

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ADAM M. FINKEL,

Plaintiff

v.

No. 3:05-cv-05525-
MLC-TJB

UNITED STATES DEPARTMENT
OF LABOR, OCCUPATIONAL
SAFETY AND HEALTH
ADMINISTRATION,

Defendant

DECLARATION OF RICHARD FAIRFAX

I, Richard E. Fairfax, do hereby declare that:

1. I am the Director of the Directorate of Enforcement Programs of the Occupational Safety and Health Administration (OSHA). In 1997 I became Acting Director of the Directorate of Enforcement Programs, and I have served in my present capacity since December 1998. In this capacity, I am responsible for the oversight of OSHA enforcement. In performing this responsibility, I confer with OSHA Regional Administrators on a weekly basis. Regional Administrators'

duties include supervising the enforcement activities of OSHA Area Offices.

2. Prior to becoming Director of the Directorate of Enforcement Programs, I held several other positions with OSHA. From 1994 to 1997, I was a Senior Industrial Hygienist in the Office of Health Compliance in the National OSHA Office. From 1991 to 1994, I was an Industrial Hygienist with an OSHA Regional Office, and from 1978 to 1991, I was a Compliance Officer. As a Compliance Officer and Industrial Hygienist with the OSHA Regional Office, I conducted health inspections that involved sampling for toxic substances.

3. The statements in this Declaration are based on the knowledge and experience I have gained as an employee of OSHA from 1978 to the present.

4. OSHA almost invariably seeks to conduct inspections on a consensual basis, except for very rare instances (less than approximately 1% of the time) in which OSHA anticipates the need for a warrant and obtains one in advance. Employers consent to OSHA inspections approximately 98% of the time.

Employers insist on a warrant less than approximately 2% of the time.

5. OSHA health standards establish exposure limits for over 500 air contaminants that are considered toxic substances because they can cause illness or death. *E.g.*, 29 C.F.R. § 1910.1000 Table Z-1 through Z-3, and the expanded health standards. When OSHA conducts an inspection and has reason to believe that employees at the facility might be exposed to any of these toxic substances, the inspection will include the collection of samples to determine the extent to which employees are exposed to toxic substances during their work activities.

6. In less than 2% of OSHA inspections involving sampling, the employer requests that OSHA protect the sampling data, or some of the chemicals identified by the CSHO, as a trade secret.

7. After OSHA collects samples of toxic substances to which employees are exposed, it sends the samples to its Salt Lake City Technical Center, in Utah, for analysis. The Salt Lake City Technical Center analyzes the samples and enters

the result in a database for OSHA's use. Neither the Salt Lake City Technical Center's database, nor any OSHA database, indicates whether the employer requested that the sampling data be treated as a trade secret. The only manner in which OSHA can ascertain whether these sampling records contain information that the employer claimed is a trade secret would be for OSHA to examine all the health enforcement case files and some of the safety case files that correspond to the requested sampling records.

8. It would be very burdensome for OSHA to examine all enforcement case files. According to data gathered by Cathryn Goedert of OSHA's Directorate of Science, Technology, and Medicine, OSHA has conducted over 73,000 inspections to obtain the sampling data that is covered by the FOIA request involved in this litigation. See Declaration of Cathryn Goedert. Thus, OSHA would have to examine over 73,000 enforcement case files to determine which employers designated sampling data as trade secrets.¹ The examination of each file can range

¹The number specified in the text is an estimate of the inspections OSHA conducted from 1979 to June 1, 2005, to

from minutes to hours and perhaps even days depending on the size of the file. Even if OSHA spent just 30 minutes reviewing each file, it would take approximately 36,500 hours, or 1,521 days, which is the equivalent of over six employee work years (assuming there are 250 work days per year).

9. In addition to the time needed to review the files, OSHA would have to expend time and resources to obtain access to many of the files. Under OSHA's record management plan, unless the case file is of "special interest" (*i.e.*, OSHA suspects there may be further activity, such as, for example, a FOIA request), Area Offices are directed to transfer enforcement case files containing sampling data to the appropriate National Archives and Records Administration (NARA) Federal Records Center after three years from the closing of the case.

obtain the requested sampling data. Some inspections, however, involve multiple employers, and enforcement case files are maintained for each employer that is subject to an inspection. Accordingly, there are presumably more enforcement case files corresponding to the requested sampling data than there are inspections.

10. Because the FOIA requests at issue in this case cover sampling data obtained since 1979, the overwhelming majority of the relevant enforcement case files have been closed for more than three years. Thus, these enforcement case files are presumably in the records centers mentioned in the preceding paragraph. To review these files, OSHA officials would have to either request that NARA ship the files back to the OSHA area offices or arrange for OSHA personnel to travel to the records centers.

11. For the reasons stated in paragraphs 8 through 10, if OSHA had to examine all enforcement case files to determine which contain trade secrets, significant resources would be diverted from OSHA's mission of protecting employee health and safety.

12. Based upon my experience, I believe 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. I would expect that employers, knowing this, would become reluctant to cooperate with

OSHA. This reduced level of cooperation would likely result in a significant increase in the number of employers who insist on OSHA obtaining a warrant before allowing OSHA to conduct any air monitoring or an inspection. If this were to occur, OSHA's ability to advance the Occupational Safety and Health Act's goal of protecting employee safety and health would suffer in the following ways:

a) OSHA's ability to obtain sampling data that accurately reflects the normal exposure levels of the toxic substances could be impaired. An employer who insists on a warrant would have time to prepare for the anticipated inspection; the employer could stop or change the process it normally uses in a way that temporarily eliminates or reduces the amount of the toxic substances to which employees are normally exposed. It is likely that some employers would take advantage of the opportunity to conceal in this manner the extent to which their employees are normally exposed to toxic substances. If so, in some instances OSHA's inspection will gather data that is qualitatively different than the data it

would have obtained had the employer consented to the inspection in the first instance.

b) A significant increase in the need to obtain a warrant could harm OSHA's interest in compliance and the effectiveness of its enforcement program. Employers could – and some likely would – use the opportunity to prepare for the inspection to avoid detection of OSH Act violations and thereby prevent OSHA from issuing citations for violations. OSHA's ability to deter future violations by issuing citations could therefore be diminished.

c) In addition, it can take days or even weeks to obtain a warrant. For any violations that may exist at the facility to be inspected, the employer's obligation to correct those violations will usually be delayed by that time period. Thus, employees could be exposed to hazardous conditions for a longer period of time than they would have been had OSHA been able to conduct its inspection on a consensual basis.

d) A significant increase in the need to obtain a warrant could also harm OSHA's interest in compliance and program

effectiveness by diverting resources from conducting inspections to preparing warrant applications.

13. Compliance Safety and Health Officers ("CSHO"s) conduct OSHA inspections. Each CSHO has a unique CSHO identification number. The CSHO identification numbers are used strictly as an internal management tool for reviewing and assessing the work activities of CSHOs. For example, the identification numbers allow supervisors to monitor the amount of time particular CSHOs work; the OSHA safety and health standards they recommend for citations; and other work activities they perform, such as providing telephone assistance to the public. By allowing OSHA supervisors to assess the work performance of all CSHOs, the identification numbers allow OSHA to evaluate the strengths and weaknesses of its CSHOs, which helps OSHA improve the quality of OSHA supervision and training programs for its CSHOs and thereby improve the quality of CSHO inspections.

14. In a directive effective December 21, 2001, OSHA changed the manner in which it formulates identification numbers for CSHOs. Under this system, all existing

identification numbers were changed so that letters and numbers are fully randomly assigned. This was done to remove any portion of a CSHO's social security number or initials, both of which had previously been used in the formulation of CSHO identification numbers. The random formulation method instituted in 2001 continues for new CSHO assignments. Additionally, when the conversion took place, all historical activity data was changed to the newly assigned random codes.

15. CSHO identification numbers serve to distinguish and identify CSHOs. They are therefore an integral part of the identity of a CSHO. A CSHO's identity could be discovered by someone intent on doing so if his CSHO ID number was known and could be tied with other publicly available information. For example, if a CSHO's ID number is known, and is associated with particular inspections conducted on particular dates, the CSHO's identity could be deduced.

16. Public knowledge of a CSHO's identity would have two undesirable results. First, it could lead to computerized profiling of a CSHO's proclivities to cite particular violations or

higher penalties, thus enabling employers to be less cooperative with, or deny to entry to, certain CSHOs. Second, it could lead to harassment of CSHOs on the job.

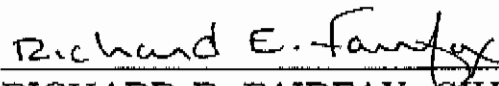
17. Likewise, release of the OSHA inspection ID numbers would allow identification, by cross-referencing with the publicly available OSHA inspection database on the OSHA website (<http://www.osha.gov/oshstats/index.html>) of the employer that was the subject of the inspection. Through identifying the locality of the inspection and the local Area Office that conducted the inspection, one can potentially identify the CSHO and the name of the employer whose facility was inspected. Similarly, by cross-referencing, one could identify the employer through the public IMIS database if one had the specific day (as opposed to just the month and year) of a particular inspection.

18. Release of the OSHA Office ID number would also allow cross-referencing, although not quite so easily. The OSHA Office ID numbers are available on OSHA's public website (<http://www.osha.gov/oshstats/index.html>). A FOIA request for a list of all inspections conducted by a particular

OSHA Office during a particular time period, would provide the requester with a list of employers that could be matched with the list of samples disclosed in this case. By comparing the list of employers inspected by a particular OSHA office in a particular month and year, to the list disclosed in this case of samples taken in a particular month and year would – if the latter also contained the OSHA Office ID – allow the requester to reverse engineer which employers yielded which samples.

I declare under penalty of perjury that the foregoing is true and correct. 28 U.S.C. § 1746.

Executed on 13 SEPT 2006



RICHARD E. FAIRFAX, CIH
Director
Directorate of Enforcement Programs
Occupational Safety and Health
United States Department of Labor