

Peter Dickson PD-1592
Potter and Dickson
194 Nassau Street
Princeton, NJ 08542
(609) 921-9555
ATTORNEYS FOR THE PLAINTIFF

**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.)

**BRIEF OF PLAINTIFF DR. ADAM FINKEL
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

October 13, 2006

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administrative appeals on August 12, 2005 and September 20, 2005, respectively. Other than granting a fee waiver request, the defendants Department of Labor (DOL) and Occupational Safety and Health Administration (OSHA) never made any formal response to his requests until after this suit was filed. A few days ago the defendants furnished some data, but redacted and formatted so as to be unusable for any reasonable purpose.

I. STATEMENT OF FACTS

In the interests of not burdening the Court with voluminous duplicative materials to review, we refer the Court to the Declarations and Plaintiff's Statement of Material Facts As To Which There Is No Genuine Dispute (Plaintiff's Statement of Material Facts). This portion of our brief will attempt to provide an overview and some highlights of those more detailed statements. Other pertinent facts are referenced as they are needed in the argument. (For the convenience of the Court, the numerous abbreviations used in plaintiff's declarations are keyed to a glossary at the end of Dr. Finkel's Declaration.)

OSHA is the Federal agency with primary responsibility for assuring the safety of the American workplace and its approximately 120 million workers. Approximately 5,500 workers perish each year from workplace safety hazards. However, a far more serious problem is death and serious injury due to exposure to toxic substances in

the workplace. The lead study estimates that there are approximately 60,000 premature deaths each year from work-related exposures to toxic substances. While OSHA has realized some successes in the past, its more recent record suggest that it is not making progress in its mission. Plaintiff's Statement Of Material Facts ¶¶ 2, 41-50. Average concentrations of many toxic substances in U.S. workplaces exceed safe levels. Declaration of Dr. Adam Finkel (Finkel Declaration) ¶¶17-20; 47-48.

Dr. Finkel is an experienced research scientist and a nationally recognized expert in quantitative risk assessment and regulatory policy. He currently holds two academic appointments: Professor of Environmental and Occupational Health at the University of Medicine and Dentistry of New Jersey (UMDNJ) School of Public Health in Piscataway, New Jersey, and Visiting Professor of Public Affairs at the Woodrow Wilson School of Public and International Affairs in Princeton, New Jersey (WWS). He has published numerous peer-reviewed papers and studies, and has received several distinguished awards and grants. His research focuses on using sound scientific and economic analysis in regulatory decision-making. Plaintiff's Statement Of Material Facts ¶¶ 2-5.

..... **A. Dr. Finkel's Service At OSHA And Whistleblower Retaliation Action**

Dr. Finkel was a Senior Executive Service (SES) employee of OSHA from 1995 until

December 2005, first as OSHA's Director of Health Standards Programs until 2000. In this position, he was responsible for promulgating all of OSHA's regulations addressing chemical, biological and ergonomic hazards in the nation's workplaces. In this position, he developed numerous partnering and cooperative relationships with industry, promoted the use of sound science and economic analysis in regulation and won wide praise for these efforts. Finkel Declaration ¶¶ 10-14. In 2000, Dr. Finkel became the agency's Region VIII Administrator, with supervision over most agency activities, including workplace inspections and air sampling, in Colorado, Montana, North Dakota, South Dakota Utah and Wyoming. Plaintiff's Statement Of Material Facts ¶ 13.

As is set forth at length in Dr. Finkel's Declaration and discussed in further detail below, he became concerned over OSHA's lack of action on the serious health problems, including in some cases death, that result from exposure to beryllium. Beryllium is a widely used element in alloys and process manufacturing that is benign in finished products but its fine dust can cause a serious illness called Chronic Beryllium Disease (CBD). CBD is a lung disease that damages the body's immune systems in the lungs and causes white blood cells to fill the lung's air sacs, with suffocation as the end stage at death. Once a person becomes "sensitized," or affected by beryllium, it is widely advised to avoid any further exposure to the

element and take a number of steps to stave off any further progression to CBD. Chronic Beryllium Disease is therefore a serious and potentially fatal illness if not diagnosed and treated (with among other things no further exposure). But despite sustained efforts by Dr. Finkel, OSHA refused to take steps to protect its approximately 4,000 current and former inspectors, also known as Compliance Safety and Health Officers, or CSHOs. Finkel Declaration ¶¶ 25-36, Plaintiff's Statement Of Material Facts ¶¶ 14-36.

After the agency's inaction became the subject of stories in the press, the agency's senior political leadership accused Dr. Finkel of "leaking" information to the press and reassigned him to a dead end job that required him to relocate his family back to Washington. Dr. Finkel then pursued a whistleblower action at the Federal Office of Special Counsel, and in the course of discovery was shown internal emails from the agency political leadership that reflected threats to his safety (including one that threatened the use of a "working weapon" on him). He thus presents a compelling case of agency animus against him, which may explain OSHA's unprecedented and unjustified refusal to grant his FOIA requests. He received a substantial settlement of that action, and returned to an academic career.

..... **B. Dr. Finkel's First FOIA Request: Beryllium Exposure and Illness**

By letter dated June 26, 2005, Dr. Finkel made a request to OSHA for "various data pertaining

to OSHA inspection activities,” namely sampling records from Jun 1, 1979 to June 1, 2005, in which the substance beryllium was analyzed. Finkel Declaration, ¶¶ 38-42, Exhibit 28. The request identified the specific fields from the OSHA database on which the records are kept and the format in which the records would be produced. The request also sought a coded list of OSHA employees who had received a beryllium exposure test known as the Beryllium Lymphocyte Proliferation Test (BeLPT) since January 2004, the coding to be accomplished to avoid revealing the identity of any of the inspectors tested. Finally, the letter requested the results of any analysis that OSHA had undertaken to estimate the cumulative exposures of any of its employees to beryllium. The letter requested a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A).

We will refer to this as the Beryllium Exposure Request, and Dr. Finkel’s second request as the Salt Lake Database Request. (Most of the information sought in the Beryllium Exposure Request is actually maintained on the same Salt Lake City Technical Center Industrial Hygiene Database as encompassed in Dr. Finkel’s second request, but includes additional medical information that is not kept on any database.)

This request followed a long-standing scientific interest of Dr. Finkel’s, which has vital public health implications. (Although the purpose of the request and the requester’s

motives are largely irrelevant for a Freedom of Information Act request, they do have some relevance here and we set them out for the Court's information.) Beryllium is one of the hazardous or toxic substances for which OSHA has issued a Permissible Exposure Limit (PEL).¹ Plaintiff's Statement Of Material Facts ¶¶ 15, 21. It is a metallic element commonly used in alloys for military and aerospace applications as well as computers, sporting goods and dental appliances. Fine beryllium dust causes a lung disease called Chronic Beryllium Disease (CBD), which deranges the immune system and produces a runaway growth of white blood cells in the lungs, and can ultimately cause death by suffocation. Plaintiff's Statement of Material Facts ¶ 16. According the United States Department of Energy (DOE), "CBD is a chronic, often debilitating, and sometimes fatal lung condition. Beryllium sensitization is a condition in which a person's immune system becomes highly responsive (allergic) to the presence of beryllium in the body."² The mortality rate was previously thought to be around thirty percent,

¹ Dr. Finkel's Declaration contains a glossary of all the abbreviated terms he uses.

² 64 Fed. Reg. 68854 (Dec. 8, 1999). This is the DOE's promulgation of its Chronic Beryllium Disease Prevention Program, and contains an extensive discussion of beryllium and its industrial and military applications, and the consequences of exposure to beryllium. As Dr. Finkel discusses, the DOE has taken a more responsible position on beryllium exposure than has OSHA. Finkel Declaration ¶ 28.

although DOE estimates that it is lower today.³

In recent years the medical literature has indicated that far less exposure to beryllium can result in “sensitization” and CBD than previously thought. Indeed, it appears that some workers have developed CBD after exposure to levels 10,000 times less than the current OSHA PEL. Once a person becomes sensitized, further exposures increase the adverse health risk and should be avoided. Plaintiff’s Statement of Material Facts ¶ 18. In 2001, Public Citizen petitioned OSHA to reduce the PEL for beryllium to one tenth of the current level, but the agency did not grant the petition despite overwhelming evidence to support the request. According to the Public Citizen petition, the current standard was established in 1949 by the Atomic Energy Commission to address a different disorder and was not based upon science.⁴

³ 64 Fed. Reg. at 68856.

⁴ According to the Public Citizen petition:

In fact, the AEC standard was barely grounded in science at all. In a memoir, Merrill Eisenbud, one of the pioneers in beryllium disease, described how the standard was developed:

One morning I was riding to [a new laboratory that would use beryllium] by taxi with Dr. Willard Machle. He was a medical consultant to the company that was building the laboratory ... We knew that when we arrived we would be expected to provide the laboratory designers with design criteria and decided that a tentative

Dickson Declaration Exhibit 32.

In 2001, Dr. Finkel reviewed information of OSHA showing that some OSHA inspectors had been exposed to much higher levels of beryllium concentrations than was prudent by any measure. In some case, concentrations were high enough to cause beryllium sensitization or CBD from a single encounter in one workplace. Finkel Declaration ¶ 27.

Ultimately, and reluctantly after adverse publicity, OSHA did offer testing to its employees, but only 271 accepted the offer. Of these ten tested positive for beryllium sensitization, a larger than expected number. Plaintiff's Statement of Material Facts ¶ 35-36. This is a large enough sample to carry out research critical to understanding whether OSHA is performing the duties committed to it by law, and how to better perform those duties, including protecting its employees and the American workplace from the serious hazards of beryllium exposure, sensitization

[standard] should be two micrograms per cubic meter. In view of the circumstances, this standard has been dubbed the "taxicab standard" in recognition of the seemingly flimsy basis on which it was established.

The Occupational Safety and Health Act passed in 1970 and OSHA adopted the 2.0 ug/m³ AEC standard in 1971 when the agency began its operations.

Public Citizen Petition, note 4 supra (citations omitted).

and CBD.

Just a few days ago, OSHA sent Dr. Finkel a list that shows nothing more than the already public fact that eleven (not ten) of the tested employees tested positive. Dickson Declaration, Exhibit 34. No other information can be gleaned from it.

..... **C. Dr. Finkel's Second Request: The Salt Lake Database**

By letter dated August 12, 2005, Dr. Finkel made a second FOIA request to OSHA, seeking essentially "[a]ll sampling records from OSHA's Salt Lake City Technical Center's analytical database, beginning on or about June 1, 1979 and extending to June 1, 2005" and specifying the precise fields of data that he sought. (Salt Lake Database Request.) Finkel Declaration Exhibit 30. These are records quantifying the airborne and surface concentrations of chemical substances in workplaces in which OSHA inspectors obtained samples. A substantial amount of very valuable research can be performed with this database, and indeed as we discuss below, a substantial amount of very valuable research has already been conducted by those who were freely given this material in the past, often without any need to make a formal FOIA request. These research opportunities are discussed in detail in the Finkel Declaration ¶¶ 73-78. To take one important example (which he described in his request), Dr. Finkel intends to study whether more stringent environmental emission controls can lead to greater hazard in the workplace because of the

controls selected. For example, a firm can reduce the amount of a chemical that leaves the facility through a smokestack by minimizing ventilation within the facility, but that increases the concentration of that chemical workers would breathe. This is an important issue that implicates several agencies and was the subject of a conference sponsored by OSHA and EPA, and has apparently never been rigorously tested. Finkel Declaration ¶¶ 47-48; Plaintiff's Statement of Material Facts ¶¶ 68-72.

By notice published in the Federal Register on April 21, 2006 the DOL solicited comments on Dr. Finkel's request for the Database. Specifically, the notice stated that

The FOIA request seeks information concerning all samples taken by OSHA from 1979 to June 1, 2005. Information requested for each sample includes the establishment name and address; the identity of the substances sample; the sample type (personal, bulk, area, wipe, etc.); the numerical results of the sample analysis; and other information. OSHA hereby solicits comments from affected employers in order to determine whether public release, in a form that identifies specific employers or workplaces, of sampling data that indicates chemical identities and the use or presence of particular chemicals or substances, would disclose confidential commercial or

trade secret information.

71 Fed. Reg. 20732 (April 21, 2006)(emphasis added). The notice described the consequences of granting the request:

A complete response to this FOIA request would result in the public disclosure of sampling records located at OSHA's Salt Lake City Technical Center, which processes workplace samples taken by OSHA compliance officers during onsite compliance visits.

Id.

But OSHA went further, in what can only be an astonishing demonstration of hostility to Dr. Finkel's request, and actually trolled among trade groups for comments objecting to the request. By letter dated April 21, 2006, OSHA wrote to an unknown number of trade associations and specifically noted that "[t]here is reason to believe that the release of this data could include the confidential commercial or trade secret information that has not been previously disclosed to the public." Finkel Declaration ¶ 54. This is not the action of a neutral agency acting to carry out the law, but an agency intent on building a record that would justify its preordained decision to frustrate a former senior official against whom it has a demonstrated record of animus.

A few days before this motion was due, OSHA provided two CDs and some written materials that explained the data on the CDs. (One of the CDs is

unreadable.) It is clear that the data most needed to conduct rigorous research, such as the company names and addresses, is redacted. Dickson Declaration Exhibit 33 Accordingly, the information furnished can not be used in any scientifically acceptable manner.

II. ARGUMENT

Summary judgment is warranted if the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). A “genuine issue” of “material fact” exists “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Although all facts and inferences therefrom are to be construed in favor of the party opposing the motion, the non-moving party must raise more than just “metaphysical doubt as to the material facts,” Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). If the evidence is merely colorable or is not significantly probative, summary judgment may be granted.” Anderson, 477 U.S. at 249-50 (citations omitted). Generally, FOIA cases are resolved on motions for summary judgment, once the documents in issue are properly identified. See, e.g., Miscavige v. IRS, 2 F.3d 366, 369 (11th Cir. 1993). The

district court makes its determination de novo. See 5 U.S.C. § 552(a)(4)(B). In order to prevail on a motion for summary judgment, the defendant agency has the burden of showing that its search was adequate and that any withheld documents fall within an exemption to FOIA. Id; OSHA Data/CIH v. United States Department of Labor, 220 F.3d 153, 160 (3d Cir. 2000). The central purpose of FOIA is “to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.” Dep’t of Air Force v. Rose, 425 U.S. 352, 361 (1976) (citations omitted). Because the basic objective behind FOIA is disclosure, not secrecy, the exemptions are to be “narrowly construed.” FBI v. Abramson, 456 U.S. 615, 630 (1982).

A. Release of the Data In The Beryllium Exposure Request Would Not Create An Unwarranted Invasion Of Privacy And Would Overwhelmingly Serve The Public Interest

Dr. Finkel expects that OSHA will claim that any further disclosure of the information sought in his first request is covered by FOIA Exemption 6, which exempts “personnel and medical files and similar files the disclosure of which constitutes a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552 (b)(6). This is plainly incorrect. The law is relatively simple, the facts are clear and this is not a close case.

It is well settled that Exemption 6 establishes a balancing test, in which the

privacy interests are weighed against the public interest in disclosure. See, e.g., U.S. Department of Justice v. Reporters Committee, 489 U.S. 749 (1989); Department of Air Force v. Rose, supra. Under this exemption, “the presumption in favor of disclosure is as strong as can be found anywhere in the Act.” Washington Post Co. v. Dep’t of Health & Human Services, 690 F.2d 252, 261 (D.C. Cir. 1982), quoting Ditlow v. Schultz, 517 F.2d 166, 169 (D.C.Cir. 1975); Citizens for Environmental Quality v. U.S. Dep’t of Agriculture, 602 F. Supp. 534 (D. D.C. 1984). In weighing an Exemption 6 claim, the court must first weigh the privacy interests, and “if no significant privacy interest is implicated,” then disclosure is mandated. National Ass’n of Retired Fed. Employees v. Horner, 879 F.2d 873, 874 (D.C. Cir. 1989), cert. denied, 494 U.S. 1078 (1990) (emphasis added). The plain language of the statute describes the privacy interest as one aimed at preventing a “clearly unwarranted” invasion of privacy. If a privacy interest exists, the court must then weigh the public interest in disclosure, based upon FOIA’s purpose: to “shed light on an agency’s performance of its statutory duties.” Reporters Committee, supra, 489 U.S. at 773. The actual purpose of the requester is not necessarily relevant; the inquiry is a public interest assessment of the documents requested and the effects of disclosure on the public. Id. at 771-772.

Applying these principles, disclosure of the beryllium data does not

represent a “clearly unwanted invasion of privacy” and there is a powerful public interest in disclosure, which will not only reveal how well OSHA is carrying out – more particularly, not carrying out – its statutory duties, but also provide substantial assistance to OSHA in the fulfillment of those duties.

The records in question consist of “[a]ll sampling records ... where beryllium (IMIS analyte 0360) was analyzed” including all data fields in the database, or at least the date of the sample, the office ID number, the inspection ID number, the (randomly coded) CSHO ID number, the establishment name and address, and specific information about the sampling test and results. Dr. Finkel also requested a list of all OSHA employees who have received the BeLPT since January 1, 2004, with the test result (positive or negative) for each ID number. Finally, Dr. Finkel requested the results of any analyses OSHA has undertaken to estimate the cumulative exposure of any of its employees to beryllium.” It appears that 271 CSHO’s have been tested thus far, and that ten have tested positive. Plaintiff’s Statement of Material Facts ¶ 35.

We accept for purposes of this motion that a portion of the information, the BeLPT test results with the randomly coded CSHO ID number, is contained in “personnel and medical files.” (To the extent that OSHA claims a confidential business information or trade secret claim under Exemption 4 for the inspection

records, we incorporate our argument concerning Dr. Finkel's second request below.)

However, disclosure of this information can not under any circumstances create a "clearly unwarranted invasion of personal privacy" for the simple reason that the CSHO ID numbers are coded so as to conceal the actual identity of the inspectors in question. Plaintiff's Statement Of Material Facts ¶ 65. While at one time OSHA CSHO ID numbers consisted of the first initial of the inspector's last name and the last four digits of the Social Security number, which could have compromised the privacy of individual inspectors, the agency has since encrypted a random CSHO ID number which cannot be used to identify the individual inspector, and corrected all past records as well. Finkel Declaration ¶ 72, Plaintiff's Statement Of Material Facts ¶¶ 64-66. Thus no invasion of personal privacy is implicated, let alone a "clearly unwarranted one."

It is well-established that disclosing data in such a manner as to prevent specific identification of the individuals does not constitute an unwarranted invasion of privacy. In Rose, supra, the requester sought case summaries of Air Force Academy disciplinary cases with "personal references or other identifying information deleted." The Supreme Court unanimously held that this fulfilled the confidentiality purposes of Exemption 6 and ordered the information disclosed for

an in camera review to assure redaction of identifying information. The requester is not required to “eliminate all risks of identifiability.” 425 U.S. at 381. Congress did not intend to “bar disclosure in any case in which the conclusion could not be guaranteed that disclosure would not trigger recollection of identity in any person whatsoever.” *Id.* at 378. A very analogous case is Citizens for Environmental Quality, supra, in which a group requested copies of all health tests performed on Forest Service employees in connection with herbicide spraying in a ranger district in Idaho. The group disclaimed any interest in any information which might identify the employees tested. It turned out that only employee had been tested, and the agency argued that it was publically known where the spraying took place and that the identity of the employee “could be deduced” from this information. The court disagreed and ordered the information disclosed, ruling that more than “[a]n increased likelihood of speculation as to the subject of the test” is needed, and that “[o]nly the likelihood of actual identification” justifies non-disclosure. Citizens for Environmental Quality, supra, 602 F. Supp. at 538, citing Rose, supra. Here, since no one can identify the tested inspectors, there can be no “clearly unwarranted invasion” of their “personal privacy.” No further inquiry is necessary and the data should be given to Dr. Finkel.

But in any event, the public interest overwhelmingly favors disclosure.

Perhaps as many as 130,000 workers are exposed to beryllium on a daily basis. Plaintiff's Statement Of Material Facts ¶ 20. It is beyond dispute that Chronic Beryllium Disease is a serious and sometimes fatal disease, and that once an individual is sensitized to it, then precautions should be taken to avoid any further exposure to the substance. Plaintiff's Statement Of Material Facts 14-16. It is beyond dispute that a failure to diagnose beryllium sensitization is tantamount to increasing the incidence of CBD with potentially fatal results. Plaintiff's Statement Of Material Facts 19. It is beyond dispute that OSHA's current PEL was first established in 1970 based on a limit set in 1949, apparently in the back of a taxicab. Plaintiff's Statement Of Material Facts 21-22. It is beyond dispute that perhaps hundreds of OSHA's current CSHOs are continuing to visit and sample in plants in which beryllium dust is present. Finally, it is beyond dispute that the current OSHA PEL is plainly inadequate to protect the health of workers and OSHA inspectors, and that OSHA shows no sign of revising it any time soon. Plaintiff's Statement Of Material Facts ¶ 23.

It is also of paramount public interest that until public disclosure of its inaction in protecting its own employees, OSHA did nothing to fulfill its mission. The agency rejected Dr. Finkel's repeated requests to offer the agency's CSHOs the opportunity to take the BeLPT. Only after this plain dereliction of its duty to

prevent serious illness and perhaps death became public did the agency begin offering the test, although it had previously made misleading statements to the effect that testing had already begun. Even then, the agency's offer of the test failed to convey the urgency of the situation, and only a small fraction of the CSHO's took up the offer of the test. Nonetheless, the sample of those who did take the test is large enough for preliminary purposes, and a larger than expected number tested positive, suggesting that beryllium sensitization is more prevalent than previously thought. Plaintiff's Statement Of Material Facts ¶¶ 26-38.

The public interest is particularly likely to outweigh privacy interests when the individuals whose privacy is at stake have an interest in the disclosure. See, e.g., S. Utah Wilderness Alliance v. Hodel, 680 F. Supp. 37 (D. D.C. 1988); National Ass'n of Atomic Veterans v. Dir. Def. Nuclear Agency, 583 F. Supp. 1483 (D. D.C. 1984). In the latter case, the court ordered disclosure of the names of those exposed to radiation tests to a non-profit group which was studying the adverse effects of the tests and directly inform those affected. No less a public interest is involved here, in which the CSHOs themselves would be vitally interested in the effects of exposure to beryllium, both for themselves and also for the workers whose health they are charged with protecting. Also very similar is Int'l Diatomite Producers Ass'n v. U.S. Soc. Sec. Admin., 1993 WL 137286 at *5

(N.D. Cal. Apr. 28, 1993), appeal dismissed, No. 93-16723 (9th Cir. Nov. 1, 1993), in which the court found that release of certain medical records including identifying names and addresses of diatomite industry workers served the “public interest in evaluating whether public agencies (OSHA, MSHA and EPA) carry out their statutory duties to protect the public from the potential health hazards from crystalline silica exposure.”

This is a serious public health problem and it seems inevitable that more CSHO’s and workers will become sensitized while OSHA fiddles about release of this information. It is equally alarming that OSHA has now said that it has not “undertaken to estimate the cumulative exposure of any of its employees to beryllium.” Plaintiff’s Statement of Material Facts ¶ 61.

It is at the core of OSHA’s mission that it provide “medical criteria which will assure insofar as practicable that no employee will suffer diminished health, functional capacity or life expectancy as a result of his work experience.” 29 U.S.C. § 651 (b)(7). Yet, the agency’s response to the repeated efforts of Dr. Finkel and others to prevent further serious adverse health effects and possible death was to (1) deny any testing of its affected employees until its dereliction was exposed to the public, (2) retaliate against Dr. Finkel by reassigning him to a dead end job, (3) offer the BeLPT only reluctantly, (4) despite alarming results of the

first round of tests, do nothing to expand the testing and (5) do no studies whatsoever of the implications of the test results in the face of substantial evidence that its current PEL is well short of what is necessary. This is a record that shows that OSHA will not act until more public disclosure occurs, and that the public would be vitaly interested to know that beryllium exposure is a more serious problem than previously thought. OSHA should be doing far more than punishing the dedicated employees who are trying to fulfill the agency's mission.

Finally, the information sought will shed very critical light on how OSHA should revise its PEL for beryllium to fulfill its statutory duties. The positive or negative BeLPT result can be matched up against that (randomly coded and unidentifiable) CSHOs history of inspection visits and the beryllium air samples encountered during that cumulative history of exposures. The extent of exposure to beryllium air samples and its correlation to a positive or negative BeLPT results will substantially assist OSHA (and other safety agencies as well) in determining how to set the PEL for beryllium so as to assure insofar as practicable that no employee will suffer diminished health, functional capacity or life expectancy as a result of [exposure to beryllium in] his work experience.” 29 U.S.C. § 651 (b)(7). It is widely accepted now that the current PEL is inadequate and in need of revision, and the data sought by Dr. Finkel is a unique opportunity to measure

cumulative exposures against a positive or negative BeLPT, and so to determine how to revise the PEL. Plaintiff's Statement of Material Facts, ¶¶ 57, 62.

OSHA's undisputed history of unjustified and irrational animus towards Dr. Finkel, based upon this very controversy, is one obvious explanation for its refusal to provide the information he requested. But it is helpful that the Supreme Court held in Reporters Committee, supra, that the actual identity of the requester can play no role in deciding the public's interest in disclosure of the information. 489 U.S. at 771. No matter how much the agency is biased against Dr. Finkel, that bias can as a matter of law have no impact on the operation of FOIA. The information sought in the Beryllium Exposure Request should be given to Dr. Finkel.

B. No Legitimate Trade Secret Or Confidentiality Interest Under Exemption 4 Exists To Deny Disclosure Of The Inspections Database

Dr. Finkel expects that OSHA will object to disclosing the information sought in his Salt Lake Database Request on the basis of Exemption 4, which protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. ¶ 552(b)(4). This exemption is inapplicable for multiple reasons.

According to the Third Circuit, the "leading case" on the meaning and

application of Exemption 4 is National Parks and Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974). OSHA Data/CIH, *supra*, 220 F.3d 153, 162, n. 24.⁵ National Parks established a two part test for determining if requested information is covered by Exemption 4. The court should consider information to be confidential if disclosure is “likely ...either (1) to impair the Government’s ability to obtain the necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.” 498 F.2d at 770 (footnote omitted). If the information is required to be furnished to the government, then the first part cannot justify refusal to disclose.

1. The Information Sought Is Not “Obtained From A Person”

The asserted “trade secrets and commercial or financial information” are exempted only if they are “obtained from a person.” 5 U.S.C. ¶ 552(b)(4). Information generated by the government itself is not subject to Exemption 4. Bd. of Trade v. Commodity Futures Trading Comm'n, 627 F.2d 392, 404 (D.C. Cir. 1980). The Salt Lake Database information requested is not “obtained from a

⁵ The District of Columbia Circuit adopted a modified test in Critical Mass Energy Project v. Nuclear Regulatory Commission, 975 F. 2d 871 (D.C. Cir. 1992)(en banc), but despite the specific urging of the government in OSHA Data/CIH, the Third Circuit has declined to follow Critical Mass and continues to follow the test of National Parks. OSHA Data/CIH, *supra*, 220 F.3d 153, 166, n. 30.

person.” Instead, it consists of information gathered by OSHA’s CSHO inspectors during visits to regulated workplaces. The information is compiled on a sheet filled out by the CSHO at the site, Finkel Declaration, ¶¶ 53, 55, Exhibit 13, and then entered by OSHA employees into the database. Finkel Declaration, ¶¶ 50-51. This is particularly true of the most critical components of the database: the address of each location, the inspection ID number, the air sample exposure values from the tests conducted by the inspector, and the randomly coded and unidentifiable CSHO ID number.

Exemption 4 does not apply, no further analysis is necessary and disclosure should be ordered.⁶

2. Disclosure of the Salt Lake Database Will Not Impair the Ability of

⁶ Courts have on occasion held that even if the government collects the information, it may come within the coverage of Exemption 4 if it is obtained during a plant inspection. In Lion Raisins Inc. v. USDA, 354 F.3d 1072, 1076 (9th Cir. 2004), the court held that a quality assessment of raisins, "including weight, color, size, sugar content, and moisture" reflected in "Line Check Sheets" prepared by USDA inspectors during plant visits was within Exemption 4. But the information here doesn't relate to the products of the sites visited, but only the air sample information and other workplace safety information. The requested information from the Salt Lake Database contains no information on the plant's output other than the SIC code. In Mulloy v. Consumer Prod. Safety Comm'n, No. 85-645, 1985 U.S. Dist. LEXIS 17194, at *2 (S.D. Ohio Aug. 2, 1985), aff'd, No. 85-3720 (6th Cir. July 22, 1986). the court held that manufacturing and sales data compiled in an inspection report prepared by an investigator after a plant visit was also included within Exemption 4. No such information is in the Salt Lake Database. See also OSHA Data/CIH, supra, 220 F.3d at 162, n. 23.

OSHA To Collect Such Data

The first prong of the National Parks test is that disclosure “is likely ... to impair the ability of the government to obtain the necessary information in the future.” 498 F.2d at 770. That is clearly not the case here.

The information collected on the database is largely collected pursuant to OSHA’s delegated authority in 29 U.S.C. §657(a) to “enter without delay and at reasonable times” any workplace and to “inspect and investigate during reasonable working hours ... any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment and materials therein... .”⁷ The Supreme Court has held that a business has a Fourth Amendment right to resist entry to an OSHA CSHO and compel the agency to obtain a warrant. Marshall v. Barlow’s, Inc., 436 U.S. 307 (1978). However, the Court emphasized that a warrant would swiftly issue, because it was not necessary for OSHA to demonstrate the same probable cause necessary for a warrant in a criminal context. “For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation, but also on a showing that ‘reasonable standards for conducting an ...

⁷ In addition to this grant of general administrative inspection authority, OSHA is also authorized to make an inspection when there is a complaint about a possible violation. 29 U.S. C. § 657(f).

inspection are satisfied with respect to a particular [establishment].”Id. at 330(footnotes and citations omitted). The latter requirement could be met, the Court held, by showing that the business “has been chosen for an OSHA search on the basis of a general administrative plan for enforcement of the Act derived from neutral sources,” which can include various measurements of administrative need and efficiency. Id. at 331.

The Court also said, of relevance here, that “the Act’s effectiveness has not been crippled by providing those owners who wish to refuse an initial requested entry while the inspector obtains the necessary process.” Id. at 318. In other words, the Court did not view the warrant requirement as one that would “exceed manageable proportions.” Id. at 331.

An example of this “general administrative plan” inspection being the subject of a warrant can be found in Erie Bottling Corp. v Donovan, 539 F. Supp. 600 (W. D. Pa. 1982). In that case, the court held, among other things that Magistrate presented with a warrant application need only review the plan itself and need not see the underlying data used to develop the plan. The agency’s discretion in selecting industries and sites for inspection is entitled to deference. Id. at 605-606. In particular, we emphasize that the court rejected an argument that attaching “dosimeters and other metering devices to employees” – the very method

used to obtain the air sampling data in the Salt Lake Database – was an unreasonable burden on the employer. *Id.* at 608-609. See also *Ingersoll-Rand v. Donovan*, 540 F. Supp. 222, 225 (M.D. Pa. 1982), also a general administrative search case, in which the court said that “[t]he courts have universally found personal sampling devices to be a reasonable mode of inspection.” (Emphasis added).

Thus, if an employer wishes to resist and force OSHA to obtain a warrant for a general administrative search, it may do so, but the burden on OSHA is minimal and so it is no surprise that nearly all such inspections are consensual.

OSHA continues to maintain a comprehensive, neutral inspection plan that governs the selection of workplaces selected for inspection. The current inspection plan can be found at:

http://osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=1594.

It is utterly absurd and illogical, as at least one objector argued in its comments in response to OSHA’s April 21, 2006, notice, that disclosure of the contents of the Salt Lake Database to Dr. Finkel will now compel business to refuse consensual searches and force OSHA to get warrants. First, the presence of confidential business information would not be grounds to contest a warrant.

Second, the relative ease of obtaining a warrant only means that the inspection is delayed, not that some ingredient is accorded any real long-term protection as a result of the lack of consent. Third, as we discuss next, OSHA's written procedures and regulations provide ample opportunity to assert confidentiality – at considerably less cost to the employer, it should be noted, than the cost of insisting upon a warrant and attempting to quash it. There is no rational reason for an employer to believe that it needs to resist a consensual search in order to protect its confidential information and trade secrets. Finally, as we discuss below, the substantial majority of the Salt Lake Database contents have already been released with company names included, and there is no indication that resistance to consensual searches has now increased as a consequence. This claim is makeweight.

Disclosure of the Salt Lake Database to Dr. Finkel will not interfere in any way with OSHA's continued statutorily mandated inspections, and disclosure is warranted.

3. The Information Sought Is Not Confidential Business Information Or Trade Secret Information And Will Not Cause Competitive Harm: It Was Not Designated As Such At The Time It Was Created By OSHA Inspectors

A party claiming confidential business information “must have a confidentiality custom and the agency must prove that custom.” Critical Mass, supra, 883 F. 2d at 883 (Ginsburg, J, dissenting). The Court can readily discard claims asserted under Exemption 4 that the Salt Lake Database contains any information that is a “trade secret” or “confidential business information.” That is because OSHA regulations and procedures provide more than ample opportunity for an inspected facility to designate any information as a “trade secret” or “confidential business information” at the point of the inspection, and there is no evidence that any business ever did so for anything contained in the Database. Moreover, so far as Dr. Finkel is aware, no company has ever threatened or brought a reverse FOIA action in the face of the numerous prior releases of what now constitutes the substantial majority of the contents of the Salt Lake Database. Finkel Declaration ¶ 69.

The DOL’s FOIA regulations mandate that OSHA give any regulated company ample opportunity to mark and designate any information that it deems confidential. 29 C.F.R. §70.26(b) provides in pertinent part:

Designation of business information. A submitter of business information 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.

OSHA's procedures go much farther than this. The OSHA Field Inspection Manual is the agency's mandatory procedure manual for all inspections, including those whose sample results are maintained in the Salt Lake Database. Section 6, Chapter II specifies procedures to be used in each inspection. Finkel Declaration, Exhibit 15. It is worth setting out in pertinent part:

A. 2. i. Trade Secrets. The CSHO shall ascertain from the employer if the employee representative is authorized to enter any trade secret area(s). If not, the CSHO shall consult with a reasonable number of employees who work in the area (29 CFR

(a) Policy. It is essential to the effective enforcement of the Act that the CSHO and all OSHA personnel preserve the confidentiality of all information and investigations which might reveal a trade secret.

(b) Restrictions and Controls. When the employer identifies an operation or condition as a trade secret, it shall be treated as such.

Information obtained in such areas, including all negatives, photographs, videotapes, and OSHA documentation forms, shall be labeled:

"ADMINISTRATIVELY CONTROLLED INFORMATION"

"RESTRICTED TRADE INFORMATION"

1 Under Section 15 of the Act, all information reported to or obtained by a CSHO in connection with any inspection or other activity which contains or which might reveal a trade secret shall be kept confidential. Such information shall not be disclosed except to other OSHA officials concerned with the enforcement of the Act or, when relevant, in any proceeding under the Act.

Thus, OSHA allows employers ample and mandatory opportunities to identify any trade secret at the very moment when its importance is likely to be best appreciated: at the time and place of the inspection. The irrefutable record is that very few employers, indeed if any, ever did anything of the kind. Moreover, as we discuss below, thousands of records from the Salt Lake Database have already been released, and there has been no complaint of adverse impact, no

reverse FOIA suits filed, no indication that anything confidential or secretive was ever compromised. In the “objections” lodged with OSHA on this request, there is not a single claim that the substantial prior releases have adversely affected anyone and no claim that the agency does not afford adequate protection to legitimately protected information. In this regard, none of the “objections” received by OSHA in response to the notification of Dr. Finkel’s suit makes any mention of any harm that occurred as a result of the numerous previous releases of Salt Lake Database portions or information. The claims of confidentiality are simply not credible.

This is especially true when the Court considers the obligations of an entity that seeks trade secret protection. It is well settled that among the factors that are to be considered in judging a claim of trade secret protection is the extent to which the entity has taken steps to protect the confidentiality of the material or process. A trade secret claim in the Federal Courts is governed by state law. See, e.g. Rohm and Haas v. ADCO, 689 F.2d 424, 429 (3d. Cir 1982). Under New Jersey law, an essential element of a trade secret claim is that the claimant show that it took precautions to maintain the confidentiality of the secret. Id. at 430. Other states such as Pennsylvania require that the claimed secrets be of value and importance in the conduct of the business.

All of this demonstrates that any entity that believes itself to be in possession

of a trade secret at a facility will take pains to instruct those at the facility of the importance of maintaining that secrecy. Obviously, this would include emphasizing those precautions at any time when an outside party proposed to enter the facility, and that includes an OSHA inspector. Since the inspector's written and mandatory instructions in the Field Inspections Manual require that he or she inform the facility on every visit of the opportunity to protect its trade secrets, and since OSHA's regulations advise the business of the agency's obligations to mark or identify confidential information, the best evidence of confidential information will always be what was done at the point of inspection. There is no evidence whatsoever that any inspections for which air sampling was accomplished considered the results of that sampling to be confidential in any way.

In any event, it is important to know what the air samples show or do not show. The air samples do not show what is in any final product made at the inspection site. Indeed, they could just as easily show what is not in the final product. All that the air sample shows is that a substance was present in the air at the site. If the substance is used in the final product, the air sample does not show how much is in the final product. All that the air sample shows is the concentration in the workplace air, which in many if not most cases says more about the employer's controls as opposed to the composition of any product.

Plaintiff's Statement of Material Facts ¶¶ 90-92; Declaration of Franklin E. Mirer (Mirer Declaration) ¶ 15.

In Northwest Coalition for Alternative Pesticides v. Browner, 941 F. Supp. 197 (D. D.C. 1996), a group sought disclosure of the inert ingredients in several pesticides against agency and industry claims of trade secret protection. Engaging in a careful, searching review on a pesticide by pesticide basis, the court examined each of the inert ingredients in question and ruled that the mere name and code number of an inert ingredient was not entitled to trade secret protection. As for claims of confidential information, the court was careful to distinguish between the confidentiality of formulas as opposed to ingredients, finding that ingredients are less likely to be the subject of a legitimate confidentiality claim. For example, the court considered whether the mere knowledge of a particular ingredient would be enough to produce a commercially viable competitive product. In most cases, the court found either that the ingredient was already in some other fashion a matter of public knowledge or that the objector had failed to demonstrate any competitive harm from disclosure of the ingredient. The same is no less true here. Plaintiff's Statement Of Material Facts ¶¶ 90-92.

Finally, we note that no regulated workplace can claim any confidentiality once it has violated an OSHA requirement. OSHA maintains a web-based, fully-

searchable database of all violations, and no information concerning the violation is redacted, including the company name and address of the affected workplace. For example, Dr. Finkel found fully documented violations of OSHA standards by six of the seven individual companies who filed comments opposing the release of the requested data in response to OSHA's Federal Register notice of April 21, 2006, on the Web-based violations database system, and four of those six violated various health standards. Finkel Declaration, ¶ 54; Plaintiff's Statement of Material Facts, ¶¶ 86-87.

4. OSHA Has Waived Any Confidentiality Interest By Numerous And Broad Disclosures Of This Data, And These Disclosures Also Demonstrate That The Data Is Not Confidential Or Trade Secret Information

Finally, and perhaps most compelling, it cannot be disputed that over many years, OSHA has previously released what certainly amounts to a substantial majority of all the contents of the Salt Lake Database, with all the company name and address information complete, and often without even the necessity of a formal FOIA request. A substantial number of requests for individual workplace accident reports are given out on an everyday basis. Plaintiff's Statement of Material Facts ¶ 85. The EPA advertises, in notices prepared with OSHA participation, that a party may request and receive this data from OSHA. Finkel Declaration ¶ 62. The

Mine Safety And Health Administration, which protects mine workplace safety and health, routinely posts air sample information on the Internet. Plaintiff's Statement of Material Fact ¶ 93. The National Institute For Occupational Safety and Health, which performs a similar mission to OSHA's in ensuring workplace safety, also routinely releases workplace air sample information of the type sought by Dr. Finkel without redacting establishment names and addresses. Trade secret claims must be made at the point of inspection, as is the case with OSHA . Plaintiff's Statement of Material Facts ¶ 94; 48 C.F.R. 85.7(b). Here as well there appear to have been no objections, no reverse FOIA actions and no damage to these agencies' ability to collect the necessary information.

Based upon Dr. Finkel's search of various databases, it is clear that numerous academic researchers have requested large portions of the database and have always been given the information. While we understand that OSHA claims that it does not keep many historical records of prior releases under FOIA, Dr. Finkel's searches have shown enough to conclude that OSHA has not objected to these releases in the past.

Moreover, it is highly relevant to the Court's review of the claims of confidentiality in this case that there appears to have been no threat or filing of any "reverse FOIA" action as a consequence of these numerous prior releases, and no

impediment to OSHA's continued ability to inspect and take air samples at the many workplaces covered.

An agency may not continue to claim an exemption once it has made a disclosure and it may not make selective disclosures to only one party. North Dakota ex rel. Olson v. Andrus, 581 F.2d 177, 182 (8th Cir. 1978) (waiver when agency made a selective disclosure to one interested party). This doctrine is important in this case because of the demonstrated history of OSHA's animus to Dr. Finkel, which is a logical explanation for why it has so freely given out this information in the past but is now refusing to give the same data to him.

These previous disclosures are described at length and in detail in Dr. Finkel's Declaration at ¶¶ 60-67 and in the Mirer Declaration and do not need extended discussion here. But it can be said that they demonstrate that OSHA has routinely given out this data whenever asked and without any objection or redaction, in a database-usable form, usually with the company names and addresses and often without the necessity of a FOIA request. To take one example, three researchers published an article in 2001 in which they received from OSHA all samples taken during a 19-year period from all establishments in the pulp and paper industry. The purpose of this article was to evaluate time trends in exposures to 32 toxic substances in this industry, and to evaluate OSHA's efforts to monitor

those exposures. According to their published paper, OSHA provided the authors with 9,933 sample results, involving 171 different substances, including company names and addresses and four-digit SIC codes. Plaintiff's Statement of Material Facts ¶ 98; Finkel Declaration ¶ 63, Exhibit 21. This is not an unusual example, and Dr. Finkel was able to locate only some of the publications which reference the Salt Lake Database, and of course such a search would not in any event identify any disclosures which did not result in a published paper.

III. CONCLUSION

For the reasons given in this brief and supporting declarations and exhibits, and in Plaintiff's Statement Of Material Facts, plaintiff Dr. Adam Finkel respectfully requests that this Court grant his motion for summary judgment and order OSHA to disclose the information sought in his two Freedom of Information Act requests.

Respectfully submitted,

S/ Peter Dickson

PETER DICKSON PD-1592
Potter and Dickson
194 Nassau Street
Princeton, NJ 08542
(609) 921-9555
ATTORNEYS FOR THE
PLAINTIFF

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