Quentin Riegel

Vice President, Litigation & Deputy General Counsel

Law Department

May 19, 2006

Ms. Sue Izumi
FOIA Officer
U.S. Department of Labor
Occupational Safety and Health Administration
200 Constitution Avenue, NW, Room N3647
Washington, DC 20210

Dear Ms. Izumi:

The National Association of Manufacturers (NAM) is the nation's largest industrial trade association representing small and large manufacturers in every industrial sector and in all 50 states. The NAM hereby responds on behalf of its membership to OSHA's April 21, 2006 notice regarding the lawsuit filed in the United States District Court for the District of New Jersey under the Freedom of Information Act (FOIA) to compel disclosure of all air and other sampling data taken by OSHA from 1979 to June 1, 2005. *Finkel v. United States Department of Labor.*

Simply stated, the public release of OSHA's sampling data from 1979 to June 1, 2005 -- the astounding scope of which encompasses upwards of one million samples -- poses three fundamental and substantial risks not only to NAM members, but to their employees and OSHA as well. First, the public release of this sampling data will undermine OSHA's own balanced approach regarding the release of such exposure information. Second, the public release of this sampling data will threaten confidential commercial and trade secret information. Third, the public release of this enormous body of sampling data is wholly unwarranted and would simply fuel the ongoing conflagration of unjustified litigation in America. Each of these risks will be discussed in turn.

First, OSHA has long recognized that access to sampling data similar to that at issue, while critical to the ability of employees to manage their own health, is not unfettered. The sampling data are employee exposure records. OSHA's regulation governing access to employee exposure and medical records, 29 C.F.R. § 1910.1020, strikes a balance by providing a broad, but not unlimited, right to access. For example, under this regulation the right to access to these records is restricted to employees or their designated representatives. *Id.* § 1910.1020(e)(1). The right to access is further restricted to exposure records "relevant to the employee," such as those that are directly relevant (*i.e.* testing data of the employee requesting the records) or indirectly relevant (*i.e.* testing of similarly situated employees). *Id.* § 1910.1020(e)(2). Moreover, if a designated representative seeks unconsented access to employee exposure records, the representative must, among other things, specify in writing the "occupational health need for gaining access to these records." *Id.* § 1910.1020(e)(2)(i)(B).

Measured against the balanced approach embodied in this regulation, the FOIA request at issue is clearly out of line. The FOIA request is not made by employees interested in managing their own health or a similarly interested designated representative. The FOIA request is almost unlimited in scope and completely devoid of any notion of relevance. Finally, it appears that no specificity has been given with respect to the occupational health need for why the massive amount of testing data has been requested. In short, the FOIA request is anathema to OSHA's general policies regarding the disclosure of employee exposure records, and it must denied as such.

Second, as part of the balance achieved by OSHA in regulating access to employee exposure records, OSHA is particularly sensitive to protecting an employer's confidential commercial or trade secret information. To that end, OSHA has imposed greater restrictions on the access to employee exposure records that may divulge such confidential information by, among other things, permitting employers the ability to withhold specific chemical identities in certain circumstances, requiring an increased burden upon those seeking the release of a specific chemical identity, and authorizing the use of confidentiality agreements to provide some safeguards to protect the disclosed information. *Id.* § 1910.1020(f).

The sheer breadth of the FOIA request at issue ensures that if it is granted, confidential commercial and trade secret information will be disclosed without consideration for any of the protections OSHA deems necessary in its regulations. It cannot be debated that the identity of chemicals or process ingredients subject to sampling often constitute confidential commercial and trade secret information that if disclosed would cause significant competitive harm to manufacturers, harm that cannot be fully remedied. Therefore, to the extent that the FOIA request poses *any* risk to manufacturers and their confidential commercial and trade secret information, especially in light of the fact that the request is not made in the traditional context of an employee or designated representative seeking information necessary for their health management, it must be rejected.

Third, it is critical for OSHA to evaluate the effect of the FOIA request in determining its response. The request encompasses all samples over more than 26 years, including details about the establishment name and address, the substances found, the numerical results and other information. This is a huge volume of information that aggressive and inventive trial lawyers, with the benefit of 20/20 hindsight, could attempt to use in new lawsuits. We can expect efforts to solicit alleged victims for class action lawsuits, with allegations that try to avoid the limits under the workers' compensation system, or alleging premises liability or other second-hand exposures.

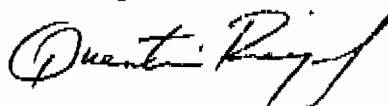
Such litigation would affect only those companies with facilities under OSHA's jurisdiction, and provide companies that have not been similarly inspected with a significant competitive advantage. Litigation is very expensive and can have a huge impact on the ability of a company to conduct its business.

Moreover, the release of information could lead to unwanted and unduly alarming solicitations of employees. It could also interfere with OSHA law enforcement by giving companies additional reason to fight future visits by OSHA personnel to their facilities.

In sum, OSHA must reject the FOIA request both because it would allow confidential information to be used to damage the competitiveness of the companies in the database, and because it would hinder OSHA's enforcement efforts in the future.

The NAM, on behalf of its members, thanks you for the opportunity to comment. While the Department of Labor's April 21, 2006 notice and regulation governing predisclosure notification of confidential commercial information envision that individual businesses would submit objections to the FOIA request at issue, 29 C.F.R. § 70.26 (e), the enormity of the FOIA request warrants a collective response on behalf of all NAM members. As such and based on the foregoing, we ask that the Department of Labor exercise its authority under the Freedom of Information Act to deny the requested disclosure.

Sincerely,



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