

DOCUMENT REQUESTS UNDER THE MINE ACT

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Mine Safety and Health Law Special Institute
Co-sponsored by
the Energy & Mineral Law Foundation and the U.S. Department of Labor
March 23, 2010

I. Introduction

- A. In the course of inspections and investigations, MSHA routinely seeks documents and information from the mine operator.
- B. Before turning over such information, the operator must weigh a number of competing considerations.
 - 1. There is a tendency, sometimes with good reason, to balk automatically at providing information and materials to MSHA, particularly when the requests come in the course of accident investigations and special investigations.
 - 2. At the same time, it is in the operator's interest to maintain a cooperative relationship with the agency, especially during investigations.
 - 3. However, there are important countervailing interests at stake.
 - a. employee privacy issues
 - b. the possibility of further disclosure to third parties – the press, plaintiffs' lawyers, union organizers, etc.
 - c. confidential business information
 - d. potentially misleading or incriminating material
 - e. the possibility that disclosure would threaten environment of open and candid internal communication, *e.g.* self-audits, internal accident investigations

- i. N.B. that 30 C.F.R. § 50.11(b) requires an operator to conduct its own investigation into mine accidents and to prepare a report thereof.

C. How, therefore, should an operator approach an MSHA request for documents or information?

II. Analysis

A. The Mine Act and its implementing regulations require mine operator to keep certain categories of documents.

1. training records, preshift exams, etc.
2. internal accident reports prepared pursuant to 30 C.F.R. § 50.11(b)

B. It is clear that those documents must be made available to MSHA upon request.

C. Other requests, for documents and information beyond what the Mine Act requires operators to maintain and which are therefore outside the comfortable core of readily-shared documents and information, require circumspection on the part of operators.

1. *e.g.* employee personal contact information, for accident investigations and other special investigations
2. *e.g.* documents and information relevant to accidents, documents relevant to equipment maintenance and repairs
3. *e.g.* confidential business information

D. What needs to be turned over when MSHA asks for it?

E. MSHA's basis for claiming the legal authority to compel an operator to disclose is based on the Mine Act's mandate to inspect and investigate, and on 30 C.F.R.

1. § 103(a) of the Mine Act
 - a. the right to inspect
 - i. "(a) Authorized representatives of the Secretary ... shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to

health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act. ... The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this Act, and his experience under this Act and other health and safety laws. For the purpose of making any inspection or investigation under this Act, the Secretary, ... with respect to fulfilling his responsibilities under this Act, or any authorized representative of the Secretary ... shall have a right of entry to, upon, or through any coal or other mine.”

2. § 103(h) of the Mine Act

a. the Secretary’s right to require operators to maintain records

i. “In addition to such records as are specifically required by this Act, every operator of a coal or other mine shall establish and maintain such records, make such reports, and provide such information, as the Secretary ... may reasonably require from time to time to enable him to perform his functions under this Act. ... Except to the extent otherwise specifically provided by this Act, all records, information, reports, findings, citations, notices, orders, or decisions required or issued pursuant to or under this Act may be published from time to time, may be released to any interested person, and shall be made available for public inspection.”

3. 30 C.F.R. § 50.41

a. “Verification of reports. Upon request by MSHA, an operator shall allow MSHA to inspect and copy information related to an accident, injury or illnesses which MSHA considers relevant and necessary to verify a

report of investigation required by § 50.11 of this part or relevant and necessary to a determination of compliance with the reporting requirements of this part.”

F. Case law

1. *BHP Copper, Inc.*, 21 FMSHRC 758 (July 1999)
 - a. The operator was cited for impeding an accident investigation when it refused MSHA’s request that it provide an employee’s telephone number and address.
 - i. BHP argued that MSHA must obtain an injunction pursuant to § 108 of the Mine Act to compel an operator to disclose information that it is not required to maintain under the Mine Act or regulations.
 - b. The Commission upheld the citation and held that the Secretary’s statutory obligation to investigate accidents, coupled with its authority to conduct warrantless searches, trumped a claim of confidentiality or privacy on behalf of the operator’s employees. 21 FMSHRC 769.
 - c. In *BHP Copper*, the Commission expressly limited its holding to the facts of the case, including MSHA’s urgent need for employees’ personal addresses and telephone numbers under exigent circumstances, and stated that its holding expressly did “not address disclosure of other information not at issue in this case.” *Id.* at 767, n. 15.
2. *Sewell Coal Co.*, 1 FMSHRC 864 (July 1979) (ALJ)
 - a. MSHA cited the operator (and subsequently issued a closure order pursuant to § 104(b) of the Mine Act) for a violation of § 50.41 for refusing to allow the inspector to inspect personnel files to determine whether the company was properly reporting employee injuries.
 - b. Chief Administrative Law Judge Broderick held that the Secretary’s authority to conduct inspections did not extend to “wholesale warrantless, nonconsensual searches of files and records in a mine office.” 1 FMSHRC 872.
 - i. Judge Broderick reasoned that the Secretary’s attempt to conduct warrantless searches of

company records implicated the Fourteenth Amendment to the Constitution.

- ii. The judge further held that because the Secretary did not have such authority, she could not constitutionally promulgate a regulation that would give her the ability to search such records.

III. Conclusion: so what is an operator to do about requests for information that is not required to be maintained?

A. Operators should try to do their best to weigh MSHA requests for information with an open mind.

- 1. Is all of the information requested truly sensitive? Can some of it be turned over without any real concern?
- 2. Would any of the information MSHA is requesting actually advance the operator's safety goals or otherwise be helpful to the operator, under the circumstances?
- 3. If so, are there ways to comply with MSHA's request while still protecting sensitive information?
 - a. employee consent to disclosure
 - b. agreements with the government that limit further disclosure of confidential business information
 - c. agreements with the government that limit MSHA's use of information to certain narrow circumstances

B. To the extent that the operator has considered, and rejected, voluntary disclosure as to some or all of its information, it may be worth discussing with MSHA, or with its counsel, limited compliance with the request for information or documents, so as to avoid unnecessary enforcement.

- 1. It may be possible to negotiate to comply with a request that is more limited in scope than the government's first demand.
 - a. Consider the possibility of providing redacted materials.
 - b. Although operators do not ordinarily create documents to share with the government under such circumstances, consider the possibility of offering a compilation of the requested information so as to limit the overall disclosure.