

The Right to Refuse

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by Adam Madison

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The "Be Secure" campaign is a voluntary security on a voluntary basis. It is not a terrorist. ATF letter announcing the documents. The voluntary questionnaires are intended to aid ATF officials' safety inspections of magazine storage areas. There are separate questionnaires for blasters, administrative personnel, truck drivers and truck loaders.

Some questions could lead to self-incrimination. For instance, a questionnaire for blasters asks "Have you ever made an adjustment to paperwork to cover up the theft of explosives?" or "Have you ever purchased or taken explosives to do 'side jobs?'" A wrong answer could land up to a \$10,000 fine for each violation or up to 10 years in prison, as well as a suspension of a license to practice.

And the ATF means business. Attorney Adele Abrams says, "They are coming in very much like storm troopers, flashing badges and just being very heavy handed."

Abrams is a Certified Mine Safety Professional that specializes in enforcement litigation from the Mine Safety and Health Administration and the Occupational Safety and Health Administration. She has been involved with the aggregates industry for more than 15 years and also is a *Rock Products* columnist.

One of her clients reports being subjected to an "ATF sweep" at 3 a.m. by six agents. They allegedly used brutish interrogative measures and went beyond

The company had proven compliance with the Safe Explosives Act in a regular ATF inspection in June, Abrams says.

Gary Bangs, chief of ATF's branch of explosives industry programs, says this is not the manner in which ATF should be using the questionnaires and checklists. Also, the questionnaires have recently been rewritten to exclude questions like "Have you ever taken explosives home?"

"In hindsight, looking at that type of question, it is worded not in a way to assess internal control but to interrogate somebody for whether they were involved in any criminal activity."

These questions are raising concerns beyond Abrams' client. The Institute of Makers of Explosives Manager of Technical Services Lon Santis, says this opens the door for innocent licensees to provide potentially incriminating evidence. He also worries about the possibility of two people within the same company providing conflicting information.

And these are legitimate concerns, Abrams says. "It's almost like the fable of the blind man feeling the elephant and describing the elephant. And depending on where you're standing, your description is going to be different." Abrams says discrepancies often evolve during accident investigations conducted by the Mine Safety and Health Administration. Simple questions can be misunderstood according to how questions are phrased. And even simple mistakes can be subject to legal scrutiny.

"My advice to any mine operator out there is don't fill out the darn questionnaires unless you have sought legal council," Abrams says. "Because anything you say can and will be used against you." Considering the position of authority that the ATF holds, however, many are afraid to say no. But the First Amendment provides people the right to withhold speech.

Bangs confirms that notion. "They don't have to answer any of those questions," he says.

Santis says the questionnaires have become an ATF routine to collect information from licensees and permittees. His members report that ATF occasionally conducts interviews during inspections and fills in the answers or leaves it for interviewees to fill in themselves.

However, Bangs says that should not be. "I would hope that (the inspectors) would do neither. I can't say that is not happening, but I don't see that as an effective way of utilizing (the questionnaires)."

Bangs says that the licensee should never see the questionnaire during the inspectors' visit. He says an inspector should be able to sit down after an inspection and answer them himself without a formal question-and-answer

session. The answers should be derived from "an informal conversation interviewing process.

"Now, I'll admit (the questionnaires) are probably not being utilized that way." However, if a Q-and-A session does break out, Bangs says that answering the questions would be completely voluntary.

The problem with something being "voluntary," however, is that it falls into unregulated gray areas, Abrams says.

If the questionnaire were mandated, it would fall under the Paperwork Reduction Act. The Small Business Administration states any form or document for regulatory purposes having a burden for economic impact. The IME estimates that the questionnaire would take 15 minutes to complete.

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"Aside from the time-consuming aspect, it is going to have a chilling effect on people who are willing to do this type of work if they are going to be subject to this kind of governmental scrutiny," Abrams says.

Bangs says the documents titled "Administrative Personnel Questionnaire" or "Blaster Questionnaire" were never intended as a device for collecting information that would require SBA approval.

The documents began with fill-in blanks to record the date, name and title of interviewee with his home address and phone number, and the name of the interviewer. He says the information that actually gets archived are the inspection reports and the actual applications.

Abrams says she can see no authority for recording home phone numbers and addresses.

The voluntary safety checklists being distributed also are immune to regulation. Bangs says this was the first out-reach to the explosives industry from ATF Director Carl Truscott, who was recently appointed by now-retired U.S. Attorney General John Ashcroft. It was intended to form an alliance with industry to examine various threat levels.

"ATF decided to put together some type of educational material that continued to prod the explosives materials industry in a voluntary nature to take a look at what their facilities are and assess their products and what the risk would be," Bangs says.

The checklist was first released in July with a letter from Truscott. It was an abridged version of the list that ATF inspectors refer to. Bangs says the list was shortened so it could all fit on one double-sided page.

The industry raised concerns over inspectors consulting a different list. Both IME and ATF are looking at consolidating the list to improve it and prevent confusion.

Abrams says the voluntary items on the list will not land citations for non-compliance. However, in a civil or criminal hearing, non-compliance with even voluntary items are frowned upon. "And when it is being done in the name of national security, you're not going to find a jury being very friendly to you in that situation," Abrams says.

Bangs says he is not aware of any legal situations evolving from the checklists or questionnaires.

Santis says the checklist could be described as an expansion of the Safe Explosives Act. For instance, the second bulleted item on the "Be Secure" checklist says, "Document shortages, losses, thefts, or otherwise unaccounted for explosives and report them to ATF 'immediately.'" The Safe Explosives Act says any loss must be reported in 24 hours.

Santis says, when trying to keep track of explosives, paperwork can be misplaced or items lost during a delivery. Often a loss is just a communication problem and is solved within 24 hours. Santis is afraid that if people followed ATF's guidelines to the T, ATF would be overwhelmed by insignificant reports.

To clear up any confusion and address industry concerns, ATF has made an informal commitment to meet with members of the concerned industries including the IME, International Society of Explosives Engineers and the National Stone, Sand & Gravel Association.

"If it is not being accepted up front by the industry members than it is hard for us to envision how you are going to get voluntary action," Bangs says. "It needs to be something that they are going to buy into and accept up front."

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