
From: Watzman, Bruce [mailto:BWatzman@nma.org]
Sent: Thursday, April 14, 2011 5:30 PM
To: zzMSHA-Standards - Comments to Fed Reg Group
Subject: RIN 1219-AB64

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Attached is a letter submitted by the National Mining Association with regard to the above referenced regulatory proceeding.

Bruce Watzman
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AB64-COMM-23



BRUCE WATZMAN
Senior Vice President, Regulatory Affairs

April 15, 2011

MSHA
Office of Standards, Variances & Regulations
1100 Wilson Boulevard, Room 2350
Arlington, VA 22209-2350

Re: RIN 1219-AB64; Proposed Rule for Lowering Miners' Exposure to Respirable Coal Mine Dust, including Continuous Personal Dust Monitors

Dear Sirs:

On behalf of the members of the National Mining Association (NMA) I request an extension of the comment period for the submission of comments on the above referenced rule. In support of this request, attached is a letter submitted yesterday to the Solicitor of Labor appealing the Mine Safety and Health Administration's (MSHA) partial denial of NMA's October 20, 2010 request for release of documents pursuant to the Freedom of Information Act. We request that the comment period remain open until: (1) the Solicitor has ruled on the appeal and (2) for an additional 60-days in the event additional documents are released in order to provide sufficient time for review and comment.

Sincerely,


Bruce Watzman



BRUCE WATZMAN
Senior Vice President, Regulatory Affairs

April 14, 2011

Solicitor of Labor
U.S. Department of Labor
200 Constitution Avenue, NW
Room N-2428
Washington, D.C. 20210

Re: Freedom of Information Act Request Appeal – Tracking No. 625329

Dear Solicitor Smith:

I am writing on behalf of the members of the National Mining Association (NMA) to appeal the decision of Ms. Lanesia Washington, Freedom of Information Act Officer, Office of Standards, Variances and Regulations, Mine Safety and Health Administration (MSHA) to exclude from release documents sought by NMA pursuant to the Freedom of Information Act, 5 U.S.C. § 552. A copy of NMA's FOIA request, dated **October 20, 2010**, and MSHA's response of **April 8, 2011** are included for your information.

Ms. Washington, in her response to items 4 and 5 of the NMA request withholds release under the deliberative process privilege of Freedom of Information Act (FOIA) Exemption 5. For the foregoing reasons we request you to re-consider the decision to withhold release of the requested documents.

On Jan. 21, 2009, the day after being sworn into office, the President issued a *Memorandum for the Heads of Executive Departments and Agencies* regarding administration of the Freedom of Information Act. In this memorandum he set a course for the administration to usher in a new era of accountability and transparency. In so doing, the President directed that agencies "adopt a presumption in favor of disclosure" where "In the face of doubt, openness prevails." Such a policy is strongly supported by U.S. jurisprudence, which has repeatedly affirmed the fact that FOIA has a "strong presumption in favor of disclosure,"¹ and

¹ See, e.g. U.S. Dep't of State v. Ray, 502 U.S. 164, 173 (1991),

that "because of its overarching goal of public disclosure, FOIA exemptions are to be interpreted narrowly."²

The President's directive was followed by a memorandum from the Attorney General (Mar. 31, 2009). In this Attorney General Holder reminded agencies of the President's view that, "The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors or failures might be revealed, or because of speculative or abstract fears." Indeed, the Attorney General recognized that exemptions to protect "national security, personal privacy, privileged records and law enforcement interests" are a necessary and important part of FOIA – protections that do not, in our view, apply to the documents we seek.

On April 17, 2009 the Department of Justice, Office of Information Policy (OIP) issued *Guidelines for Chief FOIA Officer Reports to the Department of Justice Pursuant to Attorney General Holder's FOIA Guidelines*. As the office within the Department of Justice responsible for encouraging agency compliance with FOIA and for ensuring that the President's FOIA Memorandum and the Attorney General's FOIA Guidelines are fully implemented across the government, OIP develops guidance for agencies in carrying out their statutory responsibilities under FOIA. In this regard OIP's guidance regarding the use of the deliberative process privilege of Exemption 5 is particularly relevant to our original request and appeal:

There is no doubt that records protected by Exemption 5 hold the greatest promise for increased discretionary release under the Attorney General's Guidelines. Such releases will be fully consistent with the purpose of the FOIA to make available to the public records which reflect the operations and activities of the government. **Records covered by the deliberative process privilege in particular have significant release potential.** (Emphasis added)

Additionally, the OIP guidelines quote the Attorney General's directive in stating that agencies "**should not withhold information simply because [they] may do so legally**" (emphasis added). Rather, "even if an exemption would apply to a record, discretionary disclosures are encouraged. Such releases...will be most applicable under Exemption 5." OIP further explains that, in making decisions regarding withholdings based on a "foreseeable harm," "agencies should keep in mind that mere 'speculation or abstract fears' are not a sufficient basis for withholding. Instead, the agency must reasonably foresee that disclosure would cause harm. Moreover, agencies must be mindful of the President's directive that in the face of doubt, openness prevails."

² See, e.g., *Lahr v. NTSB*, 569 F.3d 964, 973 (9th Cir., 2009).

Despite the agency's "speculative or abstract fears," no justification has been provided to prevent release of the requested documents other than the agency's convenient position to preclude release of pre-decisional documents. Our request does not include documents that have the potential to harm national security, personal privacy or harm to law enforcement interests, and in the absence of such potential, openness must prevail.

We look forward to your timely response to our request.

Sincerely,

A handwritten signature in black ink, appearing to read "Bruce Watzman". The signature is fluid and cursive, with the first name "Bruce" written in a larger, more prominent script than the last name "Watzman".

Bruce Watzman