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Public Works for a Better Government

May 5, 2015

Pipeline and Hazardous Materials Safety Administration
Office of the Chief Counsel
Attn: FOIA Appeal
1200 New Jersey Avenue, SE., Room E27-314
Washington, DC 20590
PHMSA.FOIA@dot.gov

RE: FOIA Appeal, FOIA Control No: 2015-009
VIA EMAIL AND FIRST CLASS MAIL

Dear Chief Counsel:

This letter is an appeal from the April 16, 2015, denial of a Freedom of Information Act (FOIA) request that I sent to the Pipeline and Hazardous Materials Safety Administration (PHMSA) on behalf of Public.Resource.Org on April 1, 2015. That request sought a copy of 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 is incorporated by reference in **49 CFR 171.7** and used in **49 CFR 179.100-9** et seq.

On **April 16, 2015**, in a letter signed by Madeline M. Bush, FOIA Officer, PHMSA denied the request. The letter stated:

*The Freedom of Information Act (FOIA) does not apply to these records because the records are “made available in a reading room” and/or are otherwise “published and offered for sale.” See **49 C.F.R. §7.21(b)(2), (3)**. PHMSA has made all the materials it proposes to incorporate by reference available in the Office of Hazardous Materials Safety’s Office of Hazardous Materials Standards, East Building, 1200 New Jersey SE, Washington, DC 20590-0001. For information on how to view this material in the Office of Hazardous Materials Standards, call 1-800-467-4922, or go to: <http://www.phmsa.dot.gov>. In addition, materials incorporated by reference are on file at the National Archives and Records Administration (NARA). For information on the availability of this material, refer to NARA’s website at http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html. Alternatively, you may purchase the publications at <https://www.aarpublishations.com/>.*

Copies of the **April 1, 2015 request** and PHMSA’s **April 16, 2015 denial** are enclosed with this appeal.

We are appealing the denial of the FOIA request because the record is an agency record that is not available under **5 U.S.C. § 552(a)(1) or (2)**, and no exemption applies to it. Accordingly, the record must be released under **5 U.S.C. § 552(a)(3)**.

In its response letter, PHMSA cites **49 C.F.R. § 7.21(b)**, which states in relevant part that DOT's FOIA regulations do not apply to records "published and offered for sale" or "made available in a reading room." The question here, however, is not whether DOT's FOIA regulations apply; it is whether FOIA itself applies. The regulations cannot exempt information from disclosure or exclude information from FOIA's reach unless the statute exempts or excludes that information. It is thus necessary to look at the statute's requirements.

Paragraph (a)(3) of FOIA, 5 U.S.C. § 552(a)(3), provides that records must be made available in response to a FOIA request unless they are already made available under paragraphs (a)(1) or (a)(2) of FOIA, 5 U.S.C. § 552(a)(1) & (a)(2). Paragraph (a)(1) requires certain documents to be published in the Federal Register, and paragraph (a)(2) requires certain other documents to be made available in a public reading room. We understand PHMSA, in stating that FOIA does not apply because the records are available in a reading room, to be stating that the information is available under paragraph (a)(2). However, paragraph (a)(2) requires records created after 1996, such as the requested record here, to be made available "by electronic means." PHMSA's response letter did not indicate that the requested record was available in an electronic reading room, only at PHMSA's and NARA's physical locations. Because the requested record was created after 1996, but is not available by electronic means, it is not available under paragraph (a)(2), and that paragraph does not provide a reason not to respond to a FOIA request.

Further, to be considered available under Paragraph (a)(2), records must be available for "public inspection and copying." PHMSA's letter provides information on how to view the document in its bricks-and-mortar reading room, but it does not indicate whether it will let the public copy the document. If not, then, for this reason as well, the record is not available in a reading room under paragraph (a)(2).

In addition to arguing that the record is in a reading room, PHMSA's letter stated that the records are not covered by FOIA because they are "published and offered for sale." We understand this argument, as well, to be an argument that the records are available under paragraph (a)(2), because that paragraph contains a provision stating that records that would ordinarily need to be available in a reading room do not need to be placed there if they are "promptly published and copies offered for sale." All that provision means, however, is that the agency does not need to place materials that are promptly published and offered for sale in its reading room in order to comply with paragraph (a)(2). It does not mean that records that are not placed in the reading room are "available" under (a)(2).

Moreover, FOIA governs how *agencies* make records available to the public. Thus, to be considered "published and...offered for sale," under (a)(2), the record would need to be published and offered for sale *by the agency*. See *U.S. Dep't of Justice v. Tax Analysts*, **492 U.S. 136, 152** (1989) ("The disclosure requirements set out in subsections (a)(1) and (a)(2) are carefully limited to situations in which the requested materials have been previously published or made available by the *agency itself*."); See also U.S. Department of Justice, Office of Information. Policy, *Guidance on Submitting Certification of Agency Compliance with FOIA's Reading Room*

Requirements (June 25, 2008) (“[R]ecords which are published and offered for sale by an agency are excluded from the definition of Reading Room records.” (emphasis added)). Agencies are not freed of their responsibility to make records available under FOIA anytime a private entity decides to publish and sell governmental records. Here, because neither PHMSA nor any other agency offers the requested record for sale, the record is not “published and...offered for sale” for the purposes of paragraph (a)(2).

In any event, to the best of our knowledge, the requested record is not currently “offered for sale” even by the American Association of Railroads (AAR). PHMSA’s response letter directed us to AAR’s website, www.aarpublications.com, which offers for sale a 2014 edition of the *AAR Manual of Standards and Recommended Practices, Section C—Part III* for \$399.

As far as we can tell, however, AAR does not offer for sale the December 2000 edition, which is the record we requested. On April 3, 2012, I wrote by email 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, 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.

Because it has been incorporated by reference, the requested record is part of the agency’s binding law. As such, releasing this record 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[.]”). The public should have access to this record containing the law it is required to follow and that protects it from dangers.

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 FOIA. Should you have any questions regarding this appeal, please feel free to contact me at (707) 827-7290.

With best regards,

Carl Malamud
Public.Resource.Org

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