

United States Court of Appeals
for the Third Circuit

Docket No. 99-5457 (3rd Cir.)

OSHA Data/CIH, Inc.
Appellant
v.

United States Department of Labor,
Appellee

Appeal from
the United States District Court
for the District of New Jersey

BRIEF OF APPELLANT

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Subject matter jurisdiction in the United States District Court for the District of New Jersey is based on 5 U.S.C. § 552(a)(4)(B) inasmuch as the action seeks to enjoin the Appellee from withholding its records under the Freedom of Information Act, 5 U.S.C. § 552, and for reasonable attorneys fees and litigation costs pursuant to that Act. Subject matter jurisdiction also arises under 28 U.S.C. § 1331 inasmuch as all claims are based on statutes of the United States of America.

Appellate jurisdiction arises under 28 U.S.C. § 1291 as an appeal from a final decision in a district court of the United States.

STATEMENT OF ISSUES PRESENTED

1. Whether agency records (including number of employees and calculated Lost Workday Injury and Illness rates) which obtained or derived by OSHA from a survey of regulated employers is exempt from disclosure under FOIA as confidential commercial information. Appendix page 92-98.
2. Whether this action should have been stayed so that OSHA, at a cost of nearly \$1.7 million to be charged to Appellant, can contact each survey responder to solicit a claim that the data submitted constituted confidential commercial information and then for OSHA to evaluate and determine the merit of each claim. Appendix page 92-98.
3. Whether the district judge abused his discretion on reviewing an order of a magistrate judge when he directed the the submission of transcripts, then sua sponte and without notice dismissed the appeal prior to the preparation of the transcripts, then directed the parties to a conference with the magistrate judge to set a briefing schedule for the appeal, only to decide the appeal without further briefs and without considering either the record or the arguments on the merits. Appendix page 235, 249.
4. Whether an agency's practice is to refuse production of its records created within 30 days prior to a FOIA request is rendered moot when, without abandoning the practice, the specific records which later fell outside the 30 day blackout period, are later produced. Appendix page 315-339.

STATEMENT OF STANDARD OF REVIEW

With one exception, this case was decided on cross-motions for summary judgment; therefore, the standard of review is plenary. *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 433 (3d Cir. 1996). The exception relates to Issue 3 (Legal Argument Point II, *infra*), as to whether the Judge Lechner abused his discretion in the handling of the appeal of the magistrate judge's Order staying the proceedings.

STATEMENT OF THE CASE

Appellant commenced this action on January 22, 1998 seeking production of records from the U.S. Department of Labor's Occupational Safety and Health Administration ("OSHA") pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. App. 4.¹ The Complaint asserted three counts, each based on one of three separate FOIA requests. *Id.* On January 28, 1998, Appellant filed a First Amendment to Complaint adding a Fourth Count concerning a fourth FOIA request. App. 49. This appeal only concerns the first three counts as the parties conceded that the records requested in the Fourth Count were ultimately produced.²

The First and Second Counts deal with data either collected or derived by OSHA from the "OSHA Log 200" - a log required to be maintained by OSHA-regulated employers on which workplace injury information is recorded. See, 29 C.F.R. § 1904.2.

The District Court dismissed the First and Second Counts following Appellant's refusal to pay nearly \$1.7 million for OSHA to solicit and then evaluate claims by employers that the OSHA Log 200 data contains confidential commercial information. The Third Count was also dismissed. *Id.* That Count addressed OSHA's refusal to produce information contained in its IMIS database created within 30 days prior to any FOIA request.

The First Count arose from Appellant's October 29, 1996 letter (App. 12) requesting

¹ References to the Appendix are cited as "App." followed by the page number.

² Appellant was granted leave by the District Court to apply for counsel fees related to the Fourth Count. Since the services rendered concerning the Fourth Count were minimal relative to the entire case and intertwined with the services rendered on the entire case, Appellant did not apply for fees exclusively on the Fourth Count. Assuming success on the within appeal, Appellant requests that there be a remand to assess reasonable fees and costs under 5 U.S.C. § 552(a)(4)(E) for all successful claims.

certain records from the United States Department of Labor - Occupational Safety and Health Administration ("OSHA") pursuant to FOIA. Count I:3 (admitted)³. Appellant alleged that a true copy of that letter was annexed to the Complaint as Exhibit 1. In part, the October 29, 1996 letter states:

Therefore, in accordance with the Freedom of Information Act (5 U.S.C. Section 552), we hereby submit a "commercial use request" for a copy of all Log 200 data gathered from approximately 80,000 employers under the so-called "Data Collection Initiative" which began in February 1996.

Thus, the information obtained through the Data Collection Initiative comes from the OSHA Log 200 data.

By letter dated December 10, 1996 (App. 27), OSHA denied Appellant's request asserting that OSHA is forbidden from giving "advance notice of an inspection." Count I:5 and Ex. 2 (admitted).

By letter dated December 12, 1996 (App. 29), Appellant lodged an administrative appeal of the December 10, 1996 denial, receipt of which was acknowledged on January 6, 1997. Count I:6 (admitted) and Count I:8 (admitted). As of January 29, 1998, Appellant had not received any decision on its administrative appeal. Count I:9 (admitted).

As to the Second Count, Appellant's October 24, 1996 letter (App. 32) requested certain records from OSHA pursuant to FOIA. Count II:3 (admitted). A true copy of that letter is

³ Plaintiff uses this nomenclature to cite the Complaint, as amended. For example: Count I:5 and Ex. 2 (admitted) the roman numeral designates the Count (First Count), the arabic numeral designates the paragraph (paragraph 5), the arabic numeral following "Ex." designates the exhibit to the Complaint (Exhibit 2) and the parenthetical "admitted" means that Defendant's Answer admits the allegation.

annexed to the Complaint as Exhibit 4. Count II:4 (admitted). In part, the October 24, 1996 letter stated:

In accordance with the Freedom of Information Act (5 U.S.C. Section 552), we hereby submit a "commercial use request" for a copy of the Lost Work Day Injury and Illness (LWDI) data calculated during OSHA enforcement inspections and entered into the Integrated Management Information System (IMIS) and current through September 30, 1996.

We specifically request the data include all captured fields of information associated with calculation of the LWDII such as the inspection activity number, number of work hours, reporting period and the LWDII value itself.

The October 24, 1996 letter attached a copy of a Memorandum from Deputy Assistant Secretary Michael G. Connors to all OSHA Regional Administrators requiring OSHA Compliance Safety and Health Officers to record data obtained from employers' OSHA Log 200 during their inspections, to enter that data into OSHA's IMIS system, which would then automatically calculate the Lost Workday Injury and Illness rate. Count II:4 (admitted) and Ex. 4 (App. 73). Thus, all requested information is either contained in the OSHA Log 200 or calculated from the OSHA Log 200 data.

By letter dated December 19, 1996 (App. 35), OSHA denied Appellant's request asserting that "providing this information would entail an extensive reprogramming effort which is not required under the Freedom of Information Act." Count II:5 (admitted) and Exhibit 5.

By letter dated December 23, 1996 (App. 37), Appellant lodged an administrative appeal of the December 19, 1996 denial, receipt of which was acknowledged on January 16, 1997. Count II:6 (admitted), Count II:8 (admitted) and Ex. 6. As of January 29, 1998, Appellant had not received any decision on its administrative appeal. Count I:9 (admitted).

In Appellee's Brief supporting its Motion to Stay the First and Second Counts (App. 78), it conceded that it has abandoned the initial reasons for the denial of the October 24 and October 29 requests, as set forth in its letters of December 19 and December 10, respectively. Instead, Appellee asserted, with respect to the First and Second Counts, that the data might be confidential commercial information, although it had no idea whether it was or not. It wanted Appellant to pay for OSHA to solicit claims of confidentiality and then to evaluate the merit of those claims.

In the Third Count, Appellant requested an injunction under FOIA to prohibit the withholding of the records requested in Appellant's September 12, 1997 request (App. 46), a copy of which was annexed as Exhibit 10 to the Complaint. That FOIA Request was targeted specifically to address OSHA's new policy of withholding the most recent 30 days of information from the computer "derived" file supplied to FOIA requesters. The "derived" file is a computer file generated from OSHA's database of all inspections it conducts of employers' workplaces. Thus, Appellant requested information for "all available data elements ... up to and including the date of file tape creation" but limited to the 30 days prior to tape creation. These records have never been produced.

Since 1991, Appellant has submitted, on a quarterly basis, requests for the "derived" file from OSHA's Integrated Management Information System. Complaint Count III, ¶3 (admitted in Appellee's Answer). A specimen of such a request is annexed to the Complaint as Exhibit 7. Complaint Count III, ¶3 (admitted in Appellee's Answer). The records are produced on 9-track computer tape. Complaint, Third Count, ¶3 (admitted in Appellee's Answer). The requested information constitute agency records. Appellee's Answer to Appellant's Interrogatory No. 5 (copy of which is attached to the Certification of Philip D. Stern at App. 280).

Up through the first half of 1997, the derived file included data from inspection of employers, including any alleged violations made up through the date the tape was run. Complaint, Third Count, ¶4 (admitted in Appellee's Answer). On or about August 5, 1997, Appellant was advised that the derived file would exclude violations issued within thirty days (or, perhaps, longer) prior to the date of the tapes. Complaint, Third Count, ¶¶ 5, 6, and 7 (admitted in Appellee's Answer) and Complaint, Exhibit 8.

Based on the purported withholding of the requested information, by letter dated September 12, 1997, Appellant specifically requested the sequential IMIS derived file for the 30-day period immediately prior to the tape's creation date. Complaint Exhibit 10, 2nd and 3rd paragraphs. Appellee's Answer admits that Appellant's September 12, 1997 letter (i.e., Exhibit 10) requested records. Appellee's Answer to Third Count, ¶10; Appellee's Answer to Appellant's Interrogatory No. 7 (copy of which is attached to Certification of Philip D. Stern at App. 280).

Thus, the FOIA Request (i.e., Exhibit 10 to the Complaint) specifically requested the data which was purportedly being withheld. Since that request, Appellee has not supplied the derived IMIS file with "all available data elements" containing the data within the 30 days immediately prior to the derived file's creation date.

SUMMARY OF THE ARGUMENT

The first two counts address information obtained by OSHA from employers. OSHA's own regulations call for it to notify any submitter of information when it has "has reason to believe that disclosure of the information could reasonably be expected to cause substantial competitive harm." 29 C.F.R. §70.26(d)(2). OSHA offered no competent evidence of any basis from which it could be concluded that it had a reasonable belief of a reasonable expectation that disclosure would cause substantial competitive harm. OSHA offered only a single hearsay statement of an unidentified Goodyear employee when Goodyear publicizes the very same information on its own. Even if OSHA should have to solicit the submitters, there is no basis to charge that expense to Appellant.

There is also no basis for OSHA's refusal to provide the most recent 30 days of data. Rather than address the issue, OSHA hid behind its own regulation which permits it to provide data as of the date of receipt of the FOIA request. Using the date of receipt, OSHA argued that it subsequently provided the data. OSHA applies the date of receipt rule arbitrarily to defeat FOIA's purposes and has never addressed the legality of its 30 day blackout period.

LEGAL ARGUMENT

POINT I: OSHA HAS NOT ESTABLISHED THAT THERE EXISTS A FACTUAL BASIS ON WHICH TO CONCLUDE THAT THE LOG 200 DATA IS CONFIDENTIAL COMMERCIAL INFORMATION TO AVOID FOIA'S POLICY OF DISCLOSURE.

This case arises under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"). FOIA was passed in 1966 in response to Congress' perception that Section 3 of the Administrative Procedures Act did not result in an acceptable level of disclosures. *Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979); *Environmental Protection Agency v. Mink*, 410 U.S. 73, 79 (1973). FOIA's "basic purpose reflected 'a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.'" *Department of the Air Force v. Rose*, 425 U.S. 352, 360-1 (1976). Since "these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act," the exemptions are exclusive and must be narrowly construed. *Id.*, at 361. "Consistently with this purpose, as well as the plain language of the Act, the strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents." *United States Dept. of State v. Ray*, 502 U.S. 164, 173 (1991). "Unlike the review of other agency action that must be upheld if supported by substantial evidence and not arbitrary or capricious, the FOIA expressly places the burden 'on the agency to sustain its action' and directs the district courts to 'determine the matter de novo.'" *United States Dept. of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 755 (1989).

This case was decided under Rule 56 by summary judgment. Rule 56 of the Federal Rules of Civil Procedure, in part, provides:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, 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).]

Appellant, as the movant, bore the initial burden of informing the court of the basis for the motion, however it need not submit any evidentiary proofs where the burden of proof is on the non-moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-4 (1986); 5 U.S.C. § 552(a) (4)(B). Thus, to defeat the Motion, Appellee, as the non-moving party bearing the ultimate burden of proof, must raise genuine issues of material fact. *Id.*; see, also, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986). If Appellee failed to offer any proof of an essential element of its case, any other factual issue is rendered immaterial. *Celotex*, at 323.

There is no dispute that Appellant's FOIA requests seeks records. Appellee's Answers to Interrogatories Nos. 1, 3, 5 and 7 (copy attached to Certification of Philip D. Stern at App. 279-80). There is no dispute, with respect to the First and Second Counts, that the requested records were withheld. For Appellee to have defeated the motion, it must have come forward with evidence which, if believed, would permit a trier of fact to conclude that a specific exemption under FOIA applies. Absent such a showing, Appellant was entitled to summary judgment.

Finally, it should be observed that Appellant's Complaint, as amended, seeks recovery of its litigation costs, including attorney's fees. In pertinent part, FOIA states:

The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section [i.e., 5 U.S.C. § 552.] in which the complainant has substantially prevailed.

5 U.S.C. § 552(a)(4)(E). Thus, the award of fees and costs are based, initially, on whether Appellant has "substantially prevailed." Assuming Appellant is successful on this appeal, the case

should be remanded to permit an application for an award of fees and costs.

Appellee sought a stay of this action with respect to the First and Second Counts so it could solicit possible claims of confidentiality and then evaluate those claims. “If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records.” 5 U.S.C. § 552(a)(6)(C)(i). There is no basis to grant a stay because exceptional circumstances do not exist and, further, Appellee has not exercised due diligence in responding to the requests.

A. Appellee Has Not Exercised Due Diligence

Appellee did not even proffer the exercise of due diligence. The facts, of course, establish the utter lack of due diligence.

Appellant submitted the requests in December 1996. After a denial, Appellant submitted administrative appeals in early January 1997. Decisions on the appeals were to have been completed within 20 days or, in “unusual circumstances,” 30 days. 5 U.S.C. § 552(a)(6)(A)(i) and 552(a)(6)(B)(i). “Unusual circumstances” include “the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request.” 5 U.S.C. § 552(a)(6)(B)(iii)(II). For fourteen months, from the submission of the appeals until Appellee’s March 19, 1998 Motion for the Stay, Appellee never did anything to respond to Appellant’s request. Moreover, Appellee never sought the pre-litigation extension of time which it was permitted to do. See §552(a)(6)(B)(i). Thus, the complete absence of any due diligence bars the imposition of a stay.

B. There Are No Exceptional Circumstances Justifying A Stay.

Appellee contends that it has voluminous documents to review. The records in question consist of information obtained from covered employers and are taken from the OSHA Log 200, a log maintained by employers concerning work-related injuries and illnesses. Without identifying what in those documents could be confidential, Appellee asserted that it must contact all of the business submitters and solicit their claims of confidentiality. Then, Appellee submitted, it must evaluate those claims. In addition, Appellee wants Appellant to pay approximately \$1.5 million for this solicitation and evaluation. There is, however, no basis in law or fact from which a claim of confidentiality can exist; hence, there are no voluminous documents to review and, consequently, no need for a stay.

1. The Information Requested Is Not Confidential

Appellee, some 18 months after receiving Appellant's FOIA request, contended for the first time must solicit the 80,000 employers and invite them to justify, if at all, a claim that information they submitted is confidential. Appellee wanted a continuance under *F.R. Civ. P. 56(f)* to conduct this solicitation and then to evaluate the merits of any claim of confidentiality.

To establish Exemption 4, in the context of the present litigation, it must be shown that the records sought contain information which is (1) commercial, (2) was obtained from a person, and is (3) confidential. Appellant does not dispute that the information is commercial and was obtained from a person (one specific item, however, the lost workday rate, is not commercial information obtained from a person but, instead, is a calculation made by OSHA based on data obtained from the employer; as a matter of law, Appellee should be compelled to disclose the lost workday rate. See 5 U.S.C. 552(b) (last paragraph). The issue, then, turns on whether the information is confidential.

The records Appellant seeks are very specific. In the First Count, Appellant requested the data collected from OSHA's Data Collection Initiative survey) and the lost workday rate calculated from that data. More particularly, the survey elements are:

1. The average number of employees who worked for the establishment during 1995.
2. The number of hours the employees actually worked during 1995.
3. Conditions which might have affected the answers to #1 and #2.
4. Whether there were any occupational injuries or illnesses during 1995.
5. If there were occupational injuries or illnesses, information about them taken from the submitter's *Log and Summary of Occupational Injuries and Illnesses (OSHA No. 200)*.
Regarding injuries, the survey seeks the number of deaths, number of work days affected by the injuries, and injuries without lost workdays. Regarding illnesses, the survey seeks information about the type of illnesses, the number of work days affected by the illnesses, and illnesses without lost workdays.
5. The name, title, telephone number of the individual completing the form and the date completed.

Once this information is entered into OSHA's computer system, a rate is calculated which reflects an employer's incidence of work related injuries and illness, the so-called LWDII (Lost Workday Injury and Illness) rate.

In the Second Count, Appellant seeks the LWDII rate calculated by OSHA inspectors obtained during their worksite inspections, along with the inspection activity number, the number of hours worked and the reporting period.

Other than the calculated LWDII, all the information requested is obtained from the

OSHA Log 200. Each employer covered by OSHA regulations is required to maintain “a log and summary of all recordable occupational injuries and illnesses.” 29 C.F.R. §1904.2(a). “The log and summary shall be completed in the detail provided in the form and instructions on form OSHA No. 200;” the so-called ‘OSHA Log 200’, *Id.* The employer must maintain the log and summary for five years at each of its establishments or a suitable alternate location. 29 C.F.R. §§ 1904.2 and 1904.6.

An annual summary of the OSHA Log 200 data must be posted annually in each establishment. 29 C.F.R. §1904.5.

The OSHA Log 200 and the summary “shall, upon request, be made available by the employer to any employee, former employee, and to their representatives for examination and copying.” 29 C.F.R. §1904.7.

With respect to the First and Second Count, Appellant sought the data obtained by OSHA which is taken directly from the OSHA Log 200. According to Deputy Assistant Secretary Michael G, Connors, a Lost Workday Injury and Illness (LWDII) rate is automatically computed by OSHA when the collected data is entered into OSHA’s computer system. See Exhibit 4 to the Complaint. In addition to the data taken from the OSHA Log 200, Appellant requested the computed LWDII rate which is based on the OSHA Log 200 data.

Appellee contended that the data collected from the OSHA Log 200 may be confidential commercial information. Indeed, since none of the requested data had been supplied, Appellee must contend that *all* of the information sought may be confidential. 5 U.S.C. § 552(b) (last paragraph). Appellee does not, however, contend that *any* record is in fact confidential. Rather, Appellee asserts that, pursuant to Executive Order 12,600 as implemented by 29 C.F.R. Part 70,

it must notify the employers who supplied the information prior to releasing it to Appellant. There is, however, no basis for Appellee's position.

According to Appellee's regulations, OSHA must notify a "business submitter" of Appellant's request if either (1) the business submitter previously designated the information as "sensitive," or (2) OSHA "has reason to believe that disclosure of the information could *reasonably be expected to cause substantial competitive harm.*" 29 C.F.R. §70.26 (d)(2) (emphasis added). Neither condition exists. Appellee makes no claim that any business submitter pre-designated the information as sensitive, nor can it substantiate a reasonable belief that disclosure "could reasonably be expected to cause substantial competitive harm."

On competitive harm, OSHA offered the Declaration of Emily Sheketoff, a Deputy Assistant Secretary in the Department of Labor. At a meeting she apparently never attended, she claims that representatives of Goodyear said that disclosure of the information would cause competitive harm. There was no explanation of how this would happen nor was there any explanation of any nexus between the release of any particular fact and its use to competitively disadvantage the submitter. At oral argument, on OSHA's stay motion, the court was advised that Goodyear in fact publicizes the very information which Sheketoff asserted Goodyear was fearful of disclosing.⁴ App. 208-9.

The test for confidentiality has been widely recognized to be set forth in *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). *Critical Mass Energy Project v. NRC*, 975

⁴ Because the stay order was granted, the then pending summary judgment motion (referred to in the colloquy at App. 208, line 4) was never filed.

F.2d 871, 877 (D.C. Cir. 1992)⁵ (en banc) (“so well established a precedent”); *Justice Department Guide to the Freedom of Information Act*, GPO Serial No. 027-000-01376-7, at page 140 (“long regarded as the leading case on the issue”) (hereafter *Justice Department Guide*). Under *National Parks*,

[C]ommercial or financial matter is “confidential” for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government’s ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. [*National Parks*, 498 F.2d at 770.]

Appellee does not claim that its ability to obtain the information would be impaired. Thus, the confidentiality of the information turns on whether disclosure would “cause substantial harm to the competitive position of the person from whom the information was obtained.” To satisfy the “substantial harm” standard, there must be “specific factual or evidentiary material,” *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir. 1985) cert. den. 471 U.S. 1137, “revealing ‘[a]ctual competition and the likelihood of substantial competitive injury,’” *GC Micro Corp. v. Defense Logistics Agency*, 33 F. 3d 1109, 1111 (9th Cir. 1994); *Public Citizen Health Research Group v. Food and Drug Admin.*, 704 F.2d 1280, 1291 (D.C. Cir. 1983). As discussed earlier, to obtain a continuance under *F.R.Civ.P.* 56(f), Appellee was required to show how solicitation of the submitters would preclude summary judgment. More precisely, Appellee should have shown that “specific factual or evidentiary material” could be obtained which would reveal “actual

⁵ The Court in *Critical Mass* did set forth a new rule for information which is voluntarily submitted. Although it was subsequently determined that there was no lawful basis for OSHA’s demand for the information, the survey expressly states that it “must” be completed and returned in 30 days. Employers could not believe, then, that they were submitting the information voluntarily.

competition and the likelihood of substantial competitive injury” from disclosure of the number of workers, the hours worked, the nature and number of occupational injuries and illnesses, and the calculated LWDII rate. Appellee did not make such a showing. Therefore, no continuance should have been granted and the district court should have entertained Appellant’s summary judgment motion on the First and Second Counts.

Again, the sworn statement offered on confidentiality did not constitute “specific factual or evidentiary material.” It was, at best, “[c]onclusory and generalized allegations of substantial competitive harm [which] are unacceptable and cannot support an agency’s decision to withhold requested documents.” *Public Citizen*, 704 F.2d at 1291. The Declaration of Emily Sheketoff dated April 27, 1998, in paragraph 11, states:

In a meeting between OSHA staff and representatives of Goodyear, Goodyear expressed to OSHA its concern that the data collected would cause substantial competitive harm if disclosed to competitors. Goodyear noted its industry is a highly competitive one. It explained that release of the number of hours, number of employees, and the LWDII rate would allow competitors to easily determine its productivity, hours worked, number of shifts, etc. As Goodyear explained it, this information would allow rivals to determine things like market share and what specific products are in production. They also stated that they belong to a number of employer associations and they would not release this information to these associations. [App. 200-201.]

First, there must be serious question as to any consideration of this “evidence”; there is no indication as to when or where this meeting took place, whether Ms. Sheketoff was even present, and who was speaking on behalf of Goodyear. Where is the affidavit from a representative of Goodyear? These hearsay statements should have been disregarded entirely.

Assuming the statements were admissible, there is nothing from which to establish any competitive harm resulting from disclosure in 1998 of Goodyear’s 1995 data. There is no showing,

for example, that the number of hours Goodyear's employees worked in 1995 would have any bearing on what products are now in production. Moreover, even if information about market share and products in production were disclosed, there is no showing of how that information would put Goodyear at a substantial competitive disadvantage.

Compare the proffer made here with the evidence in *Public Citizens*, where release of manufacturers' safety and efficacy testing of intraocular lenses would cause substantial competitive harm to those manufacturers "because their competitors would be receiving, free of charge, the benefits of [their] costly research and testing." *Public Citizen*, 704 F.2d at 1284 (quoting the District Court's factual finding). None of the data sought here could be likened to that in *Public Citizen*.

In *Miami Herald Publishing v. U.S. Small Business Admin.*, 670 F.2d 610 (5th Cir. 1982), a FOIA request was made for a list of SBA loans "that have been written off, liquidated or declared delinquent." *Id.* at 612. The SBA's district director testified that disclosure of the information could injure a small business in a variety of ways: the competition could take advantage of the business' weakened condition; vendors would be reluctant to deal or give credit to the business; and employees might leave out of concern for their future. *Id.* at 614n8. The Circuit Court of Appeals upheld the District Court finding that the government failed to sustain its burden of proving a likelihood of substantial competitive injury. *Id.* at 614. The Court observed that the testimony "was mere unsupported speculation about the business world generally, with no focus on small business debtors or guaranteed loans in particular." Appellee's submissions here are even less precise and more speculative than those in *Miami Herald*. Thus, there is no basis from which to conclude that disclosure of the requested information could possibly result in substantial competitive harm.

Again, to justify a continuance, Appellee must have made some proffer as to how the requested information could reasonably cause substantial competitive harm to a submitter. Appellee has not made any such proffer. While Appellee says it met with a submitter, Goodyear, who is presented as a vehement objector to disclosure, no affidavit is presented. Appellee offers no evidence sufficient to show that even one business submitter would likely suffer any harm, let alone substantial competitive harm, from disclosure. Thus, there is no showing how a continuance would lead to obtaining facts which could preclude summary judgment.

In evaluating the substantial competitive harm standard, courts have balanced the potential for harm against FOIA's strong policy favoring disclosure and the public interest in the information. In *GC Micro*, the Ninth Circuit observed that disclosure of government contractors' goals for the use of, actual use of, and expenditures on contracts with small disadvantaged businesses promotes FOIA's policy of enabling "the public to evaluate the wisdom and efficiency of federal programs and expenditures" and the Small Business Act amendment's policy of "encouraging federal contractors in general to set higher SDB subcontracting goals." *GC Micro*, 33 F.3d at 1113. The Court then observed that disclosure "would provide little if any help to competitors attempting to estimate and undercut the contractors' bids." *Id.* at 1115. Having considered the promotion of policies by disclosure and the impact of disclosure on the business submitters, the Court "agree[d] with the D.C. Circuit that, in making our determination, we must balance the strong public interest in favor of disclosure against the right of private businesses to protect sensitive information." *Id.* The Court then concluded that disclosure was warranted.

Like *GC Micro*, disclosure here promotes FOIA's presumption of disclosure and the OSHA Act's policy of promoting workplace safety. Disclosure encourages employers with poor safety

records to improve the workplace. By comparing LWDII rates for different time periods, the public can evaluate “the wisdom and efficiency” of OSHA’s “programs and expenditures.” *GC Micro*, 33 F.3d at 1113. By comparison, there is no showing how a competitor of a business submitter could use information about the number of workers, hours worked, nature and number of work-related injuries and illnesses, or the LWDII rate to undercut and out-bid that submitter. On balance, whatever harm could possibly be demonstrated after soliciting submitters does not outweigh the promotion of the congressional policies of FOIA and the OSH Act.

It should also be observed that Appellee has taken inconsistent positions on the disclosure of the number of employees and the workplace injury rates. Appellee placed this data on its Internet site. It only removed that information from the Internet *after* Appellant pointed out Appellee’s duplicity.

Finally, as indicative of the absence of any bona fide claim of confidentiality, Appellee has not cited a single “reverse FOIA” case in which an employer has sought to prevent disclosure of the number of employees or the lost workday rate from either the sequential IMIS derived file (which Appellant has been receiving since 1991) or from the OSHA Web site.

Even if some argument could be made that some of the data could cause substantial competitive harm, the remaining data must be disclosed. 5 U.S.C. §552(b) (last paragraph). Appellee is not permitted to withhold all of the data if only a portion is confidential. Conversely, to withhold all of the data, Appellee must demonstrate that each category of the data is confidential.

Even assuming, *arguendo*, that disclosure would cause substantial competitive harm, no notice is required when “[d]isclosure of the information is required by law” (other than FOIA).

29 C.F.R. §70.26(g)(3). As explained above, the OSHA Log 200 (and, hence, its data) is required by law to be disclosed to employees, former employees, or their representatives and its summary is to be publicly posted. Thus, OSHA is not required to notify the business submitters.

2. Appellant Is Not Responsible for Appellee's Notice Costs

Appellee contends that, if it has to give notice under 29 C.F.R. 70.26(d)(2), Appellant must pay for both the mailing of the notice and Appellee's evaluation of any confidentiality claims. There is no basis for this contention.

FOIA directs the implementation of fee schedules. 5 U.S.C. § 552(a)(4)(A)(i). The regulations must provide that "fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use." 5 U.S.C. § 552(a)(4)(A)(ii)(I). There is no dispute that Appellant's request is for commercial use. FOIA limits fees to "only the direct costs of search, duplication, or review." 5 U.S.C. § 552(a)(4)(A)(iv). The costs which Appellee seeks to charge Appellant have nothing to do with searching or duplicating records. Nor are they "review costs."

Review costs shall include only the direct costs incurred during *the initial examination of a document* for the purpose of determining whether the documents must be disclosed ... and for the purposes of withholding any portions exempt from disclosure under this section. [§552(a)(4)(A)(iv) (emphasis added).]

In order to assert the need to notify business submitters, Appellee must have already conducted its "initial examination." Hence, it may not charge for any additional "review" costs. Moreover, Appellee cannot charge for the evaluation of whether the business submitters raise a valid claim of confidentiality because that is the resolution of a legal issue. §552(a)(4)(A)(iv).

The Department of Labor's own regulations are consistent with the non-chargeability of

the costs for solicitation and evaluation of confidentiality claims. Subpart C of 29 C.F.R. Part 70 is entitled “Costs for Production of Documents.” The regulations, like FOIA, define “search”, “duplication”, and “review”. 29 C.F.R. §70.38(c), (d) and (e). Also, as under FOIA, the costs Appellee seeks to charge Appellant are not within the definitions of “search” and “duplication”. “Review” has a similar meaning to the FOIA definition, namely, “the process of examining documents located in response to a request ... to determine whether any portion of the document located is exempt” and to prepare the document by excising any exempt portions. 29 C.F.R. §70.38(e). Thus, the review costs are limited to an examination of the requested record -- not the solicitation of claims for exemption and evaluation of those claims.

The regulations go on to state that review costs “may only be assessed for review at the initial level, i.e., *the review undertaken the first time the documents are analyzed* to determine the applicability of specific exemptions.” 29 C.F.R. §70.40(d)(3) (emphasis added). The level of review contemplated by the regulations, as well as by FOIA, is the process already conducted by Appellee; i.e., the review to determine whether a specific exemption applies. From that review, Appellee has apparently concluded that there is no exemption but, instead, says that there could, hypothetically, be a claim of confidentiality requiring Appellee to solicit and evaluate such claims. That solicitation and evaluation are processes which occur *after* “the review undertaken the first time” and, therefore, is not a chargeable cost.

The scheme of the regulations further support the conclusion that the purported costs are not chargeable to Appellant. As discussed above, when OSHA has reason to believe that disclosure of requested information could reasonably be expected to cause substantial competitive harm, it must notify the business submitter. 29 C.F.R. §70.26(d)(2)(ii). The regulations require the notice

to be in writing and contemplate delivery by mail. 29 C.F.R. §70.26 (c) and (i). Thus, mailing costs will be incurred in notifying a business submitter. The regulation concerning mailing cost charges, however, only applies to the transmittal of the requested records. 29 C.F.R. §70.40(d)(3). Had Appellee intended to charge FOIA requesters for the cost of mailing the business submitter notification, it would have expressly said so. Its failure to do so leads to the conclusion that, even if they were permitted under FOIA, Appellee did not intend such costs to be chargeable.

Thus, if Appellee must notify the business submitters and evaluate confidentiality claims, it must do so at its own expense.

The District Court relied on the decision of the Magistrate Judge in staying the action with respect to the first two counts of the Complaint. The decision of the Magistrate Judge recited the parties' contentions but made no findings of fact. Since the issue is a matter of law, however, and there is no basis from which to conclude that the information sought falls within the exemption 4 under FOIA, the stay order should be reversed with direction that summary judgment be entered in favor of Appellant.

POINT II: THE DISTRICT JUDGE ABUSED HIS DISCRETION WHEN AFFIRMING THE DECISION OF THE MAGISTRATE JUDGE ON THE STAYING OF THE PROCEEDING.

By an undated Notice of Motion submitted under cover of a letter dated March 19, 1998, Appellee sought a stay of this action. By letter dated March 20, 1998, the Court advised Appellee that the Motion would not be considered. By letter dated March 25, 1998, defense counsel sought reconsideration of the determination not to consider the Motion. Consequently, a conference with the Court was scheduled for, and held, on April 9, 1998. After meeting with the Court, counsel were directed to meet with Magistrate Judge Cavanaugh, where Appellant was directed to file opposition to Appellee's Motion within seven days and a conference was scheduled for April 21, 1998 at 8:30 a.m. In addition, all remaining deadlines set forth in the January 29 Scheduling Order were delayed.

After two more appearances before Magistrate Judge Cavanaugh and the submission of additional motion papers, Magistrate Judge Cavanaugh filed an Opinion and an Order on June 11, 1998 granting Appellee's Motion and entered an Order staying the entire proceeding (despite the limitation of Appellee's Motion to only the First and Second Counts).

On June 29, 1998, Appellant filed a Notice of Appeal seeking review of the June 11, 1998 Order and included a statement that no brief nor transcripts were necessary. By letter dated June 30, 1998 (App. 244), the Court directed Appellant to submit a brief and to file the transcripts of the oral arguments before Magistrate Judge Cavanaugh with the brief.

Without inquiry to any party or the transcribing service, and without notice to any party, the District Judge entered an Order on August 10, 1998 dismissing the appeal on the assumption

that Appellant abandoned it or concluded that it was without merit.

On August 19, 1998, Appellant's counsel wrote to the Judge to explain that the delay was caused by the inability to obtain the transcripts. App. 146. Appellant asked for vacation of the August 12 Order.

Having not heard a response and concerned that the time within which to make a motion for reargument might expire, Appellant filed a motion for reargument on August 26, 1998. App. 249.

Shortly thereafter, Appellant's counsel received a notice of a conference before the District Judge for September 3, 1998. App. 248. When counsel appeared, they were directed to see Magistrate Judge Cavanaugh. Appearing before Magistrate Judge Cavanaugh, counsel were informed that a briefing schedule for the appeal was to be entered. The parties consented to a briefing schedule which was approved by Magistrate Judge Cavanaugh. A confirmatory Order was submitted. App. 262-3. Prior to the entry of an Order memorializing that schedule, the Court, on September 3, 1998, filed an Order denying Appellant's motion for reargument (effectively affirming the stay of proceedings as to the First and Second Counts only). In addition, the September 3, 1998 Order dismissed without prejudice Appellant's previously filed summary judgment motion and Appellee's motion to dismiss the Third Count, and directed the parties to contact Magistrate Judge Cavanaugh to schedule the re-filing of those motions.

Having not heard a response and concerned that the time within which to make a motion for reargument might expire, Appellant filed a motion for reargument on August 26, 1998. App. 249.

These facts demonstrate the District Judge's abuse of discretion. First, the appeal should

not have been dismissed without notice to the parties. Second, once the district judge decided hear the appeal, which was to be reviewed de novo, he should have reviewed the record which had been before the Magistrate Judge. His Order suggests that he did not do this.

Therefore, if this Court is inclined to remand the matter for reconsideration, at the District Court level, of the stay order, it should do so with direction that the matter be re-assigned to United District Judge Stephen M. Orlofsky. Judge Orlofsky is presently assigned a pending case between the parties concerning agency records not produced in response to Appellant's FOIA requests made after the institution of the suit below. That pending case is identified by Civil Action No. 98-4689 (SMO).

POINT III: SINCE OSHA HAS NEVER RESPONDED TO
THE SEPTEMBER 17, 1997 FOIA REQUEST,
THE THIRD COUNT IS NOT MOOT.

It is undisputed that, from 1991 through the first half of 1997, the “derived” file supplied to Appellant in response to quarterly FOIA requests, included records of inspections made within 30 days prior to the date of creation of the supplied file. Count III:4 (admitted). As alleged, when Appellant became aware of a change in policy such that OSHA was “blacking-out” the 30 days prior to the creation date, it submitted the a FOIA request dated September 12, 1997 (App. 46). In that request, Appellant requested the data in the IMIS file current through the date of creation and limited to the 30 days immediately preceding the date of creation. Thus, if OSHA had a 30 day blackout period, nothing would be produced.

OSHA admitted that nothing was produced. Count III:11 (admitted).

The question to be decided is whether Appellee may lawful withhold data in its files which came into being within 30 days prior to the IMIS file creation date. Appellee argued, and the District Court concluded, that the claim was moot. Therefore, it was dismissed.

The asserted mootness arises from the assumption that the records sought were subsequently produced. This depends on a conclusion as to what records were sought.

Appellee asserted that the records are those within the 30 days prior to the date of receipt of the FOIA request.

The FOIA Guide specifically acknowledges, in its discussion on mootness when withheld records are subsequently provided, that a claim is not moot when records are routinely withheld and later released and the situation results in a continuing injury to the requester. *FOIA Guide* at 482 (discussing *Payne Enterprises v. United States*, 837 F.2d 486 (D.C.Cir. 1988)). Under Appellee’s

theory, no Court could ever decide the issue of whether the data created within the 30 day period may be lawfully withheld because, by the time a court gets the case, the records would have been produced. A claim is not moot if “(1) the challenged action was in duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subject to the same action again.” *Gulf Oil Corp. v. Brock*, 778 F.2d 834, 839 (C.A.D.C. 1985) (citing *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975); *In re Wade*, 969 F.2d 241, 248 (C.A.7 1992) (“capable of repetition, yet evading review”); see, also, *Roe v. Wade*, 410 U.S. 113, 125, rehearing denied 410 U.S. 959 (1973). The challenged action is the withholding of the newest 30 days of records. Since there are, and will continue to be, quarterly requests, and since Appellee has not said that it will cease the practice of withholding the 30 day data, there is a reasonable expectation that Appellant will be subject to the same action. Therefore, the claim is not moot.

CONCLUSION

For the foregoing reasons, Appellant, OSHA Data/CIH, Inc., respectfully requests that the Orders dismissing the First, Second and Third Counts, staying the proceedings and affirming the stay of proceedings be reversed and remanded with instructions to enter judgment on the First, Second and Third Counts in favor of Appellant.

Respectfully submitted,

Dated: September 15, 1999

PHILIP D. STERN

ORDERS APPEALED FROM

Order Staying Action (filed June 11, 1998) 32

Order Denying Appeal (filed August 10, 1998) 33

Order Affirming Stay Order (filed September 3, 1998) 35

Order Dismissing Action (filed May 10, 1999) 39