

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

PUBLIC CITIZEN FOUNDATION,)	
)	
Plaintiff,)	
)	
v.)	No. 18-cv-00117-EGS-GMH
)	
UNITED STATES DEPARTMENT OF)	
LABOR, et al.,)	
)	
Defendants.)	

**REPLY MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION1

ARGUMENT2

 I. Form 300A data is not commercial information.....2

 II. Form 300A data is not confidential because it is not kept private or closely held
 by the submitters.5

 III. The requested records are not confidential because OSHA gave no assurance of
 confidentiality.9

 IV. OSHA has failed to show that disclosure of the Form 300A data would cause
 foreseeable harm to an interest protected by Exemption 4.9

 V. OSHA failed to segregate and release nonexempt fields in the database.11

CONCLUSION.....12

TABLE OF AUTHORITIES

CASES	PAGES
<i>Aguiar v. DEA</i> , 865 F.3d 730 (D.C. Cir. 2017)	8
<i>Center for Auto Safety v. National Highway Traffic Safety Administration</i> , 93 F. Supp. 2d 1 (D.D.C. 2000)	6
<i>Center for Investigative Reporting v. DOL</i> , No. 19-1843, 2019 WL 6716352 (N.D. Cal. Dec. 10, 2019).....	2, 3, 10
<i>Chicago Tribune Co. v. FAA</i> , No. 97 C 2363, 1998 WL 242611 (N.D. Ill. May 7, 1998)	3, 4
<i>Cottone v. Reno</i> , 193 F.3d 550 (D.C. Cir. 1999)	7
<i>Critical Mass Energy Project v. Nuclear Regulatory Commission</i> , 975 F.2d 871 (D.C. Cir. 1992)	6
<i>Flightsafety Services Corp. v. DOL</i> , 326 F.3d 607 (5th Cir. 2003)	4
<i>Flightsafety Services Corp. v. DOL</i> , No. Civ. A 300CV1285P, 2002 WL 368522 (N.D. Tex. Mar. 5, 2002).....	4
<i>Food Marketing Institute v. Argus Leader</i> , 139 S. Ct. 2356 (2019).....	1, 2, 5, 6, 7, 9
<i>Gray v. United States Army Criminal Investigation Command</i> , 742 F. Supp. 2d 68 (D.D.C. 2010)	11
<i>Mead Data Central, Inc. v. United States Department of Air Force</i> , 566 F.2d 242 (D.C. Cir. 1977)	11
<i>Mokhiber v. United States Department of Treasury</i> , 335 F. Supp. 2d 65 (D.D.C. 2004)	11
<i>National Parks & Conservation Ass’n v. Morton</i> , 498 F. 2d 765 (D.C. Cir. 1974)	10
<i>100Reporters LLC v. DOJ</i> , 248 F. Supp. 3d 115 (D.D.C. 2017)	3

Watkins v. United States Customs & Border Protection,
643 F.3d 1189 (9th Cir. 2011)4

STATUTES & REGULATORY MATERIALS

5 U.S.C. § 552(a)(4)(B)7

5 U.S.C. § 552(a)(8)(A)8, 10

5 U.S.C. § 552(b)11

29 C.F.R. § 1904.32(a)(4)1, 5

29 C.F.R. § 1904.32(b)(2)1, 5

29 C.F.R. § 1904.32(b)(5)1, 5

29 C.F.R. § 1904.32(b)(6)1, 5

Improve Tracking of Workplace Injuries and Illnesses,
81 Fed. Reg. 29,624 (May 12, 2016)1, 7, 10

OTHER

Webster’s Third New International Dictionary (1961)5

INTRODUCTION

For more than two decades, the United States Department of Labor and the Occupational Safety and Health Administration (collectively, OSHA) recognized that Form 300A data is not confidential commercial information exempt from disclosure under Exemption 4 of the Freedom of Information Act (FOIA). Indeed, the entire Form 300A must be posted for three months in a conspicuous place at the worksite, 29 C.F.R. § 1904.32(a)(4), (b)(5)–(6), and copies must be provided at no charge within one business day of a request by any employee, former employee, employee representative, or personal representative. *Id.* § 1904.35(b)(2). There is no restriction on further dissemination of the information once it is posted or provided. Until recently, OSHA publicly posted Form 300A data that it collected as part of its enforcement programs, and it routinely released Form 300A reports in response to FOIA requests. *See* 81 Fed. Reg. at 29,658 (stating that Form 300A data “is not of a kind that would include confidential commercial information” within the meaning of Exemption 4, and it has been OSHA’s “consistent policy” to release Form 300A data).

In response to plaintiff Public Citizen’s FOIA request for Form 300A summary injury and illness records submitted to OSHA from August 1, 2017, to January 31, 2018, pursuant to a rule entitled “Improve Tracking of Workplace Injuries and Illnesses,” 81 Fed. Reg. 29,624 (May 12, 2016) (the Electronic Reporting Rule), however, OSHA asserts that the records can be withheld in their entirety based on the standard set forth in *Food Marketing Institute v. Argus Leader (FMI)* for determining whether information is “confidential” within the meaning of Exemption 4. *See FMI*, 139 S. Ct. 2356 (2019). In that case, the Supreme Court rejected the lower courts’ long-standing approach to Exemption 4 and held, instead, that “[a]t least where commercial or financial information is both customarily and actually treated as private by its owner and provided to the

government under an assurance of privacy, the information is ‘confidential’ within the meaning of Exemption 4.” *Id.* at 2366. OSHA’s reliance on *FMI* is misplaced. First, the records at issue do not contain “commercial” information; thus, they cannot be withheld under Exemption 4 regardless of the decision in *FMI*. Second, Form 300A data is not “confidential” because it is not kept private or closely held by the submitters. Rather, employers are required to freely share the information with all current and former employees and their representatives. Third, OSHA gave no assurance of confidentiality when it collected the records at issue. To the contrary, it announced that it would disclose to the public all Form 300A data it received. In addition, OSHA has failed to show that disclosure of the requested records would harm an interest protected by Exemption 4 as required by the FOIA Improvement Act of 2016. Finally, OSHA failed to segregate and release nonexempt portions of the requested records.

For these reasons, the Court should grant plaintiff’s motion for summary judgment and deny OSHA’s motion.

ARGUMENT

I. Form 300A data is not commercial information.

Although OSHA argues that “Form 300A reports fall well within the ordinary and accepted definition of ‘commercial’ information protected by Exemption 4,” Defs. Opp. at 6, it fails to distinguish cases finding that similar information is not “commercial.” For example, in *Center for Investigative Reporting v. DOL (CIR)*, No. 19-1843, 2019 WL 6716352 (N.D. Cal. Dec. 10, 2019), the court rejected the government’s claim that federal contractors’ annual employment diversity reports (known as EEO-1 reports) could be withheld under Exemption 4. The court held that the statistical data at issue, which revealed the size and composition of an employer’s workforce broken down by gender, race/ethnicity, and job category, was not “commercial.” *Id.* at *4–6. The

EEO-1 reports at issue in *CIR* contain summary information strikingly similar to Form 300A reports, including the name and address of the submitting employer or establishment, the industry description or major activity, and the number of employees. *Compare* Form 300A (Edens Decl., Ex. M), with EEO-1 report form (available at <https://www.eeoc.gov/employers/eeo1survey/2007instructions.cfm>).

In *CIR*, as here, the government relied on *100Reporters LLC v. DOJ*, 248 F. Supp. 3d 115, 137 (D.D.C. 2017), but the court found such reliance “misplaced” because “the documents found to be commercial in *100Reporters* reflect a level of detail not contained in the EEO-1 reports.” *CIR*, 2019 WL 6716352, *5; *see* Defs. Opp. at 4 (citing *100Reporters* in support of OSHA’s contention that “information that bears on the operations of a commercial enterprise is protected under Exemption 4”). The court rejected the government’s assertion that “any statistical information pertaining to employees [is commercial] simply because the business is a commercial enterprise.” *CIR*, 2019 WL 6716352, *5. This Court should do the same.

Attempting to distinguish *Chicago Tribune Co. v. FAA*, No. 97-2363, 1998 WL 242611 (N.D. Ill. May 7, 1998), which held that records of in-flight medical emergencies were not commercial for purposes of Exemption 4, OSHA observes that the information at issue in that case was not limited to injuries and illnesses experienced by airline *employees* but also included medical emergencies experienced by airline *passengers*. *See* Defs. Opp. at 4. According to OSHA, work-related injury data—but not passenger injury data—is commercial because employers may use it to improve safety and reduce the costs associated with workplace injuries. *Id.* at 4–5. OSHA offers no reason, however, why employers do not have similar incentives to improve safety and reduce costs associated with passenger injuries. Moreover, just as the court in *Chicago Tribune* found that records containing “factual information regarding the nature and frequency of inflight medical

emergencies [that] do not contain any in-depth analysis of the airlines in dealing with these incidents” are not “commercial” within the scope of Exemption 4, *id.* at 3, the Form 300A data is merely factual information regarding the nature and frequency of work-related injuries and illnesses; it contains no analysis of how employers deal with such incidents.

In its opening memorandum, OSHA mistakenly cited *Flightsafety Services Corp. v. DOL*, 326 F.3d 607, 611 (5th Cir. 2003) (per curiam), as authority for its claim that Form 300A data are “within the rubric of ‘labor economics.’” Defs. Mem. at 14. Plaintiff explained in its opposition that the discussion of “labor economics” was background concerning the role of the Bureau of Labor Statistics, and not a conclusion regarding the scope of “commercial” information. Pl. Mem. at 13–14 (citing *Flightsafety Servs. Corp. v. DOL*, No. Civ.A. 300CV1285P, 2002 WL 368522, at *6 (N.D. Tex. Mar. 5, 2002), cited in *Flightsafety Servs. Corp.*, 326 F.3d at 611–12). OSHA offers no response, and instead relies on the unremarkable observation that wage data is commercial. The decision in *Flightsafety Services* is inapposite because the information reported on Form 300A does not include wage data.

Similarly, OSHA continues to rely on *Watkins v. U.S. Customs & Border Protection*, 643 F.3d 1189, 1195 (9th Cir. 2011), to support its claim that Form 300A data reveals “intimate aspects of [the providers’] business” that are “critical to each entities’ [sic] operational mission and commercial success.” Defs. Opp. at 6 (quoting *Watkins*, 643 F.3d at 1195). As plaintiff explained, the information found to be commercial in *Watkins* revealed “supply chains and fluctuations in demand for merchandise,” 643 F.3d at 1195, which is information of a commercial nature. Pl. Mem. at 14. The Form 300A data does not include such information. *Watkins* is inapposite.

II. Form 300A data is not confidential because it is not kept private or closely held by the submitters.

OSHA concedes that it cannot withhold the Form 300A data unless it can prove that Form 300A reports are “customarily kept private, or at least closely held” by the submitting employers. Defs. Opp. at 6–7 (quoting *FMI*, 139 S. Ct. at 2363). Information that is required by law to be freely shared with *every* current and former employee and their representatives cannot meet this standard. Thus, the data at issue is not “confidential” within the meaning of *FMI*, and it cannot be withheld under Exemption 4.

In *FMI*, the Supreme Court explained that “confidential” means “private” or “secret,” and confidential information is “known only to a limited few.” *Id.* (quoting Webster’s Third New International Dictionary 476 (1961)). “[R]etailers closely guard” the information that was at issue in *FMI*. *Id.* at 2361. “Even within a company, ... only small groups of employees usually have access to it.” *Id.* at 2363. In contrast, Form 300A data must be posted at the worksite for at least three months “in a conspicuous place or places where notices to employees are customarily posted.” 29 C.F.R. § 1904.32(a)(4), (b)(5)–(6). Further, copies of the Form 300A report must be provided at no charge within one business day of a request by any employee, former employee, employee representative, or personal representative (which can be anyone designated as such by an employee or former employee). *Id.* § 1904.35(b)(2). And as OSHA admits, there are no restrictions on further dissemination of the data once it is obtained by employees or their representatives. Defs. Reply to Counter-Statement of Material Facts, ECF No. 32-1, ¶ 36. Further, OSHA concedes that, at least since 2004, OSHA customarily disclosed Form 300A data obtained during onsite inspections and through the OSHA Data Initiative. *Id.* ¶¶ 37–38. Thus, Form 300A data is neither “private” nor “closely held,” and does not meet the confidentiality standard announced in *FMI*.

OSHA's arguments to the contrary lack merit. OSHA argues that "strict secrecy is not required as long as information is 'closely held' and owners do not 'share[] it freely.'" Defs. Opp. at 8–9 (quoting *FMI*, 139 S. Ct. at 2363). As explained above, however, the Form 300A data is not closely held: It is posted in a "conspicuous" place and is available without restriction to every current and former employee and their representatives.

OSHA continues to rely on *Center for Auto Safety v. National Highway Traffic Safety Administration*, 93 F. Supp. 2d 1 (D.D.C. 2000), for the proposition that limited disclosure to employees does not "preclude protection under Exemption 4, as long as those disclosures are not made to the general public." Defs. Opp. at 9 (quoting *Ctr. for Auto Safety*, 93 F. Supp. 2d at 17–18 (citing *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 880 (D.C. Cir. 1992) (en banc))). In *Center for Auto Safety*, however, the court relied on a declaration from the submitter establishing that it disclosed the requested information "only to employees or other entities as necessary, but always accompanied by a confidentiality agreement or protective order." 93 F. Supp. at 18. OSHA can make no comparable evidentiary showing here, where the regulatory scheme expressly provides to the contrary. Although OSHA asserts that the legally required disclosures are "limited and strictly regulated" because parties who receive the detailed Form 300 and 301 reports may be encouraged (but not required) to keep the information confidential, Defs. Opp. at 9–10, this case does not involve Form 300 or 301 reports. Rather, the records at issue are limited to Form 300A data.

OSHA next argues that industry comments lamenting the disclosure requirements and suggesting that the law should be changed to allow the Form 300A data to remain private prove that "a significant number of employers have stated that the information is confidential commercial information." *Id.* at 11. Such statements demonstrate that some employers would prefer that the

data be confidential, but they do not establish that the information *is* confidential; they do not bear OSHA’s burden of showing that the information is actually treated as private. If the information were treated as private, OSHA would be able to describe the methods employers use to protect the information, such as requiring recipients to sign confidentiality agreements, adding restrictive markings to the documents, and limiting access to a small subset of employees on a “need to know” basis. OSHA has presented no such evidence, nor have the commenters, because the law *prohibits* treating the data as private. Moreover, during the rulemaking on the Electronic Reporting Rule, OSHA considered the comments on which it now relies and declared that they were wrong, stating that the information “is not of a kind that would include confidential commercial information” within the meaning of Exemption 4. 81 Fed. Reg. at 29,658; *see* Defs. Reply to Counter-Statement of Material Facts ¶ 42 (admitting same); Michaels Decl. ¶ 27 (explaining that OSHA considered and rejected industry comments opposing disclosure of the 300A data); Seminario Decl. ¶¶ 41–42 (same); Frumin Decl. ¶ 32–36 (same).

OSHA wrongly asserts that plaintiff bears the burden of demonstrating that the specific information requested is already publicly available. Defs. Opp. at 11 n.9. It is OSHA’s burden to demonstrate that the requested information is “customarily and actually treated as private by its owner,” *FMI*, 139 S. Ct. at 2366, and FOIA imposes no burden on requesters to prove that the information sought is already in the public domain. *See* 5 U.S.C. § 552(a)(4)(B) (“the burden is on the agency to sustain its action” in FOIA lawsuits).¹

OSHA repeats its assertion that submission rates were lower than it expected because non-compliant employers would rather violate the law than risk having their Form 300A data released

¹ Evidence of prior public disclosure would, of course, defeat any claim that the information is private because it would negate the applicability of *any* exemption, as plaintiff previously explained. Pl. Mem. at 19 (citing *Cottone v. Reno*, 195 F.3d 550, 554 (D.C. Cir. 1999)).

under FOIA. Defs. Opp. at 11–12. Even if OSHA’s speculation were true, it would be irrelevant because the records responsive to plaintiff’s request are those that *were* submitted to OSHA. In any event, OSHA has offered no evidence to support its speculation about the cause of what it describes as a lower-than-expected submission rate, and instead simply argues that all assertions in government declarations must be taken as true no matter the lack of supporting evidence, because such declarations are accorded a “presumption of good faith.”² *Id.* Although a court may grant summary judgment on the basis of agency declarations “if they contain reasonable specificity of detail rather than merely conclusory statements, and if they are not called into question by contradictory evidence in the record or by evidence of agency bad faith,” *Aguiar v. DEA*, 865 F.3d 730, 735 (D.C. Cir. 2017) (citations omitted), OSHA’s declarations are not sufficient because OSHA has failed to explain the factual basis for its conclusion as to the reasons for noncompliance with the reporting requirement. In any event, even if OSHA’s speculation were correct, employers’ preference would not change the fact that, by law, employers cannot keep work-related injury and illness information confidential and instead must conspicuously post it in the workplace and produce it on demand to current and former employees and their representatives. *See supra* p. 5.

Finally, OSHA repeats its erroneous statement that “OSHA has taken the position since January 2017 that the Form 300A data collected through the ITA should be kept private,” asserting that its statement “remains accurate” but providing no citation to support it. Defs. Opp. at 12 n.10. As set forth in paragraph 48 of the Counter-Statement of Material Facts, the inaccuracy of OSHA’s statement is plain from OSHA’s own record citations. *See* Kapust Decl. ¶¶ 37–39, Exs. G and H.

² In paragraph 46 of Defendants’ Reply to Counter-Statement of Material Facts, OSHA denies that there is “no evidence” to support its conclusion regarding the reason for the response rates, but OSHA fails to provide any record citation to support its denial as required by Local Civil Rule 7(h)(1) and paragraph 13(g) of this Court’s Standing Order. Because plaintiff’s statement that there is no such evidence has not been properly controverted, it should be considered undisputed.

As those exhibits show, OSHA did not invoke Exemption 4 to withhold Form 300A data collected through the ITA prior to June 2018, and it did not announce a change with regard to its intention to release Form 300A data to the public until August 2019.

III. The requested records are not confidential because OSHA gave no assurance of confidentiality.

The Supreme Court in *FMI* left open the question whether information may be withheld as confidential under Exemption 4 if it was submitted to the agency without an assurance that the agency would maintain its confidentiality. 139 S. Ct. at 2363. As plaintiff explained in its opening memorandum, the Court should hold that such assurance is necessary. That approach is consistent with this Court’s pre-*National Parks* jurisprudence and *FMI*, avoids rendering other parts of FOIA superfluous, and serves the basic policy of FOIA. Pl. Mem. at 21–24. OSHA offers no response to these arguments, other than a general observation that the Supreme Court “did not decide” the issue. Defs. Opp. at 12–13. OSHA concedes, however, that it provided no assurance of confidentiality with respect to the records at issue. To the contrary, OSHA announced its intention to disclose all Form 300A data that it received. *See* Defs. Mem. at 30 (OSHA “stated that it intended to release the subject data”); Defs. Reply to Counter-Statement of Material Facts, ¶¶ 39, 43, 44 (admitting that OSHA announced that all Form 300A data would be disclosed to the public).

IV. OSHA has failed to show that disclosure of the Form 300A data would cause foreseeable harm to an interest protected by Exemption 4.

Following the FOIA Improvement Act of 2016, the government has the burden under FOIA to show that, even if requested records fall within the scope of an exemption, disclosure would harm the interest protected by that exemption. 5 U.S.C. § 552(a)(8)(A). In its opening memorandum, OSHA did not attempt to make such a showing. In its opposition, OSHA sidesteps the issue, arguing that applying the foreseeable harm standard “would render [*FMI*] meaningless”

by re-imposing the substantial competitive harm test from *National Parks & Conservation Association v. Morton*, 498 F.2d 765, 768 (D.C. Cir. 1974). Defs. Opp. at 14. As *CIR* explains, however, the Supreme Court abrogated the substantial competitive harm test for determining confidentiality because that test was fashioned from legislative history, rather than statutory text, and the Supreme Court did not address § 552(a)(8)(A)'s heightened standard because the FOIA request at issue in FMI was submitted before Congress enacted § 552(a)(8)(A). *CIR*, 2019 WL 6716352, *5. Here, plaintiff submitted its FOIA requests after Congress amended the statute to include the heightened withholding standard.

OSHA's two attempts to meet the heightened withholding standard both fail. First, OSHA argues that release of Form 300A data would hinder OSHA's enforcement targeting programs because employers will refuse to comply with the mandatory reporting requirement if their Form 300A data is subject to release under FOIA. Defs. Opp. at 15. As explained above, OSHA has offered no evidence to support this claim, only speculation regarding the reasons some employers have not submitted their Form 300A data as required by law. Second, OSHA argues that submitters will be harmed by release of their Form 300A data because the data will reveal proprietary "business processes and company approaches" such as "operations and security or a business's overall capacity and productivity." *Id.* But during the rulemaking process, OSHA considered and rejected those claims, finding that they misrepresented the breadth of information contained in the Form 300A reports. *See* 81 Fed. Reg. at 29,658 (finding that the information "is not of a kind that would include confidential commercial information"); *id.* at 29,659 ("Details about a company's products or production processes are generally not included on the OSHA recordkeeping forms."); *id.* at 29,660 ("OSHA agrees with commenters who stated that recordkeeping data generally do not include proprietary or commercial business information."); Michaels Decl. ¶ 27 (explaining

that OSHA considered and rejected industry comments opposing disclosure of the 300A data); Seminario Decl. ¶¶ 41–42 (same); Frumin Decl. ¶ 32–36 (same); Defs. Reply to Counter-Statement of Material Facts ¶ 42 (admitting same).

V. OSHA failed to segregate and release nonexempt fields in the database.

The Form 300A records at issue were submitted electronically and uploaded into a database. Edens Decl. ¶ 17. Each record consists of up to 27 discrete data fields. *Id.* ¶ 22. “OSHA admits it is technically feasible to disclose individual data fields.” Defs. Reply to Counter-Statement of Material Facts ¶ 49. Nonetheless, OSHA argues that it has no obligation to segregate and release nonexempt information because plaintiff requested each record in its entirety. Defs. Opp. at 17. OSHA cites no authority to support its argument, and it is contrary to FOIA. *See* 5 U.S.C. § 552(b) (requiring agencies to produce “[a]ny reasonably segregable portion of a record ... after deletion of the portions which are exempt”); *Gray v. U.S. Army Criminal Investigation Command*, 742 F. Supp. 2d 68, 75 (D.D.C. 2010) (holding that “an agency cannot justify withholding an entire document simply by showing that it contains some exempt material”) (quoting *Mead Data Cent., Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977)); *Mokhiber v. U.S. Dep’t of Treasury*, 335 F. Supp. 2d 65, 69 (D.D.C. 2004) (“The agency bears the burden of demonstrating that withheld documents contain no reasonably segregable factual information.”).

Further, OSHA has no basis for its assertion that plaintiff did not want any information at all if it could not have the records in their entirety. Plaintiff requested each record “in its entirety” to forestall the agency from redacting nonexempt portions of the records as “out of scope” or “non-responsive.” *See, e.g.*, Edens Decl. Ex. A, at 1 (“Public Citizen seeks each record in its entirety. Accordingly, please do not redact portions of any record as ‘non-responsive,’ ‘out of scope,’ or

the like.”). Plaintiff did not instruct OSHA to withhold requested records in their entirety if the agency asserted that some parts of the requested records were exempt from disclosure. To the contrary, each of plaintiff’s requests expressly states that if it is OSHA’s position that some portion of the records are exempt, OSHA should “provide the nonexempt portions of the records.” *See id.*

OSHA defends its violation of FOIA’s requirement that it segregate and produce nonexempt portions of the records by feigning ignorance regarding the utility of disclosure of less than all fields in the database, asserting that if OSHA withheld the names of submitting establishments, the remaining fields would be useless because plaintiff’s sole purpose in requesting the records was to examine compliance with the reporting requirement. Defs. Opp. at 17. OSHA bases its assertion on a single sentence from the portion of the requests addressing entitlement to fee waiver and ignores the very next sentence where plaintiff states that it “intends to use the work-related injury and illness data submitted to OSHA to conduct research on issues of workplace health and safety.” *See, e.g.,* Edens Decl. Ex. A, at 2. Thus, it has been clear since the original request that plaintiff would utilize identifying information to assess compliance, and injury and illness data to identify and analyze threats to worker health and safety. In any event, FOIA does not allow an agency to choose not to disclose nonexempt portions of responsive records when, in the agency’s view, the disclosure would not be useful.

In short, if some portion of the requested records are exempt from disclosure, FOIA requires OSHA to disclose the nonexempt portions.

CONCLUSION

The Court should grant plaintiff’s motion for summary judgment, deny OSHA’s motion for summary judgment, and order OSHA promptly to disclose the requested records.

Dated: January 2, 2020

Respectfully submitted

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