

VIRGINIA FOXX, NC  
Chairwoman

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MAJORITY – (202) 225-4527



ROBERT C. "BOBBY" SCOTT, VA  
Ranking Member

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MINORITY – (202) 225-3725

COMMITTEE ON EDUCATION  
AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES  
2176 RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, DC 20515-6100

January 12, 2023

The Honorable Merrick Garland  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001

Dear Attorney General Garland:

The Members of the 118th Congress were recently sworn in and, with this new Congress, we have new leadership in the House of Representatives. As the newly elected Chair of the Committee on Education and the Workforce, it is my responsibility to ensure accountability and transparency from federal agencies under the Committee's jurisdiction. With this letter, I am officially putting you on notice that your agency has an obligation to provide timely and complete responses to inquiries and requests made by the Committee.

During the first two years of the Biden administration, agencies have failed to comply fully with congressional oversight letters. I hope that this will end and we can expect robust responses from you in a timely manner to every letter sent from the Committee or its members.

Enclosed is a copy of a July 22, 2022, letter Committee Republicans sent requesting information about the Department of Justice's (DOJ) work with the Department of Labor on a directive which would have infringed on the attorney-client privilege. The Committee expects DOJ to provide timely and complete responses to the enclosed letter. You are instructed to respond in writing by no later than January 27, 2023, with your plans for responding to this letter. Enclosed is a copy of the Committee's instructions to be followed for responses to oversight requests. You are expected to comply with them as DOJ responds to this letter, the enclosed letter, and all others issued by the Committee during the 118th Congress. Failure to do so may result in the Committee taking more robust actions to ensure compliance with its oversight requests.

Sincerely,

A handwritten signature in blue ink that reads "Virginia Foxx".

Virginia Foxx  
Chairwoman

Enclosures

# Congress of the United States

Washington, D.C. 20515

July 22, 2022

Delivered via Email

The Honorable Merrick Garland  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001

Dear Attorney General Garland:

Attorney-client privilege is one of the oldest common-law privileges.<sup>1</sup> This privilege “encourage[s] full and frank communication between attorneys and their clients and thereby promotes broader public interests in the observance of law and the administration of justice.”<sup>2</sup> A recent directive from the Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP) seeks to eviscerate this privilege through its compliance reviews regarding pay equity audits.<sup>3</sup> We write to understand if the Biden administration’s position is that attorney-client privilege warrants concern and those asserting a privilege will be viewed in a negative light when invoking it.

Without notice or public comment, OFCCP issued Directive 2022-01 indicating that it may require federal contractors to provide OFCCP information protected by attorney-client privilege. In particular, the Directive states that where “a contractor conducts a dual-purpose pay equity audit or analysis of employment processes...that implicates both legal concerns and OFCCP compliance [it] may request those records...” Even more disturbingly, the Directive threatens contractors should they attempt to withhold documents from OFCCP based on attorney-client privilege, stating “[f]ailure to provide the required pay equity audit will be considered by OFCCP as an admission of noncompliance with these regulatory requirements.” This assertion not only unfairly places a federal contractor in legal jeopardy; it also undermines the very purpose of attorney-client privilege—to encourage frank discussions between the attorney and client that promote the public interest and assure adherence to the law.

The chilling effect of the Directive is clear. A well-intended employer who might otherwise proactively engage in an internal pay equity audit would likely now choose not to conduct such an audit fearing repercussions from the federal government. An employer would also likely

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<sup>1</sup> <https://www.crs.gov/Reports/RS22588?source=search&guid=ddb80b46254d44f1b5f4f52dbe56f5f7&index=0>.

<sup>2</sup> *Ibid.*

<sup>3</sup> [Directive \(DIR\) 2022-01 | U.S. Department of Labor \(dol.gov\)](#).

The Honorable Merrick Garland  
July 22, 2022  
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refrain from voluntarily initiating audits or hiring pay discrimination consultants to identify pay or promotion disparities and subsequently curing them of their own volition. As many contractors adhere to their equal opportunity obligations through voluntary compliance, this Directive seems to contradict what OFCCP should be interested in achieving to promote fair pay practices.

To fully understand the extent to which the attorney-client privilege is under attack, please provide answers to the following questions by July 28, 2022. When responding, please include a response to each question below as we have asked them, rather than in a narrative format.

1. Was Department of Justice (DOJ) staff consulted on OFCCP's Directive? If so, please provide all documents and communications related to the Directive.
2. Is it DOJ's position that asserting attorney-client privilege should be restricted? If so, please explain how this does not violate the principal of attorney-client privilege.
3. Is it DOJ's position that asserting attorney-client privilege should be viewed negatively during enforcement proceedings? If so, please explain how this does not violate the principal of attorney-client privilege.
4. Is DOJ considering interfering with attorney-client privilege in any its directives or actions? If so, please provide a list of such actions and the expected issuance date(s).

Thank you for your attention to the matter.

Sincerely,



Richard Burr  
Ranking Member  
Senate Committee on Health, Education,  
Labor and Pensions



Virginia Foxx  
Ranking Member  
House Committee on Education and Labor

## Responding to Committee Document Requests

1. In complying with this request, you should produce all responsive documents that are in your agency's possession, custody, or control, whether held by you or other past or present employees of the executive branch, or a representative acting on your behalf. Your response should also produce documents that you have a legal right to obtain, that the agency has a right to copy or to which you have access, or that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data, or information should not be destroyed, modified, removed, transferred, or otherwise made inaccessible to the Committee on Education and the Workforce (the "Committee").
2. If any entity, organization, or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.
3. The Committee's preference is to receive documents in electronic form (i.e., email, CD, memory stick, or thumb drive) in lieu of paper productions.
4. Documents produced in electronic format should also be organized, identified, and indexed electronically.
5. Electronic document productions should be prepared according to the following standards:
  - (a) The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
  - (b) Document numbers in the load file should match document Bates numbers and TIF file names.
  - (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.
6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box, or folder is produced, each CD, hard drive, memory stick, thumb drive, box, or folder should contain an index describing its contents.
7. Documents produced in response to this request shall be produced together with copies of file labels, dividers, or identifying markers with which they were associated when they were requested.
8. When you produce documents, you should identify the paragraph, question number, or request number in the Committee's request to which the documents respond.

9. It shall not be a basis for refusal to produce documents that any other person or entity—either inside or outside of the executive branch—also possesses non-identical or identical copies of the same documents.
10. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), the agency's staff should consult with the Committee staff to determine the appropriate format in which to produce the information.
11. If compliance with the request cannot be made in full, compliance shall be made to the extent possible and shall include a written explanation of why full compliance is not possible.
12. In the event that a document or portion of a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document or redaction: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author, and addressee; and (e) the relationship of the author and addressee to each other.
13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject, and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or other agency employees, or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.
15. The time period covered by this request is included in the attached request. To the extent a time period is not specified, produce relevant documents from January 20, 2021, to the present.
16. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data, or information, not produced because it has not been located or discovered by the return date shall be produced immediately upon subsequent location or discovery. Such submission shall include an explanation as to why the information was not produced originally.
17. All documents shall be Bates-stamped sequentially and produced sequentially.
18. If physical documents are to be delivered, two sets of documents should be delivered, one set to the Majority Staff in Room 2176 of the Rayburn House Office Building and one set to the Minority Staff in Room 2101 of the Rayburn House Office Building during Committee office

hours (9am-5pm, unless other arrangements are made) and signed by members of the respective staffs upon delivery.

19. Upon completion of the document production, the agency's written response should include a written certification, signed by the agency head or his or her designee, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.
20. If the agency does not expect to produce all documents responsive to this letter by the date requested, the agency's staff shall consult with the Committee as soon as it is known the agency cannot meet the deadline, but no later than 24 hours before the due date to explain: (1) what will be provided by the due date, (2) why the agency believes certain materials cannot be produced by the due date, and (3) the agency's proposed timeline for providing any omitted information.
21. The agency's response to questions and request should be answered or provided in separate document and not included inside a narrative response.

### **Definitions**

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape, or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or

otherwise, and whether in a meeting, by telephone, facsimile, email, regular mail, telexes, releases, or otherwise.

3. The terms “and” and “or” shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.
4. The terms “person” or “persons” mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business, or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.
5. The term “identify,” when used in a question about individuals, means to provide the following information: (a) the individual’s complete name and title; and (b) the individual’s business address and phone number.
6. The term “referring or relating,” with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with, or is pertinent to that subject in any manner whatsoever.
7. The term “agency” means any department, independent establishment, or corporation of the federal government. For the purposes of responding to oversight requests, the Committee expects information to be provided from all sub-agencies of an agency and not just the information that is immediately available to the addressee or the addressee’s immediate sub-agency.