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June 9, 2015

VIA EMAIL AND FIRST CLASS MAIL

Deputy Archivist of the United States (ND)
National Archives and Records Administration
College Park, MD 20740
Email: FOIA@nara.gov

RE: Freedom of Information Act Appeal, Tracking Number NGC15-166

This letter is an appeal from the May 18, 2015, denial of ten Freedom of Information Act (FOIA) requests that I sent to the National Archives and Records Administration (NARA) on behalf of Public.Resource.Org on April 1, 2015. The requests each sought access to a record that has been incorporated by reference in the Code of Federal Regulations.

On May 18, 2015, in a letter signed by Joseph A. Scanlon, FOIA Officer, Office of General Counsel, NARA denied the request. The letter stated:

Your requests for copies of the above standards are not subject to the request for records provisions of Section (a)(3) of the FOIA, 5 U.S.C. § 552(a)(3), subsection (A) of which states that “[e]xcept with respect to the records made available under paragraphs (1) and (2) of this subsection . . . each agency, upon any requests for records which (i) reasonably describes such records and (ii) is made in accordance with published rules . . . shall make the records promptly available to any person”,) inasmuch as they are subject to Section (a)(1) of the FOIA, 5 U.S.C. § 552(a)(1), which states that technical standards that are ‘reasonably available to the class of person affected thereby [are] deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.’

Copies of the **April 1, 2015 requests** and NARA’s **May 18, 2015 denial** are enclosed with this appeal.

We are appealing the denial of the FOIA request because the records are agency records that are not available under **5 U.S.C. § 552(a)(1) or (2)**, and no exemption applies to them. Accordingly, the records 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 Sections (a)(1) or (a)(2) of FOIA, 5 U.S.C. § 552(a)(1) & (a)(2). Section (a)(1)—the section that NARA’s denial letter claims applies here—states that agencies must publish certain documents, including substantive rules, in the Federal Register. The section 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 Section (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, NARA stated that because the records we requested were incorporated by reference with the approval of the Director of the Federal Register, they are “fully compliant with the provisions of Section (a)(1) of the FOIA, 5 U.S.C. § 552(a)(1),” and therefore “are not subject to the request for records provisions of Section (a)(3) of the FOIA, 5 U.S.C. § 552(a)(3).” However, although records incorporated by reference are *deemed* published in the Federal Register for purposes of Section (a)(1), they are *not*, in fact, published in the Federal Register and are not available to the public in that forum.

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. And because they are deemed published, the agencies that incorporated them are not violating Section (a)(1) by not actually publishing them in the Federal Register, even though Section (a)(1)(D) requires agencies to publish substantive rules. However, the fact that the records are deemed published does not make them “available” under Section (a)(1), as necessary to keep them from having to be released in response to a FOIA request under Section (a)(3). Section (a)(3) applies to records unless they are “made available” under paragraph (a)(1), not unless they are “deemed available” under that section.

Put differently, that an agency does not violate Section (a)(1) when it fails to include in the Federal Register the text of a standard that has been incorporated by reference does not mean that the agency has made the text of the standard “available” under Section (a)(1), such that it does not need to release the standard in response to a request under Section (a)(3).

That records are not “available” under Section (a)(1) for purposes of Section (a)(3) if they are only “deemed published” in the Federal Register is confirmed by the structure of FOIA. Sections (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. Sections (a)(1) and (a)(2) require affirmative disclosure of certain documents, and Section (a)(3) applies to all other documents—those that are not affirmatively disclosed. The provision in Section (a)(3) excusing agencies from releasing records in response to a FOIA request if they are made available under Sections (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, Section (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 records have not “already [been] released” to the public. Because the agency has not yet disclosed the records once, the provision protecting agencies from having to disclose records twice does not apply.

In any event, the records we requested cannot be “deemed published” in the Federal Register because they were 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 records were not properly incorporated by reference because they are not reasonably available. NARA’s denial letter stated that the records are available in three bricks-and-mortar locations: in the reading room of the Office of the Federal Register (OFR); potentially (although not definitely) in the research room at NARA’s College Park facility; and potentially (although, again, not definitely) in the relevant agency’s reading room. 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 many records available electronically, including, if they were created after 1996, 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. *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, not just in the agencies’ physical offices.

NARA’s denial letter also noted that “some of the standards may be available on the Internet in various forms.” As the word “may” in this sentence indicates, not all of the standard are, in fact, available online. For example, the American Association of Railroads *AAR Manual of Standards and Recommended Practices, Section C—Part III, Specification for Tank Cars, Specification M-1002, December 2000*, which we requested from the Pipeline and Hazardous Materials Safety Administration, is not, to the best of our knowledge, available online. On April 3, 2012, I wrote by email to Ms. Kathleen Trujillo, a Publications Specialist at AAR, asking to purchase this document. She responded the same day that we could purchase the 2007 edition and “we hope to release a 2012 edition of this manual by this summer.” When I responded with a specific reference to the 2000 edition—that is, to the record that was incorporated by reference—Ms. Trujillo responded:

Of the 23 sections of the Manual of Standards and Recommended Practices, none of the sections has a 2000 date. I do not know what manual the federal regulations is referring to but it is not one of my manuals.

When looking for the Underwriters' Laboratories *UL 181–2003, Standard for Safety Factory-Made Air Ducts and Air Connectors*, we went to the <http://www.ul.com> web site as specified in [24 CFR 3280.4\(hh\)](#) which directed us to the UL Standards Sales Site at <http://www.comm-2000.com>, where only the 11th Edition from July 2013 is **available for sale**, at a price of \$716 for a PDF file or \$897 for hardcopy. The 2003 version is not available on this site. We were able to find a **May 2005** and **January 1996** versions listed on the Thomson Reuters TechStreet Store, but both documents are marked “not available for sale.” The “IHS Standards Store” does list **the 1996 revision of the document** with a date of May 15, 2003 as a print edition, but no price is listed and the user is instructed to call for a quote.

I called IHS for a quote as directed. Ms. Christy Cisneros, the sales representative, explained that the 1996 revision included a series of amendments through May 15, 2003. She then informed me she could not give me a quote until I filled out an Underwriters' Laboratories *Individual Standards Acquisition Authorization Form*, and she would then need to secure permission to sell us this historical standard before determining the price. The form includes a mandatory field labeled “Reason for Request (Required).”

Even when the records are available online, they are not *reasonably* available. For example, we requested American Society of Mechanical Engineers (ASME) *A17.1-2000, Safety Code for Elevators and Escalators, including ASME A17.1a-2002 and ASME A17.1b-2003 Addendums*. ASME's website directs the user to the “IHS Standards Store” for “Out-of-Print Codes & Standards,” such as the requested record. That store sells the record for \$523 for a print edition or \$498 for an electronic copy. Given that agencies are 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 binding law, and which can be found without any search and does not need to be reviewed for redaction. In addition to being expensive, the electronic copy uses the “FileOpen Acrobat plug-in,” which severely limits access to the content, particularly for people who are visually impaired, a violation of Section 508 of the Rehabilitation Act. [29 U.S.C. 794d](#).

Similarly, NARA's denial letter stated that the National Fire Protection Association (NFPA) *NFPA 221, Standard for Fire Walls and Fire Barrier Walls, 1994 Edition* is available on the NFPA's website, www.nfpa.org/codes-and-standards/free-access. That website sells a pdf of the 1994 edition of NFPA 221, but charges \$31 for it. The **Worldcat bibliographic system** lists the length of this document as 14 pages long, a cost of \$2.21 per page. Then the buyer still must pay for printing—that is, for the duplication costs. 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 over seven times the \$.30 per page that NARA considers to be the direct cost of duplication, see [36 C.F.R. § 1250.53\(c\)\(2\)](#), for a record that contains the agency's binding law. Moreover, in order for a member of the public to buy the requested record from NFPA, that person must provide personal information, including his or her email address, to the organization. Unless the person affirmatively opts out, NFPA

will use the email for “NFPA marketing solicitations” and will make it “available” to other organizations and event sponsors. See NFPA Privacy Policy, <http://www.nfpa.org/privacypolicy>. It unreasonable for citizens to have to provide personal information to a private organization, which will potentially then be distributed to other companies, in order for those citizens to have access to binding agency law.

The NFPA does provide a very rudimentary form of free access to NFPA 221. However a person must still provide personal information, including his or her email address to the organization and must again be subjected to NFPA marketing solicitations. Furthermore, the NFPA free access page which NARA’s denial letter referenced states that “this is a read-only site—documents cannot be downloaded or printed.” Not only is it unreasonable to require people to preregister in order to read the law, it is unreasonable to limit their ability to use that law in a meaningful way, including sharing the law to inform fellow citizens.

Because the requested records have been incorporated by reference, they are part of the agencies’ binding law. Accordingly, releasing them 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.

Sincerely,



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