and privileged or confidential.’” *Food Mktg. Inst. v. Argus Leader Media*,
4 139 S. Ct. 2356, 2362 (2019) (“*Argus Leader*”) (quoting 5 U.S.C. § 552(b)(4)). There is no
5 dispute that the submitting companies constitute persons under FOIA, as the definition includes
6 corporations. 5 U.S.C. § 551(2). Thus, the Court will address whether the information sought is
7 commercial or financial in nature and whether it is privileged or confidential.

8 **i. Commercial or Financial**

9 Defendant argues that the documents sought are commercial in nature, because it relates to
10 the contractors’ respective business strategies, and could cause financial harm to the companies if
11 the information is released. (*See* Def.’s Mot. at 10.) Plaintiffs argue that the information sought is
12 not commercial or financial, rendering Exemption 4 inapplicable. (Pls.’ Opp’n at 12.)

13 Courts “have consistently held that the terms ‘commercial’ and ‘financial’ in the
14 exemption should be given their ordinary meanings.” *Pub. Citizen Health Research Grp. v. Food*
15 *& Drug Admin.*, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (citations omitted). Generally, information
16 is deemed commercial if it relates to the commercial activity of a business, but “not every bit of
17 information submitted to the government by a commercial entity qualifies for protection under
18 Exemption 4[.]” *Id.* at 1290; *see also Bd. of Trade of City of Chicago v. Commodity Futures*
19 *Trading Comm’n*, 627 F.2d 392, 403 n. 78 (D.C. Cir. 1980), abrogated on other grounds by *U. S.*
20 *Dep’t of State v. Washington Post Co.*, 456 U.S. 595, 102 S. Ct. 1957, 72 L. Ed. 2d 358 (1982).
21 Indeed, a list of names and addresses of employees, which the employer was required to submit to
22 the Government, was not considered financial or commercial under Exemption 4. *Getman v.*
23 *N.L.R.B.*, 450 F.2d 670, 673 (D.C. Cir. 1971).

24 Here, the EEO-1 reports require federal contractors to furnish the composition of their
25 workforce broken down by gender, race/ethnicity, and general job category. *See* U.S. EQUAL
26 EMP’T OPPORTUNITY COMM’N, Sample EEO-1 Report,
27 <https://www.eeoc.gov/employers/eo1survey/upload/eo1-2-2.pdf> (last visited Dec. 3, 2019).
28 There is no salary information, sales figures, departmental staffing levels, or other identifying

1 information in these reports. Rather, the diversity reports merely disclose the workforce
2 composition to ensure compliance with Executive Order 11,246, which prohibits employment
3 discrimination by federal contractors.

4 Even so, the Government contends that the information is “commercial.” In support of this
5 assertion, Defendant submitted supporting declarations from several of the objecting submitters.

6 For example, Julie Crane of Applied Materials, contends that the information furnished in the
7 EEO-1 concerns

8 its labor strategy, demographics, recruiting, and allocations of
9 resources across its segments. Disclosing the EEO-1 information
10 would provide its competitors insights into its strategy, operations,
11 recruiting, and labor costs, creating substantial competitive harm.
This would only grow over time if EEO-1 information were regularly
released, as it would allow competitors to discern shifts and strategies
for the business going forward, in a highly competitive field.

12 (Decl. of Julie Crane, “Crane Decl.,” Dkt. No. 24-2 at ¶ 6.) Similarly, Kelly Kayser, of Equinix,
13 also stated that Equinix’s EEO-1 concerns

14 its labor strategy, demographics, recruiting, and allocations of
15 resources across its segments. Disclosing the EEO-1 information
16 would provide its competitors insights into its strategy, operations,
17 recruiting, and labor costs, creating substantial competitive harm.
This would only grow over time if EEO-1 information were regularly
released, as it would allow competitors to discern shifts and strategies
for the business going forward, in a highly competitive field.

18 (Decl. of Kelly Kayser, “Kayser Decl.,” Dkt. No. 24-3 at ¶ 6.) The Court notes that these
19 conclusory declarations have other similarities beyond the verbatim rationale that the requested
20 information are commercial. The Court, however, notes that the EEO-1 form does not ask
21 submitting companies to explain how resources are allocated across a company’s “segments.”
22 Rather, the report is organized by job category, such as “Professionals,” “Sales Workers,”
23 “Operatives,” “Craft Workers,” “Laborers and Helpers,” etc. It does not request demographic
24 information by division, department, or “segment.” The data sought is companywide.

25 Another declaration claims that the workforce data provided could make the company
26 vulnerable to having its “diverse talent” poached by its competitors. (Decl. of Tania Barrios,
27 “Barrios Decl.,” Dkt. No. 24-1 ¶ 4.) Ms. Barrios attests that, when employees are lured away by
28 other companies, her employer, Xilinx, “lose[s] the talent and experience of the departing

1 employees and it would lose the significant investment it has made in training those employees.”
2 *Id.* at 4. Additionally, Xilinx would incur substantial cost in attempting to fill the positions
3 vacated by those departed employees. *Id.* While lost talent costs companies money, there is a
4 significant disconnect between access to workforce composition and poaching “diverse talent.”
5 The Court finds the claim that the EEO-1 reports would make it easier for competitors to lure
6 away talent to be dubious, since the job categories are so general. For example, the “Professionals”
7 category includes most jobs that require a bachelors or graduate degree, including “accountants
8 and auditors; airplane pilots and flight engineers; architects; artists; chemists; computer
9 programmers; designers; dieticians; editors; engineers; lawyers; librarians; mathematical
10 scientists; natural scientists; registered nurses; physical scientists; physicians and surgeons; social
11 scientists; teachers; and surveyors.” U.S. EQUAL EMP’T OPPORTUNITY COMM’N, EEO-1 Survey
12 Fact Sheet for Filers, <https://www.eeoc.gov/employers/eo1survey/2007instructions.cfm> (last
13 visited Dec. 4, 2019). Since there is no breakdown by department, the total number of
14 professionals reported not only includes the company’s computer programmers and engineers, but
15 also its lawyers and accountants. Moreover, even without access to general demographic
16 information, there is nothing stopping competitors from recruiting highly coveted female and
17 minority employees via headhunters or networking websites, such as LinkedIn or Dice. (*See*
18 *Barrios Decl.* ¶ 4.) Regardless, concerns regarding poaching go more to the confidentiality
19 element of the exemption than the commercial one.

20 Without addressing every declaration submitted by the Government, the Court notes that
21 other declarations misrepresent the breadth of information contained in the EEO-1 reports. For
22 example, the declaration of Nancy Lewis-Treolo, Senior Director of HR Operations at Docusign,
23 states that the “EEO-1 report contains highly sensitive commercial information, including the
24 number of its employees, the types of positions they hold, the span of managerial control, and the
25 distribution of those employees within various teams.” (*Decl.* of Nancy Lewis-Treolo, “Lewis
26 Treolo Decl.,” Dkt. No. 24-6 at ¶ 6.) As discussed above, the report does not provide information
27 regarding the distribution of employees within various divisions, departments, segments or
28 “teams.” Rather, the information sought is general job categories and the data provided is

1 companywide.

2 In its reply, Defendant cites to *100Reporters LLC v. United States Dep't of Justice*, 248 F.
3 Supp. 3d 115, 137 (D.D.C. 2017), in support of its contention that the demographic information is
4 commercial because “[i]nformation that is instrumental to a commercial interest is sufficiently
5 commercial for the purpose of Exemption 4.” (Def.’s Reply at 2.) In *100Reporters*, the court
6 found that the Three Year Work Plan documents were commercial because they “set forth the
7 steps the Monitor planned to take to evaluate Siemens' compliance programs... [and] reflect[ed]
8 ‘Siemens’ business operations, structure, and compliance controls.’” *Id.* at 137. “For example, the
9 Monitor’s first work plan describes ‘the number of Siemens employees in each country, new
10 orders, new government orders, joint ventures and business partnerships, and Siemens’ business
11 development strategy across different sectors of the economy.’” *Id.*² In sum, the documents found
12 to be commercial in *100Reporters* reflect a level of detail not contained in the EEO-1 reports at
13 issue here. Thus, the Government’s reliance on *100Reporters* is misplaced.

14 Finally, the Government argues that “[t]he various job categories as well as the number of
15 people hired in each category contained in the EEO-1, Type 2 reports is instrumental to each
16 submitter’s ability to carry out its commercial interests. Businesses cannot engage in commerce
17 without the sufficient personnel in specified job categories, which is thus related to the businesses’
18 commercial enterprise.” (Def.’s Reply at 2.) Essentially, the Government is asking the Court find
19 exempt any statistical information pertaining to employees simply because the business is a
20 commercial enterprise. This expansive interpretation has been rejected. *See Getman*, 450 F.2d at
21 673. At the hearing, the Court asked the Government how the demographic information was

22
23
24 ² The Court notes that, after an *in camera* review to determine segregability, the district court
25 found that most of the documents withheld were not exempt, because they “consist[ed] mostly of
26 general descriptions of the Monitor’s past and future activities with very few details about
27 Siemens’ business operations.” *100Reporters LLC v. United States Dep't of Justice*, 316 F. Supp.
28 3d 124, 140 (D.D.C. 2018). The district court did, however, find the “Countries of Interest”
section, which included “the number of Siemens employees in each country” to be exempt, but
that section also included information pertaining to “new orders, new government orders, joint
ventures and business partnerships, and Siemens' business development strategy across different
sectors of the economy,” so it is possible that the labor information was not easily segregated from
the commercial information. *See id.* at 141 (internal quotations omitted). Nevertheless, the
undersigned is not bound by the district court’s decision.

1 commercial, and the Government argued that the information would reveal each submitting
2 company's organization chart, corporate structure, and how it allocates resources. As discussed
3 above, it is impossible to discern a corporation's structure given the EEO-1's general job
4 categories, and the furnished information is companywide rather than by department.

5 Accordingly, in light of the absence of information pertaining to specific positions or
6 departments, the Court finds that the Government has failed to make a showing that the
7 demographic information contained in the EEO-1 reports is commercial. As a result, the
8 Government was not justified in applying Exemption 4 to the EEO-1 reports, and they must be
9 produced unredacted.

10 **ii. Confidentiality**

11 Since the information sought is not commercial in nature, the Court need not address
12 whether the information is confidential under *Argus Leader*.

13 Nonetheless, the Court is not convinced that the information sought would be confidential.
14 In *Argus Leader*, the Supreme Court found that uncontested testimony established that the
15 information was not disclosed, or made "publicly available 'in any way[,]'" suggested that it was
16 confidential. 139 S. Ct. at 2363. To the contrary, here, at least one of the objecting companies,
17 Gilead, published a summary of the EEO-1 data in its annual report, and included a notation that
18 the information was based on the company's 2016 EEO-1 filing. (*See* Suppl. Decl. of D. Lissette
19 Geán, Dkt. No. 34-1 ¶¶ 13-15; Gilead Sciences, 2016 Year in Review report at 24,
20 <http://investors.gilead.com/static-files/33588c5a-7f81-437a-b35a-379514d49eff> (last visited Dec.
21 6, 2019).) While the Year in Review's demographic information did not provide all data points
22 from the EEO-1 report, the information disclosed was substantial enough to undermine the
23 Government's claim of confidentiality, and call into doubt the supporting declaration from
24 Gilead's corporate representative that the company treats this information as private and "does not
25 release its EEO-1 reports to the general public...." (Decl. of Mirelle King, Dkt. No. 24-4 at ¶ 5.)

26 Thus, while the Court need not determine whether the information sought is confidential,
27 there is a significant possibility that at least some of the reports may not be.

1 **B. Whether the Foreseeable Harm Standard is Satisfied.**

2 Even if the information was exempt, the Government has failed to carry its burden of
3 showing that foreseeable harm would result should the documents be released.

4 In 2016, Congress passed the FOIA Improvement Act of 2016 (“FIA”), which amended
5 FOIA to limit the circumstances under which an agency may withhold records from the public.
6 Among other things, the FIA introduced the foreseeable harm standard, which agencies must
7 satisfy for all FOIA requests filed **after** the bill’s enactment (June 30, 2016). P.L. 114-185, 130
8 Stat. 538 (2016) (emphasis added). The foreseeable harm standard prohibits agencies from
9 withholding information unless (1) the agency reasonably foresees that disclosure of the record
10 would harm an interest protected by an exemption, or (2) the disclosure is prohibited by law. 5
11 U.S.C. § 552(a)(8)(A)(i). Consequently, even if information falls within the scope of a
12 discretionary exemption, it cannot be withheld from the public unless the agency also shows that
13 disclosure will harm the interest protected by that exemption. *Id.*; *see also Judicial Watch, Inc. v.*
14 *U.S. Dep’t of Commerce*, 375 F. Supp. 3d 93, 98 (D.D.C. 2019).

15 Here, Plaintiffs argue that even if the reports would be otherwise exempt under Exemption
16 4, the Government has failed to meet its burden under the FIA, because it has not shown that
17 foreseeable harm would result if the records were released. (Pl.’s Opp’n at 13; Amicus Br. At 4.)

18 Defendant argues that to impose the foreseeable harm standard would render *Argus Leader*
19 meaningless. (Def.’s Reply at 7.) The Court disagrees. The substantial competitive harm test set
20 forth in *National Parks & Conservation Association v. Morton*, 498 F.2d 765, 768 (D.C. Cir.
21 1974), was fashioned from legislative history, rather than statute, which was the grounds for its
22 abrogation. *Argus Leader*, 139 S. Ct. at 2364. Post-FIA, the foreseeable harm standard applies to
23 all exemptions, and is not restricted to Exemption 4. As discussed at the hearing, the FOIA
24 request in *Argus Leader* was filed before FIA was enacted, so the foreseeable harm standard was
25 not applicable. In fact, the Supreme Court did not address the validity of the foreseeable harm
26 standard. Today, FIA codifies the requirement that the agency articulate a foreseeable harm to an
27 interest protected by an exemption that would result from disclosure. Here, the Government does
28 not attempt to make such a showing, and instead relies on *Argus Leader* as the reason why it need

1 not do so.

2 Accordingly, the Court finds that the Government has failed to carry its burden under the
3 FIA’s foreseeable harm standard.

4 **C. Segregation**

5 Finally, if the agency determines that full disclosure is not possible, it is required to
6 consider whether partial disclosure is possible and to “take reasonable steps necessary to segregate
7 and release nonexempt information[.]” 5 U.S.C. § 552(a)(8)(ii). Even if the Government showed
8 that its application of Exemption 4 was justified, and there was some foreseeable harm, it would
9 have to take reasonable steps to redact the documents. It made no such attempt.

10 At the hearing, the Court asked Defendant why it could not, at the very least, redact the
11 documents and produce the total numbers. The Government did not have a response, and asked if
12 it could “look into” that. The Government is free to look into the feasibility of segregation;
13 however, it had an obligation to segregate and release nonexempt information when the request
14 was made, which it did not do.

15 Accordingly, the Court declines to delay its ruling for that purpose, and finds that the
16 Government did not attempt to segregate nonexempt information as required by statute.


17 **IV. CONCLUSION**

18 In light of the foregoing, the Court DENIES the Government’s motion for summary
19 judgment and GRANTS Plaintiffs’ cross-motion for summary judgment. The Government shall
20 produce the 10 remaining EEO-1 reports within 30 days of this order, and shall do so without
21 redaction.

22 IT IS SO ORDERED.

23 Dated: December 10, 2019

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25
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27
28


KANDIS A. WESTMORE
United States Magistrate Judge



October 2, 2020

Via Electronic Mail

Will Evans
The Center for Investigative Reporting
1400 65th Street, Suite 200
Emeryville, CA 94608

RE: Freedom of Information Act Request Acknowledgement – Tracking No. 897123

Dear Mr. Evans:

This letter is to acknowledge receipt of your Freedom of Information Act (FOIA) request submitted to foiarequest@dol.gov. The Office of the Solicitor assigned your request to the Office of Federal Contract Compliance Programs (OFCCP) on September 18, 2020. Please refer to the above-referenced FOIA tracking number in any future correspondence regarding your FOIA request.

You requested a spreadsheet of all consolidated (Type 2) EEO-1 reports for all federal contractors for 2018.

We consider you to be a representative of the news media as defined by the U.S. Department of Labor FOIA regulations at 29 CFR § 70.40(c)(3), therefore, only reproduction costs will be assessed, excluding charges for the first 100 pages. You will receive written notification if the total estimated fee for processing your request exceeds \$25.00.

OFCCP's National Office will process your request for EEO-1 data. Once we compile the data, we will send a letter to the submitters notifying them of the request for their EEO-1 data.

In accordance with 29 CFR § 70.26 and Executive Order 12600, because your request covers information that may be protected from disclosure under FOIA Exemption 4, OFCCP is required to notify submitters that their information has been requested under the FOIA to give them an opportunity to object in writing to disclosure of any specified portion of the requested information. For those submitters who do not object, we will provide the information with any necessary redactions consistent with FOIA. For those submitters who do object, OFCCP will evaluate any response provided by the submitter as to why the requested information should be withheld and make its own determination as to whether the specific facts and relevant law warrant disclosure or withholding of the requested information.

Due to the volume and complexity of the FOIA requests we have received, we anticipate that providing a full response will take longer than 20 business days to fulfill. Accordingly, OFCCP will take an additional 10 business days to fulfill your request as afforded by the FOIA at 5 U.S.C. § 552(a)(6)(B)(i). We will contact you if we are unable to fulfill your request in 30 business days.

We consider you a “news media” type of requestor. As a “news media” requestor, we charge you for photocopying after the first 100 pages in accordance with the U.S. Department of Labor FOIA regulations at 29 CFR § 70.40(c)(4). DOL’s FOIA regulations at 29 CFR § 70.42(a) deem that the filing of a FOIA constitutes an agreement by the requestor to pay all fees up to \$25.00.

If you need further assistance or would like to discuss any aspect of your request, please do not hesitate to contact this office at (202) 693-0101 or by email at OFCCP_NO_FOIA@dol.gov. Alternatively, you may wish to contact the DOL FOIA Public Liaison, Thomas Hicks, at (202) 693-5427 or by email at hicks.thomas@dol.gov.

You may also contact the Office of Government Information Services (OGIS), within the National Archives and Records Administration (NARA), to inquire about the mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740-6001. You can also reach that office by email at ogis@nara.gov, by phone at (202) 741-5770, by fax at (202) 741-5769, or by calling toll-free at (877) 684-6448.

If you are not satisfied with the response to this request, you may administratively appeal by writing to the Solicitor of Labor within 90 days from the date of this letter. In the appeal, you must state in writing the grounds for the appeal, and may include any supporting statements or arguments, but such statements are not required. To facilitate processing of the appeal, please include your mailing address and daytime telephone number, as well as a copy of the initial request and copy of this letter. Clearly mark “Freedom of Information Act Appeal” on the envelope and letter of the appeal. You must make any amendment to the appeal in writing and we must receive it prior to a decision. Address the appeal to the Solicitor of Labor, Division of Management and Administrative Legal Services, U.S. Department of Labor, 200 Constitution Avenue, NW, Room N2420, Washington, DC 20210. You may submit your appeal by email to foiaappeal@dol.gov. The Department does not accept appeals submitted to any other email address.

Sincerely,

DORIS GEAN  Digitally signed
by DORIS GEAN

Doris Lissette Geán
FOIA Manager



October 30, 2020

ALEXANDRA M. GUTIERREZ
FIRST AMENDMENT FELLOW

Direct Dial (b) (6)

VIA EMAIL

Doris Lissette Geán
FOIA Manager
Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210
OFCCP_NO_FOIA@dol.gov

Re: Freedom of Information Act Request Acknowledgement – Tracking No. 897123

Dear Ms. Geán:

We received your letter dated October 2, 2020, acknowledging FOIA Request No. 897123 made by Center for Investigative Reporting (“CIR”) reporter Will Evans. That request seeks a spreadsheet of all consolidated (Type 2) EEO-1 reports for all federal contractors for 2018, and it is a follow-on request to FOIA Request No. 875877 (seeking same for 2017) and 872421 (same for 2016).

CIR understands that the Department of Labor intends to act in contravention of a federal court decision and grant EEO-1 submitters the opportunity to object in writing to disclosure of information pertaining to them. CIR would like to remind DOL that, just last year, Judge Westmore addressed CIR’s request for 2016 EEO-1 report data and concluded that the “Government was not justified in applying Exemption 4” to this information, requiring the EEO-1 reports to “be produced unredacted.” *Ctr. for Investigative Reporting v. U.S. Dep’t of Labor*, 424 F. Supp. 3d 771, 779 (N.D. Cal. 2019).

The Government chose not to appeal this still-binding ruling. *See Ctr. for Investigative Reporting v. U.S. Dep’t of Labor*, No. 4:19-CV-01843-KAW, 2020 WL 554001, at *1 (N.D. Cal. Feb. 4, 2020) (noting DOL’s decision “that it would not be appealing the December 10, 2019 order”). Moreover, all but one of the relevant EEO-1 submitters decided against intervention. Although the District Court has permitted a single third party, Synopsys, Inc., to intervene for the limited purpose of appealing the December 10, 2019 order, *see Ctr. for Investigative Reporting v. U.S. Dep’t of Labor*, No. 4:19-CV-01843-KAW, ECF No. 79 (July 20, 2020), the Government has indeed noticed an intention to cross-appeal and oppose that intervention, *see id.*, ECF No. 93 (Sept.

CENTER FOR INVESTIGATIVE REPORTING

October 30, 2020

Page Two

18, 2020). The December 10, 2019 order generally remains in effect, as the parties, including the Government, stipulated that it would only be stayed as to the “disclosure of the requested Synopsis information.” *Id.*, ECF No. 87, ¶ 2 (July 28, 2020).

Given the continuing force of the December 10, 2019 order and the Government’s current position on this litigation, CIR is perplexed by DOL’s current plan of action as to FOIA Request No. 897123. We hope this clarifies any existing misunderstanding and allows us to avoid needless, repetitive litigation. We thank you in advance for your fulfillment of this request.

Sincerely,

Alexandra M. Gutierrez

cc: D. Victoria Baranetsky, General Counsel, Center for Investigative Reporting
Will Evans, Report, Center for Investigative Reporting
Thomas Hicks, DOL FOIA Public Liaison

From: OFCCP NO FOIA
Sent: Saturday, November 7, 2020 4:50 PM
To: Alexandra Gutierrez
Cc: Victoria Baranetsky; Will Evans; Hicks, Thomas - SOL; OFCCP NO FOIA
Subject: RE: Freedom of Information Act Request Acknowledgement – Tracking No. 897123

Good afternoon Ms. Gutierrez,

We acknowledge receipt of your email/letter. We are reviewing it and will get back to them shortly.

Thank you,

D. Lissette Geán
FOIA Manager
Office of Federal Contract Compliance Programs

From: Alexandra Gutierrez (b) (6)
Sent: Friday, October 30, 2020 8:56 PM
To: OFCCP NO FOIA <OFCCP_NO_FOIA@DOL.GOV>
Cc: Victoria Baranetsky <vbaranetsky@revealnews.org>; Will Evans <wevans@revealnews.org>; Hicks, Thomas - SOL <Hicks.Thomas@dol.gov>
Subject: Re: Freedom of Information Act Request Acknowledgement – Tracking No. 897123

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VIA EMAIL

Doris Lissette Geán
FOIA Manager
Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210
OFCCP_NO_FOIA@dol.gov

Re: Freedom of Information Act Request Acknowledgement – Tracking No. 897123

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CIR understands that the Department of Labor intends to act in contravention of a federal court decision and grant EEO-1 submitters the opportunity to object in writing to disclosure of information pertaining to them.

CIR would like to remind DOL that, just last year, Judge Westmore addressed CIR's request for 2016 EEO-1 report data and concluded that the "Government was not justified in applying Exemption 4" to this information, requiring the EEO-1 reports to "be produced unredacted." *Ctr. for Investigative Reporting v. U.S. Dep't of Labor*, 424 F. Supp. 3d 771, 779 (N.D. Cal. 2019).

The Government chose not to appeal this still-binding ruling. *See Ctr. for Investigative Reporting v. U.S. Dep't of Labor*, No. 4:19-CV-01843-KAW, 2020 WL 554001, at *1 (N.D. Cal. Feb. 4, 2020) (noting DOL's decision "that it would not be appealing the December 10, 2019 order"). Moreover, all but one of the relevant EEO-1 submitters decided against intervention. Although the District Court has permitted a single third party, Synopsys, Inc., to intervene for the limited purpose of appealing the December 10, 2019 order, *see Ctr. for Investigative Reporting v. U.S. Dep't of Labor*, No. 4:19-CV-01843-KAW, ECF No. 79 (July 20, 2020), the Government has indeed noticed an intention to cross-appeal and oppose that intervention, *see id.*, ECF No. 93 (Sept. 18, 2020). The December 10, 2019 order generally remains in effect, as the parties, including the Government, stipulated that it would only be stayed as to the "disclosure of the requested Synopsys information." *Id.*, ECF No. 87, ¶ 2 (July 28, 2020).

Given the continuing force of the December 10, 2019 order and the Government's current position on this litigation, CIR is perplexed by DOL's current plan of action as to FOIA Request No. 897123. We hope this clarifies any existing misunderstanding and allows us to avoid needless, repetitive litigation. We thank you in advance for your fulfillment of this request.

Sincerely,

Alexandra M. Gutierrez

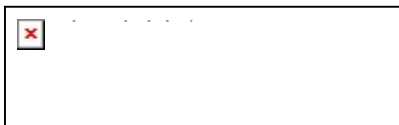
cc: D. Victoria Baranetsky, General Counsel, Center for Investigative Reporting
Will Evans, Report, Center for Investigative Reporting
Thomas Hicks, DOL FOIA Public Liaison

enc: PDF copy

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Alexandra M. Gutierrez
First Amendment Fellow

(b) (6)





December 11, 2020

ALEXANDRA M. GUTIERREZ
FIRST AMENDMENT FELLOW

Direct Dial (b) (6)

VIA EMAIL

Doris Lissette Geán
FOIA Manager
Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210
OFCCP_NO_FOIA@dol.gov

Re: Freedom of Information Act Request Acknowledgement – Tracking No. 897123

Dear Ms. Geán:

We are following up on your e-mail correspondence dated November 7, 2020, and we write seeking an update as to the status of FOIA Request No. 897123. We would also like to remind the Department that Judge Westmore’s opinion remains in effect, *see Ctr. for Investigative Reporting v. U.S. Dep’t of Labor*, 424 F. Supp. 3d 771 (N.D. Cal. 2019), as a stay was granted only as to Synopsys’s records, *see Ctr. for Investigative Reporting v. U.S. Dep’t of Labor*, No. 4:19-CV-01843-KAW, ECF No. 79 (July 20, 2020). Unless and “until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected.” *United States v. Mine Workers*, 330 U.S. 258, 294 (1947) (citation omitted).

Again, thank you for your assistance for this matter. We look forward to the expeditious fulfillment of the request and to the avoidance of unnecessary litigation.

Sincerely,

(b) (6)

Alexandra M. Gutierrez

cc: D. Victoria Baranetsky, General Counsel, Center for Investigative Reporting
Will Evans, Report, Center for Investigative Reporting
Thomas Hicks, DOL FOIA Public Liaison

From Email : ofccp_no_foia@DOL.GOV

To Email : agutierrez@revealnews.org

Cc Email : vbaranetsky@revealnews.org; wevans@revealnews.org

Bcc Email : ofccp_no_foia@DOL.GOV

Subject : Freedom of Information Act Requests – Tracking Nos. 872421 and 897123

Date Sent : 12/18/2020 12:32:05 PM

Email Body : Via Electronic Mail Dear Ms. Gutierrez: We have received your December 11, 2020, e-mail inquiring about outstanding FOIA requests that, combined, seek two years (2016 and 2018) of EEO-1 consolidated (Type 2) reports for all federal contractors. As you are aware, we have complied with the district court's order and released the 2016 reports of the individual submitters who have not appealed the court's decision in the matter of Ctr. for Investigative Reporting v. U.S. Dep't of Labor, 424 F. Supp. 3d 771, 779 (N.D. Cal. 2019). Your outstanding FOIA requests seek the EEO-1, Type 2 reports of well over 15,000, and possibly over 20,000 submitters from countless industries whose reports are not subject to that court order. We continue to be subject to Executive Order 12600 and are obligated to notify submitters of requests for their potentially confidential commercial information. See 29 C.F.R. § 70.26. Under Executive Order 12600, we must afford submitters a reasonable period of time to object to the disclosure of any portion of the information and to state all grounds upon which disclosure is opposed. The submitters that are the subject of your request have not had the opportunity to demonstrate whether their EEO-1, Type 2 reports contain confidential commercial information. Moreover, while we do not believe that the Northern California's District Court's decision in Center for Investigative Reporting has precedential effect on all EEO-1, Type 2 reports, we note that this matter is currently on appeal before the U.S. Court of Appeals for the Ninth Circuit and there is still a chance that the district court's holding may be overturned. Sincerely, D. Lissette Geán FOIA Manager

From: [Alexandra Gutierrez](#)
To: [OFCCP NO FOIA](#)
Cc: [Victoria Baranetsky](#); [Will Evans](#); [Hicks, Thomas - SOL](#)
Subject: Re: Freedom of Information Act Requests – Tracking Nos. 872421 and 897123
Date: Thursday, January 7, 2021 12:13:34 PM

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VIA E-MAIL

Doris Lissette Geán
FOIA Manager
Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210
OFCCP_NO_FOIA@dol.gov

Re: Freedom of Information Act Request Acknowledgement – Tracking No. 897123

Dear Ms. Geán,

We are following up on your December 18, 2020 e-mail. While we are considering are options as to the Department of Labor's current position as to our reporter's request, we seek answers to the following questions:

1. When did the Department provide E.O. 12600 notices to submitters?
2. Have any submitters responded, either objecting or consenting?
3. For those submitters who have consented or have waived their opportunity to object due to the passage of a reasonable amount of time, would the Department be able to provide their submitted reports on a rolling basis.

We appreciate your attention to these inquiries.

Sincerely,
Alexandra M. Gutierrez

cc: D. Victoria Baranetsky, General Counsel, Center for Investigative Reporting
Will Evans, Reporter, Center for Investigative Reporting
Thomas Hicks, DOL FOIA Public Liaison

On Fri, Dec 18, 2020 at 9:32 AM Office of Federal Contract Compliance Programs

<ofccp_no_foia@dol.gov> wrote:

Via Electronic Mail

Dear Ms. Gutierrez:

We have received your December 11, 2020, e-mail inquiring about outstanding FOIA

requests that, combined, seek two years (2016 and 2018) of EEO-1 consolidated (Type 2) reports for all federal contractors.

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We continue to be subject to Executive Order 12600 and are obligated to notify submitters of requests for their potentially confidential commercial information. *See* 29 C.F.R. § 70.26. Under Executive Order 12600, we must afford submitters a reasonable period of time to object to the disclosure of any portion of the information and to state all grounds upon which disclosure is opposed. The submitters that are the subject of your request have not had the opportunity to demonstrate whether their EEO-1, Type 2 reports contain confidential commercial information. Moreover, while we do not believe that the Northern California's District Court's decision in *Center for Investigative Reporting* has precedential effect on all EEO-1, Type 2 reports, we note that this matter is currently on appeal before the U.S. Court of Appeals for the Ninth Circuit and there is still a chance that the district court's holding may be overturned.

Sincerely,

D. Lissette Geán

FOIA Manager

--

Alexandra M. Gutierrez
First Amendment Fellow

(b) (6)



From: [Will Evans](#)
To: [OFCCP NO FOIA](#)
Subject: amendment request
Date: Monday, May 10, 2021 1:01:59 PM

CAUTION - The sender of this message is external to the DOL network. Please use care when clicking on links and responding with sensitive information. Send suspicious email to spam@dol.gov.

Dear FOIA Officer,

I would like to amend my FOIA request #872421 to include a spreadsheet of all consolidated (Type 2) EEO-1 reports for all federal contractors for 2017 and 2018 as well as 2016.

If you agree to this amendment, I will withdraw my separate FOIA #897123 for the 2018 data.

Please let me know.

Thank you very much.

Best,

Will Evans

--

Will Evans
reporter
office: 510-809-2209
cell: (b) (6)



www.revealnews.org

From: [OFCCP NO FOIA](#)
To: "Will Evans"
Bcc: [Gean, Lissette - OFCCP](#)
Subject: RE: amendment request
Date: Tuesday, May 11, 2021 12:05:00 PM

Dear Mr. Evans,

We have modified request 872421 to include a spreadsheet of the consolidated (Type 2) EEO-1 reports for all federal contractors for the years 2016 through 2018.

We will administratively close request 897123.

Cordially,

Bruce Andersen
The OFCCP FOIA Team

From: Will Evans <wevans@revealnews.org>
Sent: Monday, May 10, 2021 1:02 PM
To: OFCCP NO FOIA <OFCCP_NO_FOIA@DOL.GOV>
Subject: amendment request

CAUTION - The sender of this message is external to the DOL network. Please use care when clicking on links and responding with sensitive information. Send suspicious email to spam@dol.gov.

Dear FOIA Officer,

I would like to amend my FOIA request #872421 to include a spreadsheet of all consolidated (Type 2) EEO-1 reports for all federal contractors for 2017 and 2018 as well as 2016.

If you agree to this amendment, I will withdraw my separate FOIA #897123 for the 2018 data.

Please let me know.
Thank you very much.
Best,
Will Evans

--
Will Evans
reporter
office: 510-809-2209
cell: (b) (6)



www.revealnews.org

From: Will Evans <wevans@revealnews.org>
Sent: Tuesday, March 2, 2021 2:53 PM
To: FOIARequests
Subject: FOIA request - OFCCP
Attachments: Judge Westmore decision Dec 10 2019.pdf

CAUTION - The sender of this message is external to the DOL network. Please use care when clicking on links and responding with sensitive information. Send suspicious email to spam@dol.gov.

Dear FOIA Officer,

Under the Freedom of Information Act, I am requesting a copy of the following records from OFCCP:

* Type 2 consolidated EEO-1 reports for Amazon, from 2014 to the most recent one available.

These are public records that must be disclosed. Please see the Dec. 10, 2019 ruling by Judge Kandis Westmore in U.S. District Court for the Northern District of California, 4:19-cv-01843-KAW (attached).

I am a representative of the news media as a reporter with Reveal from The Center for Investigative Reporting, a non-profit investigative journalism organization. This request is made as part of news gathering and not for a commercial use. I respectfully ask that you waive fees related to this request. Please notify me of any charges before fulfilling this request.

Please contact me with any questions at [510-809-2209](tel:510-809-2209) or wevans@revealnews.org

Thank you for your attention to this request.

Sincerely,
Will Evans
Reveal / The Center for Investigative Reporting
[1400 65th, Suite 200](#)
[Emeryville, CA 94608](#)

--

Will Evans
reporter
office: 510-809-2209

(b) (6)



Reveal

from The Center for Investigative Reporting

www.revealnews.org

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THE CENTER FOR INVESTIGATIVE
REPORTING, et al.,

Plaintiffs,

v.

U.S. DEPARTMENT OF LABOR,

Defendant.

Case No. [4:19-cv-01843-KAW](#)

**ORDER ON CROSS-MOTIONS FOR
SUMMARY JUDGMENT**

Re: Dkt. Nos. 24, 29

On August 23, 2019, the U.S. Department of Labor filed a motion for summary judgment on the grounds that the Government was justified in withholding documents under the Freedom of Information Act’s Exemption 4. On September 30, 2019, Plaintiffs, The Center for Investigative Reporting and Will Evans, filed a cross-motion for summary judgment.

On December 5, 2019, the Court held a hearing, and after careful consideration of the parties’ arguments and the applicable legal authority, for the reasons set forth below, DENIES Defendant’s motion for summary judgment, and GRANTS Plaintiffs’ cross-motion for summary judgment.

I. BACKGROUND

Plaintiff the Center for Investigative Reporting (“CIR”) is a nonprofit, investigative news organization that publishes *Reveal*, an online news site, and has a weekly public radio show with approximately one million listeners per week. (Compl., Dkt. No. 1 ¶ 13.) Plaintiff, Will Evans, is a staff reporter for *Reveal* and an employee of CIR. (Compl. ¶ 14.) Defendant U.S. Department of Labor (“DOL”) oversees the Office of Federal Contract Compliance Programs (“OFCCP”). (Compl. ¶ 15.)

On January 4, 2018, Plaintiffs submitted a Freedom of Information Act (“FOIA”) request

1 to DOL’s OFCCP seeking disclosure of federal contractors’ employment diversity reports (known
2 as EEO-1 reports). (*See* Compl. ¶ 2; Decl. of D. Lissette Geán, “Geán Decl.,” Dkt. No. 24-11 at ¶
3 13, Ex. 1.) The request explicitly sought the 2016 EEO-1 Consolidated Report (Type 2) for 55
4 named companies. (Geán Decl. ¶ 13.)

5 Companies with 50 or more employees that contract with the federal government must
6 submit annual reports using Standard Form 100, commonly known as “EEO-1 report,” to the Joint
7 Reporting Committee (“JRC”). 41 C.F.R. § 60-1.7(a). Companies that do business at two or more
8 physical addresses (i.e. establishments) must file an EEO-1 Consolidated Report (Type 2) to that
9 web portal. U.S. EQUAL EMP’T OPPORTUNITY COMM’N, Fact Sheet for EEO-1 Survey Filers,
10 https://www.eeoc.gov/employers/eeo1survey/fact_sheet_filers.cfm (last visited Dec. 4, 2019).
11 EEO-1 Type 2 reports require companies to report the total number of employees across all their
12 establishments by race/ethnicity, gender, and job category. U.S. EQUAL EMP’T OPPORTUNITY
13 COMM’N, Memorandum from EEO-1 Joint Reporting Committee on Computer Printed EEO-1
14 Reports- Required Format (Rev 3/2007) to Multi-establishment Private Employers (July 2007),
15 <https://www.eeoc.gov/employers/eeo1survey/upload/compfiling-multi.pdf> (last visited Dec. 4,
16 2019). These reports help OFCCP monitor the contracting companies’ compliance with Executive
17 Order No. 11,246 which prohibits employment discrimination by government contractors. (Geán
18 Decl. ¶ 5.)

19 The Equal Employment Opportunity Commission (“EEOC”) collects similar data for
20 employers with 100 or more employees. (Geán Decl. ¶ 8.) To avoid duplication of efforts and
21 reduce the administrative burden on companies, EEOC and OFCCP formed the JRC to administer
22 the EEO-1 reporting system in a manner that establishes a single data collection to meet the
23 statistical needs of both agencies. *See id.* The JRC web portal is managed by the EEOC, which
24 collects the information and shares with OFCCP the reports from the companies subject to the
25 OFCCP’s jurisdiction. (Geán Decl. ¶ 9.)

26 On March 13, 2018, then-Special Assistant to the Deputy Director, D. Lissette Geán,
27 informed Plaintiffs that OFCCP identified only 36 of the named 55 companies as federal
28

1 contractors subject to OFCCP’s jurisdiction. (Geán Decl. ¶ 15, Ex. 3.)¹ On March 14, 2018, Ms.
2 Geán, notified those 36 federal contractors of the plaintiffs’ FOIA request for their EEO-1, Type 2
3 information. (Geán Decl. ¶ 16.) The notice was sent out pursuant to the notice requirement for
4 confidential commercial information as described in DOL’s duly promulgated regulation, 29
5 C.F.R. § 70.26. (Geán Decl. ¶ 16.) The letters informed the companies that they had 30 days from
6 receipt of the letter to object in writing, and that their failure to respond would result in the release
7 of their EEO-1, Type 2 data to Plaintiffs. (Geán Decl. ¶¶ 17-19, Ex. 4.)

8 On April 18, 2018, Ms. Geán sent a second notice to submitters who had not objected
9 within the initial 30 days. (Geán Decl. ¶ 20, Ex. 5.) The April 18, 2018 letters referenced the
10 March 14, 2018 letters, and informed those submitters that if they failed to object by close of
11 business on May 31, 2018, their EEO-1 Type 2 data will be released to the plaintiff-requesters.
12 (Geán Decl. ¶ 21, Ex. 5.) Also on April 18, 2018, Ms. Geán separately informed Plaintiffs that, as
13 of the date of that letter, 14 of the 36 companies objected to the release of their data on the
14 grounds of FOIA Exemption 4. (Geán Decl. ¶ 22, Ex. 6.)

15 By May 31, 2018, a total of 20 of the 36 companies submitted written objections to DOL.
16 (Geán Decl. ¶ 23.) On April 18, 2018 and on July 5, 2018, DOL sent each of the 20 objecting
17 submitters a letter informing them that DOL “concurred with their assertions that their EEO-1
18 reports were exempt from mandatory disclosure pursuant to Exemption 4 of FOIA.” (Geán Decl. ¶
19 24, Ex. 7.) As such, DOL informed these objectors that it would not release their EEO-1 Type 2
20 data to Plaintiffs. *Ids.*

21 On August 14, 2018, Ms. Geán, sent a letter to Plaintiffs confirming that one of companies
22 in the original FOIA request, Trimble Navigation, had been removed from the request. (Geán
23 Decl. ¶ 25, Ex. 8.) In addition, by the date of the letter, Ms. Geán informed Plaintiffs that 15
24 submitters had not objected to the release of their EEO-1 Type 2 data. (Geán Decl. ¶ 26.)
25 Subsequently, on August 16, 2018, via e-mail, OFCCP released the EEO-1 Type 2 data for those
26

27 ¹ The Court finds that the declaration makes a sufficient showing that DOL performed a proper
28 search to identify those companies that were currently federal contractors, so the Court will not
address Plaintiffs argument that a proper search was not performed.

1 15 submitters who failed to timely object to the release of their EEO-1 data by May 31, 2018.
2 (Geán Decl. ¶ 27, Ex. 9.)

3 On February 22, 2019, OFCCP informed Plaintiffs that it would delay issuing a final
4 response to this FOIA request pending the outcome of the Supreme Court decision in *Argus*
5 *Leader*. (Geán Decl. ¶ 28, Ex. 10.)

6 On March 1, 2019, Plaintiffs submitted an administrative appeal pursuant to 29 C.F.R. §
7 70. (Geán Decl. ¶ 29, Ex. 11.) On March 21, 2019, DOL acknowledged receipt of the appeal.
8 (Geán Decl. ¶ 30.)

9 On April 9, 2019, Plaintiffs filed this action. After the case was filed, additional
10 companies decided to release the information. (Geán Decl. ¶ 32.) As a result, the pending motions
11 only pertains to DOL's decision to withhold the EEO-1 Type 2 data for the following companies:
12 Xilinx, Applied Materials, Inc., Equinix, Gilead Sciences, Inc., Synopsys, Inc., Docusign, Inc.,
13 Agilent Technologies, Box, and Oracle America, Inc., and Fitbit, Inc. (Def.'s Mot. at 6.)

14 On August 23, 2019, Defendant filed a motion for summary judgment. (Def.'s Mot., Dkt.
15 No. 24.) On September 30, 2019, Plaintiffs filed an opposition to the motion for summary
16 judgment and cross-motion for summary judgment. (Pls.' Opp'n, Dkt. No. 29.) Also on
17 September 30, 2019, the Reporters Committee for Freedom of the Press filed an amicus curiae
18 brief. (Amicus Br., Dkt. No. 28-1.) On October 28, 2019, Defendant filed an opposition to the
19 cross-motion and a reply in support of its motion for summary judgment. (Def.'s Reply, Dkt. No.
20 34.) On November 12, 2019, Plaintiffs filed a surreply to Defendant's motion for summary
21 judgment and a reply in support of the cross-motion. (Pl.'s Surreply, Dkt. No. 35.)

22 II. LEGAL STANDARD

23 A. The Freedom of Information Act ("FOIA")

24 "Congress enacted FOIA to overhaul the public-disclosure section of the Administrative
25 Procedure Act (APA). . . ." *Milner v. Dep't of Navy*, 562 U.S. 562, 565 (2011). The intent behind
26 the FOIA was to "clos[e] the loopholes which allow agencies to deny legitimate information to the
27 public." *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 150 (1989) (citations and quotations
28 omitted). Its purpose was to "ensure an informed citizenry, vital to the functioning of a

1 democratic society, needed to check against corruption and to hold the governors accountable to
2 the governed.” *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152, (1989) (citations and
3 quotations omitted). Accordingly, FOIA mandates a “strong presumption in favor of disclosure,”
4 with “disclosure, not secrecy, [being its] . . . dominant objective” *U.S. Dep’t of State v. Ray*,
5 502 U.S. 164, 173 (1991).

6 “At the same time, the FOIA contemplates that some information can legitimately be kept
7 from the public through the invocation of nine ‘exemptions’ to disclosure.” *Yonemoto v. Dep’t of*
8 *Veterans Affairs*, 686 F.3d 681, 687 (9th Cir. 2012) (citing 5 U.S.C. § 552(b)(1)-(9)); *see also Tax*
9 *Analysts*, 492 U.S. at 150-51 (agency must disclose records unless the records may be withheld
10 pursuant to one of the enumerated exemptions listed in § 552(b)); *Lion Raisins, Inc. v. U.S. Dep’t*
11 *of Agriculture*, 354 F.3d 1072, 1079 (9th Cir. 2004) (the FOIA requires full agency disclosure
12 except where specifically exempted).

13 **B. Motion for Summary judgment**

14 Summary judgment is the proper avenue for resolving a FOIA case. *See, e.g., Nat’l*
15 *Wildlife Fed’n v. U.S. Forest Service*, 861 F.2d 1114, 1115 (9th Cir. 1988). Summary judgment is
16 appropriate when “there is no genuine dispute as to any material fact and the movant is entitled to
17 judgment as a matter of law.” Fed. R. Civ. P. 56(a).

18 To prevail on a motion for summary judgment in a FOIA case, an agency must
19 demonstrate that, drawing all reasonable inferences in the light most favorable to the requester,
20 there is no genuine issue of material fact with regard to the agency’s compliance with FOIA, both
21 in terms of conducting a search reasonably calculated to uncover all relevant documents and
22 withholding only those documents or pieces of information that fall within one of the specified
23 exemptions. *Lahr v. Nat’l Transp. Safety Bd.*, 569 F.3d 964, 986 (9th Cir. 2009); *Kamman v. IRS*,
24 56 F.3d 46, 49 (9th Cir. 1995); *Steinberg v. Dep’t of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994).

25 **III. DISCUSSION**

26 The instant motion pertains to DOL’s decision to withhold ten EEO-1 reports pursuant to
27 FOIA’s Exemption 4. (*See* Def.’s Mot. at 6.)

1 **A. Whether the Diversity Reports are Exempt from Disclosure under Exemption 4.**

2 “Exemption 4 shields from mandatory disclosure ‘commercial or financial information
3 obtained from a person and privileged or confidential.’” *Food Mktg. Inst. v. Argus Leader Media*,
4 139 S. Ct. 2356, 2362 (2019) (“*Argus Leader*”) (quoting 5 U.S.C. § 552(b)(4)). There is no
5 dispute that the submitting companies constitute persons under FOIA, as the definition includes
6 corporations. 5 U.S.C. § 551(2). Thus, the Court will address whether the information sought is
7 commercial or financial in nature and whether it is privileged or confidential.

8 **i. Commercial or Financial**

9 Defendant argues that the documents sought are commercial in nature, because it relates to
10 the contractors’ respective business strategies, and could cause financial harm to the companies if
11 the information is released. (*See* Def.’s Mot. at 10.) Plaintiffs argue that the information sought is
12 not commercial or financial, rendering Exemption 4 inapplicable. (Pls.’ Opp’n at 12.)

13 Courts “have consistently held that the terms ‘commercial’ and ‘financial’ in the
14 exemption should be given their ordinary meanings.” *Pub. Citizen Health Research Grp. v. Food*
15 *& Drug Admin.*, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (citations omitted). Generally, information
16 is deemed commercial if it relates to the commercial activity of a business, but “not every bit of
17 information submitted to the government by a commercial entity qualifies for protection under
18 Exemption 4[.]” *Id.* at 1290; *see also Bd. of Trade of City of Chicago v. Commodity Futures*
19 *Trading Comm’n*, 627 F.2d 392, 403 n. 78 (D.C. Cir. 1980), abrogated on other grounds by *U. S.*
20 *Dep’t of State v. Washington Post Co.*, 456 U.S. 595, 102 S. Ct. 1957, 72 L. Ed. 2d 358 (1982).
21 Indeed, a list of names and addresses of employees, which the employer was required to submit to
22 the Government, was not considered financial or commercial under Exemption 4. *Getman v.*
23 *N.L.R.B.*, 450 F.2d 670, 673 (D.C. Cir. 1971).

24 Here, the EEO-1 reports require federal contractors to furnish the composition of their
25 workforce broken down by gender, race/ethnicity, and general job category. *See* U.S. EQUAL
26 EMP’T OPPORTUNITY COMM’N, Sample EEO-1 Report,
27 <https://www.eeoc.gov/employers/eo1survey/upload/eo1-2-2.pdf> (last visited Dec. 3, 2019).
28 There is no salary information, sales figures, departmental staffing levels, or other identifying

1 information in these reports. Rather, the diversity reports merely disclose the workforce
2 composition to ensure compliance with Executive Order 11,246, which prohibits employment
3 discrimination by federal contractors.

4 Even so, the Government contends that the information is “commercial.” In support of this
5 assertion, Defendant submitted supporting declarations from several of the objecting submitters.
6 For example, Julie Crane of Applied Materials, contends that the information furnished in the
7 EEO-1 concerns

8 its labor strategy, demographics, recruiting, and allocations of
9 resources across its segments. Disclosing the EEO-1 information
10 would provide its competitors insights into its strategy, operations,
11 recruiting, and labor costs, creating substantial competitive harm.
This would only grow over time if EEO-1 information were regularly
released, as it would allow competitors to discern shifts and strategies
for the business going forward, in a highly competitive field.

12 (Decl. of Julie Crane, “Crane Decl.,” Dkt. No. 24-2 at ¶ 6.) Similarly, Kelly Kayser, of Equinix,
13 also stated that Equinix’s EEO-1 concerns

14 its labor strategy, demographics, recruiting, and allocations of
15 resources across its segments. Disclosing the EEO-1 information
16 would provide its competitors insights into its strategy, operations,
17 recruiting, and labor costs, creating substantial competitive harm.
This would only grow over time if EEO-1 information were regularly
released, as it would allow competitors to discern shifts and strategies
for the business going forward, in a highly competitive field.

18 (Decl. of Kelly Kayser, “Kayser Decl.,” Dkt. No. 24-3 at ¶ 6.) The Court notes that these
19 conclusory declarations have other similarities beyond the verbatim rationale that the requested
20 information are commercial. The Court, however, notes that the EEO-1 form does not ask
21 submitting companies to explain how resources are allocated across a company’s “segments.”
22 Rather, the report is organized by job category, such as “Professionals,” “Sales Workers,”
23 “Operatives,” “Craft Workers,” “Laborers and Helpers,” etc. It does not request demographic
24 information by division, department, or “segment.” The data sought is companywide.

25 Another declaration claims that the workforce data provided could make the company
26 vulnerable to having its “diverse talent” poached by its competitors. (Decl. of Tania Barrios,
27 “Barrios Decl.,” Dkt. No. 24-1 ¶ 4.) Ms. Barrios attests that, when employees are lured away by
28 other companies, her employer, Xilinx, “lose[s] the talent and experience of the departing

1 employees and it would lose the significant investment it has made in training those employees.”
2 *Id.* at 4. Additionally, Xilinx would incur substantial cost in attempting to fill the positions
3 vacated by those departed employees. *Id.* While lost talent costs companies money, there is a
4 significant disconnect between access to workforce composition and poaching “diverse talent.”
5 The Court finds the claim that the EEO-1 reports would make it easier for competitors to lure
6 away talent to be dubious, since the job categories are so general. For example, the “Professionals”
7 category includes most jobs that require a bachelors or graduate degree, including “accountants
8 and auditors; airplane pilots and flight engineers; architects; artists; chemists; computer
9 programmers; designers; dieticians; editors; engineers; lawyers; librarians; mathematical
10 scientists; natural scientists; registered nurses; physical scientists; physicians and surgeons; social
11 scientists; teachers; and surveyors.” U.S. EQUAL EMP’T OPPORTUNITY COMM’N, EEO-1 Survey
12 Fact Sheet for Filers, <https://www.eeoc.gov/employers/eeo1survey/2007instructions.cfm> (last
13 visited Dec. 4, 2019). Since there is no breakdown by department, the total number of
14 professionals reported not only includes the company’s computer programmers and engineers, but
15 also its lawyers and accountants. Moreover, even without access to general demographic
16 information, there is nothing stopping competitors from recruiting highly coveted female and
17 minority employees via headhunters or networking websites, such as LinkedIn or Dice. (*See*
18 *Barrios Decl.* ¶ 4.) Regardless, concerns regarding poaching go more to the confidentiality
19 element of the exemption than the commercial one.

20 Without addressing every declaration submitted by the Government, the Court notes that
21 other declarations misrepresent the breadth of information contained in the EEO-1 reports. For
22 example, the declaration of Nancy Lewis-Treolo, Senior Director of HR Operations at Docusign,
23 states that the “EEO-1 report contains highly sensitive commercial information, including the
24 number of its employees, the types of positions they hold, the span of managerial control, and the
25 distribution of those employees within various teams.” (*Decl.* of Nancy Lewis-Treolo, “Lewis
26 Treolo Decl.,” Dkt. No. 24-6 at ¶ 6.) As discussed above, the report does not provide information
27 regarding the distribution of employees within various divisions, departments, segments or
28 “teams.” Rather, the information sought is general job categories and the data provided is

1 companywide.

2 In its reply, Defendant cites to *100Reporters LLC v. United States Dep't of Justice*, 248 F.
3 Supp. 3d 115, 137 (D.D.C. 2017), in support of its contention that the demographic information is
4 commercial because “[i]nformation that is instrumental to a commercial interest is sufficiently
5 commercial for the purpose of Exemption 4.” (Def.’s Reply at 2.) In *100Reporters*, the court
6 found that the Three Year Work Plan documents were commercial because they “set forth the
7 steps the Monitor planned to take to evaluate Siemens' compliance programs... [and] reflect[ed]
8 ‘Siemens’ business operations, structure, and compliance controls.’” *Id.* at 137. “For example, the
9 Monitor’s first work plan describes ‘the number of Siemens employees in each country, new
10 orders, new government orders, joint ventures and business partnerships, and Siemens’ business
11 development strategy across different sectors of the economy.’” *Id.*² In sum, the documents found
12 to be commercial in *100Reporters* reflect a level of detail not contained in the EEO-1 reports at
13 issue here. Thus, the Government’s reliance on *100Reporters* is misplaced.

14 Finally, the Government argues that “[t]he various job categories as well as the number of
15 people hired in each category contained in the EEO-1, Type 2 reports is instrumental to each
16 submitter’s ability to carry out its commercial interests. Businesses cannot engage in commerce
17 without the sufficient personnel in specified job categories, which is thus related to the businesses’
18 commercial enterprise.” (Def.’s Reply at 2.) Essentially, the Government is asking the Court find
19 exempt any statistical information pertaining to employees simply because the business is a
20 commercial enterprise. This expansive interpretation has been rejected. *See Getman*, 450 F.2d at
21 673. At the hearing, the Court asked the Government how the demographic information was

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23
24 ² The Court notes that, after an *in camera* review to determine segregability, the district court
25 found that most of the documents withheld were not exempt, because they “consist[ed] mostly of
26 general descriptions of the Monitor’s past and future activities with very few details about
27 Siemens’ business operations.” *100Reporters LLC v. United States Dep't of Justice*, 316 F. Supp.
28 3d 124, 140 (D.D.C. 2018). The district court did, however, find the “Countries of Interest”
section, which included “the number of Siemens employees in each country” to be exempt, but
that section also included information pertaining to “new orders, new government orders, joint
ventures and business partnerships, and Siemens' business development strategy across different
sectors of the economy,” so it is possible that the labor information was not easily segregated from
the commercial information. *See id.* at 141 (internal quotations omitted). Nevertheless, the
undersigned is not bound by the district court’s decision.

1 commercial, and the Government argued that the information would reveal each submitting
2 company's organization chart, corporate structure, and how it allocates resources. As discussed
3 above, it is impossible to discern a corporation's structure given the EEO-1's general job
4 categories, and the furnished information is companywide rather than by department.

5 Accordingly, in light of the absence of information pertaining to specific positions or
6 departments, the Court finds that the Government has failed to make a showing that the
7 demographic information contained in the EEO-1 reports is commercial. As a result, the
8 Government was not justified in applying Exemption 4 to the EEO-1 reports, and they must be
9 produced unredacted.

10 **ii. Confidentiality**

11 Since the information sought is not commercial in nature, the Court need not address
12 whether the information is confidential under *Argus Leader*.

13 Nonetheless, the Court is not convinced that the information sought would be confidential.
14 In *Argus Leader*, the Supreme Court found that uncontested testimony established that the
15 information was not disclosed, or made "publicly available 'in any way[,]'" suggested that it was
16 confidential. 139 S. Ct. at 2363. To the contrary, here, at least one of the objecting companies,
17 Gilead, published a summary of the EEO-1 data in its annual report, and included a notation that
18 the information was based on the company's 2016 EEO-1 filing. (*See* Suppl. Decl. of D. Lissette
19 Geán, Dkt. No. 34-1 ¶¶ 13-15; Gilead Sciences, 2016 Year in Review report at 24,
20 <http://investors.gilead.com/static-files/33588c5a-7f81-437a-b35a-379514d49eff> (last visited Dec.
21 6, 2019).) While the Year in Review's demographic information did not provide all data points
22 from the EEO-1 report, the information disclosed was substantial enough to undermine the
23 Government's claim of confidentiality, and call into doubt the supporting declaration from
24 Gilead's corporate representative that the company treats this information as private and "does not
25 release its EEO-1 reports to the general public...." (Decl. of Mirelle King, Dkt. No. 24-4 at ¶ 5.)

26 Thus, while the Court need not determine whether the information sought is confidential,
27 there is a significant possibility that at least some of the reports may not be.

28

1 **B. Whether the Foreseeable Harm Standard is Satisfied.**

2 Even if the information was exempt, the Government has failed to carry its burden of
3 showing that foreseeable harm would result should the documents be released.

4 In 2016, Congress passed the FOIA Improvement Act of 2016 (“FIA”), which amended
5 FOIA to limit the circumstances under which an agency may withhold records from the public.
6 Among other things, the FIA introduced the foreseeable harm standard, which agencies must
7 satisfy for all FOIA requests filed **after** the bill’s enactment (June 30, 2016). P.L. 114-185, 130
8 Stat. 538 (2016) (emphasis added). The foreseeable harm standard prohibits agencies from
9 withholding information unless (1) the agency reasonably foresees that disclosure of the record
10 would harm an interest protected by an exemption, or (2) the disclosure is prohibited by law. 5
11 U.S.C. § 552(a)(8)(A)(i). Consequently, even if information falls within the scope of a
12 discretionary exemption, it cannot be withheld from the public unless the agency also shows that
13 disclosure will harm the interest protected by that exemption. *Id.*; see also *Judicial Watch, Inc. v.*
14 *U.S. Dep’t of Commerce*, 375 F. Supp. 3d 93, 98 (D.D.C. 2019).

15 Here, Plaintiffs argue that even if the reports would be otherwise exempt under Exemption
16 4, the Government has failed to meet its burden under the FIA, because it has not shown that
17 foreseeable harm would result if the records were released. (Pl.’s Opp’n at 13; Amicus Br. At 4.)

18 Defendant argues that to impose the foreseeable harm standard would render *Argus Leader*
19 meaningless. (Def.’s Reply at 7.) The Court disagrees. The substantial competitive harm test set
20 forth in *National Parks & Conservation Association v. Morton*, 498 F.2d 765, 768 (D.C. Cir.
21 1974), was fashioned from legislative history, rather than statute, which was the grounds for its
22 abrogation. *Argus Leader*, 139 S. Ct. at 2364. Post-FIA, the foreseeable harm standard applies to
23 all exemptions, and is not restricted to Exemption 4. As discussed at the hearing, the FOIA
24 request in *Argus Leader* was filed before FIA was enacted, so the foreseeable harm standard was
25 not applicable. In fact, the Supreme Court did not address the validity of the foreseeable harm
26 standard. Today, FIA codifies the requirement that the agency articulate a foreseeable harm to an
27 interest protected by an exemption that would result from disclosure. Here, the Government does
28 not attempt to make such a showing, and instead relies on *Argus Leader* as the reason why it need

1 not do so.

2 Accordingly, the Court finds that the Government has failed to carry its burden under the
3 FIA's foreseeable harm standard.

4 **C. Segregation**

5 Finally, if the agency determines that full disclosure is not possible, it is required to
6 consider whether partial disclosure is possible and to "take reasonable steps necessary to segregate
7 and release nonexempt information[.]" 5 U.S.C. § 552(a)(8)(ii). Even if the Government showed
8 that its application of Exemption 4 was justified, and there was some foreseeable harm, it would
9 have to take reasonable steps to redact the documents. It made no such attempt.

10 At the hearing, the Court asked Defendant why it could not, at the very least, redact the
11 documents and produce the total numbers. The Government did not have a response, and asked if
12 it could "look into" that. The Government is free to look into the feasibility of segregation;
13 however, it had an obligation to segregate and release nonexempt information when the request
14 was made, which it did not do.

15 Accordingly, the Court declines to delay its ruling for that purpose, and finds that the
16 Government did not attempt to segregate nonexempt information as required by statute.

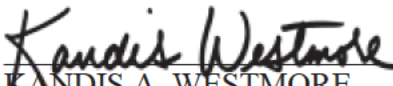
17 **IV. CONCLUSION**

18 In light of the foregoing, the Court DENIES the Government's motion for summary
19 judgment and GRANTS Plaintiffs' cross-motion for summary judgment. The Government shall
20 produce the 10 remaining EEO-1 reports within 30 days of this order, and shall do so without
21 redaction.

22 IT IS SO ORDERED.

23 Dated: December 10, 2019

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KANDIS A. WESTMORE
United States Magistrate Judge



March 5, 2021

Via Electronic Mail

Will Evans
Reporter
The Center for Investigative Reporting
1400 65th, Suite 200
Emeryville, CA 94608

RE: Freedom of Information Act Request – Tracking No. 2021-F-05573

Dear Mr. Evans:

This letter is to acknowledge your Freedom of Information Act (FOIA) request submitted to foiarequest@dol.gov. Please refer to the above-referenced FOIA tracking number in any future correspondence regarding this request. Your FOIA request asked for:

- Type 2 consolidated EEO-1 reports for Amazon, from 2014 to 2018 (the most recent one available).

OFCCP's National Office will process your request for EEO-1 data. Once we compile the data, we will send a letter to the submitter notifying them of the request for their EEO-1 data.

In accordance with 29 CFR § 70.26 and Executive Order 12600, because your request covers information that may be protected from disclosure under FOIA Exemption 4, OFCCP is required to notify submitters that their information has been requested under the FOIA to give them an opportunity to object in writing to disclosure of any specified portion of the requested information. For those submitters that do not object, we will provide the information with any necessary redactions consistent with FOIA. For those submitters that do object, OFCCP will evaluate any response provided by the submitter as to why the requested information should be withheld and make its own determination as to whether the specific facts and relevant law warrant disclosure or withholding of the requested information.

Due to the volume and complexity of the FOIA requests we have received, we anticipate that providing a full response will take longer than 20 business days to fulfill. Accordingly, OFCCP will take an additional 10 business days to fulfill your request as afforded by the FOIA at 5 U.S.C. § 552(a)(6)(B)(i). We will contact you if we are unable to fulfill your request in 30 business days.

We consider you to be a representative of the news media as defined by the U.S. Department of Labor FOIA regulations at 29 CFR § 70.40(c)(3), therefore, only reproduction costs will be

assessed, excluding charges for the first 100 pages. You will receive written notification if the total estimated fee for processing your request exceeds \$25.00.


If you need further assistance or would like to discuss any aspect of your request, please do not hesitate to contact this office at (202) 693-0101 or by email at OFCCP_NO_FOIA@dol.gov. Alternatively, you may wish to contact the DOL FOIA Public Liaison, Thomas Hicks, at (202) 693-5427 or by email at hicks.thomas@dol.gov.

You may also contact the Office of Government Information Services (OGIS), within the National Archives and Records Administration (NARA), to inquire about the mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740-6001. You can also reach that office by email at ogis@nara.gov, by phone at (202) 741-5770, by fax at (202) 741-5769, or by calling toll-free at 1(877) 684-6448.

If you are not satisfied with the response to this request, you may administratively appeal by writing to the Solicitor of Labor within 90 days from the date of this letter. In the appeal, you must state in writing the grounds for the appeal, and may include any supporting statements or arguments, but such statements are not required. To facilitate processing of the appeal, please include your mailing address and daytime telephone number, as well as a copy of the initial request and copy of this letter. Clearly mark "Freedom of Information Act Appeal" on the envelope and letter of the appeal. You must make any amendment to the appeal in writing and we must receive it prior to a decision. Address the appeal to the Solicitor of Labor, Division of Management and Administrative Legal Services, U.S. Department of Labor, 200 Constitution Avenue, NW, Room N2420, Washington, DC 20210. You may submit your appeal by email to foiaappeal@dol.gov. The Department does not accept appeals submitted to any other email address.

Sincerely,

**DORIS
GEAN**

 Digitally signed
by DORIS GEAN

Doris Lissette Geán
FOIA Manager



April 19, 2021

Via Electronic Mail

Will Evans
Reporter
The Center for Investigative Reporting
1400 65th, Suite 200
Emeryville, CA 94608

RE: Freedom of Information Act Request – Tracking No. 2021-F-05573

Dear Mr. Evans:

This letter is a final response to your Freedom of Information Act (FOIA) request submitted to foiarequest@dol.gov. Please refer to the above-referenced FOIA tracking number in any future correspondence regarding this request. Your FOIA request asked for:

- Type 2 consolidated EEO-1 reports for Amazon, from 2014 to 2018 (the most recent one available).

Amazon did not object to the release. We will email you the requested files.

If you need further assistance or would like to discuss any aspect of your request, please do not hesitate to contact this office at (202) 693-0101 or by email at OFCCP_NO_FOIA@dol.gov. Alternatively, you may wish to contact the DOL FOIA Public Liaison, Thomas Hicks, at (202) 693-5427 or by email at hicks.thomas@dol.gov.

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Sincerely,

DORIS GEAN Digitally signed by
DORIS GEAN

Doris Lissette Geán
FOIA Manager