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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

POWER CONSTRUCTORS, INC.,

Plaintiff,

vs.

U.S. DEPARTMENT OF LABOR,

Defendant.

Case No. 1:17-CV-102

COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF

COMES NOW Plaintiff, Power Constructors, Inc. (“PCI”), and for its Complaint for Declaratory and Injunctive Relief against the United States Department of Labor (“DOL”), states and alleges as follows:

**I.  
INTRODUCTION**

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701 *et seq.*, seeking injunctive, declaratory, and other appropriate relief including the release of agency records generated by the United States Department of Labor's Occupational Safety & Health Administration (“OSHA”) and requested by Plaintiff.

**II.  
JURISDICTION AND VENUE**

2. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B). Venue lies in this district pursuant to 5 U.S.C. § 552(a)(4)(B) in that Plaintiff resides in this district and its principal place of business is in this district.

**III.  
PARTIES**

3. Plaintiff is an Idaho corporation with its principal place of business at 3940 Glenbrook Drive P.O. Box 1066, Hailey, ID 83333.

4. Defendant United States Department of Labor is a department of the Executive Branch of the United States Government. The DOL is an agency within the meaning of 5 U.S.C. § 552(f), and may be served pursuant to Federal Rule of Civil Procedure 4(i), by sending a copy of the summons and complaint, by certified or registered mail, to the civil-process clerk at the United States attorney's office for the District of Kansas, at 444 S.E. Quincy, Suite 290, Topeka, Kansas 66683, with copies forwarded by certified mail to the Attorney General of the United States at the United States Department of Justice, Civil Division, 950 Pennsylvania Ave., NW

Suite 1111 , Washington, D.C. 20530 and the U.S. Department of Labor, 200 Constitution Ave., N.W., Washington, D.C. 20210.

**IV.  
FACTS RELATING TO FOIA REQUEST**

5. On May 10, 2016, Plaintiff submitted a FOIA request to OSHA, attached hereto as Exhibit A, requesting “all documents, photographs, videotapes, interviews and other materials generated” in connection with OSHA’s investigation of an August 29, 2013 high-voltage electrical accident resulting in the death of Dakota Holt and the injury to Michael Rowan, who were employees of Track Utilities, LLC (“Track”) when the accident occurred at or near Medicine Lodge, Kansas.

6. On or about June 17, 2016, OSHA provided approximately 350 pages of documentation in response to Plaintiffs request, along with correspondence waiving payment for production costs. *See* 6/17/16 letter attached hereto as Exhibit B.

7. The documents produced by OSHA contained numerous redactions. In addition, numerous documents, as well as photographs and audio recordings of witness interviews, were withheld in their entirety based upon exemptions under 5 USC § 552 (b). The following documentation was improperly withheld or redacted from Plaintiff’s request, based upon FOIA Exemption 7(c):

- a. names of employees who were interviewed in connection with the accident;
- b. written witness statements;
- c. audio recordings and/or transcripts of audio recordings of witness interviews;

- d. photographs taken in connection with the investigation; and
- e. operator's manual for the truck and derrick being used when accident

occurred;

8. On August 18, 2016, within the prescribed period, Plaintiff filed an appeal challenging Defendant's decision to withhold the foregoing information, documents and audio recordings. *See* Exhibit C.

9. To date, Defendant has not responded to Plaintiff, or otherwise made a determination of Plaintiff's appeal as required by 5 U.S.C. § 552(a)(6)(A)(ii). As such, Defendant has constructively denied Plaintiff's appeal, and Plaintiff is deemed to have fully exhausted its administrative remedies.

## V. CLAIMS FOR RELIEF

10. Plaintiff repeats the allegations in paragraphs 5 through 9 above as though fully set forth here.

11. Plaintiff has a statutory right under FOIA, 5 U.S.C. § 552(a)(3), to obtain the records it has requested, and Defendant has no legal basis for its action in withholding the right of access to such documents, information and audio recordings, as its reliance on FOIA Exemption 7(c) has no justification in law or fact.

12. Plaintiff's request for unredacted copies of the investigation report, narratives and summaries of OSHA's investigation of the accident, as well as photographs, audio recordings, statements or transcripts of any witnesses interviewed as part of that investigation, cannot be reasonably expected to constitute an unwarranted invasion of personal privacy of any the persons involved in the OSHA investigation.

13. The names, identities and job titles of all of the persons who were present at the accident scene when the accident occurred on August 29, 2013, all of whom were Track employees is public knowledge and known to be Randall Miller, Mike Rowan, Nick Dodge, Jacob Smith, and Dakotah Holt, who was electrocuted and killed.

14. Likewise, the identity of other employees of Track and Power Constructors, Inc. that were involved in the OSHA investigation is public knowledge.

15. Many of the OSHA interviews occurred in the presence of persons other than the OSHA investigators.

16. The employees of Plaintiff and Track who were interviewed by OSHA following the accident, or provided written statements, have acknowledged or admitted that those interviews occurred and/or statements were provided. None of the Track crew members interviewed by OSHA as part of its investigation are still employed by Track, so there is no risk of harm or retaliation to those former employees by disclosure of their identity and witness statements.

17. It is publicly known that OSHA determined Track committed certain safety violations on the day of the accident and assessed penalties against Track for those violations.

18. It is publicly known that Track did not appeal or contest OSHA's findings of safety violation, or its assessment of penalties, but instead entered into a settlement agreement with OSHA acknowledging the violations and paid the penalties assessed.

19. It is publicly known that Track employees recorded a video recounting the company's safety violations, which was used for safety training of other companies in the industry.

20. Following the accident, Mike Rowan filed suit in the District of Kansas as Case No. 15-cv-09227-JWL-TJJ, against Plaintiff and the utility owner Sunflower Electric Power Corporation and Mid-Kansas Electric Company, LLC (“Sunflower”), seeking \$15,000,000 in actual damages, as well as punitive damages for alleged injuries he avers arose out of the accident. Because punitive damages are quasi criminal in nature, denial of access to the witness statements, photographs, and other investigation materials that bear directly on these claims is arbitrary and capricious.

21. Under Kansas law, once a person files suit for personal injuries, he waives the patient-physician privilege and waives confidentiality of his medical records. See. K.S.A. § 60-427.

22. Mike Rowan claims to have no recollection of the events which gave rise to the accident. For that reason, and as a result of the death of Dakotah Holt in the accident, two of the five persons present are unavailable as witnesses to the accident.

23. No employee of Plaintiff or Sunflower was present at the accident location when it occurred and did not observe the events that caused the accident. Plaintiff and Sunflower conducted post-accident investigations, but were not privy to the complete investigation of OSHA.

24. Mr. Rowan denies the results of the varied investigations by Plaintiff, Sunflower and OSHA, as well as the conclusions reached in the Track video.

25. Former Track employee Randall Miller, who was acting crew foreman and journeyman power line worker on the day of the accident testified in deposition that he discussed

the accident with representatives of OSHA. Mr. Miller has testified to what he claims occurred during the accident. Thus, Mr. Miller has no expectation of privacy.

26. Former Track employee Nick Dodge, who was present on the day of the accident has given a sworn statement regarding what he observed occurred during the accident. Thus, Mr. Dodge has no expectation of privacy.

27. Based on Mr. Dodge's sworn statement, it appears that one or more of the witnesses called by Mr. Rowan may have made false or inaccurate statements in their testimony in an effort to aid Mr. Rowan's lawsuit against Plaintiff and Sunflower.

28. As an example, Mr. Miller testified Mr. Rowan was in fact wearing insulating rubber gloves and the reason his gloves were not found after the accident is "because they were melted to his hands," which is contrary to the testimony of crew members Nick Dodge and Jacob Smith, contrary to the testimony of numerous other Track employees involved including Mike Bates who found the gloves in the cab of a truck, and contrary to the testimony of the responding Sheriff.

29. In addition, Miller testified that the lift truck was in fact grounded by the use of the ground cables provided with the truck which is contrary to all investigations (by Track, Power, and OSHA) and to the testimony of Mike Bates, Nick Dodge and Jacob Smith who testified that the truck's ground cables were not in use.

30. The accounts by Mr. Miller and the other witnesses interviewed by OSHA shortly after the accident are crucial to a determination of the veracity of their testimony, as well as to a complete reconstruction of the events leading up to the accident.

31. The public interest in disclosure of this information, and in ascertaining OSHA's fulfillment of its obligations in connection with its investigation, outweighs any privacy interest that might be asserted. That is particularly true here, where Mr. Rowan seeks to recover punitive damages against Plaintiff and Sunflower.

32. DOL's failure to fully disclose information, documents, and audio recordings responsive to Plaintiff's request constitutes agency action unlawfully withheld, in violation of the APA, 5 U.S.C. §§ 701-706. DOL's failure in this matter is arbitrary, capricious, and an abuse of discretion, not in accordance with the law and without observance of procedure required by law, all in violation of the APA.

33. Plaintiff is being irreparably harmed by Defendant's unlawful withholding of requested records, and Plaintiff has no adequate remedy at law.

34. The need for timely release of public information under the Freedom of Information Act satisfies the good cause standard of 28 U.S.C. §1657 for this Court to give priority to these proceedings and expedite resolution of this matter.

**VI.  
ATTORNEY'S FEES**

35. Attorney's fees are authorized in this action pursuant to 5 U.S.C. § 552 (a)(4)(E).

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff respectfully prays that the Court grant the following relief:

1. An order enjoining Defendant from withholding the requested information, documents and audio recordings and compelling production of same;
2. An expedited proceeding pursuant to 28 U.S.C. §1657;
3. An award of costs and reasonable attorney's fees incurred in this action; and



4. Any such other relief as the Court may deem just and proper.

DATED THIS 7th day of March, 2017.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By /s/ Brad P. Miller  
Brad P. Miller, ISB No. 3630

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