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Public Works for a Better Government

May 14, 2015

FOIA Officer
Office of the General Counsel
US Access Board
1331 F Street, NW, Suite 1000
Washington, DC 20004
foia@access-board.gov

RE: FOIA Appeal, FOIA Request for ASME A17.1-2000
VIA EMAIL AND FIRST CLASS MAIL

Dear FOIA Officer:

This letter is an appeal from the April 20, 2015, denial of a Freedom of Information Act (FOIA) request that I sent to the Access Board on behalf of Public.Resource.Org on April 1, 2015. That request sought a copy of *ASME A17.1-2000, Safety Code for Elevators and Escalators, including ASME A17.1a-2002 and ASME A17.1b-2003 Addendums*, which is incorporated by reference in **36 CFR 1191, Appendix B, § 105.2.2** and used in **36 CFR 1191, Appendix D, § 407.1 et. seq.**

On April 20, 2015, in a letter signed by Lisa Fairhall, Deputy General Counsel, the Access Board denied the request. The letter stated that the requested record has “been disclosed within the meaning of § 552(a)(1)” because it was “was duly incorporated by reference in § 105.2.2 upon the approval of the Director of the Office of the Federal Register,” and therefore “is not subject to request under § 552(a)(3).”

Copies of my **April 1, 2015 request** and the Access Board’s **April 20, 2015 denial** are enclosed with this appeal.

We are appealing the denial of the FOIA request because the record is an agency record that is not available under **5 U.S.C. § 552(a)(1) or (2)**, and no exemption applies to it. Accordingly, the record must be released under **5 U.S.C. § 552(a)(3)**.

5 U.S.C. § 552(a)(3) provides that records must be made available in response to a FOIA request unless they are made available under paragraphs (a)(1) or (a)(2) of FOIA, 5 U.S.C. § 552(a)(1) & (a)(2). Paragraph (a)(1)—the paragraph that the Access Board claimed applies here—states that agencies must publish certain documents, including substantive rules, in the Federal Register. The paragraph explains that, except to the extent that they have actual and timely notice of the information, people may not “be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published.” 5 U.S.C. § 552(a)(1). Documents “reasonably available to the class of persons affected thereby” are

“deemed published in the Federal Register” for the purposes of paragraph (a)(1) if they are “incorporated by reference therein with the approval of the Director of the Federal Register.” 5 U.S.C. § 552(a)(1).

In its denial letter, the Access Board stated that because the record we requested was incorporated by reference with the approval of the Director of the Federal Register, it “has already been disclosed within the meaning” of paragraph (a)(1) and does not need to be released under paragraph (a)(3). However, although records incorporated by reference are *deemed* published in the Federal Register for purposes of paragraph (a)(1), they are *not*, in fact, published in the Federal Register and are not available to the public in that forum. Indeed, the Access Board’s denial letter conceded that the requested record “is not set out in its entirety in the CFR text.”

Because records incorporated by reference are deemed published in the Federal Register, people can “be required to resort to, or be adversely affected by” them. However, the fact that they are deemed published does not make them “available” under paragraph (a)(1), as necessary to keep them from having to be released in response to a FOIA request under paragraph (a)(3). Paragraph (a)(3) applies to records unless they are “made available” under paragraph (a)(1), not unless they are “deemed available” under that section.

That records are not “available” under paragraph (a)(1) for the purposes of (a)(3) if they are only “deemed published” in the Federal Register is confirmed by the structure of FOIA. Paragraphs (a)(1), (a)(2), and (a)(3) together ensure that all agency records will be released to the public unless they are exempt from disclosure. Paragraphs (a)(1) and (a)(2) require affirmative disclosure of certain documents, and paragraph (a)(3) applies to all other documents—those that are not affirmatively disclosed. The provision in paragraph (a)(3) excusing agencies from releasing records in response to a FOIA request if they are made available under paragraphs (a)(1) and (2) saves agencies from having to exert time and energy responding to FOIA requests when the agencies have already affirmatively disclosed the documents; it keeps records from having to be “disclosed twice.” *U.S. Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 152 (1989). But that provision is not itself a FOIA exemption that can be used to keep records from the public if the records have not already been disclosed to the public. As the D.C. Circuit has explained, paragraph (a)(3) “requires disclosure, on demand, of [a]ll other reasonably described records *not already released* under paragraphs (a)(1) and (a)(2).” *Jordan v. U.S. Dep’t of Justice*, 591 F.2d 753, 756 (D.C. Cir. 1978) (en banc) (emphasis added). Here, the requested record has not “already [been] released” to the public. That actual document has not been disclosed in the Federal Register, and the fact that it can be inspected at the bricks-and-mortar offices of the Access Board and the Office of the Federal Register (OFR) does not make it available under paragraph (a)(2), which requires records created after 1996, such as the record here, to be available for inspection and copying by “electronic means.” 5 U.S.C. § 552(a)(2). Because the agency has not yet disclosed the document once, the provision protecting agencies from having to disclose documents twice does not apply.

In any event, the record here cannot be “deemed published” in the Federal Register because it was not properly incorporated by reference. In order properly to be incorporated by reference, two requirements must be met: the record must be reasonably available and the incorporation must be approved by the Director of the Federal Register. Here, the record is not properly incorporated by reference because it is not reasonably available.

The Access Board’s denial letter claims the record is reasonably available because it is available for inspection at the offices of the Access Board and OFR. Almost two decades ago, however, Congress declared that “agencies should use new technology to enhance public access to agency records and information,” and required agencies to make records such as statements of policy, administrative staff manuals and instructions to staff that affect the public, final opinions in adjudications, including dissenting opinions, and frequently requested records available electronically. *Electronic Freedom of Information Act Amendments*, P.L. No. 104-231, § 2(a)(6), **110 Stat. 3048** (1996); see 5 U.S.C. § 552(a)(2). Congress also required agencies to make requested records available electronically if the record is readily producible that way. P.L. No. 104-231, § 5; see 5 U.S.C. § 552(a)(3)(B). Given that, once incorporated, the requested record became the agency’s binding law, it is unreasonable for it be *less* available than dissenting opinions, certain staff instructions, and run-of-the-mill agency records sought through a FOIA request. To be reasonably available, the requested record would have to be *at least* as available as these non-binding agency records—that is, it would have to be available in an electronic reading room.

The Access Board’s denial letter also notes that the agency’s regulations provide the address and website of the American Society of Mechanical Engineers (ASME), see 36 C.F.R. pt. 1191, App. B, § 105.2.2, and states that the agency ensured reasonable availability of the standard “by providing information about how it may be obtained” from ASME. But merely providing the organization’s contact information does not make the record reasonably available unless that organization itself makes the record reasonably available, and ASME does not.

The ASME web site does make available versions of the code that are more current than the 2000 version, including the 2013 edition for \$335, the 2010 edition for \$310, and the 2007 edition for \$210. However, these are not the records we requested; we requested the 2000 version, with its 2002 and 2003 addenda, because that is the version the Access Board has incorporated and thereby made into law. Moreover, in order to use these documents, one is required to use the “FileOpen Acrobat plug-in” which severely limits access to the content, particularly for people who are visually impaired.

The only record relevant to the requested record that we found on ASME’s website was a publication entitled “Handbook on Safety Code for Elevators and Escalators,” which the website says was used to “augment the Code by providing a commentary on the Code requirements.” See <https://www.asme.org/products/codes-standards/a171-2000-handbook-a171-safety-code-elevators> . The website does not indicate that the Handbook contains a copy of the requested record itself or of its addenda

and explains that the purpose of the Handbook is to “augment” the code. And even if it did contain the code with the necessary amendments, the Handbook costs \$150.

In order to find to find “**Out-of-Print Codes & Standards,**” the user is directed to the **IHS Standards Store**, where the cost for the **2000 edition with the 2002 and 2003 amendments** is \$523 for a print edition or \$498 for an electronic copy, which also uses the FileOpen Acrobat plug-in, severely limiting access to the content for those who are visually impaired.

Given that the agency is required to provide members of the public with non-binding agency records at only the “direct costs of search, duplication, or review,” 5 U.S.C. § 552(a)(4)(A)(iv), it is unreasonable to charge more than the cost of duplication for the requested record, which contains the agency’s binding law, and which can be found without any search and does not need to be reviewed for redaction.

Because this record is part of the agency’s binding law, releasing this record falls directly within FOIA’s objective of eliminating secret law. *See, e.g., Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980) (“A strong theme of our opinions has been that an agency will not be permitted to develop a body of ‘secret law,’ used by it in the discharge of its regulatory duties and in its dealings with the public, but hidden behind a veil of privilege[.]”). Citizens have the right to read, speak, and disseminate the laws that we are required to obey, including laws that are critical to public safety and commerce. In this age of technology, it is unreasonable for members of the public to be able to access the law only in a government office or for large amounts of money.

Thank you for your time and attention to this matter. We will expect a determination with respect to this appeal within twenty working days, as required by law. Should you have any questions regarding this appeal, please feel free to contact me at (707) 827-7290.

With best regards,

Carl Malamud
Public.Resource.Org

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