# Fact Sheet

## BACKGROUND ON 6/29 COURT DECISION FORCING OSHA TO TURN OVER ITS WORKER EXPOSURE TO TOXIC SUBSTANCES DATABASE TO DR. ADAM FINKEL, UNDER THE FREEDOM OF INFORMATION ACT

*Database:*

- The world's largest compendium of measurements of occupational exposures to toxic substances—more than 2 million analyses conducted during roughly 75,000 OSHA inspections of workplaces since 1979. For each sample, the database includes the name of the substance (e.g., asbestos, lead, benzene, silica dust), the name and address of the company where the sample was taken, an encrypted alpha-numeric code associated with the OSHA inspector who took the sample, and other useful information.[1]

*Plaintiff:*

- Adam M. Finkel is a professor of environmental and occupational health at the University of Medicine and Dentistry of New Jersey (UMDNJ) School of Public Health, and a visiting professor at the Woodrow Wilson School at Princeton University. He graduated from Harvard College, the Kennedy School of Government, and the Harvard School of Public Health, and is a Certified Industrial Hygienist. From 1995 to 2000, he was OSHA's chief regulatory official, and from 2000 to 2003, was Regional Administrator in charge of OSHA operations in the Rocky Mountain states. (Under FOIA, any citizen, regardless of expertise or motive, is entitled to public information that is not protected by one of seven exemptions, but in this case, OSHA has attempted to block one of its own former senior managers, with unique abilities to use the data to advance the Agency's own mission).

*Whistleblower Case:*

- In 2002, then-OSHA administrator John Henshaw tried to fire Dr. Finkel on the very day he disclosed to the press OSHA's secret decision not to offer medical testing for its own inspectors who had been exposed to beryllium dust in the course of conducting inspections.[2] The blood test costs less than $150 per person, and Finkel estimated that about 1 to 2 percent of OSHA's active and retired inspectors might be sensitized. The Department of Energy (not historically a concerned employer) has already tested 30,000 of its own current and retired employees. OSHA has about

[1] Most of the analyses are of air the workers breathe, but there are also "wipe samples" of contaminated surfaces, bulk samples analyzing suspicious materials found in the workplace, etc.

[2] Beryllium dust can cause a unique and often-fatal lung disease, known as "chronic beryllium disease" (CBD); a reliable blood test can tell whether someone's immune system has been "sensitized" to beryllium deposited in the lungs—this is the first step towards CBD, and should trigger medical counseling and cessation of needless and risky further exposure to beryllium.

1,200 active inspectors, but about 3,000 more who are retired or who work for states that run their own OSHA programs—and *OSHA declined* to offer any testing to retirees, or even to inform them about the danger and the possible need for testing.

- Finkel sued OSHA for whistleblower retaliation, and (after a judge ordered OSHA to produce internal e-mails documenting that senior career and political appointees knew of the "leak" of the beryllium policy and had made death threats against Finkel), OSHA offered him in December 2003 a large monetary settlement, and he left the agency to return to academia.

- In 2004, OSHA finally began offering the beryllium blood test, and disclosed in 2005 that *four percent* (11 of the first 271 inspectors tested) had tested positive for sensitization. This was an unexpectedly high incidence, and has serious implications for the tens of thousands of private-sector workers who are exposed to beryllium daily, rather than several times in a career (as the inspectors were). Experts already have shown that under OSHA's permissible exposure limit for beryllium (which was developed almost 60 years ago and not updated since!), the equivalent of one day's exposure at the legal limit can cause CBD.

*FOIA Request:*

- Finkel asked OSHA in June 2005 for the entire contents of the database (which OSHA had consistently advertised as being publicly available upon request, and had given out small portions of it to researchers and advocacy groups on at least 10 occasions in the past). He also asked for a list of the coded ID numbers of the inspectors who had tested positive and negative for beryllium sensitization. He wrote to OSHA that he had several important research purposes in mind for the data:

    - *To determine whether the 11 sensitized inspectors represent the tip of an iceberg, or the entire iceberg.* OSHA admits that it has never looked at the database to determine which inspectors had been exposed to very high amounts of beryllium over their careers, and therefore that it did not target the testing at the inspectors at highest risk. If it turns out that many of the roughly 4,000 inspectors who have not been tested had *higher* beryllium exposures than those who have been found to be sensitized, then there could be *hundreds* more inspectors harmed by beryllium exposure than this half-hearted program has detected.

    - *To shed light on how much lower the permissible limit for beryllium should be.* EPA, industry, and virtually all U.S. scientists agree that the OSHA limit (2 micrograms per cubic meter) is unsafe, perhaps by a factor of 100 or more. The OSHA exposure database is an epidemiologic "gold mine," because it is a unique circumstance in which the test subjects (inspectors who have tested positive or negative) were engaged in the activity of making exposure measurements when they were exposed, and presumably at no other time in their lives. By calculating the exposures to

each inspector (identified only by his or her ID code), Finkel can help determine the true dose-response relationship for beryllium sensitization, a huge boon to the roughly 100,000 U.S. private-sector workers exposed to this toxic metal.

- *To undertake the first-ever analysis of the hypothesis that firms who install controls to comply with environmental regulations may tend to inadvertently increase exposures to their employees in so doing.* There are several anecdotal studies about individual companies who have caused increased exposures and/or health problems in their workforce by installing environmental controls that tend to "move" toxic emissions from the "smokestacks" to the workplace. By examining databases from state environmental agencies showing permit dates and compliance, and cross-referencing this to companies where OSHA has made exposure measurements before and after controls were installed, Finkel can see if this is a general problem—perhaps requiring OSHA and EPA to fix their 30-year history of non-communication (as was seen last week at the House hearing on Ground Zero featuring Henshaw and former EPA head Christie Whitman).

- *To appraise, 30 years into OSHA's occupational health mission, whether the Agency is conducting a sensible and effective program of sampling and enforcement for health hazards.* All experts agree that roughly 10 times as many U.S. workers die prematurely each year from exposures to toxic substances as die from industrial accidents (approximately 50,000 "health fatalities" against 5,000 "safety fatalities"). But OSHA continues to devote roughly 90 percent of its budget and enforcement resources to safety problems, and has issued only one major health regulation (and that one under court order) since 1998. Although a few studies have looked at the OSHA sampling database to examine *industry's* performance (for example, whether exposures in a particular industry vary by year, unionization, size of the plant, etc.), no one has used the data to evaluate *OSHA's* performance: are the worst hazards scheduled for new or improved regulations? is the Agency responding to patterns of overexposures by targeting those firms and industries where they occur?

*OSHA's Refusal to Provide the Data:*

After exhausting all administrative attempts to obtain the information, Dr. Finkel and his attorney—Peter Dickson of Potter and Dickson (194 Nassau St., Princeton NJ; 609-921-9555)—sued the Department of Labor under FOIA in late 2005. **DOL made two major—and unsubstantiated—claims in its court papers: (1) that there were trade secrets lurking within the database, and that no one was entitled to see the name of**

**the company where each sample was taken[3]; and (2) that having used alpha-numeric codes rather than the actual names of each inspector, the codes themselves had to be kept secret, because revealing them could somehow compromise the inspectors' privacy.**

Anyone with any knowledge of trade-secret practice would know that the first claim was far-fetched: the reason that roughly 99.996 percent of all companies *voluntarily* disclose their environmental emissions to EPA's Toxic Release Inventory without claiming trade-secret protections is that emissions *from* a process tell competitors virtually nothing about the product itself. Besides, Dr. Finkel disclaimed any interest in any trade secret claims, legitimate or not, that any company might have made at the time of an OSHA inspection. And anyone who has ever heard about any biomedical or epidemiologic study knows that the whole purpose of creating ID codes is to *protect* privacy! We wouldn't know that smoking causes cancer, or that aspirin is good for the heart, if scientists couldn't associate the data on anonymous individuals with the outcomes for each person. The Court saw through this farce, as detailed in Table 1 below.

*Quotes from Dr. Finkel (Tel: 609-258-4828; afinkel@princeton.edu):*

1. "We all know how much the current administration is obsessed with secrecy. But the FOIA law carved out seven legitimate reasons for government to withhold information from its citizens, none of which applies to workplace exposure data. This case emphasizes that there is no "fear of embarrassment" exemption under FOIA. I believe OSHA knew they would lose this case, but were happy to spend taxpayer money to tie up my request in court for two years."

2. "OSHA should have offered the beryllium blood test to every active and retired inspector in 2000, when a number of us inside the Agency first raised the issue to the Assistant Secretary. It took OSHA until 2005 to discover a cluster of beryllium sensitization in its own workforce, and it admitted in this case that it has no intention of ever analyzing the data to learn *which of the thousands of untested inspectors are most likely to already be sensitized and need to be tested.* In the two years since I first asked for the beryllium exposure data, some of these inspectors could have progressed to undiagnosed lung disease, or continued to be exposed to beryllium after having become sensitized. The delay is unconscionable."

[3] Of course, without company names no one can use the data to compare workplace exposures to environmental control investments at any specific company. But the problem goes far beyond that. Without being able to tell which numbers within a column of data represent unique measurements at each company, as opposed to dozens of repeat measurements at the same place at the same time, no one can possibly compute any estimates of average exposure, trends, etc. The average of 11 samples, the first 10 taken at one place and the 11th taken somewhere else, is not the sum of the 11 numbers divided by 11—it is the average of the first 10 combined with the 11th.

3. “OSHA tried mightily to get U.S. industry to shelter the Agency from releasing public information, but no company was willing to feign outrage on OSHA’s behalf. *Industry knows it has nothing to fear from a scholarly analysis of trends in workplace exposures, or of an evaluation of OSHA’s beryllium testing program in light of exposures*. OSHA seems to be the one afraid of its own data—perhaps with good reason, as only my upcoming research will determine.”

4. “OSHA’s inspectors are a national treasure, and they work in full view of the public. They are not covert CIA agents whose identities must be kept secret—although perhaps I would have had more success with this Administration had I asked for *those* names! In any event, my epidemiologic research relies on my *not* knowing any inspector’s identity, which is why the codes were created in the first place.”

# TABLE 1—Analysis of Major Arguments Raised in *Finkel v. DOL*

## "**TRADE SECRET" ISSUES:**

| *OSHA's claim* | *Plaintiff's Response* | *Court Decision* |
|---|---|---|
| In "less than 2 percent" of the samples taken, the company involved asked OSHA to protect the sample result to as a trade secret. | • That percentage is made-up and vastly exaggerated; it is inconsistent with the request rate in the Toxic Release Inventory (0.027 percent), and with common sense;<br><br>• OSHA took the unprecedented step of publishing a Federal Register notice asking companies to object to the release of the data, and followed up with personal telephone appeals for affidavits in support of its position. ***No company or trade association ever came forward to assert that it had ever asked OSHA to protect a sample result.*** | For Plaintiff: "The DOL's single statement in its affidavit that 2% of samples contain information designated by the employer as trade secrets does not 'describe the withheld information and the justification for withholding with reasonable specificity, demonstrating a logical connection between the information and the claimed exemption.' DOL's affidavits and employer responses fail to identify the nature or type of trade secrets, or even how they are designated as such by employers in the sampling process." |
| OSHA claims it failed to ever transfer any of the trade secret requests to the air sampling database; as a result, it must withhold all 2 million results to protect an unknown number of unmarked "secrets." | • Incompetence, real or purported, is not an appropriate defense under FOIA;<br><br>• Any actual trade secret requests still reside in the original paper case files—OSHA should be compelled to find the requests (if any exist), mark them as such in the database, and make the remaining 99+ percent of the results public. | For Plaintiff. "The Court therefore concludes the DOL has not met its burden of demonstrating that disclosure of the site-specific sampling information such as inspection ID number, OSHA office ID number, or the specific day on which an inspection occurred will 'impair the Government's ability to obtain necessary information in the future.'" |
| OSHA can choose to protect *any* information it wants to, because inspection information is submitted "voluntarily" by companies (they could ask for a search warrant, but generally don't). If OSHA releases information that might anger American industry, it will result in a "chilling effect" on OSHA's enforcement program. | • Workplace inspections under the OSH Act are not "voluntary."<br><br>• OSHA presented no evidence that a "chilling effect" would result; in any event, the Court must balance the effect of releasing the data on OSHA's effectiveness against the effect of *suppressing the data on OSHA's effectiveness.* | For Plaintiff: "The Court finds that the information here was not voluntarily provided and will therefore apply the *National Parks* test. DOL's argument that the information was voluntarily provided 'because (with rare exception) employers did not insist on search warrants' is without merit." |

**"INSPECTOR PRIVACY" ISSUES**

| *OSHA's claim* | *Plaintiff's Response* | *Court Decision* |
|---|---|---|
| Releasing the coded IDs would allow Finkel to "deduce" the names of the inspectors. | The codes could only be "broken" by contacting each of 75,000 different companies and asking for their help in remembering which inspector might have visited their facility, as long ago as 1979. This is an absurd task. | For Plaintiff: "The Court finds the DOL has not met its burden of showing that release of the inspectors' 'coded ID numbers' would constitute a clearly unwarranted invasion of the inspectors' personal privacy. Rather, the DOL has 'established no more than a 'mere possibility' that the medical condition of a particular individual might be disclosed' - which the Supreme Court has told us is not enough. |
| Publicizing inspectors' names could lead to them being "harassed on the job." | Inspectors must *reveal* their names (but not their ID code) at the company door, so the inspected firm already knows who is conducting the inspection. Besides, OSHA often publicizes the names and photographs of its inspectors, who are the valued public face of the Agency. | For Plaintiff: "The Court finds the public interest in disclosing information that will increase understanding about beryllium sensitization and OSHA's response thereto is significant. This public interest sufficiently outweighs the inspection officers' limited privacy interests in their ID numbers." |
| Finkel or others could use the names to "profile" inspectors by their "proclivity" to cite certain violations or issue "tough" penalties. | "Profiling" is a senseless and futile task: the number of citations tells nothing about an inspector's "proclivities" without information on the number of *opportunities* s/he had to cite in a particular way—and this information has never been collected. | For Plaintiff: "The inspection officers' privacy interests in their ID numbers are more limited than the interests of other law enforcement personnel in more readily identifying personal information, and the public interest in disclosure is more compelling, than in the cases relied upon by the DOL." |