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Public Works for a Better Government

May 21, 2012

Hon. Cass R. Sunstein, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
Washington, DC 20503

Re: Request for Information 2012-7602, 77 FR 19357

Dear Mr. Sunstein:

Public.Resource.Org's fundamental concern in this Request for Information proceeding and the related Office of the Federal Register process is that the government ultimately reach the right decision and make standards incorporated by reference available to all for free on the Internet. But we write today because we are concerned that the process has not been fair, and that the lack of fairness could potentially affect the result. So we ask that OMB review the process, provide us with a response, and ensure that the process going forward treats all parties fairly.

OMB's March 30 notice announced not only a request for written comments but also a May 15 workshop whose stated purpose was to inform OMB on standards issues and the advisability of reforms. Public.Resource.Org requested from OMB the opportunity to present at the workshop. We were not invited to present, and nor we ever informed that we would not be invited to present.

The presenters at the May 15 workshop, held at NIST in Gaithersburg, were almost entirely representatives of industry or the government. On the incorporation by reference panel, three representatives of industry gave emphatic presentations supporting the status quo; government representatives did not take strong positions; and only one participant, attorney James Conrad, expressly argued in favor of free access to standards incorporated by reference. As far as we know, Mr. Conrad was the only presenter all day who offered such a position. (One of us, Halperin, did attend the morning sessions of the workshop and attempted to ask a question but was not called on.) (Similarly, the ACUS / U.S. Chamber of Commerce Implementation Summit held on May 1 at the Chamber included an IBR panel that featured five government speakers, none of whom argued expressly for free access to IBR materials, an industry representative, and no one who expressly advocated for strong reforms.)

We don't take the position that Public.Resource.Org had a right to be on one of your panels, although we have built up expertise in this area, and did, to our knowledge, file the most extensive comment in support of reform. But there were a number of individuals OMB might

have invited to participate and add to the voices for reform, thus providing a more balanced discussion. We know this because of recent developments: (1) In April, three other organizations (Association of Research Libraries, Electronic Frontier Foundation, and OpenTheGovernment.org) submitted a letter to OMB supporting Public.Resource.Org's position in this RFI; (2) In February, 20 individuals – law professors, practitioners, and Malamud – petitioned the Director of the Federal Register seeking amendment of 1 CFR part 51 to redefine what it means for standards incorporated by reference to be “reasonably available” in the Internet era; and (3) Congress passed, and President Obama in January signed, the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, which bars the Secretary of Transportation from issuing pipeline safety rules that incorporates by reference any material unless it is “made available to the public, free of charge, on an Internet Web site”; someone involved in the enactment of that provision might have been available to offer a perspective.

The lack of process fairness has now continued beyond the workshop. On May 16, a NIST staff member responded to an email from Malamud with a message that concluded “BTW, OMB has extended the comment period on their RFI to June 1st. This was announced at the close of the workshop yesterday.” As you know, the original deadline was April 30. To date, we are not aware of OMB publicly posting, in the Federal Register or elsewhere, notification of that extension. Instead the only announcement (other than the “BTW” mention that we received because we happened to be have sent an email) was to a crowd that consisted almost entirely of industry and government representatives. This failure, thus far, to notify the larger public, and, as a result, to give people in the room exclusive information or, at least, a headstart, has skewed the process even further.

We recognize that, given all its responsibilities, agencies cannot always carry out its obligations with procedural perfection, and we appreciate the hard work of you and your colleagues. However, given that the subject matter of this proceeding is public availability of information and public opportunity to participate in debates about policy issues, we find these process shortcomings to be particularly inappropriate. We ask that going forward the process be more inclusive and balanced, and, again, we ask for a response from OMB on the issues we have raised in this letter.

Sincerely yours,

David Halperin
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