



OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

Attorneys at Law

First Base Building,
2142 Boyce St., Suite 401
Columbia, SC 29201
Telephone: 803.252.1300
Facsimile: 803.254.6517
www.ogletree.com

Leigh M. Nason
leigh.nason@ogletreedeakins.com

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CONFIDENTIAL

VIA E-MAIL (OFCCP NO FOIA@DOL.GOV)

D. Lissette Gean
Special Assistant
U.S. Department of Labor
Office of Federal Contract Compliance Programs
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: Objection to EEO-1 Disclosure
FOIA Request Tracking No. 838133

Dear Special Assistant Gean:

We represent SYNEX Corporation (“SYNEX” or “the Company”), in the above referenced matter. As counsel for Company, we write to respond to the Office of Federal Contract Compliance Programs’ (“OFCCP”) November 29, 2017, letter alerting SYNEX to a Freedom of Information Act (“FOIA”) request submitted by the Center for Investigative Reporting (“CIR”) for any EEO-1 Reports submitted by the Company.

In summary, this request should be denied because: (1) release of the documents does not further government transparency or serve the public’s interest, and (2) the information contained in the Reports fall under Exemption 4 of the FOIA, 5 U.S.C. § 552(b)(4), which protects “...commercial or financial information obtained from a person [that is] . . . confidential.”

I. RELEASE OF SYNEX’S EEO-1 REPORTS WILL NOT FURTHER FOIA’S GOAL TO ENCOURAGE GOVERNMENT ACCOUNTABILITY AND SERVES NO PUBLIC BENEFIT.

The goal of FOIA is to encourage transparency in government and thereby ensure that the government is accountable to its citizens. In signing FOIA, President Lyndon B. Johnson noted, “No one should be able to pull the curtains of secrecy around decisions which can be revealed without injury.” See FOIA Update Vol. XVII, No. 3 (1996). Therefore, the purpose of FOIA is to

provide transparency to government decisions, not those of private employers. However, the disclosure obligation under FOIA is not absolute. FOIA provides exemptions to protect, for example, national security, trade secrets and confidential commercial or financial information, and privileged information.

Certainly, the release of SYNEX's EEO-1 Reports will not provide transparency regarding OFCCP decisions. Because SYNEX is a federal contractor and an affirmative action employer, the OFCCP has the ability to monitor and evaluate the Company's diversity and equal employment opportunity efforts through compliance evaluations. However, the disclosure of its EEO-1 Reports will not provide any additional governmental transparency or accountability to its citizenry for the actions of the OFCCP.

FOIA represents a carefully considered balance between the right of the public to know the activities of its government and the often compelling interest that the government has in keeping certain information private, whether to protect particular individuals or the national interest as a whole. See *John Doe Agency v. John Doe Corp.*, 493 U.S. 146 (1989). When the material in the government's control is a compilation of information about private citizens, rather than merely a record of government activity, there is little legitimate public interest that would outweigh the invasion of privacy because the information reveals little or nothing about an agency's own conduct. See *Reporters Comm. for Freedom of the Press*, 489 U.S. at 780. Here, the information requested is confidential information about private citizens, the disclosure of which does nothing to help the public or the CIR better understand OFCCP's activities.

II. THE INFORMATION CONTAINED IN SYNEX'S EEO-1 REPORTS IS EXEMPT FROM DISCLOSURE UNDER UNDER FOIA EXEMPTION 4.

A. SYNEX'S EEO-1 Reports Contain Data that Could Cause Commercial and Financial Harm to the Company

The information contained in the requested EEO-1 Reports squarely falls under Exemption 4 of the FOIA, 5 U.S.C. § 552(b)(4), by safeguarding the Company "from the competitive disadvantages that could result from disclosure." If the Company's confidential EEO-1 Reports are made public, the information in them could give the Company's competitors insight into SYNEX's hiring strategies and employment trends. A company's success in competing for prized human capital is a significant market advantage. If SYNEX's competitors gain access to confidential information about the Company's pool of professional and skilled workers, or the way the Company structures its workforce, this will place SYNEX at a competitive disadvantage in the marketplace. Indeed, SYNEX's highly trained minority and female employees in the executive, management, professional, technical and sales EEO-1 categories are likely to be in high demand in the business process services industry. If the requested EEO-1 Reports become public such that competitors are able to ascertain the location of SYNEX's workers, the Company could become vulnerable to employee-raiding activities by competitors who seek to hire away its minority employees in these skilled job categories through targeted recruiting efforts instead of developing and training their own human capital. This is precisely the type of information that FOIA intended to protect under Exemption 4.

In addition to the commercial harm the Company would suffer due to the release of the EEO-1 Reports, if the information requested by the CIR becomes public, SYNEX's competitors or other third parties may use the workforce data to harm the Company's reputation. Since the Company likely will not have the opportunity to place its workforce data in context or describe its diversity successes and programs to those to whom the results may be published, the Company's data likely will be mischaracterized, which will harm the Company's reputation and subject the Company to public and private claims that are malicious or erroneous in nature. Furthermore, any unwarranted assertions made against the Company would be harder to refute if they are somehow tied to an official document such as the EEO-1 Report. For example, a newspaper doing an exposé or plaintiffs seeking a basis for class certification in litigation could seek to negatively characterize the work environment as unfriendly toward minorities or females based on selective interpretation of data (and without further evidence).

The competitive and public relations harm that could be suffered by SYNEX through disclosure of any of its EEO-1 Reports to a third party, particularly one who may publish the data with little background information, is considerable. Thus, the request for release of the Company's EEO-1 Reports should be denied under Exemption 4.

B. SYNEX Has Maintained the Confidentiality of Its EEO-1 Reports, and has Disclosed Them Only to the U.S. Department of Labor, OFCCP or EEOC When Required

As explained above, the raw data found in the Company's EEO-1 Reports may be used to gain a competitive advantage, may be taken out of context, and is subject to manipulation and/or mischaracterization. SYNEX, therefore, treats the EEO-1 Reports as confidential and restricts access to select Company personnel on a "need to know" basis. The Company's policy is only to disclose this data to federal agencies such as the EEOC and OFCCP, which require such disclosure.

C. SYNEX Employees Have an Expectation of Privacy and Confidentiality in the Information Contained in the EEO1- Reports

SYNEX takes great pride in providing its employees an open, supportive workplace environment free from discrimination, harassment and intimidation. The Company's employees feel comfortable in their environment in part because they have an expectation of privacy and confidentiality in the information provided to and retained by the Company. SYNEX's strict policies limiting disclosure of EEO-1 information are intended not simply to protect the Company, but also to protect the privacy of SYNEX's employees. Particularly in those EEO-1 categories where the Company has relatively few employees at a particular site, disclosure of the EEO-1 Reports compromises the privacy of individual employees by revealing confidential race or ethnicity self-identification choices. Any documents that could disclose the personal racial, ethnic, or gender self-identification of individual employees could also therefore fall under the FOIA exemption for records that "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). For example, in the 2016 EEO-1 Report for 15065 Flight Avenue, Chino, CA, there is only one employee in the Technicians category. Similarly, in the HYVE Solutions 2016 EEO-1 report for 600 Stewart Street,

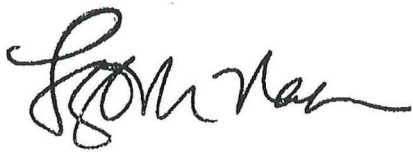
Seattle, WA, there is only one employee in the First/Mid Officials & Managers category. The same is true for the site at 4150 Industrial Center Drive, North Las Vegas, NV. At that location, there is only one employee in the First/Mid Officials & Managers category. By disclosing any EEO-1 data, OFCCP would facilitate the disclosure of the race choices of these employees. Furthermore, releasing information that SYNEX's employees relied upon as confidential will undermine the Company's credibility as an employer and disrupt the healthy workplace that SYNEX has worked so hard to create.

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For the reasons stated above, SYNEX requests that the OFCCP deny the request for disclosure of all of the Company's EEO-1 Reports under FOIA Exemption 4. We trust that this letter has illustrated the Company's legitimate concerns and the basis for its objections to the disclosure of any of its EEO-1 Reports.

Please do not hesitate to contact me if you have any questions or need any additional information. Thank you for your consideration.

Very truly yours,



Leigh M. Nason