

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

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05 - 12139 RCL

BRIAN E. LEWIS

Plaintiff,

v.

UNITED STATES DEPARTMENT  
LABOR

Defendant.

U.S. DISTRICT COURT  
DISTRICT OF MASS.

RECEIPT # 67793  
AMOUNT \$ 250  
SUMMONS ISSUED 1  
LOCAL RULE 4.1 1  
WAIVER FORM 1  
MCF ISSUED \_\_\_\_\_  
BY DPTY. CLK. Tom  
DATE 10/26/05

COMPLAINT

MAGISTRATE JUDGE Alexander

**I. INTRODUCTION**

Plaintiff Brian E. Lewis ("Lewis") brings this action, pursuant to the Freedom of Information Act, 5 U.S.C. §552(a)(4)(B), to enjoin the United States Department of Labor from withholding agency records and to order the Department of Labor to disclose such agency records.

The Department of Labor has refused to disclose to Lewis the Lost Work Day Illness and Injury Rates ("LWDII") for the reporting year 2003 for all worksites that have a Major SIC Group Code of 80, which includes Industry Groups 801 through 809. The Department of Labor has collected these LWDII rates, and has disclosed them to other entities in the past. These LWDII rates are disclosable under FOIA, and there is no exemption under FOIA that protects these records.

**II. PARTIES**

1. Plaintiff Brian E. Lewis ("Lewis") resides in Massachusetts.

2. Defendant United States Department of Labor (“DOL”) is an agency of the federal government. One of the DOL’s operating units is the Occupational Safety and Health Administration (“OSHA”).

### III. JURISDICTION

3. This action arises under 5 U.S.C. §552 *et seq.*, the “Freedom of Information Act.” This Court has jurisdiction of this action pursuant to 5 U.S.C. §552(a)(4)(B).

4. Venue is proper in this Court, as Lewis resides in Massachusetts. 5 U.S.C. §552(a)(4)(B).

### IV. FACTS

5. This action arises from the DOL’s and OSHA’s failure to disclose certain information in response to a Freedom of Information Act (“FOIA”) request made by Lewis.

6. On March 4, 2005, Lewis requested that OSHA provide the Lost Work Day Illness and Injury Rates (“LWDII”) for the reporting year 2003 for all worksites that have a Major SIC Group Code of 80, which includes Industry Groups 801 through 809. A true and correct copy of this FOIA request is attached hereto as Exhibit A. OSHA has provided these records in the past to requesters for previous reporting years.

7. By letter dated March 17, 2005, Keith Goddard, Director of OSHA’s Directorate of Evaluation and Analysis, denied Lewis’ request in full. OSHA ruled that disclosure of the LWDII rates for reporting year 2003 would have an “adverse effect on the agency’s enforcement proceedings” and that, therefore, the LWDII rates were exempt from disclosure in accordance with Exemption 7(A) of FOIA. A true and correct copy of OSHA’s denial is attached hereto as Exhibit B.

8. In 2004, OSHA distributed a survey to employers and establishments.

9. The survey was distributed to approximately 80,000 employers and their establishments.
10. The survey sought data about injuries and illnesses resulting in, among other things, days away from work, restricted work activity, and job transfers.
11. On the survey form, each employer or establishment is required by OSHA to calculate the lost work days injury and illness rate for the surveyed employer or establishment.
12. In early 2005, OSHA identified and notified approximately 14,000 employers that completed the surveys
13. OSHA informed those employers that each had higher than the national average LWDII rates.
14. In early 2005, OSHA also provided these 14,000 employers with a list of the most frequently violated OSHA standards for each specific employer's industry.
15. The 14,000 employers or establishments are also listed alphabetically on OSHA's website at [http://www.osha.gov/as/opa/foia/hot\\_11.html](http://www.osha.gov/as/opa/foia/hot_11.html).
16. OSHA utilizes the list of the 14,000 employers for its site-specific targeted enforcement program.
17. As part of the targeted enforcement program, OSHA directs its Compliance Officers to sites that reported higher than average lost work day injury and illness rates.
18. On May 5, 2005, Lewis appealed OSHA's denial to the Solicitor of Labor for the DOL (the "Appeal"). In the Appeal, Lewis argued that OSHA's denial was improper, that the information requested was not covered by Exemption 7(A) of FOIA, that OSHA's denial was inconsistent and in contravention with United States District Court Judge Shira Scheindlin's decision in New York Times Co. v. U.S. Department of Labor, S.D., N.Y., Case 03 Civ. 8334

(7/29/2004), and that the requested information should be produced. A true and correct copy of the Appeal is attached hereto as Exhibit C.

19. In response to District Court Judge's Schiendlin order in the New York Times case, OSHA disclosed the identical information sought by Plaintiff in this action, but for prior survey years.

20. On May 13, 2005, James E. Culp, the Acting Associate Solicitor of Labor, acknowledged receipt of the Appeal. The Solicitor of Labor's office took no action on the Appeal besides acknowledging its receipt. A true and correct copy of this acknowledgment is attached as Exhibit D.

21. Since May 13, 2005, Lewis has heard nothing further from the Solicitor's Office, or anyone at the Department of Labor or OSHA, regarding the Appeal.

**COUNT I—VIOLATION OF FOIA**

22. Lewis restates and reincorporates the allegations in Paragraphs 1 through 21 of the Complaint.

23. The DOL is a federal agency subject to the disclosure requirements of FOIA.

24. The LWDII rates for the reporting year 2003 for all worksites that have a Major SIC Group Code of 80, which includes Industry Groups 801 through 809 are disclosable records that must be disclosed in response to Lewis' FOIA request.

25. By failing to release the LWDII rates in response to Lewis' FOIA request, and by failing to respond to the Lewis Appeal within twenty (20) days as required by 5 U.S.C. §552(a)(6)(C), the DOL has violated FOIA.

26. By failing to release the LWDII rates in response to Lewis' FOIA request, and by failing to respond to the Lewis Appeal within twenty (20) days as required by 5 U.S.C. §552(a)(6)(C), Lewis has constructively exhausted its administrative remedies.

27. This Court, therefore, should issue an order stating that the Department of Labor has violated FOIA by failing to disclose to Lewis the LWDII rates for the reporting year 2003 for all worksites that have a Major SIC Group Code of 80, which includes Industry Groups 801 through 809.

**COUNT II—ORDER RELEASING LWDII RATES**

28. Lewis restates and reincorporates the allegations in Paragraphs 1 through 27 of the Complaint.

29. The DOL is a federal agency subject to the disclosure requirements of FOIA.

30. The LWDII rates for the reporting year 2003 for all worksites that have a Major SIC Group Code of 80, which includes Industry Groups 801 through 809 are disclosable records that must be disclosed in response to Lewis' FOIA request.

31. By failing to release the LWDII rates in response to Lewis' FOIA request, and by failing to respond to the Lewis Appeal within twenty (20) days as required by 5 U.S.C. §552(a)(6)(C), the DOL has violated FOIA.

32. By failing to release the LWDII rates in response to Lewis' FOIA request, and by failing to respond to the Lewis Appeal within twenty (20) days as required by 5 U.S.C. §552(a)(6)(C), Lewis has constructively exhausted its administrative remedies.

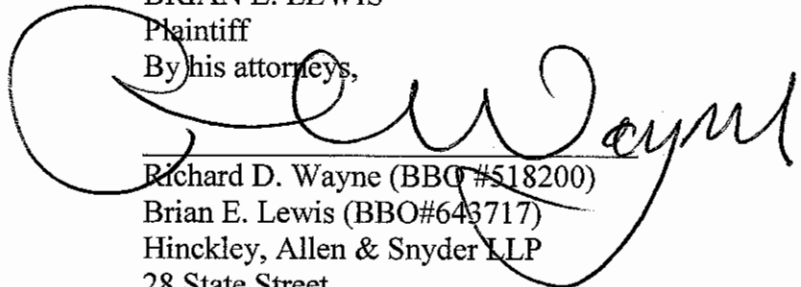
33. This Court, therefore, should issue an order requiring the Department of Labor to disclose to Lewis the LWDII rates for the reporting year 2003 for all worksites that have a Major SIC Group Code of 80, which includes Industry Groups 801 through 809 to HA&S.

**V. PRAYER FOR RELIEF**

WHEREFORE, Brian E. Lewis respectfully requests that this Court enter judgment on his behalf in the following manner.

- A. By issuing a declaration that the LWDII rates for the reporting year 2003 for all worksites that have a Major SIC Group Code of 80, which includes Industry Groups 801 through 809, are disclosable under FOIA.
- B. By ordering the Department of Labor to disclose the LWDII rates for the reporting year 2003 for all worksites that have a Major SIC Group Code of 80, which includes Industry Groups 801 through 809 to Brian E. Lewis within ten (10) days of this Court's Order,
- C. By awarding to Lewis this costs of this proceedings, including reasonable attorneys' fees, and
- D. By granting Lewis such other and further relief as this Court deems just and appropriate.

Respectfully submitted,  
BRIAN E. LEWIS  
Plaintiff  
By his attorneys,



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Dated: October 26, 2005