UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN FOUNDATION, Plaintiff, v. UNITED STATES DEPARTMENT OF LABOR, *et al.*, Defendants.	)	Civil Action No. 18-cv-117 (EGS)

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

Sean M. Sherman (D.C. Bar No. 1046357)
Michael T. Kirkpatrick (D.C. Bar No. 486293)
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Counsel for Plaintiff

September 5, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page(s)**

STATUTES AND REGULATIONS

MISCELLANEOUS

INTRODUCTION

Public Citizen brought this Freedom of Information Act (FOIA) action to compel the United States Department of Labor and the Occupational Health and Safety Administration (collectively, OSHA) to produce Form 300A summary injury and illness records that covered establishments are required to submit electronically to OSHA pursuant to a rule entitled "Improve Tracking of Workplace Injuries and Illnesses," 81 Fed. Reg. 29624 (May 12, 2016) (the Final Rule). OSHA has long recognized that the requested data is not "confidential commercial information" exempt from disclosure under FOIA Exemption 4. And, in its opposition memorandum, OSHA concedes that, throughout the development and after the promulgation of the Final Rule, it was always OSHA's intention to release publicly and in real time the Form 300A data it collected. OSHA further concedes that, since at least 2004, it has publicly posted the same type of data—previously collected through the now defunct OSHA Data Initiative (ODI)—while it was using that data in its site-specific targeting (SST) enforcement programs, and that it did so without complaints from employers and without harm to its SST programs.

Despite these concessions, OSHA now claims that unanticipated factual developments since January 2017 have forced it to reverse its long-standing position and to conclude that the Form 300A data must be withheld from disclosure for four years to prevent impact to its SST program. OSHA's new position is factually unsupported and implausible, and it relies on an expansive view of Exemption 4 that has never been recognized by the D.C. Circuit.

ARGUMENT

I. Annual Summaries of Workplace Injuries and Illnesses are not "Confidential Commercial Information" Within the Meaning of FOIA Exemption 4.

Exemption 4 protects from public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). In its

opening memorandum, plaintiff demonstrated that the requested records are neither "commercial" nor "confidential."[1] Pl. Mem. 19–34. And OSHA admits that, in the Final Rule, after "carefully considering" the issue, it concluded that the information in the Form 300A is not "confidential commercial information." *See* Defs. Reply to Counter-Statement of Material Facts ¶¶ 69–71, 73 (Defs. Resp.); *see also* 81 Fed. Reg. 29658–60; *id.* at 29653. Nothing in OSHA's opposition memorandum (Defs. Opp.) casts doubt on that analysis.

A. The requested records are not "commercial" information.

OSHA admits that the records required to be submitted under the Final Rule "do not include proprietary or commercial business information." *See* Defs. Resp. ¶ 73; *see also* 81 Fed. Reg. at 29660. In light of this admission, OSHA cannot sustain its burden to show that Exemption 4 applies.

Further, as Public Citizen explained in the opening memorandum, the court in *Chicago Tribune Co. v. FAA*, No. 97 C 2363, 1998 WL 242611 (N.D. Ill. May 7, 1998), rejected an agency's claim that information concerning the number and nature of medical emergencies on airlines was "commercial" within the meaning of Exemption 4. *See* Pl. Mem. 21. Public Citizen explained that the information at issue here—the number and nature of workplace injuries and illnesses—is similarly not commercial. *See id.* OSHA does not attempt to distinguish *Chicago Tribune*, nor could it.

Public Citizen also explained that the cases on which OSHA relied in its opening memorandum are inapplicable here, *see id.* n.6, and OSHA has now abandoned those authorities.

[1] OSHA no longer claims that the withheld data is financial. OSHA also concedes that the requested records are not trade secrets and does not argue that the records are privileged. Plaintiff agrees that the records were obtained from a person.

In their place, OSHA cites two cases that did not consider whether the information at issue was "commercial," but instead moved directly to the issue whether the information was "confidential." Defs. Opp. 4 (citing *OSHA Data/CIH, Inc. v. U.S. Dep't of Labor*, 220 F.3d 153, 162 n.23 (3d Cir. 2000) (noting that plaintiff conceded that the information was commercial); *New York Times Co. v. U.S. Dep't of Labor*, 340 F. Supp. 2d 394, 401 (S.D.N.Y. 2004) (considering only whether the information was confidential and concluding that it was not)). Because the cases on which OSHA relies did not address whether the data was commercial, OSHA is wrong to assert that the data at issue here "has been established by both *OSHA Data* and *New York Times* to be commercial in character." Defs. Opp. 4.

In addition, OSHA cites three decisions that involve records closely connected to the commercial interests of the relevant entities. *See Baker & Hostetler LLP v. U.S. Dep't of Commerce*, 473 F.3d 312, 319 (D.C. Cir. 2006) (concluding that U.S. lumber industry had commercial interest in letters detailing the industry's strengths and weaknesses because public disclosure would help rivals); *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 830 F.2d 278, 281 (D.C. Cir. 1987) (*Critical Mass I*) (holding that nuclear power plants had commercial interest in reports submitted to the Nuclear Regulatory Commission because "the revelation of the details of the operations of their nuclear power plants ... could materially affect their profitability in multiple ways"), *vacated*, 975 F.2d 871 (1992) (*en banc*) (*Critical Mass III*); *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1291 (D.C. Cir. 1983) (concluding that manufacturers of intraocular lenses had commercial interest in reports of adverse reactions and complications submitted to FDA because the reports were "instrumental in gaining marketing approval for their products"). Here, by contrast, OSHA cannot and has not shown how release of the requested records could affect the commercial interests of the submitters.

Finally, although elsewhere agreeing that the information is not "commercial," *see* Defs. Resp. ¶ 73; *see also* 81 Fed. Reg. at 29660, OSHA in a footnote quotes the Final Rule out of context to argue that the requested data is commercial in character. *See* Defs. Opp. 4 n.3 (quoting 81 Fed. Reg. at 29659 as stating that "the information recorded in compliance with part 1904 [the recordkeeping Forms 300, 300A, and 301] may contain commercial or financial information."). To begin with, OSHA omits the start of the sentence, which begins "In some limited circumstances." Even putting aside that omission, the sentences read in context make apparent that OSHA was making the point that the requested records are *not* "commercial":

> As discussed elsewhere in this document, the information required to be submitted under the final rule is not of a kind that would include confidential commercial information. The information is limited to the number and nature of recordable injuries or illnesses experienced by employees at particular establishments, and the data necessary to calculate injury/illness rates, i.e., the number of employees and the hours worked at an establishment. Details about a company's products or production processes are generally not included on the OSHA recordkeeping forms, nor do the forms request financial information. The basic employee safety and health data required to be recorded do not involve trade secrets, and public availability of such information would not enable a competitor to obtain a competitive advantage. Accordingly, the posting of injury and illness recordkeeping data online by OSHA is not a release of confidential commercial information. *In some limited circumstances*, the information recorded in compliance with part 1904 [the recordkeeping Forms 300, 300A, and 301] may contain commercial or financial information.

81 Fed. Reg. at 29659 (emphasis added). OSHA goes on to state that, in those "limited circumstances," it is agency practice to contact the employer who submitted the information prior to any potential release under FOIA Exemption 4. *See id*. Tellingly, OSHA does not claim to have contacted any employer about the potential release of the records requested in this case.

Because OSHA has failed to demonstrate that the requested information is "commercial," it cannot be withheld under Exemption 4.

B. The requested records are not "confidential."

OSHA concedes that the Final Rule requires submission of the Form 300A data and that the *National Parks* test for mandatory submissions controls whether the records are "confidential" within the meaning of Exemption 4. *See* Defs. Opp. 5; *see also Critical Mass III*, 975 F.2d at 878 (citing *Nat'l Parks & Conservation Ass'n v. Morton,* 498 F.2d 765, 770 (D.C. Cir. 1974)). OSHA further concedes that it cannot satisfy either of the two prongs of the *National Parks* test because disclosure will neither (1) impair the Government's ability to obtain the information in the future, because the submission is mandatory and submitters have no discretion with regard to the quality and extent of information that must be reported on Form 300A, nor (2) cause substantial competitive harm to the submitters. *See id.* at 8–9. Instead, OSHA urges this Court to broaden the scope of Exemption 4 to allow an agency to withhold information as "confidential" where its release could impact a "governmental interest in administrative efficiency and effectiveness." Defs. Opp. 5–9. As explained in the opening memorandum, the D.C. Circuit has not adopted such a test, and to do so would be contrary to the plain language of FOIA's Exemption 4 and Supreme Court precedent. *See* Pl. Mem. 24–27 (citing *Fed. Open Market Comm. of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 354 (1979), and *Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143, 151 (2d Cir. 2010)).

OSHA's response is to double down on its claim that the D.C. Circuit in *Critical Mass III* recognized a governmental interest in administrative efficiency and effectiveness as a third basis to consider requested records "confidential" under Exemption 4. *See* Defs. Opp. 8–9. That is not correct. In *Critical Mass III*, the *en banc* court of appeals recognized that the two prongs of the *National Parks* test are not necessarily exclusive, and noted that an earlier panel decision—which it overruled—had adopted the First Circuit's conclusion that Exemption 4 protects a governmental

interest in program effectiveness. *See Critical Mass III*, 975 F.2d at 879. The court did not, however, offer an opinion as to whether such an interest falls within the scope of Exemption 4. Rather, "[t]he Court closed with the clear statement that '[*w*]*e offer no opinion* as to whether any other governmental or private interest might also fall within the exemption's protection.'" *Ctr. for the Study of Servs. v. U.S. Dep't of Health & Human Servs.*, No. CV 14-498 (GK), 2016 WL 6835461, at *5 (D.D.C. Aug. 16, 2016) (quoting *Critical Mass III*, 975 F. 2d at 879 (emphasis added in *Ctr. for the Study of Servs.*)), *rev'd on other grounds*, 874 F.3d 287 (D.C. Cir. 2017). Thus, "the Court of Appeals has *never held* that FOIA Exemption 4 protects a government interest in administrative efficiency and effectiveness." *Id.* (emphasis in original).

OSHA bizarrely relies on an earlier decision in *Center for the Study of Services* in which the district court concluded that, even if program effectiveness were a valid basis for withholding under Exemption 4, the government had not satisfied its burden under FOIA to invoke it. *See* Defs. Opp. 6–7 (citing *Ctr. for the Study of Servs. v. U.S. Dep't of Health and Human Servs.*, 130 F. Supp. 3d 1, 15 (D.D.C. 2015)). But as that same court later made clear, the same argument that OSHA makes here is "flat out wrong." *Ctr. for the Study of Servs.*, 2016 WL 6835461, at *5.

The only other case OSHA cites in support of its assertion that Exemption 4 encompasses a program effectiveness test is *Allnet Commc'n Servs., Inc. v. FCC*, 800 F. Supp. 984, 990 (D.D.C. 1992). *See* Defs. Opp. 6. As plaintiff has explained, *see* Pl. Mem. 25, the court there considered program effectiveness only in the context of information that was voluntarily provided, not a required submission. Thus, the case cannot assist OSHA here.

C. OSHA's assertion that real-time disclosure of the data will harm its targeting program is contradicted by the record.

Not only is "program effectiveness" not a valid ground for finding records "confidential" under Exemption 4, but OSHA's assertion that releasing the Form 300A data in real time will impact its targeting program has no sound basis.[2]

In this case, OSHA initially claimed that the agency had always intended to withhold the Form 300A data for four years before releasing it but that it had "neglected to mention the timing of when the data would be made public" in the Final Rule. *See* Defs. Mem. 17. After plaintiff submitted evidence proving that the agency had intended to release the Form 300A data in "real time," Pl. Mem. 11–15, OSHA retreated. Now, OSHA admits that it concluded that real-time publication would both encourage greater workplace safety and would improve the accuracy of the Form 300A data submitted to OSHA, and it "agrees [that it was] OSHA's intent *before and during the promulgation of the Regulation*" to release the Form 300A data in real time." Defs. Opp. 9; *see* Defs. Resp. ¶¶ 50–55, 85, 90. OSHA concedes that throughout the rulemaking process—indeed until some date after January 2017—it was never OSHA's intent to delay the release of the Form 300A data. *See* Defs. Resp. ¶¶ 68, 91.

Nevertheless, the agency now claims that after longtime OSHA Administrator David Michaels left OSHA in January 2017, new and unanticipated circumstances arose that caused it to

[2] OSHA argued in its opening memorandum that releasing the Form 300A data would harm both its recordkeeping and enforcement programs. Defs. Mem. 17–18. In its opposition, however, OSHA clarifies that its decision to withhold the Form 300A data "is based only on the premise that releasing the data immediately will substantially and negatively impact OSHA's own targeting program." Defs. Opp. 9. OSHA abandonment of its recordkeeping argument was necessary in light of its admission that, as plaintiffs previously explained, the agency concluded that publicly releasing the Form 300A data in real time will *improve* the accuracy of recordkeeping, not harm it. *See* Pl. Mem. 27; Defs. Resp. ¶¶ 54–55.

completely reverse its position and to delay—for four years—release of the data. OSHA claims that it "became apparent … that 'real time' publication of the subject data would result in significantly lower compliance with the Regulation and thereby undermine OSHA's plan to use the data for accurate targeting of establishments with the highest injury and illness rates." Defs. Opp. 10. OSHA claims that it has "faced sustained objection" to real time publication from industry based on industry perception that the release of the data will cause unfair harm to employers' reputations, as reflected in a low response rate for the first two data collections under the Final Rule. Nothing in the record supports OSHA's contentions.[3]

1. OSHA has provided no evidence that it has "faced sustained objection" to the public disclosure of the Form 300A data in real time.

OSHA claims that, since January 2017, it has "faced sustained objection to publication of the data" because employers fear that release of the data will cause "unfair harm" to their reputations. *See* Defs. Opp. 10 (citing Suppl. Galassi Decl. ¶ 3). The evidence put forward by OSHA does not demonstrate anything of the sort.

OSHA primarily relies on the Galassi Declaration to support its argument. *See id.* (citing Galassi Decl. ¶¶ 13–18 and attachment EE thereto). But the paragraphs on which OSHA relies cannot support its claim: Paragraph 13 is an introductory paragraph stating the conclusion Galassi claims is supported by paragraphs 14 to 18. Paragraphs 14 through 17 discuss comments from before and during the rulemaking process, which cannot be the new facts that formed the basis for

[3] OSHA initially claimed that establishments were concerned with misinterpretation of the Form 300A data if its release was not accompanied by an explanation, which OSHA lacked the resources to prepare. *See* Defs. Mem. 19. Plaintiff explained that because the Final Rule rejected the risk of misinterpretation, and because the Final Rule also included a model explanation, OSHA's claim was implausible. *See* Pl. Mem. 30–31. In its opposition, OSHA no longer argues that the risk of misinterpretation is a basis to withhold the requested records.

OSHA's 2017 flip-flop. Paragraph 18 refers to attachment EE, which contains a handful of internet postings—none focused on potential harm from the public release of the Form 300A data. The assortment of articles that OSHA has collected in attachment EE simply inform readers about the Final Rule's mandatory reporting requirement and discuss how the new requirement will affect business practices.[4] None can appropriately be labeled a "sustained objection" to the real-time public disclosure of the Form 300A data. Indeed, one article discussing OSHA's proposal to stop collecting other information (OSHA Forms 300 and 301), while *continuing* to collect and publish Form 300A data, notes that if OSHA does not collect the other forms, "essentially all of the concerns raised by the employer community melt away." *Id.* attachment EE, at 23–25.

Mr. Galassi claims that certain unnamed trade groups "view the release of the data as an attempt to publicly shame employers into compliance." *See* Galassi Decl. ¶ 18; Defs. Opp. 10. Using the cudgel of real-time publication to encourage greater workplace safety, however, was one of the foundational reasons for the development and promulgation of the Final Rule. *See* Pl. Mem. 10. As explained by Dr. Michaels, "[p]ublic disclosure of the collected data is at the heart of the rule and is fundamental to its objective of reducing workplace injury and illness."

---

[4] *See* Galassi Decl. attachment EE at 1–4 (post by a trade group providing basic information about the Final Rule); *id.* at 5–7 (post by a benefits advisory company providing key submission deadlines for submitting records and noting current practices that may be affected by the Final Rule); *id.* at 8–11 (post from a private attorney's website recounting history of the rulemaking process and legal challenges to the Final Rule); *id.* at 12–13 (article from Business Insurance noting in unrelated contexts that OSHA was moving away from its policy of issuing press releases highlighting employer citations and penalties); *id.* at 14–15 (post by the American Society of Safety Engineers explaining how to use the new online data submission platform); *id.* at 16–22 (two posts by employment law firm discussing delays to the submission deadline); *id.* at 23–25 (post by law firm discussing OSHA's proposal to remove the reporting requirements for Form 300 and 301 data); *id.* at 26–27 (post by law firm discussing proposal to revise the Final Rule); *id.* at 28–35 (post by law firm discussing December 15 reporting deadline and potential future revisions to Final Rule); *id.* at 36–39 (identical post on a different website discussing December 15 reporting deadline and potential future revisions to Final Rule).

Michaels Decl. ¶ 14. Indeed, as Dr. Michaels referenced in testimony before the House Subcommittee on Workforce Protections, empirical evidence suggests that "OSHA would have to conduct at least 40 additional inspections to achieve the same improvement in compliance as that achieved with a single press release." Frumin Decl. ¶ 24 (citation omitted).

Moreover, objections to public disclosure based on reputational harm would not be a valid basis to withhold records under Exemption 4, especially where, as here, submission is mandatory. *See United Techs. Corp. v. U.S. Dep't of Def.*, 601 F.3d 557, 564 (D.C. Cir. 2010) ("Exemption 4 does not guard against mere embarrassment in the marketplace or reputational injury."). Further, because the Form 300A records are posted conspicuously in workplaces for three months and provided to employees and their representatives upon request for five years, *see* 29 C.F.R. §§ 1904.32, 1904.33, 1904.35, failure to comply with the Final Rule does not prevent the Form 300A data from entering the public domain.

2. OSHA has provided no evidence that the response rate to the Final Rule was affected by OSHA's intention to disclose the data in real time.

OSHA states that there was a "low response rate" to the Final Rule's mandatory deadlines for the submission of 2016 and 2017 data, which it attributes, "at least in part," to employers' recognition that the records would be publicly disclosed in real time. *See* Defs. Opp. 11. The agency provides no explanation or evidence for how it reached this conclusion and no evidence that employers decided to violate the mandatory reporting requirement rather than face real-time disclosure of their summary injury and illness rates. And OSHA elsewhere itself provided a far more plausible explanation for the 2016 response rate: In a recent notice of proposed rulemaking, OSHA stated that it "recently discovered that employers did not receive clear notice of their obligation to respond for 2016." *Tracking of Workplace Injuries and Illnesses*, 83 Fed. Reg. 36494, 36498 n.3 (July 30, 2018). OSHA did not suggest in the notice that the response rate was lower

than expected because of any fear of reputational harm associated with the publication of the Form 300A data.

OSHA also claims that a four-year delay will remedy the low response rate. OSHA again provides no evidentiary basis for its claim. Instead, the agency merely asserts, without citation to any portion of the record, that "OSHA has determined that this delay to eventual release will reduce industry concerns because, at the time of release, the older data will not represent individual establishments' *current* industry and illness rates." Defs. Opp. 11. This sort of unsupported reasoning is an insufficient basis to satisfy the agency's burden under FOIA. *See Biles v. Dep't of Health & Human Servs.*, 931 F. Supp. 2d 211, 218, 220–21 (D.D.C. 2013) (granting summary judgment to requester where agency failed to submit a "reasonably detailed and non-conclusory declaration[]" explaining its reasoning under FOIA Exemption 4 that disclosure of records would impair the government's ability to obtain accurate data in the future) (citing *McGehee v. CIA*, 697 F.2d 1095, 1102 (D.C. Cir. 1983)).

Further, contrary to OSHA's claim here, the agency's decision not to release the Form 300A data could not have been based on the response rate for 2017, because the deadline for submission was July 1, 2018—one month after OSHA's June 1 filing of its initial motion papers in this case. Moreover, it would be unsurprising if compliance with the July 1, 2018, deadline was lower than expected because, prior to that deadline, OSHA had publicly informed employers that they could submit materials through December 31, 2018, without penalty. *See* OSHA, *Injury*

Tracking Application, https://www.osha.gov/injuryreporting/; *see also* Suppl. Galassi Decl. ¶ 5 n.1.

3. OSHA's history of publishing ODI data contradicts its claim that publishing Form 300A data will harm its SST programs.

OSHA's past practice of releasing ODI data renders its argument about the threat to its enforcement program implausible. OSHA admits that the information it received through the ODI from 1996 to 2012 was the same type of information it receives under the Final Rule. Defs. Resp. ¶ 26. OSHA further concedes that it publicly disclosed the ODI data while it was being used in OSHA's SST programs throughout that time. Defs. Resp. ¶¶ 28–29, 34–35, 100–102. And OSHA admits that it is "not aware of any evidence that the routine release of the ODI data undermined or impaired OSHA's enforcement program." *Id.* ¶ 37, 102; *see id.* ¶ 38 ("Admitted that 'OSHA's routine release of injury and illness data before the issuance of the Final Rule did not impair compliance with the recordkeeping or targeting programs.'"), *id.* ¶ 47. OSHA further concedes that before it issued the Final Rule, "OSHA collected injury and illness data and put it on the web, with virtually no complaints from any employer." *Id.* ¶ 39; *see id.* ¶ 106. Although the agency spends pages arguing that the collection and release of the ODI data and the Form 300A data are somehow different, *see* Defs. Opp. 12–15, the agency elsewhere expressly concedes that "the data OSHA received from establishments through the ODI *was the same type of data* as the Form 300A data it receives under the Final Rule," *see* Defs. Resp. ¶ 26 (emphasis added).

Aside from the ODI, OSHA has publicly disclosed the same type of data through its high rate letter program, severe injury and fatality reports, and in response to FOIA requests, and has not claimed or shown evidence of any resulting harm to its enforcement program. *See* Pl. Mem. 29–30, 33–34. Although OSHA attempts to distinguish these similar programs from the collection and publication of Form 300A data, Defs. Opp. 15–17, it does not claim that there has been harm

to its enforcement programs from any of these prior disclosures. OSHA also does not dispute that many other federal agencies collect and publish establishment-specific injury and illness data, *see* Pl. Mem. 15; Defs. Resp. ¶ 57, without any known harm to their programs.

OSHA attempts to distinguish the ODI by claiming that the threat of penalties deterred widespread noncompliance with that program but will not do so here, because OSHA cannot identify employers that do not comply with the Final Rule, and that, even if it could, it lacks the resources to take action against the non-responders. Defs. Opp. 13–15. As plaintiff has explained previously, this argument boils down to a back-door attempt to invoke the impairment prong to *National Parks*, *see* Pl. Mem. 28, which OSHA concedes cannot be satisfied here, where the submission at issue is mandatory, *see supra* p.5. Moreover, in a recent notice of proposed rulemaking, OSHA indicated that it could identify non-responders, stating that "it has identified thousands of non-responders who were obligated to respond for 2016, and is in the process of informing them of their obligation to respond for 2017." 83 Fed. Reg. at 36498 n.3.

At bottom, OSHA offers no credible basis to distinguish the past public releases of ODI data—which did not harm OSHA's targeting program—from the real-time release of Form 300A data. And because OSHA's release of the same type of data did not affect its targeting program or response rates, OSHA's unsupported claim that releasing the Form 300A data will harm its program should be rejected.

II. Portions of the Annual Summaries are Reasonably Segregable.

OSHA previously claimed that no portions of the requested records were segregable because the materials were inextricably intertwined and the release of any portion would undermine program effectiveness. *See* Edens Decl. ¶ 21. In response, plaintiff explained that although nothing in the Form 300A submission constitutes confidential commercial information,

even if some portion of the records were exempt, the records are collected electronically and certain fields could be easily separated and redacted. *See* Pl. Mem. 25. In its opposition, OSHA concedes that plaintiff is correct, and that OSHA has the capability to redact the requested records. *See* Defs. Resp. ¶ 99; Defs. Opp. 18.

Nevertheless, cherry-picking language from plaintiff's FOIA requests, OSHA now claims that because plaintiff sought each record "in its entirety," redacted records are not responsive to the requests, and it therefore has no segregation obligation. *See* Defs. Opp. 17–19. However, plaintiff specified that it sought each record "in its entirety" to forestall the agency from invoking the recent practice of redacting portions of responsive records as "out of scope" or "non-responsive." *See, e.g.*, Eden 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.") (emphasis omitted). Plaintiff was not instructing OSHA to withhold requested records in their entirety if the agency concluded that some portion of the requested records were subject to redaction. To the contrary, each of Public Citizen's requests expressly notes that Public Citizen seeks "nonexempt *portions* of the records." *See id.* (emphasis added).

OSHA also takes a sentence from the portion of plaintiff's requests dealing with its entitlement to a fee-waiver out of context to suggest that the "purpose" of plaintiff's requests is to understand "whether employers are adhering to the Final Rule and submitting information to OSHA," and that therefore plaintiff will only be satisfied by the records "in their entirety." *See* Defs. Opp. 17–18. This argument misreads plaintiff's requests, which explicitly provide—*in the very next sentence*—that plaintiff seeks the records for several reasons, including conducting research with the data. *See, e.g.*, Edens Decl. Ex. A, at 2 ("HRG intends to use the work-related injury and illness data submitted to OSHA to conduct research on issues of workplace health and

safety"). Not only is OSHA wrong in seeking to circumscribe plaintiff's interest, but a requester's reason for seeking records is not pertinent to the agency's obligation to comply with FOIA—including the statutory requirement that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b).

Accordingly, if some portion of the requested records are exempt from disclosure, OSHA should be ordered to produce the nonexempt portions of the requested records.

CONCLUSION

This 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: September 5, 2018

Respectfully submitted,

/s/ Sean M. Sherman
Sean M. Sherman
(D.C. Bar No. 1046357)
Michael T. Kirkpatrick
(D.C. Bar No. 486293)
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Counsel for Plaintiff