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Description of document: Records provided by the Federal Mine Safety and Health Review Commission (FMSHRC) to the House Committee on Oversight and Reform during 2022 in response to a request

Requested date: 15-July-2022

Release date: 12-October-2022

Posted date: 02-December-2024

Source of document: OIA Request
Federal Mine Safety and Health Review Commission
Attn: Chief FOIA Officer
1331 Pennsylvania Avenue NW, Suite 520N
Washington, DC 20004-1710
Fax: 1202-434-9944.
Email: FOIA@FMSHRC.gov
[Online FOIA Request Form](#)

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From: Stacey Demps-Barrett <sdemps-barrett@fmshrc.gov>
Cc: Foia <foia@fmshrc.gov>; FOIA Public Liaison <FOIA-Liaison@fmshrc.gov>
Sent: Wednesday, October 12, 2022 at 03:49:48 PM EDT
Subject: FOIA Request - Records/slides provided to House Committee on Oversight and Reform

We apologize for the delay in the processing of your FOIA request. This email is in response to your July 15, 2022 request, in which you sought the following:

A copy of the records provided by the FMSHRC to the House Committee on Oversight and Reform during the time period May 5, 2022 to the present, in response to the Committee's letter dated May 5, 2022 from Ranking Member James Comer and Subcommittee on Environment Ranking Member Ralph Norman. That letter is posted here <https://republicans-oversight.house.gov/wp-content/uploads/2022/05/FMSHRC-Traynor-Letter-05052022.pdf>. I request a copy of the slides used for the staff briefing to the Committee staff, and I request a copy of the records provided in response to the seven items described in the letter.

We have located five records responsive to your request. Two of the records are being withheld in their entirety under FOIA Exemptions 5 and 6. The remaining three are being released with various redactions pursuant to Exemptions 2, 5, and 6. Additional details regarding these redactions can be found in the attached index.

With regard to Item # 2 discussed in the index, please be advised that this record is being withheld in its entirety pursuant to the personal privacy protections under Exemption 6 of the FOIA. Release of the record would constitute a clearly unwarranted invasion of personal privacy because the material details alleged misconduct contained in a personnel file. Further, releasing any part of this record would reveal the identity of the person who is the subject of the record.

There is no charge to you for the processing of this request.

Finally, if you have a concern regarding the processing of your FOIA request, you have the right to seek the dispute resolution services of FMSHRC's FOIA Public Liaison at FOIA-Liaison@fmshrc.gov or the Office of Government Information Services at <https://ogis.archives.gov/>. You also have the right to appeal any part of this decision to the Chairman of the Commission within 90 days of this response. Appeals may be filed at FOIA-Appeals@fmshrc.gov. For additional instructions on filing an appeal, please refer to our FOIA Rules at 29 C.F.R. § 2702.

Kindly acknowledge receipt of this e-mail.

Sincerely,

Stacey Demps Barrett
Attorney-Advisor & Chief FOIA Officer
Federal Mine Safety and Health Review Commission
Office of the General Counsel
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004-1710
Tel: 202/ 434-9939 Fax: 202/ 434-9944

e-mail: SDemps-Barrett@fmshrc.gov

May 5, 2022

The Honorable Arthur R. Traynor III
Chair
Federal Mine Safety and Health Review Commission
1331 Pennsylvania Ave., N.W., Ste. 520N
Washington, D.C. 20004-1710

Dear Chairman Traynor:

We are conducting oversight of the Federal Mine Safety and Health Review Commission (FMSHRC). Information received by Committee Republicans raises concerns that the mission of FMSHRC has been derailed by political interference, a hostile work environment, and inappropriate management practices. We request documents and information to better understand how your tenure as chair of FMSHRC has impacted the ability of the Commission to carry out its statutorily mandated mission.

According to documents obtained by Committee Republicans, you have taken unprecedented measures to unilaterally control and politicize the review of cases prepared by career FMSHRC attorneys. On February 9, 2022, in an email sent to career general counsel Michael McCord, you indicated that you personally would assign cases to attorneys in the Office of General Counsel. This action represented such a deviation from precedent that you indicated that the email and policy should remain “completely confidential” and threatened Mr. McCord with disciplinary action, including termination from federal service, if he ever told anyone about the email or the policy.¹ This new policy and the threatening manner in which it was implemented raise important questions as to the underlying motive.²

In addition, we understand you have been involved in personnel decisions without consulting your fellow Commissioners, which is outside of the normal procedure. Specifically, you ordered suspensions of current employees, such as Mr. McCord and Ms. Lisa Boyd; you also directed the hiring of Ms. Leslie Bayless to be chief operating officer of the Commission.³ These actions suggest an additional attempt on your part to control the Commission.

¹ E-mail from Arthur Traynor, Chair, FMSHRC to Michael McCord, Gen. Counsel, FMSHRC (Feb. 9, 2022 8:54 AM) (on file with the Committee)

² Fed. Mining Safety & Health Rev. Comm’n, *FMSHRC Strategic Plan 2022-2026* at 5 (Jan. 2022).

³ For malfeasance, see *Daugherty v. Ellis*, 142 W.Va. 340, 97 S.E.2d 33, 42.

Mr. McCord has filed a report with the Office of Special Counsel and invoked both the Whistleblower Protection Act and No-FEAR Act in response to your conduct.⁴ However, it appears that through your continued written threats to Mr. McCord and your subsequent suspension of his duties, you are retaliating against him in violation of the protections embedded in these two acts.⁵ Subsequently, without consultation from the other Commissioners, you initiated investigations of other employees and replaced Mr. McCord with an acting general counsel of your choosing. Your fellow Commissioners have sounded the alarm on your conduct, noting that it goes against established precedent regarding the autonomy of a Chair in a multi-member commission like FMSHRC.⁶

These allegations demonstrate that as Chair of FMSHRC your inappropriate actions endanger the important mission of the Commission. In order to assist Committee Republicans in further oversight of the allegations of politicization, hostile work environment, and inappropriate management practices, please make arrangements to provide a staff level briefing no later than May 12, 2022. Additionally, we request that you provide the following information no later than May 19, 2022.

1. All communications, from January 20, 2021, to present, between yourself and General Counsel Michael McCord;
2. All communications, from January 20, 2021, to present, between yourself and Executive Director Lisa Boyd;
3. All communications, from January 20, 2021, to present, between yourself and Chief Operating Officer (COO) Leslie Bayless, as well as documents and communications relating to hiring a COO;
4. All documents and communications, from January 20, 2021, to present, pertaining to any investigation conducted by yourself, COO Bayless, or any third party entity regarding any employee of FMSHRC;
5. All documents and communications, from January 20, 2021, to present, referring or relating to changes of policies and procedures for general counsel duties, specifically the process for assigning staff to cases;

⁴ Whistleblower Prot. Act of 1989, 5 U.S.C. 2302(b)(8)-(9), Pub. L. 101-12, § 7515; Notification & Fed. Emp. Antidiscrimination and Retaliation Act of 2002, Pub. L. 107-174, 116 Stat. 566.

⁵ Letter from William Althen, Comm'r, FMSHRC & Marco Rajkovich, Comm'r, FMSHRC, to Patty Murray, Chairwoman, S. Comm. on Health, Educ., Labor, & Pensions (Mar. 17, 2022).

⁶ Letter from William Althen, Comm'r, FMSHRC & Marco Rajkovich, Comm'r, FMSHRC, to Patty Murray, Chairwoman, S. Comm. on Health, Educ., Labor, & Pensions (Feb. 15, 2022); *Id* at 2; *Div. of Powers and Responsibilities Between the Chairperson of the Chemical Safety and Hazard Investigation Board and the Board as a Whole*, 24 Op. O.L.C. 102-109 (2000).

The Hon. Arthur R. Traynor III

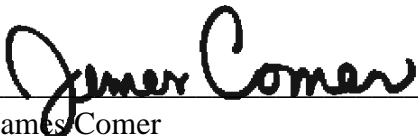
May 5, 2022

Page 3

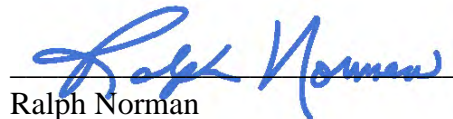
6. All documents and communications, from January 20, 2021, to present, between or among yourself and any employee of the U.S. Department of Justice Office of Legal Counsel; and
7. All documents and communications, from January 20, 2021, to present, between or among yourself and any employee of the Executive Office of the President, including but not limited to the White House Counsel's Office.

Thank you for your consideration of this important issue. To make arrangements to schedule a staff-level briefing and deliver documents, please contact the Republican staff at (202) 225-5704. The Committee on Oversight and Reform is the principal oversight committee of the U.S. House of Representatives and has broad authority to investigate "any matter" at "any time" under House Rule X. Thank you in advance for your cooperation with this inquiry.

Sincerely,



James Comer
Ranking Member
House Committee on Oversight and Reform



Ralph Norman
Ranking Member
Subcommittee on Environment

cc: The Honorable Carolyn Maloney, Chairwoman
House Committee on Oversight and Reform

The Honorable Ro Khanna, Chairman
Subcommittee on Environment

7/15/2022 FOIA Request – Copies of records/slides provided to House Committee on Oversight and Reform in response to its 5/5/22 letter to Chair Arthur Traynor from House Members J. Comer & R. Norman.

	RECORD	REDACTED/ WITHHELD PORTION(S)	DESCRIPTION OF RECORD	APPLICABLE EXEMPTION #(s)/Reason(s) for withholding
1.	May 5, 2022 Email to Comer	Page 1 – part of subject line and part of attachment description	Personal identifying information of employee	Exemption #6 – unwarranted invasion of personal privacy
2.	Employee Personnel Assessment Report	Withheld in entirety	Confidential Personnel Assessment Report detailing alleged actions of employee, withheld in entirety due to abundance of personally identifying and potentially embarrassing information	Exemption #6 – unwarranted invasion of personal privacy
3.	Letter April 5, 2022 From: Chair Traynor To: Senator Burr	a) Page 2 - paragraphs 2-4; page 3 - paragraphs 1-4; page 4 - paragraph 2 b) Page 2 – Footnote 1, last sentence c) Page 2 - paragraph 2 d) Page 3 - Footnote 3	a) Names and other personally identifying information b) Personal financial information c) Case information d) Details of Commission’s case processing system	a) Exemption #6 – unwarranted invasion of personal privacy b) Exemption #6 – unwarranted invasion of personal privacy c) Exemption #5 - deliberative process d) Exemption #2 - records related solely to the internal rules and practices of an agency
4.	Draft Position Description of Chair and Commissioners	Pages 7 – 9 (email attachment)	Draft position descriptions of Chair and Commissioners	Exemption #5 - deliberative process
5.	Draft Organizational Charts	Withheld in entirety	Three draft organizational charts of the Commission	Exemption #5 - deliberative process

[REDACTED]
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[REDACTED] Not responsive [REDACTED]
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From: Arthur Traynor <atraynor@fmshrc.gov>

Sent: Thursday, May 5, 2022 1:18 PM

To: ccash@comer.house.gov <ccash@comer.house.gov>

Subject: Emailing: Doc. No. 3 - Exemption 6 [REDACTED] 4.5.22 - Traynor Response to Burr, Doc. No. 1 - org chart evolution, Doc. No. 2 - MMR Position Descr for Chair and Commissioner

Your message is ready to be sent with the following file or link attachments:

Doc. No. 3 - Exemption 6 [REDACTED]

4.5.22 - Traynor Response to Burr

Doc. No. 1 - org chart evolution

Doc. No. 2 - MMR Position Descr for Chair and Commissioner

Note: To protect against computer viruses, e-mail programs may prevent sending or receiving certain types of file attachments. Check your e-mail security settings to determine how attachments are handled.



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHAIRMAN

April 5, 2022

Senator Richard Burr
U.S. Senator for North Carolina
217 Russell Senate Office Building
Washington, DC 20510
c/o matt_mimnaugh@help.senate.gov

Dear Senator Burr:

Thank you for your commitment to ensuring proper oversight of the Federal Mine Safety and Health Review Commission (“FMSHRC”). I welcome this opportunity to inform your committee of matters of serious concern that have kept me extraordinarily busy in the fifteen months since I took over from Commissioner Marco Rajkovich as FMSHRC Chair. As many of the matters discussed below are the subject of pending administrative and criminal investigations by the Office of Personnel Management (OPM) and the FBI, some of the information is necessarily preliminary. As soon as these investigations are complete, I welcome the opportunity to respond in greater detail.

President Trump appointed me a FMSHRC Commissioner on March 14, 2019, and President Biden appointed me as its Chair on January 20, 2021. As you know, FMSHRC is an independent agency whose primary function is the adjudication of mining health and safety cases arising under the Mine Act, 30 USC § 801 *et seq.*, first at the administrative judge (“ALJ”) level and then on review before a Presidentially appointed Commission. One Commissioner is chosen by the President to serve as Chair, and the Mine Act states that the “Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission.” 30 USC § 823(b)(2). FMSHRC’s most recent organizational charts are attached (Doc. No. 1).

For 45 years, the Mine Act has been consistently interpreted to mean that the Chair has authority over issues of personnel, procurement, and other internal administrative governance, while all Commissioners serve in an equal capacity in their appellate review function. In one of his final acts as Chair, Rajkovich directed Mary Lu Jordan (who has served on the Commission since 1994, with almost 15 years as Chair) and former Acting Chair Michael Young (who served as Commissioner from 2003-2020 and is now an ALJ) to prepare “position descriptions” delineating the division of authorities and responsibilities between the Chair and the other Commissioners. Rajkovich made final edits to these documents before directing Judge Young to transmit them to me by e-mail on January 29, 2022. They are attached. (Doc No. 2).

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TELEPHONE: 202-434-9900, WWW.FMSHRC.GOV

I accepted Rajkovich, Jordan and Young's consensus view of the division of authority between Chair and the Commissioners because it comports with my predecessors' historic practice, including Rajkovich himself. And I have done my best to adhere to that shared view throughout my tenure as Chair, despite the tremendous challenges FMSHRC has most recently faced which I will now describe per your request that I explain my recent actions.

When I took over from Commissioner Rajkovich as Chair, he suggested to me that I read a document he had authored, dated April 14, 2020. (Doc. No. 3). To my astonishment, it was, in essence, a 35-page confession of how former-Chair Rajkovich had secretly set up what he termed "The Network"—a group of 70 individuals whose specific identities he has kept hidden, but who appear to include former clients of Rajkovich's law firm¹ — to subvert federal hiring practices by outsourcing the selection of a new FMSHRC Chief ALJ, a senior official with supervisory authority over all ALJs and trial level operations. The April 14 document reveals Rajkovich and [Exemption 6 - personal privacy] had committed [Exemption 6 - personal privacy] multiple prohibited personnel practices and serious ethical violations during the hiring process. They also apparently involved themselves in the ALJ assignment of a significant case ([E5 - deliberative]) that Rajkovich and his law firm had litigated, and from which he was strictly recused. They appear to have communicated with the assigned judge about potential reassignment of the case. The corruption and impropriety detailed in the April 14 document forcefully shook my confidence in [E6].

Soon after taking responsibility for the administrative operations of the agency in my capacity as Chair, I discovered it had been seriously mismanaged for at least the last few years, primarily by [Exemption 6 - personal privacy], both long-tenured employees who report directly to me as Chair and do not hold statutory or appointed office. As a result, I made the decision to hire a Senior Executive Service Chief Operating Officer (COO) with a background in personnel management, procurement practices, and investigation. She was directed to access information necessary to ensure the agency's policies and practices meet government standards.² COO Leslie Bayless onboarded on October 25, 2021 and quickly uncovered what appears to be seriously unethical and criminal misconduct by both [E6 - privacy] that occurred during the terms of my predecessor Chairs Rajkovich and Althen, sometimes with their collaboration or express approval. She began in early December 2021 to refer evidence of such misconduct to FMSHRC's human resources service provider at the time, Bureau of Fiscal Service, Administrative Resource Center ("BFS/ARC").

Examples of the type of criminal and unethical activity that [E6 - privacy] apparently engaged in under prior administrations include: millions of dollars in improper contracting and procurement; abuse of a pandemic relief program costing the government hundreds of thousands of dollars; individual time-card fraud; and various attempts to avoid discovery and disclosure of these

¹ In one instance, slightly shy of six months into his term as Chair, Rajkovich wrote to a top executive of Alliance Resource Partners soliciting recommendations for Chief ALJ, beseeching him that "[w]e have a once-in-a-while opportunity to place a good person in a pivotal position that could last for several years... I look forward to hearing from you." ([American Oversight](#) at p. 67 of the 221 page .pdf). [Exemption 6 - personal privacy] prior to his Senate confirmation.

² In September 2021, Rajkovich challenged my authority to hire a COO. I responded with an offer to mediate "the history and current practice with respect to the Chair's role as administrator of the agency (including precedents set in your administration)," but he declined.

illegal activities. In one instance, six days after I had been made Chair and without my knowledge or approval, Rajkovich approved approximately \$20,000 in benefits to E6 in a fraudulent abuse of a pandemic relief program. At the recommendation of BFS/ARC, Mrs. Bayless began to refer evidence of misconduct to the FBI, who are coordinating with the Fraud and Public Corruption Section of the D.C. U.S. Attorney's Office.

It was in this context that I repeatedly instructed E6 to enforce ethical standards in the Office of the General Counsel (OGC), especially among a small fraction of staff attorneys E6 who had been derelict in their duties. E6 resisted and over several days in early February was not available during work hours. So, on February 9, 2022, I asked E6 to provide me his recent leave records. They revealed he had apparently committed individual leave fraud on three separate recent occasions. Alarmed by the totality of his conduct, I later that day confidentially E6

Exemption 6 - personal privacy

, I gave my subsequent direction that OGC stop producing advisory memos and instead allow each Commissioner's individual staff counsel to produce the advisory memos. Both of these directions E6 were countermanded by Rajkovich and Althen and neither has taken effect.

COO Bayless and I believe that E6 informed E6 that his leave records were being examined, because the very next day, on February 10, E6 stopped taking direction from me and instead began taking direction from the two other Commissioners. At some point in the next few days, without first consulting me or Bayless, Rajkovich contacted BFS/ARC asserting authority to halt the investigation into E6. Unfortunately, citing political uncertainty, BFS/ARC indefinitely suspended their investigations into E6. Mrs. Bayless quickly retained substitute HR services from the OPM. As a result of Rajkovich's interference, investigations were delayed for a month but have since resumed. E6

Throughout my tenure as Chair, Commissioner Rajkovich has repeatedly attempted to evade accountability, thwart outside investigations, and shield E6 all while spurning any attempts to cooperate or resolve their apparent concerns. These include but are not limited to Rajkovich's attempts to prevent the hiring of COO Bayless in September 2021 and his improper communication with BFS/ARC directing them to stop their nascent investigations. In another attempt to shield themselves from accountability, on February 15, 2022, Commissioners Rajkovich and Althen sent a letter to your Senate HELP Committee on newly created stationery that purports to have come from an "Office of Commissioners," which they claim has administrative control over the agency. ("Feb. 15 Letter"). There has never been any such department or office at the Commission, and it is deceptive for them to represent to the HELP Committee that such an office exists and that they represent it. Your

3

Exemption 2 - internal personnel practices and procedures

HELP Committee serves an invaluable oversight function over federal agencies, so I am confident it will not assist any effort to impede OPM or FBI investigators.

Contrary to the wild hyperbole in my fellow Commissioner's March 17, 2022 follow-up to the Feb. 15 letter, the Commission is neither "paralyzed," nor is it unable to perform its mission. Indeed, the new policies of which the Feb. 15 complained were never actually implemented, pursuant to my direction to the Exemption 6 - privacy to continue selecting OGC attorneys to draft advisory memos for her approval. Regrettably, even though they consented to this interim arrangement in writing, my fellow Commissioners withheld this key fact from their letters to your HELP committee. I assure you Commission decisions and orders continue to issue in ordinary course [at the trial and appellate level](#).

Despite the complaints set forth in their letters to the HELP Committee, Rajkovich and Althen do not appear to want an actual resolution to the issues they raise. Three times since he first attempted to intervene in my efforts to hire the COO in September of 2021, I have offered to mediate with Rajkovich the issue of the division of authority between Chair and Commissioners. Every time he declined. On March 15, 2022, Rajkovich, Althen and I met with two senior officials of the Department of Justice's Office of Legal Counsel. Senior counsel in that office offered to resolve our dispute in a formal opinion letter, to be issued only after all three Commissioners agreed to be bound to the process and submitted written argument and documentation. I agreed to participate in the process, but Rajkovich and Althen declined.

Though the various pending criminal and administrative investigations described herein constrain me from going into greater detail at this time, I am available and willing to meet with you or your staff to discuss any remaining inquiries. I trust you share my desire to see all ongoing investigations proceed without interference. And I respectfully request that you and your colleagues will support the continued repair and improvement of this independent agency so vitally important to the health and safety of our nation's miners.

Sincerely,



Arthur Traynor, Chair
FMSHRC

cc: Senator Patty Murray, Chair of the HELP Committee

Arthur Traynor

From: Michael Young
Sent: Friday, January 29, 2021 1:31 PM
To: Arthur Traynor; William I. Althen; Marco Rajkovich; Lisa M. Boyd
Cc: Mary Jordan
Subject: Position descriptions for Chair and Commissioners
Attachments: Position Description - Chair.docx; Commissioner Description.docx

Follow Up Flag: Follow up
Flag Status: Flagged

Hello. Marco requested Mary Lu and I to draft position descriptions for the Chair and Commissioners. I've attached the draft descriptions. Because I am leaving OGC/OCC Monday, please work with Mary Lu on these (although I will be happy to discuss them or answer any questions).

Thank you,

Mike

Position Description: Chair, Federal Mine Safety and Health Review Commission

[Redacted]

All redactions in this document are pursuant to Exemption 5 - deliberative process
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