

On page 62779, column 2, under the paragraph heading "Effective/ Applicability Date", last line of the first paragraph of the column, the language "are first effective." is corrected to read "are first applicable."

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## FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

### 29 CFR Part 2702

#### Freedom of Information Act Procedural Rules

**AGENCY:** Federal Mine Safety and Health Review Commission.

**ACTION:** Final rule.

**SUMMARY:** The Federal Mine Safety and Health Review Commission (the "Commission") is publishing final revisions to its rules implementing the Freedom of Information Act ("FOIA") in light of its experience under the rules, the need to update its fee schedules, and changes in implementing the FOIA mandated by Executive Order 13392.

**DATES:** *Effective date:* These revised rules will take effect on December 19, 2007.

*Applicability date:* The final rules will apply to FOIA requests initiated after the rules take effect. The final rules also will apply to further proceedings in matters pending on the effective date, except to the extent that such application would be infeasible or unfair, in which event the former rules would continue to apply.

**ADDRESSES:** Questions may be mailed to Michael A. McCord, General Counsel, Office of the General Counsel, Federal Mine Safety and Health Review Commission, 601 New Jersey Avenue, NW., Suite 9500, Washington, DC 20001, or sent via facsimile to 202-434-9944.

**FOR FURTHER INFORMATION CONTACT:** Michael A. McCord, General Counsel, Office of the General Counsel, 601 New Jersey Avenue, NW., Suite 9500, Washington, DC 20001; telephone 202-434-9935; fax 202-434-9944.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

The Commission is an independent adjudicatory agency that provides hearings and appellate review of cases arising under the Federal Mine Safety

and Health Act of 1977 (the "Mine Act"). Hearings are held before the Commission's Administrative Law Judges, and appellate review is provided by a five-member Review Commission appointed by the President and confirmed by the Senate.

On October 17, 2007, the Commission published proposed revisions to its rules implementing the FOIA and requested written comments to be submitted by November 16, 2007. 72 FR 58790. Upon request, the Commission subsequently reopened the comment period and accepted comments through November 30, 2007. 72 FR 65494. The Commission received comments from the United Mine Workers of America.

The Commission proposed revisions to its FOIA rules that expanded its use of electronic records to better implement the 1996 amendments to the FOIA that addressed electronic record-keeping in federal agencies.

Additionally, the proposed rules described changes in the Commission's practices to ensure timely and effective responses to the public's requests for information as mandated by Executive Order 13392. 70 FR 75373. Further, based on its years of experience in implementing the FOIA, the Commission proposed certain changes in its FOIA rules to better reflect agency practice under the rules and to maximize its utilization of the internet to disseminate information. Finally, after a comprehensive review of its fee schedule, the proposed rules increased certain fees and moved others from the rules to the Commission's FOIA Guide for greater flexibility in adjusting the fees. The final rules retain much of the same text set forth in the proposed rules, with a few non-substantive revisions.

##### II. Section-by-Section Analysis

Set forth below is a summary of the comments received on the Commission's proposed rules and the final actions taken.

#### PART 2702—REGULATIONS IMPLEMENTING THE FREEDOM OF INFORMATION ACT

##### 29 CFR 2702.1

The Commission is revising 29 CFR 2702.1 to clarify that the reference to "all designated information" to be made readily available to the public means information subject to disclosure pursuant to FOIA and the Commission's FOIA rules and not otherwise protected by law.

The last sentence in 29 CFR 2702.1 states that the scope of the Commission's FOIA regulations may be

limited to requests for information that is not presently the "subject of litigation before the Commission." 29 CFR 2702.1. As currently written, the rule could be read to exclude discovery records from the Commission's disclosure obligation under FOIA. In fact, however, such records could be subject to disclosure pursuant to FOIA, unless they fall under one of the nine exemptions provided in the statute. As proposed, the Commission is adding language stating that the Commission's FOIA rules do not affect discovery in adversary proceedings before the Commission, which are governed by the Commission's Rules of Procedure, 29 CFR Part 2700. This section also has been modified to clarify that the scope of the Commission's FOIA rules is limited to records or information of the agency or within its custody.

Finally, the Commission is amending 29 CFR 2702.1 by making two additional non-substantive revisions: (1) shortening the official title of the agency's guide to "FOIA Guide" and (2) including a reference to the Commission's Web site as an alternative means of obtaining the Commission's FOIA Guide.

##### 29 CFR 2702.3

##### Initial Requests

On December 14, 2005, the President issued Executive Order 13392, which contained several statements of government-wide FOIA policy as well as several additional planning and reporting requirements. The Executive Order requires agencies to appoint a Chief FOIA Officer who has "agency-wide responsibility for efficient and appropriate compliance with the FOIA." See Executive Order 13392, sec. 2(b)(1). Under the Commission's current rule, the Executive Director makes the initial determination on a FOIA request with the consent of a majority of the Commissioners. 29 CFR 2702.3(b). Pursuant to the Executive Order, the Commission is revising paragraphs (a) and (b) of 29 CFR 2702.3 to reflect the agency's current practice of initial FOIA requests being handled by the Chief FOIA Officer, instead of the Executive Director, without the consultation of the Commissioners. In addition, the Commission is revising paragraph (b) by deleting the requirement that a majority of the Commission must consent to the Chief FOIA Officer's initial determination of a request.

The commenter suggested that the Commission include in the rule language that specifically allows FOIA requests by e-mail and by fax. The Commission agrees and has revised the

rule to include language that refers to submission by e-mail and fax, as has been the practice under the present rule. In addition, to further assist requesters, the Commission is adding a reference in 29 CFR 2702.3(a) to its FOIA Guide, which specifies the Commission's fax number and e-mail address.

#### Appeals

FOIA refers to "the right of [a] person to appeal to the head of the agency any adverse determination." 5 U.S.C. 552(a)(6)(A)(I). Under the Commission's current FOIA rules, appeals are to be made to the Chairman, who independently makes a determination on appeal. Consistent with the changes to paragraphs (a) and (b) regarding the handling of initial requests, the Commission is revising paragraph (b) to reflect that appeals from the Chief FOIA Officer's initial determinations on FOIA requests should go to the Commission, with a majority vote of the sitting Commissioners determining the disposition of the appeal. The amended rule provides that, in the event of a tie vote, the Chief FOIA Officer's determination would be affirmed.

#### Denials

Currently, paragraph (f) only states that when a request is denied, the Commission will attempt to provide an estimate of the volume of records denied. The Commission is amending paragraph (f) to comply with additional statutory requirements regarding denials of requests. When an agency denies a record request, it must notify the requester of his or her right to judicial review, 5 U.S.C. 552(a)(6)(A)(ii), and state the name and title or position of each person responsible for the denial of a FOIA request, 5 U.S.C. 552(a)(6)(C)(I). Accordingly, as proposed, the Commission is revising paragraph (f) to state that a denial of a request, after an administrative appeal, shall include notice of a requester's right to judicial appeal and the name and title or position of each person denying the FOIA request.

#### Other Revisions

The Commission is adding headings to each paragraph of 29 CFR 2702.3 to make it easier for a reader to locate important information governing the Commission's processing of FOIA requests.

#### 29 CFR 2702.4

Under FOIA, each agency must make available for public inspection and copying (without the need for a formal FOIA request) the following items: final opinions and orders issued in the

adjudication of administrative cases; policy statements and interpretations that have been adopted by the agency but which were not published in the **Federal Register**; administrative staff manuals that affect members of the public; and records processed and disclosed in response to a FOIA request which the agency has determined have or will become the subject of similar requests for substantially the same records (often referred to as "FOIA-processed records"). See 5 U.S.C. 552(a)(2). Agencies generally provide access to these records in what is called a reading room, which is open to the public. Records in all four categories must be indexed in order to facilitate the public's access to them. The index must be published and distributed at least quarterly unless an agency determines by order published in the **Federal Register** that the publication would be unnecessary and impracticable.

In addition to an on-site reading room, the E-FOIA amendments of 1996 require each agency to make the records created by it on or after November 1, 1996, in all four categories described above, available to the public by electronic means. 5 U.S.C. 552(a)(2). The index of the FOIA-processed records must be made available electronically. Electronic reading rooms were to be operational by November 1, 1997.

The Commission is revising 29 CFR 2702.4 to refer to a Commission on-site reading room, to state that the four categories of documents as described in 5 U.S.C. 552(a)(2) of the FOIA may be made available at that reading room, and to refer to the Commission's electronic reading room available on its Web site at <http://www.fmshrc.gov>. The commenter stated that the Commission should clarify what information is available to the public. The Commission's rule generally tracks the statutory language in the FOIA. In addition, a more detailed listing of materials available in the Commission's reading rooms is provided in the Commission's FOIA Guide, also available on its Web site.

#### 29 CFR 2702.6

The fees the Commission charges for searching, reviewing, and duplicating records pursuant to FOIA requests are set forth in 29 CFR 2702.6. In its submission, the commenter generally objects to any increase in fees that the Commission charges in responding to FOIA requests. However, the Commission believes it is appropriate to update its fee schedule, which was last revised in 1997, to ensure that the fees

represent "reasonable standard charges" as required by FOIA. 5 U.S.C. 552(a)(4)(A)(ii). Revisions are also necessary to comply with guidelines promulgated by the Office of Management and Budget, Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 FR 10012, 10018, Mar. 27, 1987 ("OMB Guidance"), which states that an agency must charge fees that recoup the full allowable direct costs that it incurs.

Accordingly, the Commission is adopting its proposal to revise its search and review fees to charge at the salary rates (basic pay plus 16 percent) of the employees making the search or providing the review. This is consistent with the language of the OMB Guidance. The Commission is adding to the rule the address of its Web site, where the specific hourly rates will be listed.

The Commission's current fee regulation also states that if search charges are likely to be more than \$25, the Commission shall notify the requester of the estimated amount of fees, unless the requester has indicated in advance a willingness to pay fees as high as those anticipated. 29 CFR 2704.6(a). This language originated in the Commission's 1988 interim FOIA rule, 53 FR 737, 739, Jan. 12, 1988, published almost twenty years ago. As was proposed, the Commission is increasing the \$25 figure to \$50.

In addition, the Commission is revising the statement in the current rule that "[t]ime spent on unsuccessful searches shall be fully charged." 29 CFR 2702.6(a). The term "unsuccessful" is ambiguous and requires clarification. Pursuant to the OMB Guidance, 29 CFR 2702.6(a) is revised, as proposed, to clarify that fees shall be charged even if the documents are not located or if they are located but withheld on the basis of an exemption. Also, the reference in 29 CFR 2702.6(b) to the Executive Director is being changed to the Chief FOIA Officer for the reasons stated in the discussion above regarding revisions to 29 CFR 2702.3.

The Commission also is adding language in paragraph (c) which states that the Commission shall charge the actual cost of production, including operator time, for copies prepared by computer (such as tapes or printouts). This is consistent with language in the OMB Guidance and replaces the current language in paragraph (a) stating that the fee for computer printouts shall be \$.40 per page. With regard to a comment concerning the cost of computer printouts, the Commission notes that it is not increasing the cost of computer printouts, which is presently \$.40, but imposing the actual cost of producing a

computer copy, which it anticipates will be close to the \$.15 amount charged for other copies. The Commission is moving language about fees for computer copies to paragraph (c) (duplicating fee) from paragraph (a) (search fee) because language addressing fees for computer copies is more similar to that describing a duplicating fee than a search fee. As proposed, the Commission also is adding language to paragraph (c) stating that for other methods of reproduction or duplication, it will charge the actual direct costs of producing the documents. This is also consistent with the OMB Guidance.

#### 29 CFR 2702.7

The Commission is revising paragraph (a), as proposed. That provision states that fees of less than \$10 shall be waived, essentially because it is not cost effective for the Commission to collect sums smaller than \$10. 29 CFR 2702.7(a). This figure was first utilized in an interim FOIA rule published by the Commission in 1988. 53 FR 737, 739, Jan. 12, 1988. Taking inflation into account, the Commission is amending this figure to \$20.

The Commission also is revising paragraph (b)(2), as proposed, to reflect that the Chief FOIA Officer, rather than the Executive Director, shall decide whether a waiver or reduction of fees is warranted. Similarly, the Commission is amending the rule to state that the Commission, rather than the Chairman, decides appeals regarding fee issues. This is consistent with the amendment of the language of 29 CFR 2702.3 requiring that an appeal from the Chief FOIA Officer's initial substantive determination shall be decided by the full Commission, rather than the Chairman.

### III. Matters of Regulatory Procedure

The Commission is an independent regulatory agency, and as such, is not subject to the requirement of Executive Order 12866, Sept. 30, 1993; 58 FR 51735, Oct. 4, 1993.

The Commission has determined under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) that these rules will not have a significant economic impact on a substantial number of small entities. Therefore, a Regulatory Flexibility Statement and Analysis has not been prepared.

The Commission has determined that the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) does not apply because these rules do not contain any information collection requirements that require the approval of the OMB.

### List of Subjects in 29 CFR Part 2702

Freedom of information.

■ For the reasons stated in the preamble, the Federal Mine Safety and Health Review Commission is amending 29 CFR part 2702 as follows:

#### PART 2702—REGULATIONS IMPLEMENTING THE FREEDOM OF INFORMATION ACT

■ 1. The authority citation for part 2702 continues to read as follows:

**Authority:** Sec. 113, Federal Mine Safety and Health Act of 1977, Pub. L. 95-164 (30 U.S.C. 801 *et seq.*); 5 U.S.C. 552; E.O. 13392, 70 FR 75373.

■ 2. Revise § 2702.1 to read as follows:

##### § 2702.1 Purpose and scope.

The Federal Mine Safety and Health Review Commission (Commission) is an independent agency with authority to adjudicate contests between the Mine Safety and Health Administration of the U.S. Department of Labor and private parties, as well as certain disputes solely between private parties, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 *et seq.* The purpose of the rules in this part is to establish procedures for implementing the Freedom of Information Act, 5 U.S.C. 552, as amended by the Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048; to provide guidance for those seeking to obtain information from the Commission; and to make all information subject to disclosure pursuant to this subchapter and FOIA, and not otherwise protected by law, readily available to the public. Additional guidance on obtaining information from the Commission can be found in the document entitled "FOIA Guide," which is available upon request from the Commission and on the Commission's Web site (<http://www.fmshrc.gov>). These rules apply only to records or information of the Commission or in the Commission's custody. This part does not affect discovery in adversary proceedings before the Commission. Discovery is governed by the Commission's Rules of Procedure in 29 CFR part 2700.

■ 3. In § 2702.3, add paragraph headings to paragraphs (a) through (g), remove the first sentence of paragraph (a) and add two sentences in its place, revise paragraph (b), and revise paragraph (f) to read as follows:

##### § 2702.3 Requests for information.

(a) *Content of request.* All requests for information should be in writing and should be mailed or delivered to Chief

FOIA Officer, Federal Mine Safety and Health Review Commission, 601 New Jersey Avenue, NW., Suite 9500, Washington, DC 20001-2021. See FOIA Guide for more information on the submission of requests, including requests submitted electronically or by facsimile. \* \* \*

(b) *Response to request.* The Chief FOIA Officer will determine whether to comply with the request. Except in unusual circumstances, as described in paragraph (c) of this section, the determination will be made within 20 working days of receipt. Appeals of adverse decisions may be made, in writing, to the Chairman of the Commission, at the same address, within 20 working days of the decision. The sitting Commissioners, by majority vote, will decide appeals within 20 working days after receipt. In the event of a tie vote of those Commissioners, the Chief FOIA Officer's initial determination will be deemed approved by the Commission. Records to be disclosed shall be provided with the initial letter setting forth the determination as to the request or shall be sent as soon as possible thereafter.

(c) *Processing of request.* \* \* \*

(d) *Additional time to respond to request.* \* \* \*

(e) *Expedited processing of request.* \* \* \*

(f) *Denial of request.* In denying a request for records, in whole or in part, the Commission shall state the reason for the denial; set forth the name and title or position of the person responsible for the denial of the request; make a reasonable effort to estimate the volume of the records denied; and provide this estimate to the person making the request, unless providing such an estimate would harm an interest protected by the exemption pursuant to which the request is denied. If an appeal is denied, the Commission's notice of denial shall inform the requester of the right to obtain judicial review of the Commission's action under 5 U.S.C. 552(a)(4)(B)-(G).

(g) *Partial response to request.* \* \* \*

■ 4. Revise § 2702.4, to read as follows:

##### § 2702.4 Materials available.

(a) *FOIA Reading Room.* Materials which may be made publicly available for inspection and copying at the Commission's on-site FOIA Reading Room, 601 New Jersey Ave., NW., Suite 9500, Washington, DC, include, but are not limited to:

(1) Final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(2) Those statements of policy and interpretations which have been adopted by the agency and are not published in the **Federal Register**;

(3) Administrative staff manuals and instructions to staff that affect a member of the public;

(4) Copies of all records, regardless of form or format, which have been released to any person under this subpart and which, because of the nature of their subject matter, the Commission has determined have become or are likely to become the subject of subsequent requests for substantially the same records; and

(5) A general index of records referred to under this paragraph (a).

(b) *E-FOIA Reading Room*. Materials created on or after November 1, 1996, under paragraphs (a)(1) through (5) of this section may also be accessed electronically through the Commission's Web site at <http://www.fmshrc.gov>.

■ 5. Revise § 2702.6 to read as follows:

**§ 2702.6 Fee schedule.**

(a) *Search fee*. The fee for searching for information and records shall be the salary rate (that is, basic pay plus 16%) of the employee making the search. This hourly rate is listed on the Commission's Web site at <http://www.fmshrc.gov>. Fees for searches of computerized records shall be the actual cost to the Commission, but shall not exceed \$300 per hour. This fee includes machine time and that of the operator and clerical personnel. If search charges are likely to exceed \$50, the requester shall be notified of the estimated amount of fees, unless the requester has indicated in advance his willingness to pay fees as high as those anticipated. Fees may be charged even if the documents are not located or if they are located but withheld on the basis of an exemption.

(b) *Review fee*. The review fee shall be charged for the Chief FOIA Officer's initial examination of documents located in response to a request in order to determine if they may be withheld from disclosure, and for the deletion of portions that are exempt from disclosure, but shall not be charged for review by the Chairman or the Commissioners. See § 2702.3. The review fee is the salary rate (that is, basic pay plus 16%) of the Chief FOIA Officer or the employee designated to perform the review. This hourly rate is listed on the Commission's Web site at <http://www.fmshrc.gov>.

(c) *Duplicating fee*. The copy fee for each page of paper up to 8½" × 14" shall be \$.15 per copy per page. Any private sector services required, including the fee for copying photographs and

nonstandard documents, will be the actual direct cost incurred by the Commission. For copies prepared by computer, such as tapes or printouts, the Commission shall charge the actual cost, including operator time, of production of the tape or printout. For other methods of reproduction or duplication, the Commission will charge the actual direct costs of producing the document(s). If duplication charges are likely to exceed \$50, the requester shall be notified of the estimated amount of fees, unless the requester has indicated in advance his willingness to pay fees as high as those anticipated.

■ 6. In § 2702.7, revise paragraph (a) and paragraph (b)(2) to read as follows:

**§ 2702.7 No fees; waiver or reduction of fees.**

(a) No fees shall be charged to any requester, including commercial use requesters, if the anticipated cost of processing and collecting the fee would be equal or greater than the fee itself. Accordingly, the Commission has determined that fees of less than \$20 shall be waived.

(b) \* \* \*

(2) The Chief FOIA Officer, upon request, shall determine whether a waiver or reduction of fees is warranted. Requests shall be made concurrently with requests for information under § 2702.3. In accordance with the procedures set forth in § 2702.3, appeals of adverse decisions may be made to the Commission within 5 working days. Determination of appeals will be made by the Commission within 10 working days of receipt.

Dated: December 14, 2007.

**Michael F. Duffy**,  
Chairman, Federal Mine Safety and Health Review Commission.

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**DEPARTMENT OF LABOR**

**Mine Safety and Health Administration**

**30 CFR Part 75**

**RIN 1219-AB52**

**Sealing of Abandoned Areas**

**AGENCY:** Mine Safety and Health Administration, Labor.

**ACTION:** Final rule; limited reopening of comment period; availability; notice of public hearing; close of comment period.

**SUMMARY:** The Mine Safety and Health Administration (MSHA) is reopening

the comment period for the Emergency Temporary Standard (ETS) on sealing of abandoned areas of underground coal mines to provide commenters time to review and submit comments on the U.S. Army Corps of Engineers' Draft Report "CFD [Computational Fluid Dynamics] Study and Structural Analysis of the Sago Mine Accident" (Report).

**DATES:** All comments on the ETS published at 72 FR 28796, May 22, 2007, and other appropriate data must be received by midnight, January 18, 2008, Eastern Standard Time. MSHA will hold a public hearing on January 15, 2008. Details about the public hearing are addressed in the **SUPPLEMENTARY INFORMATION** section of this document.

**ADDRESSES:** Comments must be clearly identified and may be submitted by any of the following methods:

1. *Federal Rulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

2. *Electronic mail:* [zzMSHA-Comments@dol.gov](mailto:zzMSHA-Comments@dol.gov). Include "RIN 1219-AB52" in the subject line of the message.

3. *Telefax:* (202) 693-9441. Include "RIN 1219-AB52" in the subject.

4. *Regular Mail:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Blvd., Room 2350, Arlington, Virginia 22209-3939.

5. *Hand Delivery or Courier:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Blvd., Room 2350, Arlington, Virginia 22209-3939. Sign in at the receptionist's desk on the 21st floor.

6. *Docket:* Comments can be accessed electronically at <http://www.msha.gov> under the "Rules and Regs" link. MSHA will post all comments on the Internet without change, including any personal information provided. Comments may also be reviewed at the Office of Standards, Regulations, and Variances, 1100 Wilson Blvd., Room 2350, Arlington, Virginia. Sign in at the receptionist's desk on the 21st floor.

MSHA maintains a listserve that enables subscribers to receive e-mail notification when rulemaking documents are published in the **Federal Register**. To subscribe to the listserve, go to <http://www.msha.gov/subscriptions/subscribe.aspx>.

**FOR FURTHER INFORMATION CONTACT:** Patricia W. Silvey, Director, Office of Standards, Regulations, and Variances, MSHA, 1100 Wilson Boulevard, Room 2350, Arlington, Virginia 22209-3939. Ms. Silvey can be reached at [Silvey.Patricia@dol.gov](mailto:Silvey.Patricia@dol.gov) (Internet E-mail), (202) 693-9440 (voice), or (202)