

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 OPPOSITION  
TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

November 20, 2006

## Table of Contents

	<u>Page</u>
Introduction .....	1
I. Preliminary Statement .....	2
II. Supplemental Statement of Facts .....	4
III. Argument .....	5
A. Defendants Have Not Met Their Burden of Justification for Withholding Most of The Salt Lake Database .....	5
1. Plaintiff Is Entitled To Release Of All Portions Of The Database That Have Already Been Released .....	6
2. Defendants Have Not Met Their Burden Of Showing That There Are Legitimate “Trade Secrets” Or Confidential Business Information In The Database .....	7
3. Defendants Do Not And Can Not Show That There Are Any Trade Secrets Or Confidential Information In The Database For Samples Taken At Least Ten Years Ago .....	17
4. Defendants Do Not Claim And Can Not Show That Disclosure Will Cause Competitive Harm .....	18
5. Defendants’ Assertions That Disclosure Will Impede Future Inspections Is Makeweights And Unsupported .....	19

B.	Defendants Do Not And Can Not Meet Their Burden Of Demonstrating That Anyone Can In Fact Deduce The Actual Identity Of CHSO’s From Their Coded CSHO ID Numbers, And Thus Cannot Meet Their Burden Under Either Exemption 7 or Exemption 7	23
C.	Defendants Do Not Meet Their Burden Of Demonstrating The Coded CSHO ID Numbers Quality For Exemption 6	25
D.	Defendants Do Not Meet Their Burden Of Demonstrating That The Coded CSHO ID Numbers Qualify For Exemption 7	30
1.	The Records Sought Are Not Compiled For Law Enforcement Purposes	31
2.	Disclosure Would Not Constitute An “Unwarranted Invasion Of Personal Privacy”	32
3.	Disclosure Would Not Reveal Techniques And Procedures Used For Investigations Or Prosecutions	34
IV.	Conclusion	37

## Table of Authorities

Page

### STATUTES

5 U.S.C. § 552(b)(7) .....	30
42 U.S.C. § 11001 et seq. ....	15

### CASES

Arieff v. US Dept of the Navy, 712 F. 2nd 1462 (D. C. Cir. 1983) .....	26
Billington v. U.S. D.O.J., 233 F.3d 581 (D.C. Cir. 2000) .....	8
Campbell v. U.S. D.O. J., 164 F.3d 20 (D.C. Cir. 1998) .....	9
Citizens For Environmental Quality v. U.S. Department of Agriculture, 602 F. Supp. 534 (D. D.C. 1984) .....	9, 27
CooperCameron Corporation v. U.S.D.O.L., 280 F.3d 539 (11th Cir. 2002) .....	31
Critical Mass Energy Project v. Nuclear Regulatory Commission, 975 F.2d 871 (D.C. Cir. 1992)(en banc) .....	7
Davin v. U.S.D.O.J., 60 F.3d 1043 (3d Cir. 1995) .....	6, 9, 31, 34
Department of the Air Force v. Rose, 425 U.S. 352 (1976) .....	26
Ferri v. Bell, 645 F.2d 1213 (3d Cir. 1981) .....	34
Int'l Diatomite Producers Ass'n v. U.S. Soc. Sec. Admin., 1993 WL 137286 (N.D. Cal. Apr. 28, 1993), appeal dismissed, No. 93-16723 (9th Cir. Nov. 1, 1993) ...	28

King v. Department of Justice, 830 F.2d 210 (D.C. Cir. 1987) .....	6, 8, 9
National Parks and Conservation Ass’n v. Morton, 498 F.2d 765 (D.C. Cir. 1974) .....	12, 18
New York Times Company v. United States Department of Labor, 03 Civ. 8334 (SAS) (D.D. N.Y. July 29, 2004) .....	29
Niagara Mohawk Power Corp. v. U.S. Dep’t of Energy, 169 F.3d 16 (D.C. Cir. 1999) .....	8
Northwest Coalition for Alternative Pesticides v. Browner, 941 F.Supp. 197 (D.D.C. 1996) .....	19
OSHA Data/CIH v. United States Department of Labor, 220 F.3d 153 (3d Cir. 2000) .....	7
Public Citizen Health Research Group v. F.D.A., 704 F.2d 1280 (D.C. Cir. 1983) .....	8, 11
State v. Soto, 324 N.J.Super. 66 (Law Div. 1996) .....	37
United Steelworkers of America v. Auchter, 763 F.2d 728 (3d Cir. 1985) .....	8

REGULATIONS

29 C.F.R. § 70.26(b) .....	16
29 C.F.R. § 70.26(d) .....	17
29 C.F.R. § 70.26(i) .....	10
29 C.F.R. § 1904 .....	24
29 C.F.R. § 1960 .....	24

71 Fed. Reg. 20732 (April 21, 2006) . . . . . 10

ARTICLES

A. Rees, “Recent Developments Regarding The Freedom Of Information Act:  
A ‘Prologue To A Farce Or A Tragedy, Or Perhaps Both,’”  
44 Duke L.J. 1183 (1995) . . . . . 7

G. Taylor, “The Critical Mass Decision: A Dangerous Blow To Exemption 4  
Litigation,” 2 CommLaw Conspectus 133 (1994) . . . . . 7

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 OPPOSITION  
TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Plaintiff Dr. Adam Finkel submits this brief in opposition to the motion of the defendants for summary judgment. The defendants' arguments are an unpersuasive stew of confessed incompetence (probably inaccurate), unsupported speculation and flight from common sense. This brief is accompanied by the Opposition Declaration of Dr. Adam Finkel (Finkel Opposition Declaration), the Declaration of Dr. Manuel

Gomez and the Declaration of David Barstow, a New York Times reporter who has won a Pulitzer Prize for his stories on workplace safety and OSHA's inability to protect workers.<sup>1</sup>

## **I. PRELIMINARY STATEMENT**

The defendants have made two “releases” to Dr. Finkel, both on the eve of the first round of briefs and well over a year after both of his requests. First, they furnished him with a simple list of random numbers with positive or negative beryllium sensitization test result. This is no more worthwhile than a statement that eleven inspectors tested positive, and so is non-responsive. Second, they furnished him with two CD-ROMs with a small portion of the contents of the database that he sought in his second request, the Salt Lake Database. Nearly all of the information that Dr. Finkel needs to make any productive use of the database contents was redacted. It is also very disappointing to note that defendants went to the unnecessary added work of converting the database into a plain text file, therefore rendering it useless for research purposes. Finkel Opposition Declaration ¶ 2. There was no explanation given for this, and so it must be taken as further proof of the agency's animus to Dr. Finkel. This response, too, amounts to a denial of the request, as the

---

<sup>1</sup> Dr. Gomez's Declaration was inadvertently omitted from our motion papers and is discussed at paragraph 66 of Dr. Finkel's Declaration in support of our motion; there is no discussion of it in this brief.

defendants well know.

In support of their refusal to grant the two requests, the defendants' offer weak and unpersuasive arguments.

The defendants argue that despite the fact that the inspectors' identities are protected by a random code unknown to Dr. Finkel, he might somehow be able to ultimately deduce their identity. This simply cannot be accomplished in anyone's lifetime even if the effort were made. This in turn, they claim, would allow him to develop "profiles" of the inspection tendencies of individual inspectors. This argument betrays a fundamental ignorance of how "profiling" is accurately conducted, and Dr. Finkel demonstrates beyond dispute that no one has the necessary information to engage in accurate profiling. Still assuming that Dr. Finkel can somehow break a closely guarded code, the defendants also argue that once the code is broken and the identities revealed, the inspectors would be subject to "harassment on the job." To the extent that we understand this argument, which is based entirely upon a single, unsupported and unexplained sentence in one declaration, it is absurd, as the inspectors must reveal their identity at each inspection and are thus already well known to the companies they inspect. There is no credible argument that anyone outside the community of regulated companies would have any interest in "harassing" any OSHA inspector "on the job." The defendants make no argument whatsoever

about the public's strong countervailing interest in disclosure.

Specific to the Salt Lake Database, the defendants resort to an attempted confession of incompetence which is demonstrably inaccurate. They claim that although their own regulations require them to protect legitimate claims of confidential information and trade secrets, they have not made any allowance in entering information into the database for identifying confidential or trade secret information. Although they claim, based again on a single, unsupported and unexplained sentence in one declaration that “less than 2%” of inspections include a claim of confidentiality, they nonetheless argue that their own asserted incompetence in protecting this information in the database means that the entire contents of the database are barred from release. In other words, defendants ask this Court to forever seal from public view the entire contents of the database based solely upon the theoretical possibility that less than two percent of the contents might contain confidential information, and their own incompetence in how the database is kept. We show that the alleged incompetence is inaccurate – there is no realistic reason to believe that there legitimate confidential information in the database – and no part of the defendants' arguments withstand any analysis.

## **II. SUPPLEMENTAL STATEMENT OF FACTS**

In his Opposition Declaration, Dr. Finkel testifies to some additional facts in

response to the defendants' arguments. In the interests of not setting them out in duplicate, we will simply refer to those facts in the pertinent portions of this brief below.

### **III. ARGUMENT**

At the outset, we emphasize that Dr. Finkel never requested and does not seek the identity of any individuals, and has emphasized that knowing anyone's identity would compromise the independence and impartiality of his research. Dr. Finkel never requested and does not seek any legitimate trade secrets or confidential information. Much of the defendants' arguments assume or imply otherwise.

#### **A. Defendants Have Not Met Their Burden Of Justification for Withholding Most of The Salt Lake Database**

Defendants wrongly imply that they have released to Dr. Finkel most of the Salt Lake Database. Brief of Defendants In Support of Motion For Summary Judgment And Dismissal of the Occupational Safety and Health Administration (Defendants' Brief) at 1. They have not. They have only given him a small portion of the information in the database, thus rendering it nearly useless for any legitimate research purposes that will shed light on the agency's diligence – or lack of diligence – in performing its statutory responsibilities. In addition, as we said before, defendants went out of their way to render even the minimal information they gave him even less useful by converting the database into a plain text file which cannot be searched and

arranged for research purposes, as they surely knew. Finkel Opposition Declaration ¶ 2. Since this was an extra step not dictated by Dr. Finkel's request, it is undoubtedly further evidence of OSHA's animus to him.

### **1. Plaintiff Is Entitled To Release Of All Portions Of The Database That Have Already Been Released**

As we demonstrated at length in our opening brief, OSHA has previously and without any objection – or even the necessity of a formal FOIA request – released large portions of the Salt Lake Database to others. Dr. Finkel is entitled to whatever the agency has already given out to others, which in his opinion constitutes the majority of the contents of the database.

It is disappointing that the defendants in their motion papers do not acknowledge these prior releases and do not identify other prior releases which have undoubtedly taken place. It is also disappointing that defendants continue to resist their obligation to promptly release these previously disclosed portions to Dr. Finkel. As the Third Circuit has noted, “[a]ffidavits submitted by a governmental agency in justification for its exemption must strive to correct, however imperfectly, the asymmetrical distribution of knowledge that characterizes FOIA litigation.” Davin v. U.S.D.O.J., 60 F.3d 1043, 1050 (3d Cir. 1995), quoting King v. Department of Justice, 830 F. 2d 210, 218-219 (D.C. Cir. 1987). There is no argument to be made here by defendants: they must be compelled to identify each and every prior release

and promptly furnish that to Dr. Finkel. As he says in his Opposition Declaration at ¶ 4, there are at least two individuals, one of whom has furnished a declaration in this case, who have institutional knowledge of these prior releases.

## **2. Defendants Have Not Met Their Burden Of Showing That There Are Legitimate “Trade Secrets” Or Confidential Business Information In The Database**

As we anticipated in our opening brief, the defendants’ Exemption 4 arguments are based largely on the widely criticized case of Critical Mass Energy Project v. Nuclear Regulatory Commission, 975 F. 2d 871 (D.C. Cir. 1992)(en banc), which no other circuit has adopted and which the Third Circuit has expressly declined to adopt.<sup>2</sup> OSHA Data/CIH v. United States Department of Labor, 220 F.3d 153, 166, n. 30 (3d Cir. 2000). We will accordingly ignore these arguments.

Defendants argue that the database contains trade secrets. But their arguments fall well short of the law’s well-settled requirement that such claims be well documented and explained in specific detail.

The term “trade secret” in FOIA exemption 4 is narrowly defined. The lead case is Public Citizen Health Research Group v. F.D.A., 704 F. 2d 1280 (D.C. Cir.

---

<sup>2</sup> See, e.g., A. Rees, “Recent Developments Regarding The Freedom Of Information Act: A ‘Prologue To A Farce Or A Tragedy, Or Perhaps Both,’” 44 Duke L. J. 1183 (1995); G. Taylor, “The Critical Mass Decision: A Dangerous Blow To Exemption 4 Litigation,” 2 CommLaw Conspectus 133 (1994).

1983), cited with approval in United Steelworkers of America v. Aucther, 763 F. 2d 728, 739 (3d Cir, 1985). There the court defined the term “trade secret” as a

secret, commercially valuable plan, formula, process or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.

704 F. 2d at 1288 (emphasis added). In addition, “conclusory and generalized accusations of substantial competitive harm, of course, are unacceptable.” Id. at 1291. Affidavits or declarations in support of claims of confidentiality must describe the “justifications for non-disclosure in enough detail and with sufficient specificity to demonstrate that the material withheld is logically within the domain of the exemption claimed, and ... the affidavits are not controverted by contrary record evidence or impugned by bad faith on the part of the agency.” King v. U.S. D.O.J., supra, 830 F. 2d at 217. Declarations that are “too vague or sweeping” are insufficient. Id. at 219. Accord, Billington v. U.S. D.O.J., 233 F. 3d 581, 585 (D. C. Cir. 2000)(“bald assertions” insufficient); Niagara Mohawk Power Corp. V. U.S. Dep’t of Energy, 169 F.3d 16, 18 (D.C. Cir. 1999)(summary judgment for government not justified on the basis of a “conclusory and generalized” assertion, even if not controverted by requester); Campbell v. U.S. D.O.J., 164 F. 3d 20, 32 (D.C.Cir. 1998)(affidavits that “fail to supply facts in sufficient detail” insufficient). See also Davin v. Department of Justice, supra, 60 F. 3d at 1051 (“Categorical description of redacted material

coupled with categorical indication of anticipated consequences of disclosure is clearly inadequate”), quoting King v. U.S.D.O.J., supra, 830 F. 2d at 223-224; Citizens For Environmental Quality v. U.S. Department of Agriculture, 602 F. Supp. 534, 539 (D. D.C. 1984)(burden of proof is on the government and it cannot meet that burden with “only speculation and possibilities”).

It defies common sense to claim that by their own incompetence defendants have failed to protect any real number of confidential or trade secret information in the Salt Lake Database, and that this incompetence has continued for over twenty five years through numerous releases of large portions of the database. Defendants ask this Court to believe that they have paid to set up and maintain a database with no discernable function, since they admit they do not use it for internal studies such as beryllium exposure observations, and they now claim it should not be divulged to the public. It is far more logical to assume that the database was always intended at least in large part to be publically available and simply assumed that there was no need to mark the very minuscule number of confidentiality requests, especially since no one asked them to stop. Now, after a whistleblower with a stated desire to use the database to study OSHA’s activities in a scientific and comprehensive manner requests the database and the agency suddenly decides that it must now withhold most of the contents. The most logical explanation for this is a combination of animus to

Dr. Finkel and a well-based fear of how the results of this research will reflect poorly on the agency's performance. Finkel Opposition Declaration ¶¶ 6-8

The available facts amply bear this out. As is set forth in the defendants' Declaration of Kevin Ropp (Ropp Declaration), OSHA published a notice in the Federal Register of Dr. Finkel's requests and also sent letters to a number of trade associations. In both the notice and the letters, OSHA specifically warned that granting Dr. Finkel's request could lead to release of confidential or trade secret information. 71 Fed. Reg. 20732 (April 21, 2006); Mr. Ropp's letter is attached to the comment filed by the National Association of Manufacturers in Mr. Ropp's Declaration.<sup>3</sup> The letter's assertion that granting the request would divulge trade secrets or confidential information was wholly unwarranted and incorrect, as Dr. Finkel has never sought any such information, and still does not seek it today.

It is worth noting that Dr. Finkel searched the Federal Register from 1980 to 2006 and found not one other notice of a request for any portion of the database.

---

<sup>3</sup> There is no question that to the extent that notice was required, publication in the Federal Register and solicitation of comments from trade associations met the requirements of the law:

Where notification of a voluminous number of submitters is required, such notification may be accomplished by posting and publishing the notice in a place reasonably calculated to accomplish notification.

29 C.F.R. §70.26(i).

Finkel Opposition Declaration ¶ 3.

Both the notice and Mr. Ropp's letter were quite clear about what anyone objecting to the release had to furnish to OSHA: "a detailed statement of any objection, including an explanation of the grounds for their objection. In particular, if your member contends that the requested information includes confidential or trade secret information, an explanation of the basis for that conclusion should be provided." Id. (emphasis added).

Notwithstanding this unambiguous notice, not a single comment filed with the agency contains any specific, concrete information that would permit this Court to conclude that any legitimate trade secret or confidential business information was contained in the Salt Lake Database. Instead, the comments are mere unsubstantiated assertions, lacking any factual explanation or basis whatsoever. Not one letter meets the trade secret" requirement of Public Citizen, supra, that the air sample claim refers to a "commercially valuable plan, formula, process or device." This is hardly surprising, since the air samples in the Salt Lake Database are, as we pointed out in our opening brief, merely individual substances in the ambient air of the workplace, with no proof that any such substance is part of any finished product, or part of any "plan, formula, process or device." Not one commenter asserts that it at any time actually requested confidential treatment of any air sample. In the comments, there

is no discussion of any specific substance in the air sample records in the database. There is no discussion of how disclosure would compromise a trade secret or “cause substantial harm to the competitive position of the person from whom the information was obtained.” National Parks and Conservation Ass’n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974). There are no affidavits or declarations or sworn statements.

It is compelling that not one comment even mentions, let alone describes in any credible detail, any competitive harm from the numerous prior releases that Dr. Finkel meticulously documented in our motion. It is equally if not more compelling that in spite of these repeated entreaties by the defendants, not one company has sought to intervene in this case or brought any “reverse FOIA” action to enjoin release of any information.

But the defendants went much further, demonstrating an unjustified and to our knowledge unprecedented hostility to Dr. Finkel, sending out yet another letter seeking specific litigation assistance in this case for its refusal to grant his request. It is worth noting that it is not the defendants who brought this letter to the court’s attention, but the AFL-CIO, which attached the letter to its brief as amicus curiae in support of Dr. Finkel. In a letter dated July 19, 2006 to Acme Brick and presumably also sent to all other commenters, OSHA’s Mr. Ropp pleaded for additional support for OSHA’s decision to deny Dr. Finkel’s request:

You should be aware that our motion for summary judgment in this case is due September 8; therefore time is of the essence. As with the assertion of any exemption in any FOIA case, the burden of proof in this case would be on OSHA to defend any decision to assert exemption 4. In cases where exemption 4 is at issue, courts generally give a great deal of weight to declarations, affidavits, or other evidence supplied by business submitters in determining whether exemption 4 applies to the documents at issue. [Citation omitted.] Therefore the more information we obtain in the form of declarations, affidavits or other evidence, the better we will be able to evaluate an exemption 4 claim. Since we need to quickly make decisions on how best to proceed in this case, a member of my staff will be contacting you shortly to determine what additional information you may be able to provide.

Notwithstanding this very specific and pointed request, which is compelling evidence of bad faith on the part of OSHA, and which was apparently followed by even further attempts by OSHA staff, not one company has furnished any affidavit or declaration to support claims of trade secret or confidential information. If any entity were concerned about any legitimate trade secret or confidential information, it doesn't seem very interested in undertaking even the most minimal diligence to protect it.

Not a single claim of these comments can therefore be credited.<sup>4</sup>

There is, moreover, substantial and conclusive evidence that defendants have

---

<sup>4</sup> Notwithstanding the utter lack of merit to these "objections," Dr. Finkel is willing to accept release of the Salt Lake Database with all information pertaining to these objectors redacted, so long as those files are marked with a unique code that identifies them as having been redacted, as opposed to simply unknown or unidentified companies that otherwise exist in the database. Finkel Opposition Declaration ¶ 20.

tried to vastly overstate the extent to which the Salt Lake Database contains any legitimate trade secret or confidential information. Their sole authority for the claim that any such information is contained in the database is a single, unsupported, unexplained and carefully crafted sentence in the Declaration of Richard Fairfax at ¶6, that “[i]n 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.” (Emphasis added.) That “or” is highly significant, since it indicates that the estimate includes not just the “sampling data” – which are in the Salt Lake Database – as well as other chemicals – which are not in the database. “Less than 2%,” of course, can be anything from 1.9999% to zero. No “specific facts” or explanation of any kind are offered to back up this utterly unrevealing estimate. This is precisely the sort of conclusory and generalized assertion that is unacceptable in any FOIA litigation, or indeed, in any litigation in this Court. The defendants’ Brief misstates this estimate at page 21 in claiming that “[l]ess than approximately 2% of the air samples at issue here were designated as trade secrets” – Mr. Fairfax’s estimate includes requests for trade secret protection for items other than air samples.

Set against this are several compelling proofs to the contrary. First, there is the utter lack of any response both to OSHA’s request for detailed comments, and its follow-up request in bad faith for declarations or affidavits to support their pre-

conceived decision in this case. Second, there is the utter lack of any evidence of any complaint or reverse FOIA action in response to the numerous prior releases of most of the contents of the database. Third, there is a very comparable database in which the same companies regulated by OSHA file information about the same sort of toxic materials for which OSHA performs air sampling, and in this comparable database, companies almost never request confidential treatment. The Environmental Protection Agency (EPA) maintains a comprehensive database called the Toxic Release Inventory (TRI). Under the Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. §§11001 et seq., 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 trade secret or confidential information protection for their submissions. Companies almost never request confidential treatment of anything in these submissions. Indeed, in the most recent year available, 2004, 24,106 separate facilities submitted a total of 90,611 reports to EPA, but only four facilities claimed confidentiality. Over the entire eighteen years of reports available, only 119 facilities of a grand total of 433,957 claimed confidentiality. That's a rate of 0.027 percent (.00027), 100 times lower than the upper limit of defendants' unexplained and uncorroborated estimate. If we translate the EPA rate into the 73,000 OSHA

inspections for which there are air samples, that rate means that no more than twenty facilities would have in fact requested confidentiality in an OSHA inspection. Of those 119 facilities, only nineteen separate companies were involved, which means that only a very few companies ever request confidentiality. Finkel Opposition Declaration ¶ 9. None has stepped forward in this case or anywhere else and claimed that it ever made such a request.

As the AFL-CIO points out in its amicus brief, not one of those companies which filed objections in response to Dr. Finkel's requests has ever requested confidentiality in any of its submissions to the EPA's TRI.

Finally, we note a somewhat bizarre aside by defendants that companies that seek confidentiality for their air samples are not required to identify that claim when the sample is taken or during the inspection. Defendants' Brief at 23, n. 9, citing 29 C.F.R. §70.26(b). But that regulation 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.

(Emphasis added.) That is not "discretionary" language. Moreover, the defendants' interpretation renders absurd the ten year limit on such claims discussed next. But it is all irrelevant to this case, because neither the defendants nor any objector nor

anyone at all has set forth in any concrete way how the Salt Lake Database contains confidential or trade secret information or how any legitimate competitive harm would befall any company by yet another release of the database. Without such specific facts, this Court cannot uphold the invocation of Exemption 4.

### **3. Defendants Do Not And Can Not Show That There Are Any Trade Secrets Or Confidential Information In The Database For Samples Taken At Least Ten Years Ago**

Dr. Finkel is conclusively entitled to release of all inspection records from ten years ago and beyond. OSHA's own regulations specifically offer virtually no protection for these older records:

Notice of a request for confidential commercial information falling within paragraph (d)(2)(i) of this section shall be required for a period of not more than ten years after the date of submission. The business submitter may request a specific notice period of greater duration. The submitter should provide a justification for such a request. In such a case, the Department may, in its discretion, provide for an extended notice period.

29 C.F.R. §26(d)(emphasis added). No "extended notice period" has been provided for and there is no mention anywhere in the defendants' motion papers that any party has ever made a request to maintain confidentiality beyond ten years. None of the "objections" filed with OSHA in response to its notice of Dr. Finkel's requests mention any such claims, let alone offer a justification for one.

This limit seriously diminishes the defendants' (probably overblown) estimate of the amount of time and effort needed to manually inspect files for claims of

confidentiality. Instead of the many years of effort asserted by defendants, Dr. Finkel estimates that it would instead take about two months for a small staff of four. Finkel Opposition Declaration ¶ 11.

But as Dr. Finkel also points out, the defendants deliberately ignore the most useful and efficient means to ascertain legitimate claims of confidentiality: the files in the Salt Lake Lab, which consist of a single piece of paper. Searching the most recent ten years of data sheets wouldn't take more than about two weeks work for two employees. Finkel Opposition Declaration ¶ 12.

#### **4. Defendants Do Not Claim And Can Not Show That Disclosure Will Cause Competitive Harm**

In this case, defendants have specifically disclaimed any intent on relying upon that prong of the test of National Parks that permits withholding if disclosure is “likely ... (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). Defendants’ Brief at 19 (“Site-specific sampling data meets the first and third prongs of this test.”) While no reason is given for this, it is no doubt compelled by the lack of any useful information in any of the objectors’ comments filed with OSHA, as well as the lack of any affidavits or declarations or reverse FOIA action on the part of any employers. Thus, the Court would lack the ability to engage in the careful review of such claims in the manner accomplished in cases such as Northwest Coalition for Alternative

Pesticides v. Browner, 941 F. Supp. 197 (D. D.C. 1996), discussed in our opening brief. The defendants have no real argument to offer on this.<sup>5</sup>

The lack of any serious claim of competitive harm also seriously undercuts the defendants' principal argument, which we discuss next.

### **5. Defendants' Assertions That Disclosure Will Impede Future Inspections Is Makeweight And Unsupported**

Defendants focus their Exemption 4 argument (apart from misguided reliance on Critical Mass) on the claim that release of the Salt Lake Database “is likely ... to impair the ability of the government to obtain the necessary information in the future.” National Parks, *supra*, 498 F.2d at 770. We have already addressed much about this claim in our opening brief and will not repeat that here. A company concerned about disclosure of supposedly confidential or trade secret information will not logically express that concern by insisting on a warrant, because there are other, more concrete means to protect the information and because the warrant will inevitably issue anyway.

As we just noted, the defendants concede that they cannot make any realistic argument that release will cause competitive harm to the companies they regulate. This also means that in the eyes of the defendants, employers lack a legitimate

---

<sup>5</sup> We addressed the lack of “serious competitive harm” prong in our motion brief at pages 29-34.

competitive reason for now hindering OSHA's inspection program. If employers are not legitimately concerned about the impact on competition, there must be some other reason for that obstructionism. Defendants do not offer any rational alternative motive, and neither do the objectors in their comments, and we are unable to discern one. In essence, then, this "hindrance" argument is wholly based on an assumption that regulated companies will act irrationally. That is, these companies will now refuse to cooperate with OSHA, insist on warrants and risk the agency's wrath even though they lack a serious competitive reason for any of this added cost, time and aggravation, all solely because of granting Dr. Finkel's requests.

Defendants do not identify a single instance in which they are confident that an employer insisted on a warrant or otherwise refused to cooperate because of confidentiality or trade secret concerns. Nor do they or any of the objectors identify a single instance in which an employer engaged in such obstruction as a result of the numerous prior releases of large portions of the Salt Lake Database that we have identified for the Court. As we discussed above, the real number of companies which have legitimate confidentiality interests in inspections of ten years vintage or less is far less than the cleverly worded "less than 2 percent" of sample and other inspections. So even if we were to accept the agency's entirely speculative prediction of future irrational behavior, the actual number of companies that might engage in obstruction

is painfully small, if not non-existent. Defendants' estimates of the rate at which warrants are sought are inconsistent. In this connections, Bruce Beveridge estimates in his Declaration at ¶4 that OSHA was compelled to seek a warrant in "less than, but close to, 1.4% of initial attempts." Richard Fairfax estimates (without explanation or providing any specific facts) that OSHA obtains a warrant in advance "less than approximately 1% of the time" which could mean as low as zero, and that employers consent to OSHA inspections "approximately 98% of the time."

But none of these estimates can be credited. Just a few years ago, the same defendants represented by the same counsel argued to this Court that the actual OSHA warrant rate is as low as .5%, one third of their "estimates" in this case. Finkel Opposition Declaration ¶ 14, Exhibit 5. Whatever the actual rate, it is very low and adding – at best, based on the actual figures in the EPA TRI submissions – twenty or so obstructionist companies engaging in utterly irrational behavior is not going to hamper OSHA's mission.

Defendants also argue that one consequence of this irrational behavior on the part of a few companies is that by insisting on a warrant, these obstructionists will be able to "clean up" their facilities, and that this somehow hurts the agency's mission. Defendants' Brief at 19-20. One would have thought that getting employers to "clean up" their facilities is the agency's core mission and something to be applauded

however it is accomplished. But their argument is logically absurd. An employer that wants to cheat the inspection can already do that, not because of speculative concerns about disclosure of legitimate trade secrets, but because the employer runs a non-compliant, unsafe, unhealthy workplace. As Dr. Finkel explains, an inspection that involves air sampling will likely involve multiple days on site, because many air samples are taken over the course of an entire workday, and also because the CSHO will inquire as to when particular operations will be performed. Thus, there is already ample opportunity to cheat the air sample inspection process. No employer will waste time, money and effort in obstructing an inspection because of trade secrets but because of a generalized hostility to any role of the federal government or because it wants to clean up a non-compliant workplace. Finkel Opposition Declaration ¶¶ 14-19.

**B. Defendants Do Not And Can Not Meet Their Burden Of Demonstrating That Anyone Can In Fact Deduce The Actual Identity Of CSHO's From Their Coded CSHO ID Numbers, And Thus Cannot Meet Their Burden Under Either Exemption 6 or Exemption 7**

Defendants assert that they cannot release CSHO ID numbers in either the Salt Lake Database or in the results of the beryllium tests. These arguments are based entirely on the false premise that Dr. Finkel – or anyone else – can ascertain the actual identities of the inspectors from the closely guarded CSHO ID numbers and the contents of the database, in particular, the dates and locations of particular inspections. Fairfax Declaration at ¶16. Defendants do not explain in any detail how anyone would go about trying to do this, and thus the Court cannot credit this argument.

It's illogical for the defendants to assert that they use the codes for management purposes. Supervisors do not study how well their inspectors are performing using closely guarded and unknown codes. No one notices that "Inspector 4498" is not performing well and then asks someone in headquarters if they can get that inspector's name. Among other things, that does not protect the code. Finkel Opposition Declaration ¶¶ 21-22.

The effort that would be needed to accomplish only a fraction of this task is characterized by Dr. Finkel as "Herculean," and properly so. As he describes in paragraph 24 of his Opposition Declaration, he would have to make literally thousands of calls to employers (many of whom have gone out of business or are no

longer located at the location shown in the database), locate in each workplace someone willing to go search old files (many in off-site storage or even discarded) for a total stranger, then stay on the line or await a call-back later to obtain the name of the inspector (assuming that information even existed in any file at the site). It's simply ludicrous to assert or assume that anyone would (a) even attempt this effort or (b) achieve any success of any value.

The agency's professions of concern for the privacy of its employees are overstated. As a former employee, Dr. Finkel is entitled as a matter of law to the actual identities of the eleven inspectors who have tested positive for beryllium sensitization. 29 C.F.R. §1904 mandates that private sector employers must maintain and make available to all present and former employees the OSHA 300 Log, which lists the names and conditions of all employees who are injured or ill, which certainly includes any beryllium sensitization. 29 C.F.R. Part 1960 requires that OSHA itself comply with the requirements of §1904. Accordingly, OSHA's 300 Log for 2004 has to include the names of the eleven inspectors who tested positive, and as a former employee, Dr. Finkel is entitled to this log. He has not requested it precisely because he does not want to know the identity of those eleven inspectors. Finkel Opposition Declaration ¶ 27.

**C. Defendants Do Not Meet Their Burden Of Demonstrating That The Coded CSHO ID Numbers Qualify For Exemption 6**

As expected, defendants claim that based on Exemption 6 and the need to protect “personal medical information,” the coded CSHO ID numbers should not be disclosed in the results of the tests of the eleven inspectors who have tested positive for beryllium sensitization or the approximately 300 who tested negative.<sup>6</sup> We have already addressed most of their arguments in our motion papers and need not repeat that here. But several points of the defendants deserve mention.

First, in response to the defendants’ expressions of concern for the inspectors’ medical privacy, we emphasize again that Dr. Finkel is not interested in and does not seek the identity of the inspectors. He has explained the public’s strong interest in correlating the inspectors who have tested positive with the cumulative history of the workplaces they inspected, which would help the agency do a better job of protecting both its inspectors and the approximately 130,000 employees who are exposed to beryllium on a daily basis. It is just as important to analyze the cumulative history of those who did not test positive, for purposes of trying to understand the exposure threshold for a positive test. Finkel Declaration ¶¶26-28; 35-37; 40-43. The agency’s confession that it has not undertaken any study of these cumulative impacts,

---

<sup>6</sup> As is clear from their arguments on pages 28-29, defendants do not claim that Exemption 6 allows them to redact the CSHO ID numbers from the Salt Lake Database, presumably because the database does not meet the exemption’s threshold test of “personnel, medical and similar files.”

Defendants' Brief at 1, is startling and disappointing, and demonstrates a callous indifference to both its employees and the workers it is charged with protecting. In addition, correlating the inspectors and their cumulative history of inspections will shed light on whether OSHA should revise as soon as possible its exposure limit for beryllium. The agency's lack of interest in this subject is also disappointing. Chronic Beryllium Disease is a serious and sometimes fatal disease, and doing nothing to understand its causes and prevent it is a completely unacceptable response. Defendants' profession of "concern" for their employees' privacy certainly seem contrived in light of their indifference to the possibility that those same employees might be suffering from a serious disease.

Second, the defendants' arguments about how someone could conceivably gain the identity of the inspectors fall well short of what the law would require to invoke a legitimate privacy interest. In Arieff v. US Dept of the Navy, 712 F. 2nd 1462, 1467 (D. C. Cir. 1983), an opinion written by then Circuit Judge Scalia and joined by then Circuit Judge Ginsburg, the court emphasized that "speculation" about the identity of individuals and a "mere possibility" of identification through cross-referencing was insufficient to invoke Exemption 6. See also Department of the Air Force v. Rose, 425 U.S. 352, 380 n. 19 (1976)(Exemption 6 requires "threats to privacy interests more palpable than mere possibility;" " courts may properly discount the probability

of invasion of privacy in light of attendant circumstances”). In particular, the case of Citizens For Environmental Quality v. U.S. Department of Agriculture, *supra*, shows that the defendants’ speculation is insufficient to support an inference that someone could deduce the identity of the inspectors. In that case, a single test result in a remote district in Avery, Idaho was ordered to be released, in spite of affidavits stating that speculation focused on two individuals and some individuals could logically deduce the subject’s identity. 602 F. Supp. 534 at 538-539. As we demonstrated in the previous section of this brief, defendants cannot show that anyone, let alone Dr. Finkel, could successfully identify the inspectors.

Third, according to the defendants, the actual beryllium test results are individually coded not with the newer, closely guarded CSHO ID numbers, but with a code that is based upon the last four numbers of the inspector’s Social Security Number. It is a complete mystery as to why this step was taken, as defendants’ own personnel policies mandate that they use the new random CSHO ID codes that protect the identities of the individuals. Perhaps the use of the older codes was intentionally done to better argue that the test results should not be disclosed. Still, this alleged problem is easily overcome, as it would take only a few hours for someone to recode the test results with the new CSHO ID numbers before releasing the results to Dr. Finkel. Finkel Opposition Declaration at ¶¶22-23.

The application of Exemption 6 involves, as both plaintiff and defendants agree, a balance between the privacy interests of the affected federal workers and the public interest in shedding light on how the federal government is performing, or more likely in this case, not performing. 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)(“If IDPA can use this information to determine how well these agencies [OSHA, MSHA, and EPA] are protecting the public from crystalline silica exposure and potential danger, this would sway the balance in favor of disclosure.”<sup>7</sup>) Defendants assert that there is no public interest in the CSHO ID numbers, but this is plainly wrong. Dr. Finkel has explained at length how his research will shed light on OSHA’s activities with respect to both the many workplace health issues that can be addressed using the Salt Lake Database and the looming health problems of OSHA inspectors and workers exposed to beryllium. Finkel Declaration ¶¶ 15-23; 26-29; 36-43; Finkel Opposition Declaration ¶ 25.

The AFL-CIO amicus brief also emphasizes the public interest that workers have in maintaining access to this information so that they can continue to lobby OSHA to better perform its workplace safety mission.

---

<sup>7</sup> We note that this case involved a request for actual Social Security numbers, yet the court still tipped the balance in favor of disclosure.

David T. Barstow, a New York Times reporter who has won a Pulitzer Prize for a series of articles about workplace safety in facilities owned by the McWane companies and OSHA's inability to properly protect those workers, says that continued unredacted access to the Salt Lake Database will "provide the public with valuable information about worker risks, trends in those risks over time, distribution of risks by geographical area, industry sector, etc. and about the adequacy of OSHA's response to a major public health problem." Barstow Declaration, ¶6. He says that without continued access as requested by Dr. Finkel, he would "have no systematic way to identify persistent violators like McWane, and no systematic way to assess OSHA's response to those companies." Continued full access, he says, "will help journalists like me scrutinize OSHA's performance and identify employers who repeatedly expose workers to high levels of toxins." Id. ¶¶ 7-8.<sup>8</sup>

The fact that OSHA may not like some of the results of this research and investigative reporting, which could show that the agency is not adequately performing its mission, does not of course mean that there is no public interest in such

---

<sup>8</sup> Mr. Barstow's Declaration refers at ¶ 4 to an unreported decision of the United States District Court for the Southern District of New York, in which the court rebuffed OSHA's efforts to deny release of information similar to the information Dr. Finkel seeks. The New York Times Company v. United States Department of Labor, 03 Civ. 8334 (SAS) (D.D. N.Y. July 29, 2004). We include a copy of this opinion with this brief.

results.

#### **D. Defendants Do Not Meet Their Burden Of Demonstrating That The Coded CSHO ID Numbers Qualify For Exemption 7**

Finally, defendants assert that they can withhold the CSHO ID numbers pursuant to Exemption 7(C) and (E). (Although this argument is not mentioned in the defendants' preliminary statement at pages 1-2 of their brief, it is made later at pages 25-28.) Exemption 7 permits an agency to withhold "records or information compiled for law enforcement purposes, but only to the extent that production ... (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy \*\*\* (E) would disclose techniques and procedures for law enforcement investigations or prosecutions ... ." 5 U.S.C. §552(b)(7). There is an insurmountable problem with any argument on this Exemption and the defendants' claims are unsupported and makeweight.

##### **1. The Records Sought Are Not Compiled For Law Enforcement Purposes**

The insurmountable problem with the claim under both subsections is that CSHO ID numbers do not meet the Exemption 7 threshold test of having been made or "compiled for law enforcement purposes." While individual inspection records are prepared for some type of "law enforcement" purpose, there is no claim in any of the declarations by OSHA that the Salt Lake Database itself, and in particular, that portion

of the database which was requested by Dr. Finkel, is compiled for law enforcement purposes. The database is not used in determining violations or assessments or in pursuing cases against violators; the actual inspection files are used for that.

The only authority that defendants cite for their assertion that the ID codes are “law enforcement records” is Cooper Cameron Corporation v. U.S.D.O.L., 280 F. 3d 539 (11 Cir. 2002). But that case did not involve the production of either CSHO ID codes or any portions of the Salt Lake Database. Instead, it sought certain investigatory materials prepared by OSHA after an explosion at a petrochemical plant to determine if the plant violated safety standards, and so is irrelevant.

In Davin v. U.S. D.O.J., supra, the Third Circuit adopted a two part test for deciding if any material had been “compiled for law enforcement purposes.” Under that test, “the government must identify a particular individual or incident to a potential violation of law or security risk. The agency must then demonstrate that this relationship is based upon information ‘sufficient to support at least a “colorable claim” of its rationality.’” 60 F. 3d at 1056. Defendants have not even tried to carry this burden here. The CSHO ID codes have no rational connection to any potential violation or risk, and the contents of the Salt Lake Database that have any age at all are also irrelevant to any particular violation or risk.

## **2. Disclosure Would Not Constitute An “Unwarranted Invasion Of Personal Privacy”**

Defendants assert without elaboration that granting Dr. Finkel’s request would lead to “harassment” of inspectors “on the job.” Defendants’ Brief at 26. Once again, this argument assumes that Dr. Finkel would somehow be able to discern the identities of inspectors. But it’s makeweight in any event.

OSHA inspectors are not anonymous undercover agents or confidential informants operating in some cloak and dagger world. They do not reside in a Witness Protection Program. They have to publically disclose their true identity (and not their CSHO ID code) every time they set foot in a workplace. OSHA’s regional and area offices are in the telephone book and on the Web – they even helpfully offer maps.<sup>9</sup> Any plant manager who wants to harass that CSHO who wrote him up has all the information he needs to do just that, even a map if he gets lost on the way. Defendants do not state that anyone else would ever have any interest in “harassing” an OSHA inspector, and it would be doubtful if more than a handful of people outside the regulated companies has even heard of OSHA or its inspectors. No one would have any interest in harassing a retired OSHA inspector. Finally, OSHA frequently publicizes the identities of its inspectors. Finkel Opposition Declaration ¶¶ 29-30. Once again we note that OSHA’s professions of concern for its inspectors do not

---

<sup>9</sup> New Jersey’s OSHA offices can be found at <http://www.osha.gov/oshdir/nj.html>, which includes the map link.

extend to caring enough to adequately protect those who are exposed to workplaces and conditions that might lead to Chronic Beryllium Disease. Although the balancing test of Exemption 7(C) is less weighted in favor of disclosure than the balancing test of Exemption 6 (which concern any disclosure that would be a “clearly” unwarranted invasion of personal privacy), all of our points concerning the strong public interest in rejecting the defendants’ Exemption 6 claim are applicable here, and we incorporate them by reference.

### **3. Disclosure Would Not Reveal Techniques And Procedures Used For Investigations Or Prosecutions**

The defendants’ final argument is that disclosure of the CSHO ID numbers would allow Dr. Finkel or others to “profile” inspectors for “proclivities to cite a particular violations or higher penalties.” Defendants’ Brief at 27. Again, this argument fails if this Court concludes that Dr. Finkel cannot realistically discern the actual identity of the CSHO’s from their closely guarded code numbers. This argument is based entirely on a single, unexplained and unsupported sentence in §16 of the Fairfax Declaration that some form of such “computerized profiling” could be accomplished. Not only is this the very sort of “conclusory and generalized” assertion that cannot support a FOIA (or any other) summary judgment motion, it betrays an ignorance of how accurate profiling cannot be accomplished with respect to CSHOs.

A “proclivity” to cite for particular violation(s) is not a “law enforcement

“technique or procedure.” It is not a unique method of catching out a set of violations, or a specialized technique of how to look for or prove a certain set of violations. It is simply a tendency, and no more. Since OSHA’s workplace mission is supposed to inspect for any and all safety and health problems, any such “proclivity” is probably not part of any legitimate enforcement technique. The same is true of a “proclivity” to assess higher penalties. The courthouse scuttlebutt that a particular judge tends to mete out harsher sentences is not evidence of that judge’s “law enforcement techniques or procedures” in any useful sense.

The Third Circuit held in Davin, supra, that Exemption 7(E) cannot be used to withhold “routine techniques and procedures already known to the general public, such as ballistic tests, fingerprinting, and other scientific tests commonly known.” 60 F. 3d at 1058, quoting Ferri v. Bell, 645 F. 2d 1213, 1224 (3d Cir. 1981). It is surely common knowledge that not every inspection produces the same violations or the same proposed assessment for a violation. And in Davin, the court refused to accept a generalized assertion without proof, exactly all that defendants have offered here. Id.

Even if the government were able to prove that release might reveal “secret information” about its techniques, it must prove that the release also “would risk circumvention of the law.” Id. But here the defendants only assert that disclosure

would “enabl[e] employers to be less cooperative with, or deny entry to, certain CSHOs.” Fairfax Declaration ¶16. The logical steps to this conclusion only show how utterly far-fetched and impossible this is. First, Dr. Finkel would have to make that myriad of telephone calls and gain the cooperation of that myriad of employer officials who would deign to go find information in their own files to hand out to a perfect stranger. Next, Dr. Finkel would have to perform the analysis of the Salt Lake Database to ascertain the individual “proclivities” of certain CSHOs. Next, Dr. Finkel would make this information available to regulated companies.

Then, the defendants ask this Court to conclude based upon no proof whatsoever that in general employers would tend to be less cooperative with CSHOs perceived to be “tough” than others. The fact that an employer might be “less cooperative with, or deny entry to” a CSHO is not unheard of, by the defendants’ own admission in their discussion of warrants, but they can not legitimately claim that this inevitably leads to a “risk of circumvention of the law.” It is just as likely that an employer would be more cooperative with a CSHO perceived to be “tough,” in hopes of avoiding a more searching inspection or tougher assessments. The belief that a judge metes out tougher sentences may or may not encourage any individual defendant to cooperate with the prosecutors, but it stands to reason that it probably encourages more cooperation. Surely OSHA is not contending that it can be thwarted

in its mission by an uncooperative employer or two when Congress and the Supreme Court have given it ample tools to deal with all employers including those who insist upon a warrant.

Dr. Finkel explains why the “profiling” or “proclivity” claim is factually impossible. It is not enough to know that inspector A has handed out more citations for, say, ladder violations, than inspector B, which is all that will be revealed in the Salt Lake Database. One cannot deduce that inspector A is in fact tougher than the B without information that is unknown and unknowable: what kinds of conditions prevail at the workplaces inspected by the two inspectors. If there are no ladders at the sites inspected by B, that explains the lack of citations. One cannot make any accurate deductions about any two inspectors unless the workplaces they inspect are comparable, and that is of course impossible and unknowable. Thus any “profiling” information would be useless in any practical sense. Finkel Opposition Declaration ¶28.<sup>10</sup>

#### **IV. CONCLUSION**

---

<sup>10</sup> The same lack of accurate, knowable data also doomed the notorious New Jersey State Police program of “profiling” drivers by race in an effort to interdict drug trafficking. *See, e.g., State v. Soto*, 324 N.J. Super. 66, 71, n. 4 (Law Div. 1996) (“neither side produced any evidence identifying the Turnpike population between Exits 1 and 3 or 1 and 7A eligible to be arrested for drug offenses or otherwise.”)(emphasis added).

Aside from the relatively modest privacy interests of the inspectors – whose identity cannot be gleaned from the information Dr. Finkel has requested – there are no legitimate private interests implicated by this case. Essentially this case presents an issue of OSHA’s speculative, unexplained and uncorroborated assertions that its inspection programs will be hindered by (a) employers with no real competitive interest nonetheless acting irrationally to insist on warrants and otherwise engage in expensive obstructionist behavior and (b) employers resisting inspectors “profiled” as “tough,” both balanced against the public’s right to know how well – or not – OSHA is performing its important duties of protecting the health of America’s workers. Given the weaknesses and fallacies that pervade the defendants’ arguments, and the lack of any specific facts to support them, the balance is clear. This would seem to be especially true since defendants seek to forever bar access to a database with millions of records based on the unproven possibility that a minuscule handful of these records might contain legitimate trade secret or confidential information – this in spite of the fact that no one has come forward with specific and credible evidence that this is true or that disclosure would cause any harm.

For the reasons given in this brief, our motion brief and supporting declarations and exhibits, plaintiff Dr. Adam Finkel respectfully requests that this Court grant his motion for summary judgment and deny the defendants’ motion for summary

judgment.

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

November 20, 2006