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Congress of the United States House of Representatives

March 6, 2019

The Honorable Alexander Acosta
Secretary
United States Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Dear Secretary Acosta:

The Freedom of Information Act (FOIA) provides that any person has a right, enforceable in court, to obtain access to federal agency records, except to the extent that such records are protected from public disclosure by exemption or by special law enforcement record exclusion.¹ The United States Supreme Court has affirmed that the purpose of the FOIA is to ensure an informed citizenry which is both vital to democracy and a necessary tool for those who wish to hold their government accountable.² As much of the government's work continues to be delegated to private contractors, it is important that the spirit of accountability through transparency prevails, and that citizens retain the right to access information related to the oversight and compliance of private contractors in whom the United States has bestowed the public's trust.

It has come to my attention that several government contractors have asserted that data regarding the racial and gender makeup of their workforces, information critical to contract oversight, qualifies as a trade secret and/or privileged commercial information under exemption 4 of the FOIA.³ These reports tread on the heels of a long history of firms seeking to enshroud information of public concern into well-guarded vaults of secrecy. Often seeking to avoid public scrutiny, it is my concern that the government could fortify the efforts of relevant contractors through interpretations of the FOIA that favor the presumption of non-disclosure. Specifically, I write out of concern that required EEO-1 forms, which enumerate the diversity of firms accepting the taxpayer money, may potentially be denied disclosure under Department of Labor Office of Contract Compliance Programs interpretation of the FOIA.^{4,5}

I am respectfully requesting the following information before April 1, 2019:

- The number of and precise instances where the Department of Labor has released an EEO-1 report following the objection of a federal contractor pursuant to 29 CFR § 70.26 since January 1, 2017.

¹ Department of Justice. "The Department of Justice & The Freedom of Information Act," Updated October 30, 2018. <https://www.justice.gov/archives/open/foia>

² *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)

³ Williams, Jamillah Bowman. "Why Companies Shouldn't Be Allowed to Treat Their Diversity Numbers as Trade Secrets," February 15, 2019. <https://hbr.org/2019/02/why-companies-shouldnt-be-allowed-to-treat-their-diversity-numbers-as-trade-secrets>

⁴ Evans, Will. "We Sued the Government for Silicon Valley Diversity Data," April 26, 2018. <https://www.revealnews.org/blog/we-sued-the-government-for-silicon-valley-diversity-data/>

⁵ Rangarajan, Sinduja and Will Evans. "We Got the Government to Reverse its Longtime Policy to Get Silicon Valley Diversity Data," November 15, 2018. <https://www.revealnews.org/blog/we-got-the-government-to-reverse-its-longtime-policy-to-get-silicon-valley-diversity-data/>

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- Copies of letters of objection submitted by relevant technology companies relating to The Center of Investigative Reporting's 2017 Freedom of Information Act requests to the Department of Labor's Office of Federal Contract Compliance Programs.
- Whether or not the Department of Labor has decisively determined that consolidated EEO-1 reports for multi-establishment employers demands the same protections under exemption 4 of 5 U.S. Code § 552 as do other required EEO-1 submissions.
- Any established case law, rules, or regulations the Department of Labor believes would exempt consolidated EEO-1 reports from public disclosure.

While the disclosure of specific information about internal business strategies and initiatives may be determined to be privileged, it is my strong conviction that neither the spirit or letter of commercial information protections, or regulation of trade secrets as defined in 18 U.S. Code § 1839, would prevent the Department of Labor from disclosing consolidated government contractor demographic data under the FOIA. Several companies in competitive industries have voluntarily released consolidated EEO-1 forms, or diversity reports, lending scrutiny to the oppositional idea that disclosure of such information would create a significant competitive disadvantage in the hands of competitors. Further, the idea that non-consolidated forms provide competitors with insight of value into other protectable information begs evidentiary demonstration of the actual possibility and likelihood of significant harm. Also demanding further evaluation are private-sector claims that the disclosure of diversity information on required EEO-1 forms would deter employees from voluntarily reporting such information, thereby inhibiting the governments ability to collect reliable information, which pivot on arguments of derisory impact and dubious assumptions.⁶

It is my hope that the public and private interests entitled by the FOIA are receiving the appropriate balance, and I look forward to continued dialogue on this important issue.

Sincerely,



Emanuel Cleaver, II
Member of Congress

⁶ <https://www.documentcloud.org/documents/5448961-Palantir-Objection-to-FOIA-838133.html>