



U.S. Department
of Transportation

**National Highway
Traffic Safety
Administration**

JUN 12 2015

1200 New Jersey Avenue, SE
Washington, DC 20590

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Mr. Carl Malamud
President and CEO
Public.Resource.Org, Inc.
1005 Gravenstein Highway North
Sebastopol, CA 95472

RE: Appeal of Freedom of Information Act (“FOIA”) Request #ES15-001704

Dear Mr. Malamud:

This responds to your letter dated May 4, 2015 (received by this office for action on May 14, 2015), in which you appeal the agency’s April 16, 2015 response to your Freedom of Information Act (FOIA) request.

Original FOIA Request

In your FOIA request, dated April 1, 2015, you requested a copy of ANSI/RESNA Standard WC/Vol. 1 –1998, Section 13, “Wheelchairs: Determination of Coefficient of Friction of Test Surfaces” (referred to as “ANSI Standard” for purposes of this appeal) which is incorporated by reference in 49 CFR § 571.5 and used in 49 CFR § 571.403.

FOIA Response

By letter dated April 16, 2015, the agency responded to your FOIA request and informed you that “because NHTSA adheres to U.S. copyright law in its dissemination practices, NHTSA is unable to disclose the document you seek.” Additionally, the agency stated that you must request a copy of the document directly from the American National Standards Institute (ANSI).

FOIA Appeal

By letter dated May 4, 2015, you appeal the agency’s decision to withhold the document due to copyright law. You state that “NHTSA’s denial did not state any exemptions.” You contend that “no exemption applies to the requested record.” You also state that as the Agency’s response mentioned copyright law, it is suggesting that the record is exempt under FOIA Exemption 3 and that the Copyright Act does not qualify as an Exemption 3 statute.

Agency Decision on Appeal

The document you seek is part of an ANSI voluntary consensus standard incorporated by reference under 49 CFR § 571.5 for use in 49 CFR § 571.403. Such voluntary consensus standards, created by organizations outside the Federal Government, are protected under U.S. copyright law. *See* 17 U.S.C. § 102(a). The Copyright Act gives the copyright holder exclusive right to disseminate his work by sale, lease or rental. *See* 17 U.S.C. § 106.

In accordance with the *National Technology Transfer and Advancement Act of 1995* (Pub. L. No. 104-113) and REVISED OMB CIRCULAR A-119, NHTSA incorporated the ANSI standard into FMVSS 403 in lieu of developing a unique government standard. OMB has made clear that, when using a voluntary consensus standard in this manner, NHTSA is required to “observe and protect the rights of the copyright holder.” A-119, ¶ 6J. Furthermore, Federal courts have declined to hold invalid the copyrights of privately authored standards on the grounds that they have been incorporated by reference in a law. *See e.g., Practice Mgmt. Info. Corp. v. Am. Med. Ass’n*, 121 F.3d 516 (9th Cir. 1997), *modified*, 133 F.3d 1140 (9th Cir.), *cert. denied* 119 S. Ct. 40 (1998); *CCC Info. Servs., Inc. v. MacLean Hunter Mkt. Reports, Inc.*, 44 F.3d 61, 73-74 (2d Cir. 1994); *Veeck v. S. Bldg. Code Congress Intern., Inc.*, 293 F.3d 791, 805 (5th Cir. 2002) (noting that copyrighted works “do not ‘become law’ merely because a statute refers to them.”).

I have reviewed the Agency’s initial response to your FOIA request for the ANSI standard incorporated by reference into FMVSS 403 in light of the requirements of the FOIA and relevant case law. For the reasons set forth below, I affirm the agency’s decision to withhold the document at issue on the grounds that it is copyrighted material protected from disclosure by FOIA Exemption 4.

Exemption 4 provides that “trade secrets and commercial or financial information obtained from a person and privileged or confidential” need not be disclosed pursuant to a FOIA request. 5 U.S.C. § 552(b)(4). This exemption is intended to protect the interests of both the government and submitters of information. *See Nat’l Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 767-70 (D.C. Cir. 1974). Exemption 4 applies to this copyrighted document, provided it contains information that is (1) commercial, (2) obtained from a person, and (3) confidential. *See* § 552(b)(4).

Under Exemption 4, the Agency first must determine whether the information is commercial or financial. Records are commercial as long as the submitter has a “commercial interest” in them. *Pub. Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983). *Id.* ANSI is a nonprofit membership organization that administers and coordinates the voluntary standardization system in the United States. ANSI clearly has a commercial interest in its standards because it is primarily the revenue generated by such sales that funds the organization and its ongoing development of new standards. *See* ANSI, *Why Voluntary*

Consensus Standards Incorporated by Reference into Federal Government Regulations are Copyright Protected.

Second, the Agency must determine whether the information was obtained from a person. In this context, the term person refers not only to individuals, but also to a wide range of entities including corporations, banks, state governments, and public or private organizations other than an agency. *Nadler v. FDIC*, 92 F.3d 93, 95 (2d Cir. 1996). Prior to drafting 49 CFR § 571.5 and 49 CFR § 571.403, NHTSA purchased a copy of the ANSI standard at issue in order to reference it. For this reason, I find that the requested information was obtained from a person.

Third, the Agency must determine whether the information is privileged or confidential. Commercial information is confidential under Exemption 4 if its disclosure would either “(1) ... impair the Government's ability to obtain necessary information in the future; or (2) ... cause substantial harm to the competitive position of the person from whom the information was obtained.” *Pub. Citizen*, 704 F.2d at 1290-1291 (quoting *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C.Cir.1974)). Under the second prong of this test—the one at issue here—the Agency is not required to conduct a sophisticated economic analysis of the likely effects of disclosure. Rather, a finding by NHTSA that there is ‘[a]ctual competition and the likelihood of substantial competitive injury’ is sufficient to bring commercial information within the realm of confidentiality. Here, I find that dissemination by NHTSA of a copyrighted standard would cause substantial competitive injury to ANSI, an organization whose operations are funded, in large part, by the sales of its standards.

As the ANSI standard sought by the appellant is commercial in nature, obtained from a person and confidential, it falls within the scope of Exemption 4 and was properly withheld.

For the reasons detailed above, I deny your appeal.

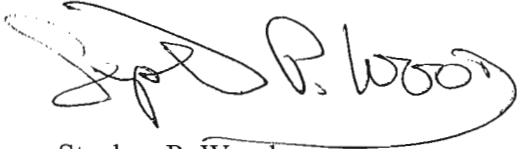
Nevertheless, while we cannot disseminate the copyrighted ANSI standard at issue, a copy of the standard is publicly available for viewing at:

- NHTSA’s Technical Reference Library, located at Technical Information Services, National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE, East Building (E12-100), Washington, DC 20590;
- The Office of the Federal Register; and
- <http://ibr.ansi.org/>.

I am the person responsible for this decision. It is administratively final and has been concurred in on behalf of the General Counsel of the Department of Transportation by Claire

McKenna, an attorney on her staff. If you wish to seek review of my decision, you may do so in the U.S. District Court for the District of Columbia or in the district where you reside, have your principal place of business, or where the records are located. 5 U.S.C. § 552(a)(4)(B).

Sincerely,

A handwritten signature in black ink, appearing to read "S.P. Wood", with a large, sweeping flourish underneath.

Stephen P. Wood
Acting Chief Counsel