

**Chapter 5****Freedom of Information Act Requests:  
MSHA Reduces Freedom  
and Denies Access to Information**

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**§ 5.01. Introduction.**

For 39 years the Freedom of Information Act (FOIA) has provided that the federal government must share its records with the public.<sup>1</sup> This so-called “sunshine law” provided only a few instances in which the government could rightfully withhold exempted materials.<sup>2</sup> In 2004, without announcement or public comment, the Federal Mine Safety and Health Administration (MSHA) changed its policy on responding to FOIA requests. In accordance with its

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<sup>1</sup> Freedom of Information Act, 5 U.S.C. § 552 (1966)(amended in 1974 to force greater agency compliance; amended in 1996 to allow for greater access to electronic information).

<sup>2</sup> *Id.* at (b)(1-9).

new policy, MSHA now withholds inspector notes containing information valuable to mine operators and relating to regular MSHA inspections and investigations. To deny the release of such factual information, MSHA relies on FOIA Exemption 7(a).<sup>3</sup>

### § 5.02. MSHA's Policy Change and Reaction.

#### [1] — Change to Twelve Year Policy.

Since its inception in 1977, MSHA routinely released coal mine inspector's (CMI) notes, and other factual information consistent with its statutory charge to disseminate data to the public on the health and safety conditions of the nation's mines. This policy to disclose information pursuant to a FOIA request was set forth twelve years ago on June 2, 1993, in a memo from Edward P. Clair, now the Department of Labor's (DOL) Associate Solicitor for Mine Safety and Health, to Peter D. Galvin, Co-Counsel for Administrative Law, DOL Office of the Solicitor. Eleven years later in June 2004, at the Energy and Mineral Law Foundation Safety & Health Conference in Washington, D.C., Mr. Clair disclosed that MSHA had changed its policy on responding to FOIA requests without public comment or input. MSHA now withholds coal mine inspectors' notes and other factual information based on Exemption 7(a) of FOIA.<sup>4</sup>

Exemption 7(a)<sup>5</sup> provides that records or information for law enforcement purposes may be withheld to the extent that the production of such documents could reasonably be expected to interfere with enforcement proceedings. According to MSHA, coal mine inspectors' notes will not be released until enforcement proceedings are concluded, *i.e.*, when enforcement actions at issue become a final order of the Federal Mine Safety and Health Review Commission. Presently, when mine operators file a FOIA request to obtain information concerning the issuance of MSHA citations, orders, or investigations, they will only receive the citation or order they already have. MSHA will not release coal mine inspectors' notes or any other information concerning an inspection to the mine operators.

FOIA Exemption 7(a) has been the subject of litigation. In *Associated Dry Goods Corp. v. National Labor Relations Board* (NLRB),<sup>6</sup> the plaintiff

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<sup>3</sup> 5 U.S.C. § 552(7)(a).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Associated Dry Goods Corp. v. NLRB*, 455 F. Supp. 802 (S.D.N.Y. 1978).