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March 10, 2016

VIA EMAIL AND CERTIFIED MAIL

Carl Malamud
President & Chief Executive Officer
Public.Resource.Org
1005 Gravenstein Highway North
Sebastopol, CA 95472

*Re: U.S. Consumer Product Safety Commission
Appeal of FOIA Request 15-F-00684
ANSI/UL 325 (Fifth and Sixth Editions)*

Dear Mr. Malamud:

By letter dated February 8, 2016 and received on that day, you appealed the January 29, 2016 response of the U.S. Consumer Product Safety Commission's ("CPSC") Freedom of Information ("FOI") Officer to your Freedom of Information Act ("FOIA") request dated September 10, 2015 (FOIA No. 15-F-00684) ("FOIA Request").

I have reviewed your appeal. For the reasons described below, under authority delegated to me by the Commission, 16 C.F.R. § 1015.7, I am denying your appeal. The requested records constitute confidential commercial information that CPSC obtained from a person. As a result, these records are prohibited from disclosure under Exemptions 3 and 4 of the FOIA, 5 U.S.C. § 552(b)(3) and (4), and section 6(a)(2) of the Consumer Product Safety Act ("CPSA"), 15 U.S.C. § 2055(a)(2).

BACKGROUND

1. Summary of the FOIA Request and Subsequent Appeals

The FOIA Request sought the following records:

1. Copies of the Fifth and Sixth editions of ANSI/UL 325, Safety for Door, Drapery, Gate, Louver, and Window Operators and Systems (“ANSI/UL 325”); and
2. Any communications between CPSC and Underwriters Laboratories Inc. (“UL”) regarding “making available to the public of [ANSI/UL 325] or other standards produced by Underwriters Laboratories as part of the NPRM currently underway for garage door openers, ... or after such documents become required by law.”

In the September 23, 2015 response letter to the FOIA Request, the FOI Officer advised that a search of CPSC files failed to produce any records responsive to your request for communications between CPSC and UL. The FOI Officer also denied your request for ANSI/UL 325, stating that the records are copyrighted materials that must be purchased from UL. On October 2, 2015, you appealed the FOI Officer’s denial of your request for ANSI/UL 325.

I reviewed your appeal. In a letter dated November 2, 2015, I advised that the FOI Officer will follow the procedures prescribed by the CPSA and evaluate any claims of trade secret or commercial information in accordance with section 6(a)(5) of the CPSA and 16 C.F.R. § 1015.18 to determine whether ANSI/UL 325 constitutes “confidential commercial information” for purposes of the FOIA and section 6(a)(2) of the CPSA.

In accordance with section 6(a)(3) of the CPSA, 15 U.S.C. § 2055(a)(3), UL submitted to the FOI Officer comments regarding the Fifth and Sixth editions of ANSI/UL 325. UL stated that ANSI/UL 325 is a “work[] of authorship in which UL owns copyright.” UL further explained that ANSI/UL 325 is a “proprietary UL standard that was created using significant human and financial resources.” UL explained that the company charges third parties licensing fees to obtain a copy of ANSI/UL 325. In addition, according to UL, ANSI/UL 325 “is crucial for the operations of UL’s subsidiaries in testing and certifying garage door openers for safety.”

On January 29, 2016, the FOI Officer denied your request for ANSI/UL 325. The FOI Officer withheld ANSI/UL 325 under Exemptions 3 and 4 of the FOIA and section 6(a)(2) of the CPSA. The FOI Officer explained that the decision to apply Exemption 4 of the FOIA “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.” On February 8, 2016, you appealed the FOI Officer’s January 29, 2016 denial of your request for ANSI/UL 325 (the “February 8, 2016 appeal”).

2. ANSI/UL 325 and CPSC’s Regulation of Garage Door Operators

Please note that contrary to statements in your FOIA Request and the February 8, 2016 appeal, ANSI/UL 325 is not incorporated by reference into CPSC’s regulations governing garage door openers. Instead, the substance of the entrapment provisions of ANSI/UL 325 (comprising

only a portion of the standard) is codified directly into the regulation itself at 16 C.F.R. part 1211, *Safety Standard for Automatic Residential Garage Door Operators* (the “Safety Standard”). Over time, as ANSI/UL 325 has been revised, the regulation has been updated to reflect the applicable revisions to ANSI/UL 325 in the regulatory language. *See* 56 Fed. Reg. 28050 (June 19, 1991); 57 Fed. Reg. 60449 (Dec. 21, 1992); 65 Fed. Reg. 70656 (Nov. 27, 2000); 72 Fed. Reg. 54816 (Sept. 27, 2007). Continuing this pattern, CPSC recently commenced rulemaking to reflect UL’s changes to ANSI/UL 325 since CPSC’s last update to the Safety Standard in 2007. 80 Fed. Reg. 53036 (Sept. 2, 2015).

The February 8, 2016 appeal also suggests that ANSI/UL 325 has the status of law, noting that agencies are not permitted to develop “secret law.” Section 203 of the Consumer Product Safety Improvement Act of 1990, cited in the appeal, states that the *entrapment protection requirements* of ANSI/UL 325 “shall be considered to be a consumer product safety rule.” As discussed above, the Safety Standard sets forth for the public the entrapment protection requirements of ANSI/UL 325. In short, there is no “secret law,” as suggested in the appeal; the applicable requirements of ANSI/UL 325 are set forth in the regulatory language itself.

LEGAL ANALYSIS

Exemption 3 of the FOIA protects from disclosure matters that are specifically exempted from disclosure by statute. 5 U.S.C. § 552(b)(3). Section 6(a)(2) of the CPSA prohibits the Commission from disclosing information that is prohibited from disclosure under Exemption 4 of the FOIA. 15 U.S.C. § 2055(a)(2). Exemption 4 of the FOIA protects “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” 5 U.S.C. § 552(b)(4).

As confirmed by UL, ANSI/UL 325, like UL standards generally, is a work of authorship in which UL owns a copyright. Under the Copyright Act of 1976, 17 U.S.C. §§ 101 *et. seq.*, the holder of a copyright has the exclusive right to reproduce and distribute copies of the copyrighted work. *See* 17 U.S.C. § 106. Federal agencies are required to “observe and protect the rights of the copyright holder” of voluntary standards. OMB Circular No. A-119, “Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities” (Feb. 10, 1998).

Although ANSI/UL 325 is not a trade secret, information that does not qualify as a trade secret may be protected from disclosure under Exemption 4 of FOIA if the information is:

1. commercial or financial,
2. obtained from a person, and
3. privileged or confidential

(collectively, the “Exemption 4 criteria”). *Pub. Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C.Cir. 1983).

Under the first prong of the Exemption 4 criteria, the information must be commercial or financial. Although the FOIA does not define the terms “commercial” and “financial,” case law has held that the terms “should be given their ordinary meanings,” and that records are commercial if the submitters have a “commercial interest” in the requested information. *E.g., id.* Similarly, the term “commercial” has been construed in the context of Exemption 4 to include all information “pertaining or relating to or dealing with commerce.” *See American Airlines, Inc., v. Nat’l Mediation Board*, 588 F.2d 863, 870 (2d Cir. 1978).

According to UL, the company expended “significant human and financial resources” to develop ANSI/UL 325. UL entities rely on ANSI/UL 325 when testing and certifying garage door openers for safety. In addition, UL charges third parties licensing fees to obtain a copy of ANSI/UL 325. *See* <http://www.comm-2000.com/ProductDetail.aspx?UniqueKey=26575> (making the sixth edition of ANSI/UL 325 available for \$ 798 (PDF) or \$ 998 (hardcopy)). According to UL’s tax filings, over 85% of UL’s total revenues consist of fees paid for standards. As reflected in U.S. Department of Justice (“DOJ”) guidance, “It simply stands to reason that a valuable document sold as a commodity in the marketplace should be regarded as “commercial” within the meaning of Exemption 4.” DOJ, Office of Information Policy, FOIA Update, Vol. VI, No. 1 “Protecting Intrinsic Commercial Value” (Jan. 1, 1985). UL’s valuable copyrighted standards thus pertain to commerce, and UL has a clear “commercial interest” in ANSI/UL 325, satisfying this Exemption 4 requirement. *See* DOJ, Office of Information Policy, FOIA Update, Vol. IV, No. 4 “Copyrighted Materials and FOIA” (Jan. 1, 1983) [hereinafter DOJ, “Copyrighted Materials and FOIA”].

The second prong of the Exemption 4 criteria requires the information to be “obtained from a person.” As a corporation, UL is a “person.” *See Nadler v. FDIC*, 92 F.3d 93, 95 (2d Cir. 1996). Pursuant to section 203(c) of the Consumer Product Safety Improvement Act of 1990, which requires UL to notify CPSC of any proposed revisions to the entrapment protection requirements of ANSI/UL 325, UL submitted to CPSC those pages of ANSI/UL 325 that were revised. In addition, CPSC obtained full copies of ANSI/UL 325 through CPSC’s UL standards subscription service. Thus, CPSC obtained ANSI/UL 325 from a person, satisfying the second element of the Exemption 4 criteria.

Under the final prong of the Exemption 4 criteria, the information must be “privileged or confidential.” If the disclosure of ANSI/UL 325 would “cause substantial harm to the competitive position of the person from whom the information was obtained,” then ANSI/UL 325 is “confidential” for FOIA Exemption 4 purposes. *Nat’l Parks & Conserv. Ass’n v. Morton*, 498 F.2d 765, 770 (D.D.Cir. 1974).

Summarizing the applicable precedents, DOJ FOIA guidance states that:

[the confidentiality requirement of Exemption 4] should be met whenever it is determined that the copyright holder’s market for his work would likely be adversely affected by FOIA disclosure. The fact that the work can be acquired

elsewhere, albeit at some cost (e.g., by purchase, directly or indirectly, from the copyright holder) should not render it “nonconfidential” under Exemption 4.

DOJ, “Copyrighted Materials and FOIA”. When requested information is available other than through FOIA, the determination of whether information is “confidential” requires consideration of both the commercial value of the requested information and the costs of acquiring the information through other means. *Worthington Compressors, Inc. v. Costle*, 662 F.2d 45, 51 (D.C.Cir. 1981). Where a commercially valuable document can be acquired other than through a FOIA request “only at considerable cost,” agency disclosure for “only minimal FOIA retrieval costs” results in a windfall for competitors, causing competitive harm to the submitter. *Id.*

As the copyright holder of ANSI/UL 325, UL has the exclusive right to publish, or to determine who may publish, this standard. In addition, UL charges licensing fees approaching nearly \$1,000 to access ANSI/UL 325. Licensing fees are an integral source of UL’s revenues. Therefore, ANSI/UL 325 has considerable commercial value to UL.

ANSI/UL 325 also has considerable commercial value to UL’s competitors. UL expended “significant human and financial resources” to create ANSI/UL 325. If a competitor could simply submit a FOIA request for ANSI/UL 325 without paying the significant licensing fee, the competitor would be receiving “quite a bargain.” *See Worthington*, 662 F.2d at 51. Such a result would deprive UL of essential revenues, which “could easily have competitive consequences not contemplated as part of FOIA’s principal aim of promoting openness in government.” *Id.* Moreover, there would be little reason for members of the public to purchase a UL standard if they simply could submit a FOIA request for the document. *See Center for Auto Safety v. U.S. Dep’t of Treasury*, 2015 WL 5726348, *14 (D.D.C. 2015). For these reasons, ANSI/UL 325 is “confidential” and subject to withholding under Exemption 4.

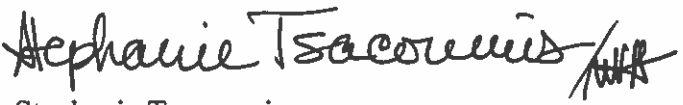
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For all the reasons set forth above, I have determined that CPSC must withhold ANSI/UL 325 under Exemptions 3 and 4 of the FOIA and section 6(a)(2) of the CPSA.

You have the right to seek judicial review of this decision, as provided by 5 U.S.C.
§ 552(a)(4)(B).

Very truly yours,

U.S. Consumer Product Safety Commission

By: 
Stephanie Tsacoumis