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REQUESTS TO EEOC UNDER FREEDOM OF INFORMATION ACT
AND SECTION 83 OF EEOC'S COMPLIANCE MANUAL
TO EVALUATE CLAIMS OF EMPLOYMENT DISCRIMINATION

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I. EEOC INVESTIGATIVE FILES

To properly assess an individual's claims of employment discrimination prior to deciding whether to file suit, the individual's attorney examines the investigative file compiled by the Equal Employment Opportunity Commission (or the related state or local agency) concerning the individual's charge. Unlike in many other areas of the law prior to litigation, the potential plaintiff's attorney often can see in the EEOC's charge file a detailed position statement from the employer or other Respondent with some relevant documents.

For example, the EEOC's charge file may contain personnel files, production records, witness statements or interview notes, collective bargaining agreements, newsletters, audio tapes, and a myriad of other documents. On the other hand, many charge files contain only the charge and the dismissal notice with the Notice of Right to Sue. Regardless, a key beginning step for the attorney faced with an individual with a timely Notice of Right to Sue from the EEOC is to obtain the EEOC's investigative file.

There are two alternative ways to request a copy of the EEOC's charge file: (1) under the Freedom of Information Act ("FOIA") and (2) under Section 83 of the EEOC's Compliance Manual. Each year the EEOC receives about 17,000 FOIA requests and about 7,000 Section 83 requests. The following explains the two different procedures:

I. REQUESTS TO EEOC UNDER FREEDOM OF INFORMATION ACT

A. Time for the FOIA Request

1. Charging Parties and their attorneys may obtain their EEOC charge file under FOIA only **after** receiving the **Notice of Right to Sue** from the EEOC (provided the Notice of Right to Sue has not expired 90 days after receipt without filing a suit).
2. By contrast, Respondent may obtain the EEOC charge file under FOIA only **after** Charging Party has **filed a suit** under a law enforced by the EEOC or a related law enforced by a state or local agency. The EEOC enforces and investigates charges of employment discrimination under Title VII of the Civil Rights Act of 1964 ("Title VII"), the Americans with Disabilities Act ("ADA"), the Age Discrimination in Employment Act ("ADEA"), and the Equal Pay Act ("EPA").

B. Type of File

1. All EEOC charge files may be obtained under FOIA.
2. Another method of obtaining **Title VII and ADA** charge files (but not charge files alleging claims only under ADEA or Equal Pay Act) is pursuant to Section 83 of the EEOC's Compliance Manual (see II below). The EEOC is considering expanding Section 83 so that ADEA and Equal Pay Act files also can be obtained under Section 83.

C. How to Make a FOIA Request

The FOIA request must be in writing, addressed to the Regional Attorney of the EEOC office that conducted the investigation, state that it is made under FOIA, and give the name of the charge and the charge number of the file that it is requesting. No particular form is required.

D. Time for Response by EEOC

FOIA specifies that the EEOC's response is to be made within 20 working days, although an extension of 10 working days is permitted if needed. The average time for response is slightly less than 20 working days.

E. Description of Response by EEOC

For charge files, the applicable Regional Attorney responds in writing with a detailed description of any documents withheld and the legal justification. In general, a paralegal drafts the response. The vast majority of requests are granted in large part.

F. Primary Reasons for Denying Request in Part or in Full

1. Exemption 3

This exemption covers information prohibited from disclosure by another statute. Because Title VII and the ADA prohibit the EEOC from making charges public, only the Charging Parties and Respondents may see the particular charges filed by or against them.. Consequently, the EEOC uses Exemption 3 to withhold Title VII and ADA files and any reference to them when the requester is not a party to those charges.

2. Exemption 4

EEOC uses this exemption to withhold trade secrets and confidential commercial or financial information. Executive Order 12,600 and its regulations require that, when EEOC receives a FOIA request for trade secrets or confidential commercial or financial information, it notify the submitter of the information and permit it an opportunity to object to disclosure of the documents.

If the submitter objects but EEOC determines that the information should be disclosed because it does not constitute a trade secret or confidential commercial or financial information, EEOC again provides advance notice to the submitter to allow it to seek judicial relief (or negotiate a protective order with Charging Party) before EEOC discloses the information to Charging Party.

3. Exemption 5

The most common reason used by EEOC to deny disclosure of certain documents is that they are deliberative in nature and thereby exempt from disclosure under Exemption 5 of FOIA. Documents withheld under Exemption 5 include:

- Investigative Memoranda recommending an outcome of the investigation;
- analysis by EEOC investigators;
- memoranda between EEOC investigators and managers; and

- documents covered by the EEOC's attorney-client privilege or the work product doctrine.

4. Exemption 6

Exemption 6 protects personal privacy interests in medical and other personnel files. EEOC uses this exemption primarily for medical records.

5. Exemption 7(A)

Exemption 7(A) allows documents to be withheld if their release could reasonably be expected to interfere with enforcement proceedings. EEOC uses that exemption to withhold the following:

- charge files still under investigation;
- conciliation materials;
- charge files sought by Respondents prior to a suit filed by Charging Party; and
- charge files that are the basis for Commission litigation (the EEOC advises Defendants to seek the charge files in normal discovery).

6. Exemption 7©)

This permits the withholding of documents if their release could reasonably be expected to constitute an unwarranted invasion of personal privacy. EEOC uses this exemption to withhold ADEA and Equal Pay Act files requested by third parties. Exemption 3 is not available for those laws, as they do not have the confidentiality requirements contained in Title VII and the ADA.

7. Exemption 7(D)

This exemption allows EEOC to withhold documents compiled for law enforcement purposes if their release could reasonably be expected to disclose the identity of a witness who requested confidentiality.

G. Appeal

1. If EEOC denies a FOIA request in whole or in part, the requester may appeal within 30 calendar days to the Assistant Legal Counsel in EEOC's Headquarters. The appeal must include a copy of the Regional Attorney's determination.
2. If the Assistant Legal Counsel fully or partially denies the appeal, the requester may file suit in federal court to obtain the denied documents.
3. FOIA permits an attorney's fee award to a plaintiff who substantially prevails. 5 U.S.C. § 552(a)(4)(E). But note *Union of Needletrades, Industrial and Textile Employees v. INS*, 336 F.3d 200, 206 (2d Cir.2003), for example, in which the Second Circuit upheld the denial of attorney's fees to the union because there was no judgment in its favor and no consent decree, even though the government provided the requested documents only after the union filed suit and negotiated a successful outcome.

H. Destruction of Files

Generally, without a disclosure request, charge files are destroyed a year after the charge processing is completed and the charge is closed. After a FOIA request, files are retained for at least five years.

I. EEO-1s

Once Charging Party files suit based on the charge following the issuance of the Notice of Right to Sue, Charging Party can obtain from EEOC the annual EEO-1 reports from the Defendant employer. In the EEO-1 reports, employers with 100 or more employees (and government contractors with 50 or more employees) provide a count of their employees by job category and then by ethnicity, race and gender.

J. Increased Automated Processing of FOIA Requests

EEOC is soliciting contractors to "take advantage of best available technology for FOIA file disclosure function." <http://www.eeoc.gov/foia/foiaplan.html> at 5.

II. REQUESTS TO EEOC UNDER SECTION 83 OF COMPLIANCE MANUAL

A. Time for Request

1. As with FOIA, Charging Parties and their attorneys may obtain their EEOC charge file under Section 83 of the EEOC's Compliance Manual only after receiving the Notice of Right to Sue from the EEOC (provided the Notice of Right to Sue has not expired 90 days after receipt without filing a suit).
2. Again as with FOIA, Respondent may obtain the EEOC charge file under Section 83 of the Compliance Manual only after Charging Party has filed a suit under a law enforced by the EEOC or a related law enforced by a state or local agency.

B. Type of File

1. The EEOC established Section 83 of its Compliance Manual as an uncomplicated way for parties to obtain the investigative files for their Title VII charges. When the ADA was enacted, EEOC added ADA files to its Section 83 disclosure procedure.
2. The EEOC is considering expanding Section 83 so that ADEA and Equal Pay Act files also can be obtained under Section 83. The Department of Labor, which originally enforced the ADEA and EPA, required a FOIA request to obtain its files. The EEOC maintained that procedure for ADEA and EPA when it began to enforce those laws in 1979.

C. How to a Make a Section 83 Request

The Section 83 request must be in writing, addressed to the EEOC office that conducted the investigation, and give the name of the charge and the charge number of the file that it is requesting. It will be considered a Section 83 request if it does not mention FOIA. No particular form is required.

D. EEOC's Response

Because no formal response identifying withheld documents and reasons is required as with FOIA, EEOC's response may be quicker under Section 83, depending on the status of the staffing at the particular office. Section 83 contains no deadlines for responses.

Investigative Support Assistants often handle the processing of Section 83 requests. As with FOIA, the vast majority of Section 83 requests are granted in large part.

E. Primary Reasons for Withholding Documents or Files

In general, the EEOC withholds the same documents under FOIA and Section 83 of its Compliance Manual.

1. Intra-Agency and Inter-Agency Memoranda

Under Section 83, as under FOIA, EEOC does not disclose intra-agency or inter-agency memoranda or any other documents that are deliberative in nature. Again, such documents include Investigative Memoranda recommending an outcome of the investigation; analysis by EEOC investigators; memoranda between EEOC investigators and managers; and documents covered by the attorney-client privilege or the work product doctrine.

2. Documents Concerning Unrelated Charges

Charging Parties receive only documents related to their charges.

3. Settlement and Conciliation Material

EEOC withholds all documents concerning settlement and conciliation.

4. Medical Records

EEOC withholds all sensitive medical information.

5. Confidential Witnesses

All confidential witness statements and other documents identifying those witnesses are withheld.

F. Appeal

No formal appeal right, although the District Director presumably will consider requests for reconsideration..

G. Multiple Charges

When there are multiple related charges against the same Respondent, EEOC either copies relevant information into each charge file or maintains a central file containing investigative material relevant to all of the individual charges. Charging Parties then receive access to the information relevant to them, but not to the other individual charge files.

H. Commissioner Charges

EEOC will disclose information from a Commissioner charge file to a class member who is in litigation or who has received a Notice of Right to Sue that has not expired. Under Section 706(f)(1) of Title VII, an “aggrieved person” can obtain Notices of Right to Sue based on a Commissioner charge even if he or she did not file a separate charge. Statistics and other documents relevant to the claims of the class member may be disclosed.