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Public Works for a Better Government

May 28, 2015

VIA EMAIL AND FIRST CLASS MAIL

U.S. Department of Labor - MSHA
FOIA Officer
Solicitor of Labor
Rm. N-2420
200 Constitution Ave., NW
Washington, D.C. 20210
E-mail: foiaappeal@dol.gov

RE: Appeal of Freedom of Information Act Request No. 773547

Dear FOIA Officer:

This letter is an appeal from the May 5, 2015, denial of a Freedom of Information Act (FOIA) request that I sent to the Mine Safety and Health Administration (MSHA) on behalf of Public.Resource.Org on April 1, 2015. That request sought a copy of the American Conference of Governmental Industrial Hygienists *Threshold Limit Values for Substance in Workroom Air (1972)*, which is incorporated by reference in **30 CFR 70.1900(c)**.

On May 5, 2015, in a letter signed by Lanesia Washington, Freedom of Information Act Officer, Office of Standards, Regulations and Variances, MSHA denied the request. The letter stated that MSHA had found 83 pages of responsive material that it was withholding under FOIA exemption 4, 5 U.S.C. § 552(b)(4).

Copies of my **April 1, 2015 request** and MSHA's **May 5, 2015 denial** are enclosed with this appeal.

We are appealing the denial of the FOIA request because the record we requested is not exempt under FOIA exemption 4, which applies only 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, once it was incorporated by reference, the record became the agency's law. 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)).

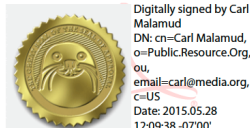
Moreover, even apart from its status as law, the requested record is not exempt from disclosure. In order to be incorporated by reference into the Code of Federal Regulations, a record must be “reasonably available to the class of persons affected thereby.” 5 U.S.C. § 552(a)(1). Once the record is incorporated 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)

For similar reasons, the requested record cannot be exempt under Exemption 4 because it is neither secret nor confidential. See *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1154 (D.C. Cir. 1987) (“To the extent that any data requested under FOIA are in the public domain, the submitter is unable to make any claim to confidentiality—a *sine qua non* of Exemption 4.”). Further, release of the requested record would not cause substantial competitive harm. It seems unlikely that the American Conference of Governmental Industrial Hygienists is in actual competition over the setting of threshold limit values for substances in workroom air. And even if it is in such competition, releasing the record would not cause competitive injury because the record is available in the agency’s office and current versions of the organization’s standards (which have been greatly enhanced and expanded) would be more useful to competitors than the 43-year old version requested and are available for sale on the organization’s website.

We will expect a response within 20 working days as provided by law. If you have any questions regarding this request, please contact me at (707) 827-7290.

Thank you very much for your attention to this matter.

Sincerely,



Carl Malamud
 President & CEO
 Public.Resource.Org

cc: David Halperin
 Of Counsel
 Public.Resource.Org