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Public Works for a Better Government

May 28, 2015

VIA EMAIL AND FIRST CLASS MAIL

U.S. Department of Labor - OSHA
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. 247616

Dear FOIA Officer:

This letter is an appeal from the April 30, 2015, denial of a Freedom of Information Act (FOIA) request that I sent to the Occupational Safety and Health Administration (OSHA) on behalf of Public.Resource.Org on April 1, 2015. That request sought a copy of the American National Standards Institute (ANSI) standard B175.1 – 1991, titled *ANSI B175.1–1991, Safety Requirements for Gasoline-Powered Chain Saws*, which is incorporated by reference in [29 CFR 1910.6](#) and used in [29 CFR 1910.266\(e\)\(2\)](#).

On April 30, 2015, in a letter signed by Amanda L. Edens, Director of the Directorate of Technical Support and Emergency Management, OSHA denied the request. The letter stated: “We are denying your request under *Exemption 4* of FOIA, which protects, ‘trade secrets and commercial or financial information obtained from a person privileged or confidential.’ Where OSHA has in its possession documents that are provided by the private sector, the Agency is obligated to determine if the release of those documents under FOIA would lead to financial damage to the source. We have, as required by Executive Order 12600, contacted a company which markets the ANSI standard you requested and they have indicated that they do foresee a potential harm to their business. OSHA finds that their objections have merit; therefore, is denying your FOIA request under *Exemption 4* of FOIA.”

Copies of my [April 1, 2015 request](#) and OSHA’s [April 30, 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 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)

The requested record also cannot be considered secret or confidential because it has been released to the public by ANSI itself. OSHA’s letter states that “one can obtain a copy” of the requested record by purchase through the IHS Standards Store. The IHS Standards Store lists the price of the 1991 version of ANSI B175.1 as \$54 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 an ANSI 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). ANSI’s sale of the requested record on the open market means that the record is not confidential.

OSHA’s denial letter stated that Exemption 4 applies to the requested record because the company that sells it “foresee[s] a potential harm to their business” if the record is released. 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 ANSI actually has any competitors. Even if it does, however, ANSI would not face competitive harm from the release of the requested record because competitors can already access the record either by inspecting it at a government office or by purchasing it on the open market.

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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cc: David Halperin
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