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**Public Works for a Better Government**

February 8, 2016

VIA EMAIL AND FIRST CLASS MAIL

U.S. Consumer Product Safety Commission  
FOIA Appeal  
General Counsel  
Attn: Office of the Secretary  
4330 East West Highway  
Bethesda, Maryland 20814  
E-mail: [cpsc-foia@cpsc.gov](mailto:cpsc-foia@cpsc.gov)

**RE: Appeal of Freedom of Information Act Request No. 15-F-00684**

Dear FOIA Officer:

This letter is an appeal from the **January 29, 2016**, denial of a Freedom of Information Act (FOIA) request that I sent to the U.S. Consumer Product Safety Commission (CPSC) on behalf of Public.Resource.Org on **September 10, 2015**. That request sought a copy of the Underwriters' Laboratories (UL) standard 325 (Fifth Edition and Sixth Edition) which was deemed to be a regulation by the U.S. Congress in § 203 of the Consumer Product Safety Improvement Act of 1990 ("CPSIA") (**Pub. Law 101-608**, 104 Stat. 3110).

On January 29, 2015, in a letter signed by Alberta E. Mills, a FOIA Officer in the Office of the General Counsel, CPSC denied the request. The letter stated: "We must withhold the requested UL standards pursuant to the FOIA Exemptions 3 and 4, **5 U.S.C. § 552(b)(3)** and (b)(4) and section 6(a)(2) of the Consumer Product Safety Act ('CPSA'), **15 U.S.C. §§ 2055(a)(2)**. FOIA Exemption 3 provides for the withholding from disclosure of matters that are specifically exempted from disclosure by another statute. In applying FOIA Exemption 3 to these records, we are relying in part on CPSA section (6)(a)(2) to withhold files that contain proprietary and confidential information. Section 6(a)(2) prohibits the Commission from disclosing information that is exempt from disclosure under Exemption 4 of the FOIA. That exemption protects trade secrets and confidential commercial information directly related to a firm's business that the firm has not made public and whose disclosure could give a substantial commercial advantage to a competitor."

We are appealing the denial of the FOIA request because the record we requested is not exempt under FOIA exemption 4, which applies to "trade secrets and commercial or financial information obtained from a person and privileged or confidential." **5 U.S.C. § 552(b)(4)**.

To begin with, Exemption 4 cannot apply to the requested record because, Congress passed and the President signed a law that stated that UL 325 shall be “considered to be a consumer product safety rule issued by the Consumer Product Safety Commission.” and at that time, the record became the agency’s law. **CPSIA § 203(a)**. It is self-evident that the law, which is binding on the public, cannot be a “trade secret,” “privileged,” or “confidential.” Indeed, it is “strong theme” of FOIA law “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[.]” *Coastal States Gas Corp. v. Dep’t of Energy*, **617 F.2d 854**, 867 (D.C. Cir. 1980). “Under the FOIA an agency must disclose its rules governing relationships with private parties and its demands on private conduct.” *U.S. Dep’t of Justice v. Reporters Comm. For Freedom of Press*, **489 U.S. 749**, 772 n.20 (1989) (quoting Easterbrook, *Privacy and the Optimal Extent of Disclosure Under the Freedom of Information Act*, **9 J. Legal Studies 775**, 777 (1980)).

Moreover, even apart from its status as law, the requested record is not exempt from disclosure. In order to be incorporated by reference into the Code of Federal Regulations, a record must be “reasonably available to the class of persons affected thereby.” 5 U.S.C. § 552(a)(1). Once the record is incorporated by reference, the Office of the Federal Register requires the agency to “maintain a copy at the agency for public inspection.” See *Incorporation by Reference*, **79 Fed. Reg. 66267**, 66270 (Nov. 7, 2014). In addition, the record must be placed “on file with the Office of the Federal Register.” **1 C.F.R. 51.3(b)(4)**. Because the requested record has already been made public, FOIA’s exemptions cannot apply. Even “materials normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record.” *Cottone v. Reno*, **193 F.3d 550**, 554 (D.C. Cir. 1999)

The requested record also cannot be considered secret or confidential because it has been released to the public by Underwriters’ Laboratories itself. CPSC’s letter states that the FOIA “protects trade secrets and confidential information directly related to a firm’s business that the firm has not made public and whose disclosure could give a substantial commercial advantage to a competitor.” The IHS Standards Store **lists the price of the 6th edition** of UL 325 as \$998 in print format. Although this amount would be a lot for the average citizen that is seeking to see the law, it would not be a lot for a UL competitor. As the D.C. Circuit has explained, records “freely or cheaply available from other sources...can hardly be called confidential.” *Worthington Compressors, Inc. v. Costle*, **662 F.2d 45**, 51 (D.C. Cir. 1981). UL’s sale of the requested record on the open market means that the record is not confidential.

CPSC’s denial letter stated that Exemption 4 applies to the requested record because the company that sells it would be harmed by release. Exemption 4, however, cannot be used by a business to shield from the public all records that the business would prefer not to be released. Rather, the exemption protects only against harm that “flow[s] from the affirmative use of proprietary information by competitors.” *United Technologies Corp. v. U.S. Dept. of Defense*, **601 F.3d 557**, 563 (D.C. Cir. 2010) (citation omitted) (emphasis added). It is not clear whether UL actually has any significant competitors. Even if it does, however, UL would not face competitive harm from the

release of the requested record because competitors can already access the record purchasing it on the open market.

When Congress passed Pub. Law 101-608, it did so with an overwhelming majority. For example, the House agreed to the Senate version of the bill by 375 to 41 in **Roll Call Vote 520**. The Congressional mandate to make UL 325 the law is clear and direct, and just as the text of any other Public Law may not be subject to copyright, neither may the text of UL 325. The U.S. Copyright Office is very clear on this principle:

*“As a matter of longstanding public policy, the U.S. Copyright Office will not register a government edict that has been issued by any state, local, or territorial government, including legislative enactments, judicial decisions, administrative rulings, public ordinances, or similar types of official legal materials. See **Banks v. Manchester**, 128 U.S. 244, 253 (1888) (‘there has always been a judicial consensus, from the time of the decision in the case of **Wheaton v. Peters**, 8 Pet. 591, that no copyright could under the statutes passed by Congress, be secured in the products of the labor done by judicial officers in the discharge of their judicial duties’); **Howell v. Miller**, 91 F. 129, 137 (6th Cir. 1898) (Harlan, J.) (‘No one can obtain the exclusive right to publish the laws of a state in a book prepared by him’). [U.S. Copyright Office, **Compendium of U.S. Copyright Office Practices, Third Edition**, 22 December 2014, § 316.6(C)(1), p. 37.]*

Denying my request for a law passed by Congress flies in the face of long-standing public policy that the law must be readily available for citizens to read and communicate. This federal record is in the possession of the CPSC and therefore must be released under the provisions of FOIA.

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.

Sincerely,



Digitally signed by Carl Malamud  
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