



# RockLaw

## Paper, Paper Everywhere

Bringing MSHA's documents into the light.

by Marci Fulton

*"It is not deeds or acts that last: it is the written records of those deeds and acts."* — Elbert Hubbard

**T**he e-mails, faxes, letters, post-it notes, voice mails, text messages, and other written or recorded forms of communication that we send and receive every day create a record of our lives. Documents record the decisions we make, the reasons supporting those decisions, and when we inevitably make mistakes, documents often capture those as well. You can tell a lot about a person by their records and the same is true of the Mining Safety and Health Administration (MSHA) and the documents it creates.

Other contributors to this column have recently discussed the procedures for informally conferencing a citation issued by MSHA, but how do you know whether it makes sense to move forward with an informal conference or even to proceed into more formal contest proceedings? Of course, you are going to discuss the citation internally, review any documents that you have pertaining to the alleged violation, and talk to the individuals involved to determine whether you have a defense to the citation. However, you may also consider requesting the documents that MSHA has in its possession — a feat achieved through the Federal Freedom of Information Act (FOIA).

FOIA, enacted in 1966, provides a means through which individuals can access records of all federal agencies. The purpose behind FOIA is to “ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.” Upon taking office in 2009, one of President Barack Obama’s first official acts

was to issue two memos regarding government transparency and FOIA, announcing a commitment “to creating an unprecedented level of openness in government.” While it is not yet clear whether these directives have ushered in a new era of openness in practice, operators should not overlook the opportunity to request MSHA documents relating to particular citations or inspections. Some operations request inspection files as a matter of course after every inspection.

There are no magic words for making a FOIA request, and there is little guidance as to what a FOIA request must look like. One thing is certain, a FOIA request must be made in writing, but a simple letter will do the trick. It is a good idea to specify in the subject line that the letter is a “Freedom of Information Act Request.” From there, you should describe the types of documents you are requesting or what they concern. You might request all documents pertaining to a particular inspection, a specific citation, or a given regulation.

Be careful not to be too specific in your request. For example, if you ask for “all notes taken in Independence Hall on July 4, 1776,” you will not receive any of the notes taken on other dates or in other locations. You also need to consider whether your request is too broad. “All documents relating to the events taking place in Independence Hall on July 4, 1776” is likely to yield millions of documents in any way relating to the Declaration of Independence. Because MSHA is entitled to charge for searching for, reviewing, and photocopying records, you want to make sure you are not requesting more than you actu-

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ally want. Additionally, in order to speed up the processing of your request, you may want to include a statement about how much you are willing to pay for the processing of the request (e.g. We will pay up to \$250 for copies of responsive documents).

FOIA requests can be submitted via mail, fax, or e-mail. E-mail requests appear to receive quicker responses than those sent via other methods. The e-mail address for FOIA requests is [foiarequest@dol.gov](mailto:foiarequest@dol.gov). Information regarding other methods of delivery can be found at [www.msha.gov/readroom/FOIARequest.asp](http://www.msha.gov/readroom/FOIARequest.asp).

In most cases, MSHA must respond to a FOIA request within 20 working days of receipt. You can request expedited handling of your request, which cuts the response time to 10 working days, but the circumstances under which an expedited request is granted are limited. MSHA does not have to provide you with all documents that they have relating to your request. FOIA includes nine exemptions and three exclusions to disclosure. For example, no agency has to disclose any document that is classified national defense and foreign relations information. However, if MSHA determines that any of its records fall within these exemptions or exclusions, they must inform you in writing of that determination, proving the reason for the denial of the records, the specific exemption or exclusion relied upon, and an estimate of how much is being withheld.

If MSHA fails to disclose all or part of the requested information or does not respond within the 20 working days, you may file an appeal with MSHA, asking that it reconsider its decision to withhold requested documents. Appeals must be made within 90 calendar days of the action being appealed.

Assuming you do receive docu-

ments, what do you do with them? The best approach is to read them carefully and see if anything in the documents supports your defenses to a particular action. Does the body of the citation match up with the inspector notes that you received? If there are inconsistencies, do they relate to any of the classifications made by the inspector? As an example, if he writes something as S&S, but in his notes states that he does not know how long the condition has existed, you might want to challenge the S&S determination. Additionally, do the documents that you received indicate

that there were additional documents created that were not provided? If so, you may wish to appeal the determination to request the “missing” records or simply file a new request asking specifically for those documents.

Reviewing MSHA’s documents will help you to make more informed decisions about whether moving forward with an informal conference or contest proceedings makes sense, as well as assisting you in determining whether you have bitten off more than you can chew on your own and need to ask for additional assistance in pursuing a particular course of action. **AM**

