

Gutting FOIA: The Public Has A Right to Know How Decisions Are Made

*By Ellen Smith, Editor and Owner
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Phone calls have been coming into *Mine Safety and Health News* for about a month from mine operators stating that they can no longer get information from the Mine Safety and Health Administration through the Freedom of Information Act.

This has been a complaint from the United Mine Workers for over a year now, and recently a complaint by *Mine Safety and Health News*. But what is happening at MSHA is in fact occurring government-wide.

Last week, Ed Clair, the U.S. Labor Department's Associate Solicitor for Mine Safety and Health, disclosed that, without public comment or input, MSHA secretly changed its long-standing policy of routinely releasing inspector notes under the Freedom of Information Act. The policy has been in place since 1977, the inception of the current-day Mine Act.

My first response to the mine operator who most recently called regarding his FOIA troubles was: "join the club."

Under the "pre-Bush MSHA" federal officials never denied *Mine Safety and Health News* information. As a reporter, I could get MSHA inspector notes and MSHA inspection records, even while the investigations were still under way.

The Williams Station Mine explosion, South Mountain explosion, Solvey Minerals collapse, Akzo Salt collapse, Phelps Dodge Morenci raise collapse, and the Kaiser Aluminum explosion are just a few notable examples of where MSHA released copious amounts of information before MSHA had finished its work. In these cases, MSHA released boxes upon boxes of information that I was allowed to sift through to develop my own story on what might have happened in these accidents.

In addition, I've used FOIA to verify what I've been told by MSHA sources, such as the MSHA credit card abuse story, or the case of the not-for-bid contracts.

But things in the Bush Administration are different, and not for the better, when it comes to getting information from the government.

No Easy Answers From MSHA and Other Agencies

On May 18, 2004, *Mine Safety and Health News* asked for some biographical information on David Dye, the new Deputy Assistant Secretary at MSHA. Many in the mining industry had never heard of Dye or even knew that he held the DAS position.

Mine Safety and Health News was denied that information by Suzy Bohnert, who heads MSHA's Office of Public Affairs. She said that she was denying this biographical information based on "privacy" concerns. Her exact written statement was: "This is a personnel matter, and because of privacy concerns, we can't discuss this."

At first, I thought she was joking or simply misinformed, but after talking with other members of the press, and reading reports from other journalists, I found out that the Bush Administration is routinely denying biographical information on political appointees.

For instance, the Texas Press Assn., reports that Todd Carter, a reporter for the *Natural Resources News Service* obtained biographical information on senior officials from the Environmental Protection Agency, who then demanded that he not publish the information because of "privacy concerns." He was then sent résumés of the officials with blacked out education levels, awards, affiliations and even job experience.

"When asked for the return of the unredacted résumés, Carter refused and posted résumés on the news-service website showing that EPA had brought in former Enron employees," according to the Press Association.

In another case, the Federal Aviation Administration recently asked the *Fort Worth Star-Telegram* to stop working on a profile of Ruth Leverenz, an FAA official, and to not photograph her, reports the Press Association.

In response to FAA's request, which the paper did not respect, *Star-Telegram* Executive Editor Jim Witt said, "The public must be able to evaluate the qualifications of government officials to judge whether they are capable of performing their jobs,"

The same argument can be made for the mining industry's need to know about the

background of MSHA's latest political appointee David Dye.

Michael Ravnitzky, a reporter with *American Lawyer Media*, was denied information under FOIA because he "failed to address how American Lawyer Media intends to use the records subject to the request." This is certainly not a valid reason for denying a citizen government information, and I would argue, illegal.

The History of FOIA

It's important for *Mine Safety and Health News* readers, or any citizen for that matter, to understand the history of FOIA.

FOIA was enacted by Congress and signed by President Lyndon Johnson in 1966. By law, FOIA grants citizens access to federal agency records. There are seven specific exceptions where government FOIA officers may withhold records. However, anyone denied information under FOIA may appeal.

The Watergate scandal led Congress to pass additional legislation that affected FOIA by forcing federal agencies to disclose their public records and documents.

FOIA was further refined in October 1993 under the Clinton Administration.

Then-Attorney General Janet Reno issued a ground-breaking memorandum stating that FOIA officers should "apply a presumption of disclosure" creating more openness in government. Reno said in the memo that the Justice Department would "no longer defend an agency's withholding of information merely because there was a "substantial legal basis" for doing so.

"Where an item of information might technically or arguably fall within an exemption it ought not to be withheld from a FOIA requester unless it need be," Reno wrote.

The Importance of FOIA

Ruth Rosen, editorial writer and columnist for the *San Francisco Chronicle* has called FOIA "one of our greatest democratic reforms... allow[ing] ordinary citizens to hold the government accountable by requesting and scrutinizing public documents and records. This act allowed greater access to ... records; access that had been previously severely proscribed. Without it, journalists, newspapers, historians and watchdog groups would never be able to keep the government honest."

Rosen has pointed out that it is FOIA that "allows us to know what our elected officials do, rather than what they say. It is our national sunshine law, legislation that forces agencies to disclose their public records and documents."

Quinlan J. Shea Jr., former director of the U.S. Justice Department's Office of Privacy and Information Appeals under Presidents Ford and Carter, said of FOIA, "I have long believed that secrecy is the mortal enemy of democracy. The more secrecy, the less democracy. The more that citizens are told that they must trust their government—that they must take on faith its integrity, and the value of what the government is doing and why it is doing it—the greater is the tendency away from democracy as we would like to see it."

Shea notes, "The Freedom of Information Act helps us to learn what is actually going on inside our government. Remember that any government, regardless of the party in power, will seek to conceal some of the things it does and, more frequently, the reasons for the actions it takes or fails to take."

It is under this FOIA model that the pre-Bush MSHA functioned as an agency.

How Did We Get Here? FOIA in 2004

On October 12, 2001, under the guise of "national security," U.S. Attorney General John Ashcroft sent a memo to all federal agencies creating a new level of secrecy under FOIA. According to the memo, it "supersedes the Department of Justice's FOIA Memorandum of October 4, 1993" (the "Reno" memo).

Ashcroft stressed to all federal agencies, including MSHA, that the Bush Administration is "committed to protecting other fundamental values that are held by our society. Among them are safeguarding our national security, enhancing the effectiveness of our law enforcement agencies, protecting sensitive business information and, not least, preserving personal privacy."

In wanting less information divulged under FOIA, Ashcroft states in his memo that "No leader can operate effectively without confidential advice and counsel. ...When you carefully consider

FOIA requests and decide to withhold records, in whole or in part, you can be assured that the Department of Justice will defend your decisions unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records.”

American University Washington College of Law Professor Robert Vaughn said that Ashcroft’s memo is “an indication to agencies to be more aggressive in denying FOIA requests and not be concerned about going to court.”

The *Christian Science Monitor* wrote in an editorial that “Years of hard-won battles that turned FOIA into a fundamental routine bulwark against government secrecy were undermined in a day.”

A *San Francisco Chronicle* editorial stated “without fanfare, the attorney general simply quashed the FOIA.” But it’s not just law professors and the media who are upset over this memo and its chilling effect on FOIA.

Tom Blanton, director of the nonpartisan National Security Archives at George Washington University stated that “The Bush administration is mounting the most sustained assault on open government since President Gerald Ford vetoed the FOIA amendments in 1974.”

Steven Hensen, president of the Society of American Archivists, rhetorically stated in the *Washington Post*, “How can a democratic people have confidence in elected officials who hide the records of their actions from public view?”

Specifically regarding the Ashcroft FOIA memo, Phyllis Schlafly of the *Eagle Forum* said, “While private businesses and households can be selective about what they tell the world, the American people are not willing to accord the same privacy to public officials paid by the taxpayers. The American people do not, and should not, tolerate government by secrecy. The Freedom of Information Act and many other laws embrace the limited-government principle that ‘government by the people’ requires government disclosure to the people.”

Justice Dept. Denies Policy Change

Dan Metcalfe, co-director of the Justice Department’s Office of Information and Privacy, has denied that there has been any change in FOIA policy. Metcalfe told Rebecca Daugherty of the Reporters Committee for Freedom of the Press that “the Ashcroft memorandum does not represent a ‘drastic’ shift in the government’s FOI policies as many have claimed. But it is ‘certainly a shift in tone.’”

Bob Zachariasiewicz, who handles FOIA for Public Affairs at MSHA and other DOL programs, stated in writing to *Mine Safety and Health News*, “I forwarded your concerns about FOIA to the appropriate offices in the Office of the Solicitor (SOL) and in MSHA. As I noted in a previous e-mail, the chief FOIA lawyer in SOL stated that there is no discernible difference in the department’s FOIA operations since the promulgation of the Attorney General’s FOIA memorandum. ... I handle FOIAs in the Office of Public Affairs. Speaking for myself as well as for OPA, the system remains the same.”

However, on the MSHA front, we have all witnessed a drastic policy change first-hand with the pro-secrecy forces out in full regalia.

The first instance we saw of this policy came with the Inspector General’s Martin County Coal Impoundment report. Almost 50% of that was redacted (blacked out). There was no good answer for the redactions. It certainly had nothing to do with national security. MSHA-head Dave Lauriski claims that it was the Inspector General’s decision to redact all of that information, but it is hard to believe that MSHA under Lauriski and the Labor Dept. under Secretary Elaine Chao, could not convince the IG to release that information to the public.

Now, the public will no longer be able to get MSHA inspector notes from a mine inspection, unless the operator or miner is willing to go through legal proceedings and the discovery process. Under this new policy, the press is certainly excluded from these notes, miners maybe as well, and it certainly hampers an operator’s ability to resolve many MSHA enforcement disputes without litigation.

I keep asking myself, “Is this America? How can this administration adopt policies that go against democratic traditions? How can MSHA secretly adopt policies that go against 27 years of openness? And how can this administration openly violate a law whose intent and purpose is to make records available to the public?”

Ed Clair claims that MSHA has changed its policy so it “does what OSHA and other

enforcement agencies in DOL do.” Why not make those agencies more FOIA friendly as MSHA has been over the last 27 years? Why not make “the pre-Bush MSHA” the model for freedom of information?

The mining community – operators, miners, the press, the public – has a right to know on what basis MSHA makes a decision – any decision. **We the people** have a right to know.

Ellen Smith is the editor and owner of Mine Safety and Health News. She has won 17 journalism awards in her 17 years of reporting on mining-related issues, including the Freedom Bell Award for Accuracy in Reporting, the Sigma Delta Chi Award for Public Service in Newsletter Journalism, The National Press Club’s Newsletter Journalism Award, the Apex Grand Award for Publication Excellence, awards from the Capital Press Women, and several investigative reporting awards from the Newsletter and Electronic Publishers Foundation. She has appeared on 60 Minutes, National Public Radio, Market Place, and the Radio Project to discuss MSHA-related issues.