

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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LAINE ADAIR		)
1855 W Kenilworth Road		)
Spring Glen, Utah 84526,		)
		)
	Plaintiff,	)
		)
	v.	) Civil Action No. 08-1573 (EGS)
		)
MINE SAFETY AND HEALTH		)
ADMINISTRATION		)
1100 Wilson Boulevard, 21st Floor		)
Arlington, VA 22209-3939,		)
		)
	Defendant.	)
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**PLAINTIFF LAINE ADAIR’S OPPOSITION TO  
DEFENDANT’S MOTION FOR SUMMARY JUDGMENT**

Plaintiff Laine Adair, through counsel, respectfully submits this opposition to the motion for summary judgment filed by defendant Mine Safety and Health Administration (“MSHA”). For the reasons stated below, the Court should deny MSHA’s motion and allow the parties to conduct appropriately limited discovery.

**INTRODUCTION**

The dispute in this case is simple. Adair was induced by MSHA to provide testimony on December 13, 2007 in an accident investigation on the express understanding that MSHA would provide a copy of the transcript to Adair. After Adair testified, MSHA reversed course and refused to produce it, or even let Adair review it for accuracy. According to MSHA, the so-called law enforcement exemption in the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552(b)(7)(A), permits the agency to withhold

the transcript because release “could reasonably be expected to interfere with enforcement proceedings” – namely, a criminal investigation being conducted by the United States Attorney’s Office for the District of Utah (“USAO”).

For two reasons, MSHA’s motion for summary judgment should be denied. First, discovery is necessary to determine whether MSHA already has released the transcript, in a manner that undercuts MSHA’s reliance on Exemption 7(A), to an investigatory body charged with reviewing MSHA’s conduct relating to the tragedies that occurred in August 2007. Among other things, that investigatory body has quoted a crucial portion of the transcript in a publicly available report. The risks associated with disclosure, therefore, may already have been run. MSHA’s summary judgment motion and supporting affidavits say nothing about these issues. Appropriately circumscribed discovery is necessary to determine whether MSHA is entitled to rely on Exemption 7(A) under the circumstances.

Second, even if MSHA’s reliance on Exemption 7(A) were not threatened by its apparent disclosure of the transcript to independent investigators, summary judgment is inappropriate because MSHA should be estopped from relying on Exemption 7(A). Government agencies, for good reason, are rarely subject to principles of equitable estoppel. But this is the rare case. Adair detrimentally relied on MSHA’s promises and testified on the express condition that he would receive a copy of the transcript. Neither MSHA nor the USAO has shown why the public interest would be unduly damaged by disclosure of the transcript to Adair. Indeed, as we show below, the public interest would be furthered, not harmed, by disclosure of the transcript. Accordingly, MSHA’s motion should be denied.

### **STATEMENT OF FACTS**

In late August 2007, MSHA began an investigation into catastrophes at the Crandall Canyon mine that had occurred earlier that month. Stricklin Declaration ¶ 4. As part of the investigation, MSHA representatives, including chief investigator Richard Gates, conducted sworn interviews of mine personnel and others. Adair was among the persons interviewed by the Gates team.

On December 10, 2007, Gates sent a letter to Adair, through Adair's counsel, requesting a voluntary statement from Adair and stating that the "principal purpose" of MSHA's investigation was to "determine the cause or causes of the disasters at the Crandall Canyon mine in Utah in August 2007, in an effort to prevent similar accidents from occurring in the future." Complaint, Exhibit A at 2. The Gates letter stated that the interview would occur under oath and be transcribed by a court reporter. *Id.* at 1. It added: "A copy of each witness' statement can be requested in writing and will be provided at a later time." *Id.* at 2.

Before Adair agreed to be interviewed by MSHA, Adair's counsel negotiated certain conditions with MSHA. Stricklin Declaration ¶ 6. As part of those negotiations, MSHA agreed to provide Adair with a copy of the transcript at or around the time MSHA issued its accident investigation report. *Id.*; see also Complaint, Exhibit C ("As we explained to you earlier, prior to the interview, Mr. Adair's statement will be provided at or around the time that the accident investigation report will be issued."). MSHA's initial position during those negotiations was that Adair could be accompanied only by one lawyer. See Declaration of Gregory L. Poe ("Poe Declaration") ¶ 4. Adair's counsel emphasized that accuracy was critical, and asked that, because receipt of the transcript

would not be immediate, he be permitted to attend with a lawyer for the company as well as another lawyer on behalf of Adair whose purpose would be to take accurate notes while primary counsel for Adair focused on the interview. *Id.* Eventually, the government representative informed counsel for Adair that MSHA would permit only one lawyer for Adair and one lawyer for the company to attend. *Id.* Counsel for Adair relayed the terms offered by MSHA (attendance by only one lawyer representing Adair, attendance by a lawyer for the company, and eventual receipt of the transcript). *Id.* ¶ 5. Relying on MSHA's representations, Adair then consented to the interview. *Id.*

On December 13, 2007, Adair gave a sworn statement at MSHA's Approval and Certification Center in Triadelphia, West Virginia in the presence of a court reporter. *Id.* ¶ 6. The interview occurred in a large, cafeteria-style room and lasted approximately eight hours. *Id.* Adair was accompanied by one lawyer. *Id.* One lawyer representing the company also was present. *Id.* Counsel's recollection is that the reporter used a steno mask and an audio tape. *Id.* The other persons present, to the best of counsel's recollection, were MSHA representatives. *Id.* Counsel's recollection is that not every MSHA representative was in the room for the entire interview. *Id.* Counsel's further recollection is that approximately nine MSHA representatives attended all or part of the interview. *Id.*

Through counsel, Adair requested a copy of the transcript by letter dated February 4, 2008, asking in part that Adair be permitted to review the transcript for accuracy. See Complaint, Exhibit B. Counsel for MSHA responded on February 7, 2008. See Complaint, Exhibit C. Counsel for Adair followed up with a letter dated February 8, 2008. See Complaint, Exhibit D. Counsel for MSHA did not respond to the February 8

correspondence. Poe Declaration ¶ 8. At no time was Adair offered the opportunity even to review the transcript for errors. *Id.* ¶ 9.

MSHA's final investigation report was issued publicly on July 24, 2008. Stricklin Declaration ¶ 10. Adair again requested a copy of the transcript by letter dated July 25, 2008. Poe Declaration ¶ 10; Complaint, Exhibits B–E. MSHA did not produce the transcript as it had promised in December 2007 and again in February 2008. Instead, MSHA's counsel replied on August 1, 2008, stating that he had forwarded the request to MSHA's FOIA officer and instructing that such requests be sent directly to the FOIA officer in the future. Poe Declaration ¶ 10; Complaint, Exhibit F. After hearing nothing more from any MSHA representative, Adair initiated this civil action on September 12, 2008. Poe Declaration ¶ 10.

On the day that MSHA released its final report, the Department of Labor made public a report dated July 21, 2008 and prepared for the Secretary of Labor by Earnest C. Teaster, Jr. and Joseph W. Pavlovich entitled *Independent Review of MSHA's Actions at Crandall Canyon Mine* ("Teaster Report"). The full Teaster Report is available at <http://www.msha.gov/CCreview/CrandallCanyonIRComplete.pdf>; excerpts of the Teaster Report are contained in Exhibit 1 to the Poe Declaration. The Teaster Report is critical of MSHA's actions in ways that relate to the criminal investigation of Adair's conduct. It was prepared by an independent review team ("Teaster Review Team") with the purpose of evaluating MSHA's actions that relate to the August 2007 accidents. Teaster Report at 1. Not least important for purposes of this lawsuit, the Teaster Report includes a quotation that appears to have been taken verbatim from Adair's interview transcript. Poe Declaration ¶ 7; Teaster Report at 23.

By the time Adair made his July 25, 2008 request for the transcript, he had been referred to the Department of Justice for a criminal investigation by Representative George Miller of the United States House of Representatives. Tolman Declaration, Exhibit 1 (April 29, 2008 letter). Notably, the referral was by Representative Miller himself, not the Committee on Education and Labor that he chairs, and was not joined by any other Member. The referral concerns alleged statements made by Adair to MSHA field representatives in 2007. Tolman Declaration, Exhibit 1 at 4. On August 27, 2008, MSHA requested that the USAO investigate various conduct relating to the Crandall Canyon tragedies. Tolman Declaration ¶ 8. The USAO is currently acting on the April 29, 2008 Miller referral and the August 27, 2008 MSHA referral. Tolman Declaration ¶ 9. On August 7, 2008, counsel for Adair met with representatives of the USAO. Poe Declaration ¶ 11. During the meeting, Adair's counsel expressed, among other things, that the lack of access to the transcript by Adair and his counsel put Adair at a disadvantage in attempting to show the USAO that criminal charges against Adair are utterly unwarranted. *Id.*

### **ARGUMENT**

MSHA's effort to win summary judgment right out of the box rises or falls based on FOIA Exemption 7(A) – the so-called “law enforcement” exemption. The applicability of that exemption, in turn, depends on one potential risk associated with disclosure identified by MSHA: that other witnesses may obtain access to the transcript and threaten the integrity of the criminal investigation. See Defendant's Memorandum in Support of Motion for Summary Judgment (“MSHA Br.”) at 6, 13–16. That risk, however (assuming that it is real), may already have been run by disclosure of the

transcript to the Teaster Review Team, thus defeating any justification for continued nondisclosure to Adair. Appropriate discovery on this issue should be permitted before the Court decides whether MSHA is entitled to withhold the transcript under Exemption 7(A) and whether a grant of summary judgment is appropriate.

Even if the Court determines that MSHA already has met the Exemption 7(A) conditions, the doctrine of equitable estoppel should prevent application of the exemption. Adair detrimentally relied on MSHA's promise of disclosure before he subjected himself to questioning under oath by MSHA officials. The crucial element of an estoppel claim against a government agency – whether application of the doctrine would unduly damage the public interest – is also met in this case. As we show below, the positions taken by MSHA and the USAO in the summary judgment papers fail to show otherwise. In all events, summary judgment at this stage would be premature.

**I. Exemption 7(A) Cannot Justify Withholding If MSHA Already Has Disclosed The Transcript.**

The available evidence shows that MSHA *already* has disclosed the transcript to the Teaster Review Team. Poe Declaration ¶ 7. Indeed, the Teaster Report appears to quote a crucial part of the transcript. Teaster Report at 23. The Teaster Review Team is an independent body and is not under the control of either MSHA or the USAO. *Id.* at 1. Whether MSHA already has disclosed the transcript, and the circumstances surrounding such disclosure, are genuine issues of material fact that should defeat MSHA's summary judgment claim. See Fed. R. Civ. P. 56(e). Indeed, the notion that MSHA may have selectively disclosed the transcript to the Teaster Review Team for public use and then deny it to Adair "is offensive to the purposes underlying the FOIA and intolerable as a matter of policy." *North Dakota ex rel. Olson v. Andrus*, 581 F.2d 177, 182 (8th Cir.

1978) (forbidding an agency to withhold certain records under FOIA Exemption 5 in part because of the agency's prior selective disclosure of the records).

The sensible rule that a government agency may not withhold a record from a requester after it has been disclosed appears throughout the FOIA jurisprudence in different garb (albeit with certain exceptions not applicable here). Sometimes it is invoked simply as a way of saying that a FOIA exemption does not apply at all. See, e.g., *Hertzberg v. Veneman*, 273 F. Supp. 2d 67, 81-82 (D.D.C. 2003) (disclosure would waive attorney–client privilege, preventing the application of FOIA Exemption 5). Other times, it is invoked to demand that a record be released (whether or not a FOIA exemption applies) if the record already has been made part of the public domain. See, e.g., *Students Against Genocide v. Dep't of State*, 257 F.3d 828, 836-37 (D.C. Cir. 2001). The underlying principle is simple: an agency may not rely on a FOIA exemption to withhold a record if the risks against which that exemption is designed to protect have already been run. See *Cottone v. Reno*, 193 F.3d 550, 555 (D.C. Cir. 1999) (“[T]he ‘logic of FOIA’ postulates that an exemption can serve no purpose once information – including sensitive law-enforcement intelligence – becomes public.”); see also *Niagara Mohawk Power Corp. v. Dep't of Energy*, 169 F.3d 16, 19 (D.C. Cir. 1999) (“[I]f identical information is truly public, then enforcement of an exemption cannot fulfill its purposes.”).

The putative basis for the April 29, 2008 Miller referral is that Adair supposedly may have made a false statement in March 2007 to MSHA District 9 Roof Control

Branch Supervisor Billy Owens concerning certain conditions at the mine.<sup>1</sup> According to the Teaster Report, which is highly critical of MSHA, Adair and Owens had an important telephone conversation in March 2007 concerning damage that had occurred at the mine during the weekend of March 10, 2007. The Teaster Report states that Owens's account

conflicts markedly with the account of this phone conversation given by the [mine's] General Manager to the Crandall Canyon Accident Investigation Team. . . . Reportedly, Adair told Owens that, "in the No. 4 entry there was two pillars that had blown out into the walkway, one-or-two-foot high, and that if you would have been in one of these areas, you would have been seriously injured or maybe even killed."

Teaster Report at 23.

Although the Teaster Report does not provide a source for the quotation attributed to Adair, it is reasonable to conclude that it was taken directly from the transcript of Adair's December 13, 2007 MSHA interview. The quotation closely matches the account of the telephone conversation with Owens that Adair gave during that interview. Poe Declaration ¶ 7. Furthermore, the Teaster Review Team did not interview Adair and could not have received the account from him directly. See Teaster Report, Appendix A (List of Persons Interviewed). For the purpose of deciding MSHA's summary judgment motion, the Court should infer from these facts that the transcript is the source of the quotation and therefore that MSHA has provided the transcript to the Teaster Review Team. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("all justifiable

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<sup>1</sup> Crucial factual allegations concerning Adair in Representative Miller's April 29, 2008 letter are highly misleading. Although that fact is properly beside the point for present purposes, we note it because MSHA has chosen to submit Representative Miller's entire letter to this Court. See Tolman Declaration, Exhibit 1. In addition, as we have stated above, the referral was by Representative Miller himself – *not* the Committee on Education and Labor or any other Member – and is a product of a highly politicized investigation in which Adair amounts to a pawn in a longstanding struggle between Representative Miller and other forces.

inferences” are to be drawn in the favor of the non-movant).

Having apparently disclosed the transcript to the Teaster Review Team, MSHA cannot now take refuge in Exemption 7(A) and deny access to Adair. The risks associated with disclosure already have been run. *Cf. Owens v. Dep’t of Justice*, 2007 U.S. Dist. LEXIS 21721, at \*18 (D.D.C. March 9, 2007) (when considering risks associated with disclosure of an agency record, a court cannot take into account promises of the recipient to keep the record secret or conditions of secrecy imposed by the disclosing agency); *Kansi v. Dep’t of Justice*, 11 F. Supp. 2d 42, 44-45 (D.D.C. 1998) (suggesting that Exemption 7(A) would not apply if the plaintiff could show that the information at issue “was actually disclosed to a third party”); MSHA Br. 14 (“FOIA contains no provisions that would permit an agency to limit the dissemination of documents once they are released and once released, ‘nothing in FOIA prevents the [recipient] from disclosing the information to anyone else’” (quoting *Swan v. SEC*, 96 F.3d 498, 500 (D.C. Cir. 1996))).

Presumably, MSHA will claim that risks associated with disclosure to Adair exist that are not associated with disclosure to the Teaster Review Team. Even if MSHA could substantiate such a claim, however, the law does not permit an agency to draw so fine a distinction. In *Swan*, 96 F.3d 498, a case on which MSHA relies heavily (see MSHA Br. at 14–15), the court made clear that a FOIA requester’s identity is of “no significance” in determining whether Exemption 7(A) applies. See *Swan*, 96 F.3d at 499–500 (citing *Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 771 (1989), for the principle that, except when an exemption is based on privilege, “the identity of the requesting party has no bearing on the merits of his or her FOIA request”). *Swan*

involved FOIA requesters who argued that their identities caused an agency record to fall *outside* a claimed FOIA exemption. But the principle announced in the case applies equally when an agency defendant (instead of the plaintiff requester) claims that a requester's identity causes a record to fall *within* a claimed exemption. If the Teaster Review Team had been a FOIA requester, it would not have been able to argue that Adair's interview transcript falls outside Exemption 7(A) by asserting that, as independent reviewers of MSHA's conduct, they would be less likely than Adair to share the transcript with other witnesses. See *Swan*, 96 F.3d at 500 (the risk of disclosing records to a person must be evaluated "not simply in terms of what the requester might do with the information but also in terms of what anyone might do with it"). By the same principle, MSHA cannot argue that the transcript falls *inside* Exemption 7(A) because Adair is more likely than the Teaster Review Team to share it (even assuming that is true).

We also anticipate that MSHA will assert that disclosure to the Teaster Review Team may be treated differently from disclosure to an individual like Adair because the Secretary of Labor commissioned the Teaster Review Team. Again, however, the law does not support such a claim. The Teaster Review Team is independent of MSHA. The Secretary of Labor had decided that "an evaluation of MSHA's actions [regarding the Crandall Canyon Mine] by an Independent Review Team (IRT) would be more appropriate" than an evaluation by MSHA's own investigative team, so she selected "two former MSHA Managers [Messrs. Teaster and Pavlovich] . . . to conduct the independent review." Teaster Report at 1. The report notes that the Teaster Review Team would be able to conduct an impartial evaluation of MSHA's performance "without the direction or

oversight of the Agency,” and that the team, comprising the two retirees and five MSHA employees reassigned to perform the task, could operate “without any interference or influence from the Agency.” *Id.* Compare *Aviation Consumer Action Project v. Washburn*, 535 F.2d 101, 107–08 (D.C. Cir. 1976) (permitting the withholding of records that had been disclosed to an advisory committee under FOIA Exemption 5 (concerning litigation privileges) in part because “[t]he policy behind exemption five is particularly applicable to advisory committees, whose sole function is to advise the agency”). Defendant MSHA is not entitled to summary judgment in these circumstances.

Appropriately limited discovery should occur regarding the circumstances surrounding the disclosure of the transcript to the Teaster Review Team and the conditions, if any, placed on the Teaster Review Team’s use of the transcript. See, e.g., *Alyeska Pipeline Service Co. v. U.S. Envtl. Protection Agency*, 856 F.2d 309, 313–14 (D.C. Cir. 1988) (“[I]f material facts are genuinely in issue or, though undisputed, are susceptible to divergent inferences bearing upon an issue critical to disposition of the case, summary judgment is not available.”); *Baker & Hostetler LLP v. Dep’t of Commerce*, 473 F.3d 312, 318 (D.C. Cir. 2006) (discovery may be appropriate in FOIA cases). On this record, there is every reason to believe that the Teaster Review Team, which quoted a crucial portion of the transcript in its report, could have attached the entire transcript to its report had it chosen to do so. In that event, Adair already would possess what MSHA had promised to him, and no lawsuit would be necessary. Nothing in the FOIA suggests that the application of an exemption may hinge on such happenstance.

**II. The Court Should Deny MSHA's Motion for Summary Judgment Because the Doctrine of Equitable Estoppel Applies to MSHA's Conduct.**

Even if the Court determines, with or without discovery, that Exemption 7(A) permits MSHA to withhold the transcript, MSHA should be required to produce the transcript under the doctrine of equitable estoppel. Although it is true that the doctrine of equitable estoppel must be applied to a government agency in a “rigid and sparing” way, *ATC Petroleum, Inc. v. Sanders*, 860 F.2d 1104, 1111 (D.C. Cir. 1988), it is just as true that the doctrine's fundamental principles apply equally to government agencies and private parties, *Investors Research Corp v. SEC*, 628 F.2d 168, 174 n.34 (D.C. Cir. 1980). To prevail on an estoppel argument, a litigant must show that “(1) there was a ‘definite’ representation to the party claiming estoppel; (2) the party relied on its adversary's conduct to his detriment; and (3) the reliance on the representation was ‘reasonable.’” *Hertzberg*, 273 F. Supp. 2d at 83 (quoting *Graham v. SEC*, 222 F.3d 994, 1007 (D.C. Cir. 2000)). When a litigant makes an estoppel argument against the government, the litigant must also show “injustice . . . and lack of undue damage to the public interest.” *Hertzberg*, 273 F. Supp. 2d at 83 (quoting *ATC Petroleum*, 860 F.2d at 1111) (ellipsis in original).

This is the unusual case in which estoppel against a government agency is appropriate. First, MSHA representatives made definite representations to Adair before he agreed to be interviewed that the agency would provide him with a copy of the transcript. Stricklin Declaration ¶ 6; Complaint, Exhibit A (“A copy of each witness' statement can be requested in writing and will be provided at a later time.”); *id.*, Exhibit C (“Mr. Adair's statement will be provided at or around the time that the accident investigation report will be issued.”); Poe Declaration ¶¶ 3–5.

Second, Adair relied on MSHA's representation to his detriment. As MSHA has acknowledged, "[b]efore agreeing to Mr. Adair's interview, his attorney, Gregory Poe, requested by telephone that certain interview conditions be met and MSHA agreed to some of Mr. Adair's conditions." Stricklin Decl. ¶ 6. Adair consented to a sworn interview with MSHA officials in reliance on a promise from MSHA that he would receive the transcript. The importance of having access to an accurate record of the interview was a specific subject of negotiation between counsel for Adair and MSHA. Poe Declaration ¶ 4. The promise of receiving a transcript became all the more important to Adair as an inducement for the interview when MSHA's counsel refused to agree to the request by Adair's counsel that another lawyer be permitted to attend on behalf of Adair in order to focus on note-taking. *Id.* ¶ 4. Now, Adair is the subject of a criminal investigation concerning alleged false statements in which his lawyer has no access to the transcript. Indeed, Adair and his counsel do not even have the benefit of notes taken by counsel's colleague because MSHA forbade that colleague's presence at the interview.

Third, it was reasonable for Adair to rely on MSHA's promise that the transcript would be produced as an inducement to consent to the interview. The issue of obtaining a transcript had been raised in Gates's initial letter requesting Adair's assistance. Complaint, Exhibit A. Discussions between Adair's counsel and MSHA representatives included the importance of having an accurate record, and the transcript's production became all the more important as an inducement when MSHA refused to allow Adair's counsel to be accompanied by a note-taking colleague. At that stage, Adair reasonably believed that MSHA was sincere when it promised him that he would receive a copy of the transcript. The three traditional elements necessary to prove an estoppel claim are

thus met in this case. See *Hertzberg*, 273 F. Supp. 2d at 83.

The real issue here is whether the two additional elements necessary to apply the doctrine of equitable estoppel to a government agency – injustice and lack of undue damage to the public interest – have been met as well. *Id.* The injustice caused by MSHA’s treatment of Adair is palpable. After having been assured by MSHA that he would receive a copy of the transcript, Adair volunteered to help the agency achieve its stated goal of determining the cause of the August 2007 accidents at Crandall Canyon Mine. Then, after MSHA had secured from Adair what it wanted (his testimony), the agency not only refused to provide Adair with the promised transcript, but did not even bother to give him the courtesy of explanations for its conduct.

After MSHA rebuffed a request by Adair’s counsel in February 2008 to allow Adair to review the transcript (made in part for the express purpose of furthering MSHA’s own stated goals), MSHA never responded to a request for an explanation for the denial. Poe Declaration ¶ 8. In other words, despite Adair’s efforts, he was never provided an opportunity, afforded to witnesses in civil litigation and even grand jury witnesses, to make sure that the transcript accurately reflected what he actually said. *Id.* ¶¶ 8-9; Complaint, Exhibit B; *cf. S.E.C. v. Parkersburg Wireless Ltd. Liability Co.*, 156 F.R.D. 529, 535-36 (D.D.C. 1994) (applicable rule of civil procedure is designed to permit the correction of factual statements, whether those changes are in form or in substance); *In re Grand Jury*, 490 F.3d 978, 988 (D.C. Cir. 2007) (grand jury witnesses have an interest in ensuring “that the transcripts of their testimony accurately convey their recollections”). And after Adair’s counsel requested the transcript on July 25, 2008 (the day after MSHA’s report was issued), he was simply directed by MSHA to its FOIA

officer. Poe Declaration ¶ 10; Complaint, Exhibit F. MSHA itself did not bother communicating its position to Adair until we received its motion for summary judgment.

That leaves a single question with respect to the doctrine of equitable estoppel: whether disclosure of the transcript to Adair would cause undue damage to the public interest. According to the MSHA and the USAO, disclosure of the transcript would “create[] the possibility for others to compare their potential testimony with Mr. Adair’s and would allow them to collaborate to obtain a consistency of detail and memory that will not be available if Mr. Adair’s statement is not released. In the same vein, disclosure of the statement also would enable a witness to adopt Mr. Adair’s version of the facts and preclude a more thorough investigation of the witness’s recollection.” Tolman Declaration ¶ 10. The touchstone of the USAO’s position is that the transcript must be withheld to “ensure that [the USAO] remains able to obtain independent recollections of witnesses regarding the events surrounding the accident.” *Id.*

Especially from an estoppel perspective, a basic defect in MSHA’s position is that MSHA and the USAO have not even *attempted* to describe the supposed factual areas in which Adair and other witnesses could “collaborate.” Indeed, the key allegations concerning Adair in the Miller referral (see Tolman Declaration, Exhibit 1 at 3) revolve around statements that Adair allegedly made to *MSHA officials*. The idea that Adair would “collaborate” with government officials to whom he supposedly made misleading statements is nothing short of fanciful. The Teaster Report’s criticisms of MSHA, and its specific identification of the differing accounts of Adair and MSHA official Billy Owens (see Teaster Report at 23), underscore that point. The fact that the publicly available Teaster Report already has quoted crucial language from the transcript further shows that

disclosure of the transcript would not unduly damage the public interest. And even if disclosure could be said to cause *some* damage to the public interest, any such putative damage would not be *undue* under the circumstances. See *Hertzberg*, 273 F. Supp. 2d at 83; *cf. Prieto v. United States*, 655 F. Supp. 1187, 1995 (D.D.C. 1987) (holding Department of Interior estopped by its own conduct from revoking trust status of certain land).

Furthermore, the public interest should not be defined solely by the manner in which the USAO and MSHA have chosen to identify their interests in the investigation. If MSHA is permitted to withhold the transcript from Adair, then witnesses in future civil agency investigations – especially highly politicized ones that involve the spectre of criminal allegations and pressure on the Department of Justice to pursue charges – will be less inclined to provide information voluntarily. That disincentive is all the more pointed where, as here, the agency does not even allow the witness to review the transcript for accuracy. The public interest will be furthered, not harmed, by ensuring that such fundamental disincentives are not created. Indeed, limited discovery is appropriate in this respect, we submit, to determine whether MSHA representatives had contemplated the possibility of a criminal referral or a criminal investigation, especially before Adair agreed to testify in December 2007.

Finally, the proper and fair functioning of a government agency should be considered in determining the scope of the public interest. The unfair treatment of Adair in this matter, and the conduct of a taxpayer-funded agency charged with protecting the safety of miners, merit consideration in determining whether principles of estoppel should defeat MSHA's summary judgment motion. As we have stated elsewhere, "Mr.

Adair has earned an impeccable reputation in the mining industry as a hard-working, straightforward person devoted above all to the safety of miners and fairness in his treatment of others.” See Tolman Declaration, Exhibit 1 at 4. It is not difficult for a government investigation – even one that eventually goes nowhere – to cause permanent damage to a person who has spent decades building his good name. The public interest in disclosure or nondisclosure, in other words, is not divorced from a citizen’s efforts to protect his hard-earned reputation.

**CONCLUSION**

For the reasons stated above, and for any other reason that the Court may deem just and proper, plaintiff Laine Adair respectfully requests that the Court deny defendant MSHA’s motion for summary judgment and permit the parties to conduct appropriately limited discovery.

Dated: January 7, 2009

/s/ Gregory L. Poe  
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CERTIFICATE OF SERVICE

Pursuant to Local Civil Rule 5.4(d)(2), proof of service is satisfied by the automatic notice of filing sent by the CM/ECF software to counsel for the government, Assistant United States Attorney Jeremy Simon, who receives electronic notification of filings.

/s/ Gregory L. Poe

IN THE UNITED STATES DISTRICT COURT  
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**PLAINTIFF’S STATEMENT OF GENUINE ISSUES OF MATERIAL FACT**

In response to Defendant’s Statement of Material Facts Not in Dispute, Plaintiff Laine Adair provides the following Statement of Genuine Issues of Material Fact:

1. Adair disputes paragraph eleven of Defendant’s Statement of Material Facts Not in Dispute. For the reasons stated in Plaintiff’s Opposition to Defendant’s Motion for Summary Judgment, disclosure of the transcript of Adair’s December 13, 2007 interview with the Mine Safety and Health Administration (“MSHA”) could not reasonably be expected to interfere with a law enforcement investigation – specifically, a criminal investigation being conducted by the United States Attorney’s Office for the District of Utah.

2. A genuine issue of material fact exists with respect to whether, and under what conditions (if any), MSHA provided access to or a copy of the transcript to Earnest C. Teaster, Jr., Joseph W. Pavlovich, or any member of their investigative team, which

produced a report entitled *Independent Review of MSHA's Actions at Crandall Canyon Mine* (available at <http://www.msha.gov/CCreview/CrandallCanyonIRComplete.pdf>).

That genuine issue of fact is material to whether the transcript already has been disclosed in a manner that undercuts the force of FOIA's law enforcement exemption on which MSHA has relied in refusing to provide the transcript to Adair.

3. Adair does not dispute that he had knowledge of *certain* "events and circumstances relating to the Crandall Canyon mine collapse" but does dispute that he "had knowledge of *the* events and circumstances relating to the Crandall Canyon mine collapse" as stated in paragraph 5 of MSHA's Statement of Material Facts Not in Dispute (emphasis added).

4. With respect to the statement in paragraph 5 of MSHA's Statement of Material Facts Not in Dispute that Adair was "General Manager of UtahAmerican Energy, Inc. and Genwal Resources, Inc., the companies that ran the Crandall Canyon mine," Adair agrees that his title was General Manager. The rest of the quoted language, whether accurate or not, is immaterial.

5. Adair does not dispute the accuracy of paragraph 9 in MSHA's Statement of Material Facts Not in Dispute, but its description of the material facts is incomplete. Adair's first written request for production of the transcript was made on February 4, 2008. See Complaint, Exhibit B. Counsel for MSHA responded on February 7, 2008. See Complaint, Exhibit C. Counsel for Adair followed up with a letter dated February 8, 2008. See Complaint, Exhibit D. Counsel for MSHA never responded to the February 8 correspondence.

Dated: January 7, 2009

/s/ Gregory L. Poe

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