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OF THE
UNITED STATES OF AMERICA

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May 22, 2006

The Honorable Edwin G. Foulke, Jr.
Assistant Secretary of Labor for
Occupational Safety and Health
U.S. Department of Labor
200 Constitution Ave., N.W.
Washington DC, 20210

By electronic submission: <http://ecomments.osha.gov>

RE: OSHA Request for Comment on Releasing Air Sampling Data pursuant to
a FOIA request (71 Fed. Reg. 20732, April 21, 2006)

Dear Assistant Secretary Foulke:

As the largest business federation in the country, representing three million businesses, the U.S. Chamber of Commerce has members in every industry, every sector of the economy, and throughout the country. Accordingly, our members would most certainly be affected by the release of sample data proposed under the Freedom of Information Act (FOIA) request being considered in connection with the case filed against OSHA in the U.S. District Court for the District of New Jersey, *Adam M. Finkel v. United States Department of Labor, Occupational Safety and Health Administration*, No. 3:05-cv-05525-MLC-TJB.

The U.S. Chamber of Commerce believes granting this FOIA request would violate the employers' intention to protect confidential business information that is contained in the samples collected by OSHA. Such a breach of this privilege would have a chilling effect on employers' willingness to submit such samples in the future and thereby undermine the public's interest in the collection of sample data. Granting this FOIA request would also likely lead to more litigation where the plaintiffs do not have the adequate data to support their claim, but hope to find it using this approach. We urge OSHA and the Department of Labor to oppose this request vigorously.

Pursuant to 29 CFR 70.26(h)¹, in an attempt to notify affected businesses, OSHA

¹ This section requires an agency to give notice to the business submitter of confidential business information whenever a lawsuit seeking to compel disclosure is brought. Section 70.26(i) indicates that

published in the Federal Register on April 21, 2006 a notice of the lawsuit and the possibility that the agency would be compelled to release data from all samples collected from workplaces between 1979 and June 1, 2005. As an additional attempt to notify employers who might be affected, OSHA sent a letter to the president and CEO of the U.S. Chamber of Commerce on the same date describing the lawsuit and the possible release of confidential business information contained in the data taken from these samples. The Chamber has not yet taken any action to notify its members, nor have we been able to determine how many Chamber members would be affected. Indeed, providing effective notice to all Chamber members affected is not feasible. The estimate by the plaintiff is that this could involve as many as a million samples, and among the information from each sample are establishment name and address; the identity of the substance(s) sampled; the sample type; and the numerical result of the sample analysis.

OSHA's efforts to alert businesses affected by this FOIA request are a "shotgun" approach, which while satisfying the regulations, have little chance of success, at best. Therefore, the intentions of hundreds of thousands of businesses that submitted samples, and took the necessary steps to identify and protect their confidential business information, will be undermined without adequate opportunity to object if this FOIA request is granted. While some of these businesses will most likely be members of the U.S. Chamber, our comments here are not intended to represent formal objections on their behalf; nor is the Chamber able to formally notify those members that have an interest in this FOIA action.

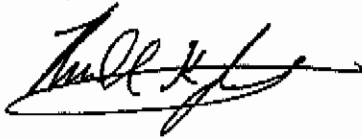
The public has an interest in this data being collected, subject to appropriate protections for safeguarding confidential business information, as it can lead to more precise and better supported workplace protections. FOIA requests like the one under consideration will only discourage employers from submitting such data, and encourage them to exercise legal options to prevent the collection of such samples.

Furthermore, granting such a FOIA request would very likely spur more litigation where the plaintiff does not have adequate data to support a claim, but hopes to develop that data from using a limitless, excessively broad FOIA request. Such litigation amounts to not much more than a "fishing expedition" in search of data, and only serves the interests of the trial bar.

when such notice would have to cover "a voluminous number of submitters" that notification "may be accomplished by... publishing the notice in a place reasonably calculated to accomplish notification."

The U.S. Chamber and its members who would be affected by this overly broad, open ended FOIA request strongly object to it being granted. We emphatically urge OSHA and the Department of Labor to oppose the granting of this FOIA request.

Sincerely,



Randel K. Johnson
Vice President
Labor, Immigration and Employee Benefits



Marc Freedman
Director
Labor Law Policy

Copy: Ms. Sue Izumi, FOIA Officer