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**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

Adam M. Finkel,)	Civil Action No. 05-5525 (MLC)
Plaintiff,)	
)	Hon. Mary L. Cooper
v.)	
)	
The United States Department)	
Of Labor and)	
Occupational Health and Safety)	
Administration,)	
)	
Defendants.)	

OPPOSITION DECLARATION OF ADAM M. FINKEL, Sc.D.

A. Introduction

1. The Department of Labor's (DOL's) rationale for (retroactively) removing from public view the nation's most comprehensive database of workplace exposures to toxic substances rests on two assertions and depends on two predictions based on those assertions. DOL asserts: (1) that providing the company names associated with each sample result will compromise at most a very small fraction of trade secrets hidden

(deliberately or by OSHA's incompetence) within the large database; and (2) that providing the CSHO ID codes will allow me to "deduce" the names of particular OSHA inspectors. DOL then predicts that these revelations will poison the relationship between American industry and OSHA, and give industry the motivation and the tools to evade OSHA enforcement. These two assertions are factually incorrect, and the predictions that flow from them are unsound even if the predicates were true. In this Declaration, I will discuss the illogic of DOL's position, from my vantage point as a former senior executive at OSHA and an expert on occupational and environmental risk assessment.

2. ***Data Received Subsequent to My Declaration of October 13.*** The data provided by DOL to date in response to my two FOIA requests of 2005 are unresponsive to my requests and only contain information that cannot be used for any of the public purposes spelled out in my requests and in my earlier Declaration. As my Declaration amply documented, providing the sampling results without the location and date of the inspection renders the data useless for any reputable analysis of worker risks, governmental performance, industry compliance, or any other general purpose. It also makes it impossible to perform a specific study I intend to conduct about the relationship between environmental regulation and worker exposures, at the company level, using other company-specific public data sources provided by state environmental agencies. Withholding the inspector identification codes further makes it impossible to use the sampling data for a new and urgent purpose—to evaluate the adequacy of OSHA's medical testing program for beryllium disease, and to provide populations of OSHA employees (and retirees) and private-sector workers with vital scientific

analysis of the dangers of their past and continuing exposures to this highly dangerous workplace contaminant.

In addition, DOL's Brief (at ¶ 6) states that it provided some data to me "on or about September 29, 2006." On or about that date, I did receive a CD-ROM that purported to contain such data, but that disk was unreadable (no files that might have been written to the disk could be opened, and no contents at all were evident on the disk) in any of approximately 10 different desktop and laptop computers owned by Potter and Dickson and by Princeton University's Department of Information Technology (and operated by senior experts in IT employed by the University). I informed DOL of the unreadable disk on or about September 29. Not until October 23, ten days after I filed my previous Declaration, did I receive from DOL an e-mail containing the data in a readable form. However, DOL took the extra and entirely unnecessary step of converting files kept in a usable database format, which I had specifically requested, into plain text files. The plain text files are not readily usable in performing research and must be converted to database format, in a time-consuming manner, before they are usable. In fact, the text file itself is too large even to be read as a text file, given that most common word-processing software is not designed to handle "documents" consisting of more than 100,000 "pages."

However, DOL's Brief did contain two new pieces of information that have heightened the inherent public interest in the resolution of this case. First, we have now learned that OSHA calculates it has conducted roughly 73,000 inspections in the past 26 years that have involved any chemical sampling at all. This is a significant finding, as OSHA has emphasized for many years that roughly 20 percent of its inspections are "health inspections." Even

though (Finkel Declaration at ¶17) the scientific consensus holds that roughly 90% of all premature workplace deaths are related to health rather than to safety hazards, at least my fellow researchers and I believed that OSHA was devoting 20% of its enforcement to the former area. Attached as Exhibit 1 is a true and correct copy of a chart I obtained from the DOL Website, showing the number of “health inspections” conducted from 1972-2000, including some simple calculations I made showing the percentage of “health inspections.” When one considers the more than 2 million inspections conducted both by Federal OSHA and the state OSHA programs since 1979 (the state sampling inspections are included in the 73,000 figure, so they belong in the denominator as well), the new figure for sampling inspections is less than 4 percent of the total. Apparently, OSHA has been doing far fewer health inspections than its tracking system indicates.¹ This finding increases the urgency of examining the Salt Lake database to see what these unexpectedly few sampling inspections did and did not reveal about occupational health issues across 27 years of inspecting U.S. industry.

DOL’s brief also indicated that OSHA has done no analyses at all of the beryllium exposures associated with sensitization, which increases the urgency that some interested party make use of data that the Agency apparently has no interest in examining.

3. ***Multiple Prior Releases.*** I note at the outset that DOL’s Summary Judgment brief fails to mention a very critical and commonly-known fact: that its decision to remove company names, inspection dates, inspector

¹ I believe this discrepancy is largely an indication that any time an inspector with industrial hygiene training conducts an inspection, it is coded as “health” even if no sampling is done or if the only foci of the inspection involve safety hazards.

identification codes (“CSHO ID” numbers), and other information vital to research and review of OSHA’s performance of its duties represents an abrupt reversal of more than 20 years of prior release policy, as I have amply documented in my Declaration of Oct. 13. The multiple prior releases (in which all of the various types of information I have requested were readily provided to numerous academic researchers and advocacy groups, without objection, and in the original easy-to-use database format) clearly establish that complying fully with my two FOIA requests from 2005 could not possibly result in any harm to industry, to OSHA’s mission, or to its employees’ privacy, beyond any speculative harm that would already have occurred long ago following the (at least) half-dozen or so of these releases that I have been able to identify.

It is also noteworthy that, based on a search I conducted of the *Federal Register* from 1980 to 2006, there has apparently been no other instance where OSHA has ever notified submitters of the potential or actual disclosure of identical information from the Salt Lake database. For the purposes of this particular case, the abrupt reversal (and DOL’s failure to acknowledge it) seems best explained by a hostile animus to me that runs counter to the letter and spirit of FOIA (the identity of the requestor must not affect the decision to release or withhold information). I ask that the Court take this animus, and its effect on DOL policy, into account in deciding the legitimacy of DOL’s refusal to release this information.

4. Before proceeding to discuss the two key issues in this case—the purported trade-secret and the inspector-privacy concerns—I wish to explain the origin and nature of my skepticism about some of the factual assertions DOL has made, which goes beyond my concern about the personal animus

of certain OSHA officials towards me that I documented in my earlier Declaration. It is unmistakable that DOL is under no obligation to act as it has in this case. DOL has expressed its preference, rather than its obligation, to withhold useful information.²

Because DOL has expressed an institutional stake in thwarting my request, and at the same time has the ability to control certain information pivotal to this case, perhaps it has reason to be unhelpful (as in the conscious decision to convert the database-formatted sampling information into a plain text file, or its failing to mention (see below) that its own regulations dictate that trade-secret requests expire after ten years). For example, it is certainly possible, as the government's brief claims, that DOL has in the past received some non-zero number of trade-secret requests regarding chemical sampling data, but that it has consistently failed to mark any of those requests as such in the sampling database. Logically, however, it is also at least possible that the database *at one time* contained a column "flagging" a small minority of the samples as made under claims of trade secrecy, but that DOL has deliberately removed those flags in order now to make the claim that it cannot remember which company names it might be permitted to redact. Similarly, DOL has failed to make any attempts to identify how many prior releases of unredacted sampling data have occurred since 1979, beyond the seven instances I was able to document merely by searching a small portion

² As discussed in our Brief in Opposition, of the three possible concerns about trade-secret information (disclosure could impair future information collection; could cause competitive harm to the submitter of the information; or could impair a governmental program), DOL clearly states that only the first and third "prongs" are involved in this case (DOL Brief at p. 19). In other words, DOL admits that it has no obligation to withhold company names out of concern over harm to industry, but chooses to do so out of concern for its own programs.

of the peer-reviewed literature and contacting authors. However, two OSHA headquarters employees—Joseph DuBois of the Office of Statistics and Bruce Beveridge of the Office of Management Data Systems—have helped create and manage the IMIS system for more than 20 years each, and have been acknowledged in several of the peer-reviewed articles I cited earlier as having provided the authors with OSHA sampling data. Surely these in-house experts could be tapped to help the Agency remember prior releases, if DOL was acting in complete good faith. When I used to defend before various Courts and the U.S. Congress, on DOL's behalf, regulations I helped to promulgate, I was acutely aware that the Agency held cards that our adversaries did not.

In addition, I wish to preface this Declaration with one additional observation: I have demonstrated as an OSHA executive and as an academic researcher a consistent and unflagging respect for the Agency's mission. I therefore take quite seriously any risk to that mission. My rebuttals to DOL's assertions below reflect genuine disagreement over facts and the effects of those facts on OSHA's effectiveness—not any lack of concern on my part with the seriousness of any possible harm to the Agency I served for 11 years.

B. Structure of this Declaration

5. The remainder of this Declaration will consist of two major sections, one on the trade secrets issues, and one on the inspector privacy issues. In each case, I will compare two possible scenarios to explain the facts as DOL

presents them, and then demonstrate that “Occam’s Razor”³ provides a strong indication of which possible explanation is the more plausible one. In so doing, I will in effect be defending DOL against admissions of incompetence that DOL itself has made as a reason to withhold the key information in the air sampling database.

C. Trade-Secret Issues

(note: Paragraphs 6 through 13 below will deal with the likely number of trade-secret requests; Paragraphs 14 through 20 will deal with the likely consequences to employers and thence to OSHA of another release of the sampling data)

6. ***Two Possible Explanations of OSHA’s Purported Failure to Protect Trade-Secret Sampling Results—Only One Makes Any Sense.*** In this first scenario, I will describe the events leading up to the present-day condition of the Salt Lake database, accepting DOL’s version of each of the key facts as it presented them, but putting them in logical sequence. According to this scenario—

- Roughly 25 years ago, OSHA set up a database in Salt Lake designed to be for internal Agency use only. Since the results were never supposed to be divulged, OSHA could safely ignore any requests that may have been made by employers to flag a small minority (*at most*, less than 2 out of every 100 samples, by OSHA’s unexplained estimate) as possibly containing confidential business information (CBI). OSHA treated CBI

³ The principle, attributed to the 14th-Century logician William of Ockham, which states that “entities should not be multiplied beyond necessity”—in other words, that the explanation that requires the fewest assumptions tends to be the most plausible one.

samples and others the same way. OSHA put no flag on the database itself, on the order of “Warning: Private Data Containing Some CBI—Do Not Release Outside The Agency.” OSHA repeatedly assigned senior Agency officials to EPA panels that drafted public documents about the availability of OSHA sampling data with company names and addresses attached, advertising the free and routine use of this valuable public resource. OSHA, *by its own admission*, has made no use of the database to examine exposure trends, the effectiveness of enforcement targeting for health hazards, etc.—which means that if the database is indeed “secret,” OSHA has been paying to maintain a database for 30 years that no one is expected to use (Wright Declaration at ¶ 4). OSHA then proceeded to “forget,” on at least seven occasions that I am aware of and documented in my first Declaration, that the data should never have been given out, and released large portions of it to academics and even to the nation’s leading anti-employer watchdog group (Public Citizen), redacting no company names and addresses, or CSHO ID numbers.

7. ***Alternative Scenario.*** To accept the scenario above requires suspending disbelief at five different junctures. The following alternative scenario to explain OSHA’s behavior is, I submit, far simpler and more plausible than the one above:

- OSHA set up a database at Salt Lake intended for Agency *and public use* (which explains both the multiple prior releases of data and OSHA’s participation in advertising the database as

publicly available). The database contained no field (or a “column” if the data were arrayed in a spreadsheet format) to mark any samples as CBI, for one of two possible reasons: (1) *perhaps no employer has ever requested such protection for an air sample* (as opposed to, say, videotapes of a particular assembly line), because, as I have already explained, OSHA samples for substances that are ubiquitous and whose presence in a manufacturing process is of no use to competitors, and because the concentration of the agent in workplace air is not useful to competitors in any event (see Finkel Declaration at ¶¶56-57, and Mirer Declaration at ¶15); or (2) perhaps OSHA did not take any rare industry request seriously enough to properly mark the sample result—and then the subsequent lack of any negative response by any company to the many prior releases reinforced OSHA’s lack of concern. Then, after multiple prior releases over many years, OSHA received a FOIA request in 2005 from a plaintiff with three unique characteristics: (1) the first senior executive in OSHA history to have sued the Agency for whistleblower retaliation; (2) one of the nation’s leading experts in occupational health risk assessment; and (3) with a stated desire to be the first researcher to use the data not only to create a snapshot of how particular industries are reducing (or failing to reduce) concentrations of toxic substances in American workplaces, but to shine light on whether OSHA has ever conducted (or once conducted but has now abandoned) a credible occupational health program (i.e., half or more of its core mission).

Whether the failure to create a database field for CBI was due to incompetence or to lack of need, it should be clear that the multiple prior releases establish that OSHA was unconcerned about this issue until the FOIA requests at issue in this case were made. This consistent stance over nearly 25 years, in my opinion, casts severe doubt on the explanation proffered in Defendants' brief (that it has, only now, become concerned about the past releases). It also casts doubt on DOL's response to that concern: that because "less than two percent" of the inspections reflected in the database may contain sampling results involving CBI, the entire database should be forever shielded from public scrutiny and use.

8. ***Most Likely Explanation of OSHA's Failure to Flag CBI Samples.***

For at least three sets of reasons, I maintain that the most likely explanation for there not being (at least according to OSHA) a database field to flag CBI samples is that no employer has ever requested that *a sample result* be so designated (that is, instead of OSHA's explanation that it has received such requests and repeatedly failed to take them seriously enough to flag them as such). In this analysis, I am in large part relying on my experience as an OSHA Regional Administrator. As Mr. Fairfax states prominently in his Declaration (¶ 1), in order to perform his responsibilities overseeing OSHA enforcement, he must "confer with OSHA Regional Administrators on a weekly basis." I therefore believe I have the requisite special knowledge to present a knowledgeable alternative to his estimate (Fairfax Declaration at ¶ 6) that "in less than 2% of OSHA inspections involving sampling," the employer requests CBI protection.

Mr. Fairfax's estimate occupies one sentence of his Declaration and is accompanied by no factual or theoretical support whatsoever, in contrast to my alternative estimate of zero (see Paragraph 13 below). Moreover, the precise phrasing of Mr. Fairfax's estimate is extremely significant, in two respects. First, the phrase "less than 2%" includes, of course, the estimate of zero. Second, there is an important "or" construction in this sentence. All Mr. Fairfax is claiming is that when he thinks about *both* any purported requests to protect the sampling data itself *and* any possible requests to protect "some of the chemicals identified by the CSHO," he believes that somewhere between zero and "2%" of inspections were involved. But the latter category of requests is irrelevant to my FOIA case—these would involve cases where the CSHO asks the employer for narrative information about one or more substances in use, and the employer requests that the CSHOs *inspection notes* mark those chemical names as confidential, whether or not s/he subsequently makes analytical measurements of their workplace concentrations. I have not requested any information from any case files regarding the identities of chemicals that were discussed during an OSHA inspection but for which samples were not sent to the Salt Lake Lab for analysis; therefore, Mr. Fairfax is actually alleging that in "less than 'less than 2% of cases' might there be sampling data that the employer requested be marked as confidential."

9. *Analogy to EPA's "Toxic Release Inventory."* By far the most relevant other federal program to the OSHA sampling program is EPA's Toxic Release Inventory (TRI). Under the Emergency Planning and Community Right-to-Know Act of 1986, companies are required to file annually with EPA estimates of the quantity of more than 600 different

chemicals that are released to the environment from their establishments. As OSHA does, EPA also provides means for companies to claim CBI protection for their submissions at the time the report is made. Any concern that a company might have that a competitor could learn valuable details of their production process by knowing the identity and quantity of a substance released from the process would apply at least equally to environmental releases as to workplace releases. If anything, companies would be *more* concerned about reporting to EPA than to OSHA, because the TRI covers substances disposed of as hazardous wastes, which reveal information about finished products (e.g., toxic metals from the final grinding and polishing of products become part of the hazardous-waste report) much more directly than do workplace air samples, which often involve solvents that are incidental to the production process. Despite this, *U.S. companies almost never request CBI protection when submitting TRI data to EPA*, presumably for the reason mentioned in previous Declarations by myself and Mirer— releases to the outdoor or indoor environment, of substances common enough to be regulated by EPA or OSHA, are simply not useful information for competitors seeking to duplicate another's product or process.

Attached as Exhibit 2 is a true and correct copy of a “screenshot” of an EPA Webpage, explaining how to query its “Envirofacts” system to generate a report on TRI activity by year, industry, etc. Attached as Exhibit 3 is a true and correct copy of a “screenshot” from this Website, explaining the data field “TRADE_SECRET_IND” EPA uses to mark such requests. I used this system to generate the spreadsheet provided below as Table 1.

TABLE 1: EPA-TRI DATA ON CBI REQUESTS

Reporting Year	CBI Facility Count	CBI Document Count	Total Facility Count	Total Document Count	Percentage Facilities With CBI Claims	Percentage Documents with CBI Claims
1987	6	6	21,872	81,093	0.027%	0.007%
1988	4	4	23,902	88,516	0.017%	0.005%
1989	6	6	24,899	88,626	0.024%	0.007%
1990	8	8	25,485	88,554	0.031%	0.009%
1991	10	12	25,168	87,676	0.040%	0.014%
1992	10	10	24,870	84,496	0.040%	0.012%
1993	9	9	24,399	82,965	0.037%	0.011%
1994	13	13	23,629	77,969	0.055%	0.017%
1995	10	11	23,044	77,697	0.043%	0.014%
1996	9	10	22,688	75,679	0.040%	0.013%
1997	9	10	22,497	75,671	0.040%	0.013%
1998	10	11	24,380	90,799	0.041%	0.012%
1999	2	3	23,480	86,862	0.009%	0.003%
2000	2	3	24,243	94,034	0.008%	0.003%
2001	1	2	25,879	98,345	0.004%	0.002%
2002	2	8	25,108	95,481	0.008%	0.008%
2003	4	10	24,400	93,221	0.016%	0.011%
2004	4	10	24,016	90,611	0.017%	0.011%

Source: Data Query to EPA's "Envirofacts" System: A. Finkel, Nov. 15, 2008

These data show, for example, that in the most recent reporting year (2004), 24,106 separate facilities submitted a total of 90,611 reports to EPA—but only 4 facilities claimed CBI protection for a total of 10 individual submissions. Over the entire 18 years of reporting, only 119 out of 433,957 facilities asserted CBI, a rate of 0.027 percent. *Thus, DOL's uncorroborated upper-bound estimate of "2 percent" is roughly 100 times higher than the actual rate at EPA.* At a rate of 0.027 percent, and accepting DOL's estimate that 73,000 OSHA inspections in its history involved chemical

sampling, one would expect that no more than **20** establishments requested CBI status for sampling results, even if employers made requests to OSHA at the same rate they made them to EPA. Assuming (see Appendix A below) that there are roughly 2.6 million sampling results in the complete database, *DOL therefore plans to withhold key information from 2,599,980 records in order to protect perhaps 20 records that it should have marked as CBI but purportedly failed to.* Even if—through DOL’s own claimed incompetence—release of all 2 million records might compromise (once again) the confidentiality of 20 of those records, I believe that the public interest in the information contained within the 2,599,980 records far outweighs any private or public harm contained within the 20.

Examination of the raw data underlying Table 1, which the “Envirofacts” query provides (a true and correct copy of these data are attached as Exhibit 4), reveals further that although 119 separate facilities made requests over the 18 years, a few corporations with multiple establishments dominated the list: there were only **19** unique corporations on the list. Thus, even if there were as many as 20 CBI requests among OSHA’s 73,000 sampling inspections, it is likely that only 2 or 3 corporations were involved (19/119 times 20 equals 3.2). This should provide some perspective on OSHA’s purported concerns about a “chilling effect” on its enforcement program due to employer backlash (see Paragraphs 14-19 below).

10. ***Lack of Specificity and Response by Industry Commentors.*** It is highly significant that none of the 18 commentors to OSHA in this case who oppose the *concept* of the federal government providing workplace sampling data to the public provided any assertions, let alone any specific information, that they themselves requested CBI protection at the time the OSHA

sampling was conducted. OSHA’s Field Inspection Reference Manual (see Finkel Declaration at ¶ 55) provides clear procedures for such requests at the time of the inspection. Moreover, DOL’s broader regulations regarding CBI are quite clear: 20 CFR Part 70.26(b) requires that companies “will use good-faith efforts to designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, any portions of its submission that it considers to be protected from disclosure under Exemption 4 [of FOIA]” (emphasis added). These regulations also require submitters to “specify all grounds” for objecting to disclosure of trade secrets previously identified as such at the time of submission, and require them to “demonstrate the basis” for the contention that the information is confidential—the commentors in this case failed to provide any such specificity or showing. This bolsters the common-sense conclusion that the presence of one or more commonly-used toxic materials in workplace air is completely unhelpful to anyone interested in a competitor’s manufacturing process or formula.

Thus, OSHA and DOL rules establish a two-step process for asserting CBI at the time of inspection and then justifying that assertion at the time of a relevant FOIA request: the commentors in this case did not avail themselves of either opportunity. And, the specific commentors did not seek to have their processes or releases kept confidential by EPA under TRI either (AFL-CIO Brief *Amicus Curiae*, at pp. 7-9). Surely a commentator who knew he had asked for CBI protection at the time of OSHA air sampling at his facility would have mentioned this in comments objecting to the subsequent release of sample results—but none of the commentors mentioned having done so. And, contrary to DOL’s assertion in Footnote 9 of its Brief, employers *are*

“required” (not just “permitted”) to designate trade secrets, *if they expect OSHA to protect those secrets* (Exhibit 15 to Finkel Declaration (OSHA Field Inspection Reference Manual, § A.4.g(1)(b)): “When the employer identifies an operation or condition as a trade secret, it shall be treated as such”). It is therefore false that “even a pain-staking search such as that described above would not guarantee discovery of all trade secrets”—it would assuredly discover all such secrets that any employer has a right to later object to disclosure of. To read otherwise would be to grant that OSHA has given companies the right to assert CBI for air samples at the time of the inspection, but also to exercise that right decades later having failed to do so at the time. I maintain that there are zero such secrets designated either in the database or in the case files of individual inspections, for if there were, surely one or more of the commentors would have at least alluded to that fact.

11. ***DOL’s Own Regulations Remove Trade-Secret Protections after Ten Years.*** 29 CFR Part 70.26(b) is clear that “[t]hese designations [of trade secret status] will expire ten years after the date of the submission unless the submitter requests, and provides justification for, a longer designation period” (emphasis added). None of DOL’s papers even alludes to ever having received a request for such an extension. Thus, only the air-sampling data collected subsequent to June 1, 1995 can possibly contain any trade-secret requests that OSHA might be permitted to redact from the database (upon a subsequent showing of a proper basis for applying Exemption 4). This application of DOL regulations also has a profound effect on the estimate of the workload involved to find any “missing” CBI designations. Assuming that the DOL estimate of 73,000 case files is correct, and

adjusting slightly for the fact that the number of samples OSHA has collected in each year in the 1990s and beyond is significantly smaller than the amount collected in the 1980s (see Appendix A below), I estimate that only about 17,000 of the sampling inspections involved occurred after June 1, 1995.

Further, DOL's estimate (Fairfax Declaration, at ¶ 8) that it could take at least thirty minutes to review each case file to find a trade secret designation is far too pessimistic. The form OSHA-91A (the "sampling sheet" that the inspector fills out with each sample sent to Salt Lake City for analysis) is only two pages long (see Exhibit 13 of Finkel Declaration), and is supposed to be kept in the same portion of each case file, separate from witness statements, notes of visual observations, etc. If OSHA follows the procedures set forth in its "Field Inspection Reference Manual," any trade-secret request would be prominently marked as "ADMINISTRATIVELY CONTROLLED INFORMATION/ RESTRICTED TRADE INFORMATION." I estimate it would take no more than 5 minutes to discern whether any given case file has any such designations on (any of) the OSHA-91 form(s). At 5 minutes per case file, OSHA personnel could read through 17,000 case files in about 1400 hours—or about two months' work for a small group of four employees, or about \$50,000 at a labor rate of \$35/hour. And, assuming the conservative "EPA rate" of 0.027 percent CBI requests, this exercise would only be expected to find about *five* CBI requests during the past 10 years—the other roughly 15 requests that I estimated in Paragraph 9 above might exist would have *expired* by now under DOL's own rules.

12. *The Task of Finding any CBI Designations is Even Simpler than This.* DOL correctly notes that any assertions of CBI by an employer would reside in the inspection case file, on the OSHA 91-A sampling form. DOL fails to mention, however, that although the *original* 91-A forms stay with the case file, the inspector must mail a copy of the form to the Salt Lake lab, attached to the physical sample itself (filter cassette, test tube, glass bubbler, etc.). Indeed, a staff person at the Lab must sign or initial the 91-A upon receipt of the sample and form, and then again at five additional junctures (including when the analytical result was obtained and entered on the 91-A, and again when it was checked for accuracy by a supervisor), in order to maintain legal chain of custody over the sample⁴. Therefore, the Salt Lake lab should have within its premises a complete set of (copies of) OSHA 91-A forms, without all the extraneous pieces of paper that make up the rest of the original case files. And so, the task of combing through these forms to see if any of them contain CBI assertions would be much simpler even than looking through case files (the case files should, but may not always, have the 91-A in the same place in the file), and no trips to the Archives would be necessary. Using the estimate above of 17,000 sampling inspections conducted within the past 10 years, and conservatively estimating one-half minute to page through each (one-page, double-sided) 91-A form, the task would actually require roughly 150 hours, or two weeks for two employees, or roughly \$5,000 at a labor rate of \$35/hour. I do not know how much OSHA has spent since 1979 to create and maintain this database, but \$5,000

⁴ See Item 63, "Chain of Custody," on the OSHA 91-A, which was attached as Exhibit 13 to the Finkel Declaration; note the six boxes, marked "a" through "f," which Salt Lake personnel must initial at various junctures in the process. See also Exhibit 11 (attached to this declaration), which is a true and correct copy of an OSHA publication, available on the Web, that explains the elaborate chain-of-custody procedures followed at the Lab.

would surely be a *de minimus* fraction of that sum to ensure that the entire contents of the database could be (given the past releases, “could continue to be”) be made available to the public without any *additional* risk of revealing any trade secrets that might exist within.

13. For all the reasons discussed above, as well as the arguments in my earlier Declaration and the Mirer Declaration explaining how tenuous the physical/chemical connections are between air-sampling results (for the ubiquitous, “meat and potatoes” sorts of substances OSHA has exposure limits for) and information relevant to competitors seeking to duplicate an innovative formula, I maintain that the best estimate of the number of relevant CBI requests employers have made during OSHA inspections is zero. Based on having supervised CSHOs who together conducted more than 6,000 inspections during my tenure as Regional Administrator, and my experience writing standards, negotiating partnerships, and conducting scientific dialogue involving many managers at chemical and other manufacturing industries, I am not aware of a single particular instance in which an employer requested trade-secret protection for an OSHA chemical sampling result.

14. ***Even if Some Information Previously Asserted as CBI Exists and is Released (again), the Assumptions Underlying DOL’s Claim of a “Chilling Effect” Upon OSHA Enforcement are Fallacious.*** In order to believe that the release of the data I requested under FOIA will create a “chilling effect” on OSHA enforcement, the Court would have to accept all of the following three premises as true: (1) that any time a company demands OSHA return with a warrant, OSHA’s ability to fulfill its mission will be substantially hindered; (2) that *all* employers will lash back at

OSHA, even though by OSHA's own unexplained estimation "less than 2 percent" of them have ever asked for the trade-secret protections; and (3) that the desire for a backlash against OSHA will be fueled by the re-release of the data to me, rather than by OSHA's new claim (which is now too late to "put back in the bottle") that it has not taken employer requests for CBI seriously for the past 27 years. As the following three Paragraphs will demonstrate, each of these premises is dubious on its own—so to accept them all as valid simultaneously is extremely far-fetched. In addition, DOL's entire argument assumes that the normal rate of warrant demands is high enough to border on jeopardizing the program. However, only a few years ago, in the "OSHA DATA" case, DOL argued that the warrant rate was only 0.5% (1/3 of what they are now saying it is), when they were trying to convince the Court that only a few inspections are truly "compulsory." Attached as Exhibit 5 is a true and correct copy of the cover page and pages 18 and 24 from this brief, which I downloaded from <http://www.oshadata.com/case2doc6.pdf>); page 18 contains the statements about the normal warrant rate.

15. ***The Warrant Requirement Does Not Impair the OSHA Program: The (Hypothetical) Employer Acting in Bad Faith Does.*** DOL's discussion of the "chilling effect" on p. 20 of its Brief makes it seem as if demanding a warrant changes the complexion of a "surprise" sampling inspection to one where the employer has the opportunity to "game" the system and evade OSHA enforcement. This is not a realistic depiction of the OSHA inspection process when sampling is involved. In fact, motivated employers (assuming such employers exist) routinely have ample time to "cheat" with regard to health hazards *with or without demanding a warrant*. In my

experience as a Regional Administrator, inspectors whom I supervised rarely began sampling on the first day of an inspection, and almost never concluded sampling on the first day, for a variety of reasons: (1) to document overexposures to a Permissible Exposure Limit, samples generally should be collected for a full eight-hour workshift—and it is simply impractical to conduct an opening conference with an employer, conduct the “walkaround,” and still have time to sample for eight hours on the first day⁵; (2) different toxic substances require different equipment to sample, and the inspector would rarely know when leaving the Area Office to travel to the inspection site which type(s) of equipment s/he had to bring to the worksite—that decision would depend upon the employer’s answers to questions about the specific processes at the facility, questions that would remove any element of surprise about the location where sampling would later take place and the identity of chemicals to be sampled for; (3) many facilities do not perform every process of interest every day—I recall occasions where the inspector had to ask the employer (for example) “what day this month do you next plan to run the spray-painting operation, so that we can take samples during normal operating conditions?”; and (4) often, inspectors have to sample multiple times during an inspection, either to verify the conditions at one operation or to cover multiple operations. For all these reasons, it is not unusual for several weeks to elapse between the

⁵ An OSHA inspection can take up to six months from start to finish; on average, a health inspection requires about 40 hours of on-site activity by the CSHO, spread out over several or more weeks. The “opening conference” occurs immediately after the CSHO presents his credentials (name badge and photo ID) and gains entry to the worksite, and involves a discussion with the employer (and employee representative, if any) about what hazards will likely occupy most of the Agency’s attention. The parties then engage in a “walkaround,” in which the CSHO asks management and employees about the normal operating conditions at various workstations, process lines, etc.

opening conference and the conclusion of sampling⁶—giving the motivated employer ample time to “cheat” in the ways DOL’s brief suggests he might during the briefer time period while he forces OSHA to obtain a warrant. If OSHA has a problem with unreliable sampling information, the warrant is not the culprit.

16. ***Only The Aggrieved Employers Might Respond to a Release of Data by Demanding Warrants in the Future—And Even They Might Think Twice Before Doing So.*** Premise (2) in Paragraph 14 above is illogical, because it presumes that the vast majority of employers who chose not to request trade-secret protection at the time of an OSHA inspection will attempt to stymie OSHA enforcement if OSHA releases the *unprotected* data. While it may be at least plausible that some employers might feel betrayed by the release of sampling data they had at one time asked be kept confidential (although, again, no such employer has come forward in response to the April 2006 *Federal Register* notice), it makes no sense to predict that employers who *expected* their data to be disclosable would react badly upon its disclosure. Besides, despite broad swings in the ideology of the party in control of the Executive Branch over OSHA’s history, one constant has been the denial-of-entry rate, which has wavered little from the 1.4% average figure cited in the Beveridge Declaration (at ¶4). It seems that employers do not react to major changes in OSHA philosophy, policy, or

⁶ In fact, I specifically remember a discussion among Region VIII managers and CSHOs in which several inspectors asked whether it was proper to enter “no” in the data field “was advance notice given?” when the inspector had to return to conduct sampling and had let the employer know which substance(s) would be sampled for. The official word from OSHA headquarters on this issue was that the data field was only intended to reflect advance notice of the inspection itself—that it was understood that in most health inspections, the first appearance of the CSHO would be a surprise, but the sampling would not.

priorities by changing their propensity to demand warrants—in my 11 years’ personal experience at OSHA, when employers as a group have been most upset at OSHA, they express that displeasure by working with Congress to change OSHA’s budget (or constrain it through appropriations riders), working with OMB to block pending regulations, or filing suit to challenge rules after promulgation.⁷ The rate of denied entry each year did not increase after previous major releases of the air sampling database, after OSHA began posting company-specific violation data on the Internet, or after OSHA proposed a “draconian” ergonomics standard fiercely opposed by industry—OSHA thus has little historical reason to fear that this rate will increase following (yet another) release of the Salt Lake data.

In addition, DOL makes a partial inference here about the likely behavioral response by any aggrieved employer who is considering what is best for his business. Demanding a warrant is at best a double-edged sword; while it sends a signal of dissatisfaction with OSHA’s presence, it also risks making the inevitable inspection more confrontational. I maintain that there are no data suggesting that employers enjoy net benefit by demanding warrants, and so the link between their assumed outrage and their actual tendency to escalate confrontation is something DOL asserts without logical support.

17. *OSHA’s Purported Errors May Have Endangered its Relationship with Industry: Compliance with FOIA is Not the Problem.* The most

⁷ A very few individual employers, in my experience as a Regional Administrator, simply demand warrants as a matter of corporate policy, no matter how cooperative or adversarial the relationship between an individual establishment and its local OSHA office might be at a given time. That was certainly the case with (as an example) a major national supermarket chain with many stores in Region VIII, whose home office told the stores to always require OSHA to enter with a warrant in hand. I believe that much of the overall 1.4% warrant rate stems from these sorts of policy decisions.

charitable interpretation of the multiple prior and unredacted releases from the Salt Lake database, in light of DOL's assertions in its Brief, is that OSHA has failed to protect trade-secret information over many decades, failed to inform industry of the deficiencies in its procedures over an equally long period, and failed to inform industry of this deficiency in April 2006 when it contacted the companies and issued its *Federal Register* notice.⁸ To the extent that any employers are actually concerned about specific trade secrets in air samples, they now have ample reason for concern about *future* inspections where OSHA personnel promise confidentiality of sample results, because the Agency has seemingly admitted it has no procedure for honoring those requests. To solve any such problem, all that OSHA has to do is to follow its own procedures from this point forward and mark any trade-secret requests received as such. I therefore vigorously dispute Mr. Fairfax's assertion (Fairfax Declaration at ¶ 12) that "if OSHA were to release sampling data that employers consider confidential, OSHA would have to advise employers prior to any inspection that any sampling data obtained by the agency is releasable under FOIA." This is completely backwards. In fact, from this point forward, OSHA must advise employers that it "will now properly protect any confidential sampling data obtained by the Agency so that it is not disclosable under FOIA." OSHA's concern about its enforcement program is by definition forward-looking, and I find it impossible to believe that employers will "punish" OSHA for previous releases of unprotected data—future inspections will suffer, if at all, from *future* problems handling trade-secret requests.

⁸ OSHA's Notice did not warn employers that "a FOIA requester has asked for the non-CBI data, but we may have to release all of it because we never marked CBI as such." Instead, the Agency told employers that I had demanded their CBI information, which was not the case.

18. ***More Time, and More Motivation, For Companies to Reduce Workplace Risks Has Benefits for OSHA’s Mission.*** It must also be said that even if OSHA is correct that its release of site-specific sampling data collected years or decades ago will impel some employers to “use the opportunity [afforded them by insisting on a warrant] to prepare for the inspection to avoid detection of OSH Act violations” (Fairfax Declaration at ¶ 12b), such an outcome would be salutary for the workers involved. Any hazardous condition that is abated in order to avoid monetary penalties is a plus for worker safety, even if it may be in some sense a minus for the U.S. Treasury.

19. ***OSHA Increasingly Reserves Strong Enforcement for “Truly Bad Actors,” Who Pose Problems that Pre-date and Dwarf any “Backlash Effect.”*** With its limited resources (the ability to physically inspect fewer than 1 percent of U.S. establishments each year), OSHA is in effect at the mercy of those who want to cheat outside OSHA scrutiny. Any “chilling effect” making OSHA’s job more difficult at the facilities it does inspect won’t change conditions at the remaining 99% of establishments. With its new-found emphasis on partnerships and alliances with businesses who appear willing to provide safe workplaces without the threat of enforcement—an emphasis I helped pioneer with respect to rulemaking, and participated centrally in during my tenure as a Regional Administrator—OSHA is further limiting its enforcement resources. OSHA is trying to offset the effects of this policy choice by targeting its resources towards the small minority of recalcitrant employers—but they are by definition the ones who are *already* doing what OSHA worries they will do after the data release. Attached as Exhibit 6 is a true and correct copy of an article in

OSHA's newsmagazine describing the "enhanced enforcement program." In the context of this case, it should be clear that OSHA believes that a minority of companies pose the truly severe challenges to OSHA enforcement—challenges that transcend any ebbs and flows in the general relationship between American business and the government. When I was Regional Administrator in the Rocky Mountain States, on a few occasions I fielded calls from my Area Directors concerned with employers in very remote areas who had threatened our inspectors with firearms if they set foot on their property. I am completely confident that such an attitude had nothing to do with concern over trade-secret information contained within air sampling results, but simply reflects the unshakeable stance of certain employers with respect to any governmental intervention of any kind.

Attached as Exhibit 7 is a true and correct copy of an article in the *New York Times*, discussing a recent jury verdict against a company whose managers apparently engaged in a long-running conspiracy to defraud OSHA and escape penalties. Against this backdrop, it seems bizarre for OSHA to claim that its mission could suffer further if it risks angering a tiny fraction of employers concerned about proprietary chemicals in air sampling results.

20. ***Conclusion of Trade-Secret Issue.*** For many reasons discussed in this document, in previous briefs, and in Plaintiff's Brief in Opposition, I do not believe that any company names should be withheld. *However, if this concession will help the Court resolve this matter, I am willing to accept a copy of the Salt Lake database with the name of the company redacted for all samples (those analyzed subsequent to June 1995) taken at facilities owned by the eight individual companies who objected in their public comments to the release of their names.* Even though none of these

companies asserted that they had properly requested trade-secret protection, I am willing to have their company name replaced with “Redacted Company” in the interest of resolving this dispute. The public comments of the following eight companies contain a general statement of objection to the release of air sampling results: Acme Brick Co.; Anchor Block Co.; Gates Corp.; General Shale Brick, Inc.; Southern Champion Tray, LP; STIHL Inc.; Tecton Products LLC; and Weaber, Inc.⁹

D. Inspector Privacy Issues

21. ***The CSHO ID Numbers Must Never Have Been Intended as Purely for Agency Use.*** DOL’s version of history would have us believe that OSHA created the CSHO ID numbers several decades ago, with the intent of using them only as a private management tool. As is the case with the company names in the sampling database, this scenario is immediately undercut by the fact that OSHA soon began supplying the CSHO IDs to various researchers and advocacy groups who requested sampling data, whether informally or through FOIA requests (see Finkel Declaration at ¶¶ 63 and 67). OSHA also helped draft an EPA document that advertised to the public the availability of OSHA sampling data, with “inspector code” listed prominently as one of the available data fields (Finkel Declaration at ¶ 62). It becomes even harder to believe that OSHA intended the CSHO ID codes

⁹ I am not including Brush Wellman, Inc., in this overture, because it clearly stated that it was only concerned with my seeing any sampling data “if that data identifies certain types of processes, either by naming the process itself or by naming the job title which discloses the process.” Since I have not asked for these two data fields (process description or job title) from the Salt Lake database to be included in any of my FOIA requests, I do not believe it would be appropriate for DOL to redact Brush Wellman’s name from the portion of the database I have requested.

as private, because in December 2001 (see Exhibit 27 in Finkel Declaration), OSHA *changed* all the “weak” CSHO IDs to “strong passwords” (containing no letters or numbers connected in any way to the name or SSN) numbers, because (in the words of OSHA Direction ADM 1-1) the former codes were vulnerable to “abuse of social security numbers and identity theft” (and OSHA at that time removed all traces of the “weak” codes from its databases).

It makes no common sense to have a system of ID codes for exclusively internal use. Why would an OSHA manager need to have the names of CSHOs under her supervision anonymized in order to “monitor the amount of time particular CSHOs work” (Fairfax Declaration at ¶ 13), when she would have to then look up the name that matches the code in order to manage the employee? It makes even less sense for OSHA to have gone to the trouble of *changing* thousands of “internal” codes to make them less “vulnerable to identity theft” if the only persons meant to see the “weak” codes were OSHA’s own managers (were they implicitly being accused of identity theft in the wording of ADM 1-1?).

22. ***Alternative Scenario.*** It is vastly more plausible that OSHA intended both the “weak” and later the “strong” CSHO ID codes to serve the same function that coded identifiers commonly serve in medical, financial, and other realms—to *enable persons outside the organization to make use of data without implicating personal privacy*. The multiple prior releases of the “weak” IDs were not a series of mistakes under this scenario, but an Agency doing its job to *protect* the privacy of its employees by substituting codes (albeit ones that were “strengthened” once computer-aided identity theft became a national issue several years ago) for personal names. As was

the case with the company names, a far more plausible explanation for OSHA's multiple prior releases of the CSHO IDs, coupled with its abrupt reversal of policy in my case, is that I am the first FOIA (or informal) requester with the three unique characteristics enumerated in Paragraph 7 above. I am at a loss to explain why, with or without OSHA's concurrence, the Federal Occupational Health Service (FOH) purportedly "contaminated" the beryllium test records with SSN information in 2004, several years after ADM 1-1 went into effect. One possible explanation is that OSHA encouraged (by providing the SSNs?) or welcomed this action, as it might have the effect of shielding the test results from public scrutiny, but I have no evidence to support or refute this supposition.

DOL argues (Brief, at p. 28) that "the 'coded ID numbers' I asked for of the OSHA employees that took the test consist of the last four digits of their social security numbers," but that is a deliberate misreading of my FOIA request. I asked for the "strong" CSHO ID numbers associated both with the beryllium sampling results and with the blood test results, not for new "weak" numbers OSHA claims have been substituted for the "strong" ones (contravening the clear requirement of OSHA ADM 1-1, which "PROHIBITS" the use of SSN information in creating ID codes).

23. ***It is a Trivial Task to Correct the Error Made by FOH or DOL Involving Social Security Information.*** In any event, I estimate that it would take someone at OSHA with authorized access to the "strong" codes no more than one or two hours to take the FOH codes and replace them with the CSHO ID codes, for the roughly 300 inspectors who have undergone the beryllium sensitization test.

24. *The Privacy Issue is Moot, Because I Cannot “Deduce” Inspectors’ Names from their ID codes.* Whichever explanation above for OSHA’s behavior is true, there still remains no privacy interest that must be balanced against the public interest involved in being able to evaluate OSHA’s beryllium testing program. *I declare without reservation that I do not believe I am capable of “deducing” the inspectors’ names from their ID codes, as Mr. Fairfax alleges I can (Fairfax Declaration at ¶ 15).* DOL offers no explanation whatever for this allegation, and does not mention that the “strong” CSHO IDs offer no clues whatsoever to an individual’s name or SSN. However, rather than offer a conclusory assertion that I cannot “deduce,” I will assume for the sake of providing a more thorough response that DOL might mean that I could “deduce” the names of the inspectors by making use of the only other piece of specific information contained in the unredacted information I have requested—the name of the company associated with each inspection.

Let us examine the plausibility of an exercise in deduction that makes use of company names. Imagine this required chain of events, and the scope and difficulty of this task will become evident: (1) I would have to locate the phone number of each company (many of whom are no longer in business); (2) I would have to locate someone in that company who clearly remembers the OSHA inspection (which may have occurred as long as 27 years ago), or who is able and authorized to find notes from the inspection in the company’s files; (3) the person would have to find either a business card or some hand-written notation made by a company representative in the file in order to discern the inspector’s name, because OSHA does not issue any correspondence to the employer in the name of the CSHO—all letters of

violation, etc., are signed by the Area Director or a higher-level manager; and (4) most significantly, I would finally have to convince the person on the other end of the phone to divulge the inspector's name, *for no other reason than that I asked for it*. If OSHA's assessment of the fragility of the employer-government relationship, and the coordinated "backlash" in the wake of this FOIA release, holds even a kernel of truth, then I would literally be the last person in the world that any of these companies would want to help.

Now take whatever the probability of success on any one such "fishing expedition" might be **and multiply it by itself as many as 73,000 times** (the number of separate inspections where an inspector's name might be gleaned), and a fanciful task becomes an utter impossibility. Rather than make up a number with no support, such as "2% to the power 73,000" (a probability of success vastly smaller than the odds of correctly identifying a single electron within the boundaries of the universe), I will simply conclude that no one person's life would be sufficiently long to succeed in this Herculean endeavor.

25. *Any Hypothetical Risk of Compromising Personal Privacy is Far Outweighed by the Compelling Public Interest in the Analysis using the CSHO IDs.* DOL is mistaken when it asserts (DOL Brief at p. 27) that "[t]here is no countervailing public interest in the disclosure of CSHO ID numbers." DOL is well aware (see Finkel Declaration at ¶ 41) that only with the CSHO ID numbers can a database of unconnected exposure measurements, useless to shed light on the risks faced by OSHA inspectors, be radically transformed into a database of the *cumulative* exposures of unique (unidentified) individuals, superior to the quality of data available in

almost any other epidemiologic resource. The ID codes are the key to discovering hitherto-unknown facts about the risks inherent to beryllium exposures and about the number of OSHA employees who are at grave risk of having undiagnosed beryllium disease by virtue of having been exposed to far more danger than their colleagues who are already sensitized.

DOL insults the compelling interest in literally helping save the lives of public- and private-sector workers exposed to beryllium, by insinuating that this new knowledge would be akin to “the type of interest that may exist in celebrities, weather events, natural disasters, or high-profile litigation.” Just within the OSHA “family,” it is clear that 11 workers have been sensitized to beryllium, with only $\frac{1}{4}$ of the active group of inspectors tested to date. Even if the current sensitization rate is no higher among the retirees and the inspectors who work for state OSHA programs (and see Paragraph 30 below for evidence that this assumption is conservative), one would expect roughly 121 additional current and former inspectors to already be sensitized, given that $\frac{3}{4}$ of the active inspectors and all the retirees and state-plan inspectors remain untested. Any of these 121 persons could progress from a treatable condition (sensitization) to irreversible chronic beryllium disease before availing himself of the medical test, *especially* if due to lack of information he continues to be exposed to beryllium on the job. Beyond this toll, there are over 130,000 private-sector workers exposed to beryllium every day, who are awaiting better scientific information about the risks of exposure that can come from this unique opportunity to study the exposures of OSHA inspectors known to have tested positive or negative.

But even beyond this urgent general interest, there exists a further purpose, one that indeed is “needed to check against corruption and hold the

governors accountable to the governed” (DOL Brief at p. 27, quoting *NLRB v. Robbins Tire and Rubber Co.*). My analysis of the cumulative beryllium exposures of OSHA inspectors may reveal that OSHA has concluded a flawed testing program that has left more than 85 percent of its own current and former employees at substantial risk of undiagnosed, potentially fatal disease. In light of its admission (DOL Brief at p. 13) that it has undertaken no analysis of the beryllium exposures in the 18 months since testing revealed a cluster of sensitized individuals in its own workforce, such a finding by an independent analyst (doing OSHA’s own work for it) might in fact reveal the undeniable consequences of negligence on the part of the nation’s worker-protection Agency—both in terms of how it treats its own workers and in terms of what priority it places on revising a 57-year-old occupational exposure limit that apparently did not protect even its own intermittently-exposed inspectors.

Even more, OSHA has a responsibility to respond to the cluster in its own workforce by stepping up enforcement of the current beryllium standard. The more recent air samples from the Salt Lake database will reveal whether OSHA is now making any attempt to monitor conditions at the very facilities where the worst overexposures to beryllium have occurred in the past—surely an effort that many of “the governed” would expect the Agency to make in light of the unexpected findings from its internal medical program.

26. ***I am Entitled by OSHA’s Own Regulations to the Actual Names of the Sensitized Inspectors, Yet I Seek Only the Encrypted ID Codes.*** Several years ago, OSHA promulgated a revised final rule (29 CFR Part 1904) that governs how private employers must record certain illnesses and injuries in their workforce, and make these records available to current and former

employees. In 2004, OSHA then promulgated 29 CFR Part 1960, which OSHA described as an initiative “to make the Federal sector’s injury and illness recordkeeping requirements essentially identical to the private sector” (quote from the OSHA Website, at http://www.osha.gov/dep/fap/recordkeeping_faqs.html). OSHA must therefore comply with 29 CFR §1904, which in relevant part requires the employer to give any employee, *or former employee*, a copy of the “OSHA 300 Log,” which must list both the names and conditions of all employees found to be injured or ill (see 29 CFR §1904.35(b)(2) for this requirement). Attached as Exhibit 8 is a true and correct copy of various pages from the 2005 OSHA publication “OSHA Recordkeeping Handbook,” which states on p. 140 that “OSHA has determined that employees, former employees and authorized employee representatives have a need for the information that justifies their access to records, including employee names, for all except privacy concern cases¹⁰” (emphasis added). On page 144 of this document, OSHA includes a Letter of Interpretation making clear that employee access to the OSHA 300 Log trumps the privacy requirements of the Health Insurance Portability and Accountability Act.

It is clear that an abnormal result on the beryllium lymphocyte proliferation test is a “recordable condition,” for two reinforcing sets of reasons: (1) 29 CFR §1904.7(b)(7) states that “significant progressive diseases, such as ...silicosis” must be recorded. Moreover, 29 CFR §1904.11 requires that a positive result on a skin test for sensitization to tuberculosis be recorded, and page 171 of the Recordkeeping Handbook notes that “blood tests with

¹⁰ Under 29 CFR §1904.29(b)(7)(i-vi), the employer is allowed to redact the name of certain affected employees, but only if the condition being recorded is within one of six “privacy concern categories,” which include “an injury or illness to an intimate body part or the reproductive system,” mental illness, etc.—but not any conditions akin to a chronic lung disease like beryllium disease.

abnormal results ... are clearly abnormal conditions and disorders”; and (2) any event that leads a medical professional to recommend restrictions in an employee’s duties is also a recordable event—and I assume that any competent physician would recommend that an OSHA inspector found to be sensitized to beryllium must assiduously avoid further exposure, which would result in the inspector’s not being able to enter establishments in many SIC codes where beryllium is likely to be present.

If OSHA is in compliance with federal recordkeeping requirements, therefore, *its 300 Log for 2004 should contain the names of the 11 inspectors diagnosed in that year as sensitized to beryllium*. I do not wish to exercise my right to receive this Log as a former employee, for reasons given previously (Finkel Declaration at ¶ 43)—in essence, knowing the names might cast doubt on my objectivity to conduct “blinded” epidemiologic research. Surely if I am legally entitled to receive the names of the 11 sensitized individuals by other regulations, I am entitled under FOIA to receive their CSHO ID numbers in lieu of this, which provide me the same ability to serve the compelling public interest, with no risk to personal privacy.

27. ***DOL Posits Two Fanciful Effects of the Potential Identification of its Inspectors by Name.*** DOL asserts that someone with access to the names of its CSHOs (access which I have explained above I will not have if merely provided with CSHO ID codes) could engineer two adverse effects upon its enforcement program: (1) he could incite U.S. employers to be less cooperative with CSHOs “profiled” by computerized data analysis as having “proclivities to cite certain violations or [assess] higher penalties” (DOL Brief at p. 27); and (2) he could incite “harassment of CSHOs on the job”

(DOL Brief at p. 26). Neither of these concerns is legitimate, for reasons I will explain in the following two paragraphs.

28. ***“Profiling by Proclivity” is a Straw Man Created by DOL—The Information Does Not Exist Upon which to “Profile.”*** In order to be of any utility whatsoever, a “profile” of a CSHO’s “proclivities” would have to credibly purport to distinguish how different CSHOs would react to identical situations (that is, how they would react to the conditions prevailing at the worksite of the employer who was considering buying or making use of the “profile”). Without the name of the CSHO, no “profile” could be used for any purpose, because the employer never has the opportunity to see the CSHO ID number of the inspector who arrives at his site—this is not part of the official credential/photo that the inspector is obliged to show to gain entry. But even if someone could “deduce” the names from the ID codes, he would have to manipulate two sets of data to develop any “profile” worth anything to a buyer of the information—data on the number of violations of different types the CSHO issued (or the number of penalties of different sizes) and data on the number of opportunities the CSHO had to cite each violation or assess each size of penalty. Only the first type of data are available; the second kind are not available and will never exist.

An example may help explain the fallacy of “CSHO profiling.” OSHA purportedly is concerned that I could develop information that “CSHO A” tends to cite a lot of scaffolding violations, or that he tends to issue large penalties. This information could supposedly lead the employer to steer “CSHO A” away from finding scaffold violations, or lead him to be less cooperative with an inspector he believed was “tough on crime.” But imagine two police officers, Smith and Jones, and an entrepreneur trying to

“profile” them. A database shows that Smith has arrested 20 cocaine dealers in the past year, while Jones has only arrested 2—perhaps further, 19 of Smith’s “busts” resulted in jail time, with an average sentence of 10 years, while both of Jones’ “busts” were acquitted. Does this mean that Smith is “tough” and Jones “easy,” and that drug dealers should run when they see Smith and breathe easy when they see Jones? Nothing of the sort. Suppose that in fact, Smith patrols the mean streets of Gary, Indiana, while Jones works out of rural Utah. *Smith may have arrested only one out of every ten dealers he could have encountered, while Jones may have found the only two dealers in his entire territory*—and Jones, not Smith, may be the greater threat to any given drug dealer who encounters one of the two policemen. Without information about the opportunities each policeman (or inspector) had to cite particular violations, there is no “proclivity,” only meaningless noise. In the case of OSHA, no such information about the “denominator” (the number of chances each inspector had to see certain violations, as a function of the types of inspections each has conducted) will ever or can ever be available, so the entire exercise is futile. I have performed several topic searches on the World Wide Web and found no instance of an entrepreneur offering to sell or give away such “profiles,” suggesting that potential purveyors of this information understand it cannot be made useful to customers.

There are several other reasons why “profiling” is a straw man. First, the sizes of monetary penalties are now largely determined by formula (with automatic discounts for small businesses, companies with no prior serious violations, etc.), not by CSHO discretion, and are frequently changed by headquarters during settlement discussions or litigation. Secondly, if OSHA

was truly trying to hide information about the likely violations a CSHO would find in a given establishment, it would not go to such lengths to provide a Web-based tool to employers (<http://osha.gov/pls/imis/citedstandard.html>) that allows them to rank the most frequently-cited OSHA standards in their particular SIC code. Finally, DOL chooses to mention only one of the three logically possible kinds of response by employers to “profile” information—negative, as opposed to positive or neutral. Even if someone were to convince employers that certain CSHOs were “tough,” DOL offers no evidence that employers will become less cooperative with presumptively “tough” inspectors. Since warrants are universally granted, the employer would be faced with the choice of either dealing with a “tough” inspector today, or a “tough and angry” inspector tomorrow. If anything, I maintain that most employers would react to such a “profile” by becoming more rather than less cooperative.

29. ***Release of CSHO Names Cannot Possibly Lead to “CSHO Harassment On the Job.”*** DOL (Brief, at p. 26) offers up a nonsensical assertion—that someone who must present a photo ID and name badge to perform his job can possibly be “harassed” if his job title is revealed. OSHA inspectors are not “undercover,” and indeed are not permitted to conceal their names or the fact that they are inspectors from the employers they inspect. Even if DOL meant to say in its Brief that CSHOs could be harassed “off the job” if identified as such, such a concern would be completely inconsistent with OSHA’s long-standing practice of publicizing the identities of its valued corps of inspectors. Attached as Exhibit 9 is a true and correct copy of a report available on OSHA’s public Web site, one of many examples where OSHA publicizes the names of its CSHOs to call

attention to their work. Attached as Exhibit 10 is a true and correct copy of another OSHA Webpage, which in this case publicizes both the names and the photographs of two CSHOs from Region VIII. If DOL truly believes that releasing encrypted CSHO IDs could lead, through laborious “deduction,” to the knowledge that Deshler, Kelly, Rake, Holland, etc. are in fact working as OSHA compliance officers, and thence to their subsequent “harassment,” it would seem inconsistent for DOL to already publicize their names and pictures so readily.

Perhaps more telling is this sentence from page 24 of the Brief filed by DOL in the OSHA DATA/CIH v. DOL case (see attached Exhibit 5), in which DOL argued that “the name, grade and duty station of federal employees is generally disclosable [under] 5 CFR § 293.311.” (At the time, DOL was arguing that the publicly-available OSHA personnel lists, combined with the “weak” CSHO ID codes extant then, would allow someone to deduce the names from the codes by using the first initial of the last name and the SSN information—an argument which of course no longer applies now that the “weak” codes are long-gone). Since 5 CFR §293.311(b)(2) states in relevant part that such personnel lists are not disclosable to the public if they “would otherwise be protected from mandatory disclosure under an exemption of the FOIA,” it seems that DOL believed only a few years ago that the public had an absolute right to receive the names of all CSHOs and their job title (i.e., “CSHO”). In any event, as discussed above, the CSHO IDs I seek for epidemiologic research do not provide a useful clue to the names they disguise, so DOL’s concern about “harassment” is unfounded.

30. ***DOL Has No Argument for Withholding the CSHO ID Codes of Retired Inspectors.*** Perhaps most importantly, all the arguments DOL offers

for withholding CSHO ID codes do not apply at all to a large and important group of inspectors—those who were exposed to beryllium in the past but have since retired from OSHA. I argued repeatedly with the OSHA political leadership in the 2000-2002 period that retirees should be given particularly high priority for testing, because of the industrial-hygiene truism that workplace concentrations of toxic substances tended to be higher in the 1970s and 1980s than they are today. Only by adding together the beryllium concentrations in each facility a retiree (identified only by CSHO ID) sampled during his career can I assess *how much greater* their exposures may have been on average than those of the current employees. By definition, none of the retirees has been tested, because OSHA has consistently refused even to send them the informational brochures that would allow them to make an informed decision about seeking medical attention on their own. Therefore, no conceivable medical privacy issues apply here. By definition, no retiree later identified by name could be “harassed on the job,” as they no longer inspect facilities for OSHA. And by definition, no “CSHO profile” I might allegedly want to develop for a retiree whose name I could “deduce” could possibly affect the OSHA enforcement program, as no employer could choose to be “uncooperative” with someone who will never inspect his facility. For these reasons, I maintain that DOL must at a minimum provide me with every CSHO ID associated with a retired inspector,¹¹ although the discussion above should persuade the Court

¹¹ There may be a small number of former inspectors who have assumed other jobs within OSHA, and therefore may have been tested for beryllium sensitization. Because no “harassment” or “employer non-cooperation effect” could possibly apply in the case of an OSHA employee who no longer conducts inspections, I assert that I am unequivocally entitled to the CSHO IDs of any “former but non-retired” inspectors as well.

that OSHA's arguments about the IDs of the current inspectors lack merit as well.

E. Summary and Conclusion

31. As stated at the outset, DOL's entire case for withholding two key pieces of information rests on two factual predicates: (1) that providing the company names associated with each sample result will compromise a very small fraction of trade secrets hidden (deliberately or by OSHA's incompetence) within the large database; and (2) that providing the CSHO ID codes will allow me to "deduce" the names of particular OSHA inspectors. I have shown that it is likely that there are no trade secrets in the air sampling results, marked as such or not, in the database, and any ones that do exist but that refer to inspections opened before June 1995 are no longer protected by DOL's own rules in any event. I have also shown that for DOL to verify that there are no protectable trade secrets in the database, or to redact any *de minimus* number that do exist, would occupy roughly 100 hours of staff time, rather than the 36,500 hours claimed by DOL. Even this modest effort is only necessary because of DOL's claimed incompetence in not marking the results properly in the first instance, and I (and the rest of the general public) should not be deprived of the millions of extremely valuable records that no one argues are withholdable for the sake of a few possible records that DOL may have failed to mark properly. On the CSHO ID codes, I have shown that it is impossible for anyone to generate a list of inspectors' names from the ID codes and the sampling data I requested.

32. DOL has only identified two similar interests that might balance or outweigh the compelling public interest in the unredacted data: a possible

“chilling effect” on the OSHA enforcement program caused by angry employers aggrieved by the release of CBI, and a similar effect in which employers stymie the enforcement program having been armed with the names and “profiles” of OSHA’s compliance inspectors. I have shown that neither of these effects is credible: few if any employers will have the motivation and the means to hinder OSHA enforcement (and those who do can do so already, without the added excuse of this FOIA release), and CSHO names are already public knowledge (and are further put before the public by OSHA’s own public relations efforts).

33. Finally, I believe it is extremely significant that DOL has not asserted that there are *any private interests at stake here*, only the public interest of the OSHA enforcement program—with one exception, the medical privacy of the inspectors who have undergone testing for beryllium sensitization (who cannot be identified by name from the data I seek, and whose interests are overwhelmed by the interests of more than 130,000 other public- and private-sector workers exposed to beryllium). The success of OSHA is a significant public interest, one I clearly revere, and untoward effects on employer cooperation or on the ability of inspectors to do their jobs are serious concerns indeed. But DOL’s own arguments reduce this case to a *balance between competing public interests regarding the OSHA program itself*. On the one hand, releasing the data might hinder the enforcement of workplace standards—and that could matter because if so, it could work to the detriment of the U.S. workforce. But on the other hand, withholding the data might prevent revelations that OSHA is failing to adequately discover, target, and remedy serious occupational health hazards, failing to update outdated health standards that allow intolerably high mortality risks to

persist, failing to keep up with new and emerging health hazards, and failing to take seriously the health of its own inspectors—and *that* would matter because it *would* work to the detriment of the U.S. workforce. The first effect might negatively affect the OSHA enforcement program; the second effect might positively affect that very program, while also advancing the other core missions of OSHA—standard-setting and education.

I have shown that the huge and varied public interests in having access to the data requested dwarfs any minor public interest in having the data withheld.

The two effects are not only commensurable (“apples to apples”), but they are two sides of the same coin—the compelling public interest in a strong and effective OSHA, and whether OSHA will on balance be made more or less effective by the resolution in this case. That public interest—by DOL’s admission the only interest at stake in this case—can only be served by ensuring that the Salt Lake database remains open to the public, and it can only be thwarted by allowing DOL to close it down.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief. Executed this 19th day of November, 2006, in Princeton, New Jersey.



Adam M. Finkel, Sc.D.

APPENDIX A
Information and Calculations from OSHA's "Chemical Information File"

1. Total Number of Samples, Estimated:

Attached as Exhibit 12 is a true and correct copy of the first page of a 33-page document I used when I was Director of Health Standards at OSHA. The document provides "counts"—the number of samples analyzed, but no information about the individual sample results—for each of the roughly 1,600 substances OSHA has ever sampled for in its history. The first row on the first page provides the total number of samples analyzed in six different time periods: each year from 1996 through 1999, and the totals from 1995-99 and 1985-99. The last two numbers—307,232 samples during 1995-99 and 1,561,560 samples during 1985-99—allow one to make a rough estimation of the number of samples analyzed each year during the entire period of my FOIA request (1979-2005).

This estimation begins with a simple calculation: because the larger number (1,561,560) contains within it the smaller number (307,232), it follows directly that the difference—1,254,328 samples—were taken during the non-overlapping period of 1985-1995. It now becomes clear that the intensity of OSHA sampling decreased markedly during the 1985-99 period:

1,254,328 samples during the 10 years (1985-95) = 125,400 samples/yr on average
307,232 samples during the next 5 years (1995-99) = 61,450 samples/yr on average

Thus, it improves the estimate to extrapolate forward to the 1999-2005 period using the more recent average figure, and to extrapolate backward to

the 1979-85 period using the older average. This yields the following estimate of the total number of samples for the FOIA period (1979-2005):

(16 years @ 125,400 samples/yr) + (10 years @ 61,450 samples/yr) =
 (2,000,000 samples [1979-95]+ 614,500 samples [1995-2005]) = 2,600,000 samples in all

2. Estimated Fraction of Samples, and Sampling Inspections, Between 1995 and 2005:

In my Opposition Declaration, I estimate how many of the 73,000 sampling inspections (DOL's estimate—DOL Brief at p. 22) occurred after 1995. This figure is important, because according to DOL regulations, only these inspections could possibly have any associated trade-secret requests that have not expired. Because 614,500 (the estimated number of samples taken during the past 10 years) is 23.7 percent of the total of 2,600,000 samples, it is reasonable to also assume that 23.7% of the 73,000 sampling inspections during the full period (1979-2005) occurred during the last 10 years of this period. 23.7 percent of 73,000 is approximately 17,000, which is the estimate I present in Paragraph 11 of my Opposition Declaration. Note that had I simply tried to compute the number of sampling inspections in the past ten years by multiplying 73,000 by the fraction (10/26)—assuming a constant sampling rate over the 26-year period despite the data showing otherwise—I would have arrived at a figure of 28,000 inspections; a larger number but still much more manageable than 73,000 in terms of workload to search case files or OSHA 91-A sampling forms.

3. Of the 1,600 Substances in the Database, Most of the Samples Are From the 21 Most Common Substances:

Examination of the counts for all 1,600 substances from 1985-99 reveals that most of the 1.56 million samples during this period fall into two groups.

Eleven metallic elements (antimony, beryllium, cadmium, chromium, cobalt, copper, iron, manganese, molybdenum, vanadium, and zinc) each appear almost exactly the same number of times (roughly 65,000 times each) in the database. This is because the device (an atomic absorption spectrometer) automatically provides a result for all 11 elements even if the CSHO requests only one element be reported. [Therefore, a substantial fraction of all the sample results OSHA puts in the Salt Lake database may be “unwanted” metal samples, which tends to exaggerate the number of useful samples taken in total.] A second arbitrary group is the 10 most common substances sampled other than the 11 metals: in descending order of frequency, these include:

Lead	approx. 111,000 counts from 1985-99
Asbestos	approx. 65,000
Toluene	approx. 39,000
Silica	approx. 32,000
Xylene	approx. 32,000
Styrene	approx. 16,000
Formaldehyde	approx. 16,000
Arsenic	approx. 13,000
Stoddard Solvent (petroleum distillates)	approx. 13,000
Isopropyl Alcohol	approx. 11,000

Adding these 10 counts to the counts for the 11 metals (11 x 65,000) yields a total of roughly 1.1 million samples. So, more than 70% of the 1.56 million samples analyzed during 1985-99 come from the 21 most common analytes.

This finding is not surprising, but it is relevant to this case, in light of the public comment by the American Foundry Society (fourth paragraph of its submission):

“Most sampling in the foundry industry involves substances that are common across many foundries, *such as crystalline silica or various metals, for which trade secrecy is not an issue.* However, some foundries use advanced process technology with complex and experimental resin systems and release of sampling data would compromise trade secrets.” (emphasis added).

None of the public commentators mention a single name of a substance that might possibly be a trade secret, so it is impossible for me to search the 33-page list of “counts” to see if that substance was ever sampled for (and even finding a non-zero count would, of course, not imply that there was ever an actual trade secret request made for that substance). It is clear, however, that the vast majority of all the records in the OSHA database involve substances that are so common that their presence in workplace air cannot possibly reveal anything of competitive interest. Finding iron in the workplace air at a steel mill is about as revealing as finding carbon dioxide at a Coca-Cola factory: whatever the secret ingredients are in Coca-Cola, CO₂ is not one of them.