

# EXHIBIT X

Case No. 1:14-cv-00857-TSC-DAR



# National Archives and Records Administration

## Office of the Federal Register

August 3, 2009

Mr. Carl Malamud  
President & CEO  
Public.Resource.org

Dear Mr. Malamud:

I am responding to your Freedom of Information Act (FOIA) request. In your letter you request copies of all technical standards incorporated by reference into the Code of Federal Regulations (CFR).

Under the FOIA, Federal Register publications, including the daily *Federal Register* and the CFR are not subject to the request for records provisions of the law. See 5 U.S.C. 552(a)(3)(A) (FOIA requests do not apply to records made available through the CFR under 5 U.S.C. 552(a)(1)). Additionally, the FOIA 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." See 5 U.S.C. 552(a)(1). Because these standards are deemed published in the *Federal Register* when the Director approves agencies incorporation by reference requests these standards are not subject to the request provision of the FOIA.

As you correctly point out in your letter, the Director of the Federal Register established regulations in 1 CFR part 51 that govern the incorporation by reference approval process. As part of this process, the standard must be readily available and useable to the class of persons affected by the regulation. 1 CFR 51.7(a)(4). In addition, section 51.9(b)(4) requires that agencies "make an official showing" that the publication is available by setting out in the regulation text where and how copies of the standards may be inspected and obtained for the "maximum convenience of the user." 1 CFR 51.9(b)(4). As stated in the OFR regulations, agencies are to list the publisher information so that regulated entities can purchase a copy of the standard that has been incorporated by reference. 1 CFR 51.9. Additionally, agencies need to list contact information for the agency and for the OFR so that the class of affected parties may inspect the incorporated materials either at the agency issuing the regulation or at the OFR. See, 1 CFR 51.3(a)(3) and 51.9(b)(4). While the standards themselves are not set out in their entirety in the CFR text, there is enough information set out in the regulation text that affected parties can obtain or inspect these standards in order to comply with the regulation.

Contrary to your suggestions, there is no federal law, regulation, or Presidential memorandum that requires standards incorporated by reference to be set out in full text in the CFR or posted verbatim on the National Archives and Records Administration

U.S. mail address: 700 Pennsylvania Avenue, NW, Washington, DC 20408-0001  
Office location: 800 North Capitol Street, NW, Suite 700, Washington, DC 20002-4244  
Federal Register web sites: [http://www.archives.gov/federal\\_register](http://www.archives.gov/federal_register) and <http://www.gpoaccess.gov/nara>

(NARA) website. As discussed above, the FOIA provides that the materials approved for incorporation by reference into the CFR are "deemed published in the Federal Register." The requirements for incorporation by reference approval clearly state that agencies must provide information for purchase or examination of the materials; under these requirements, publisher information, including phone numbers and web-sites, are set out in the regulation text. Additionally, agency contact information is provided in the regulation text so that affected parties can contact the agency directly regarding the incorporated standard. Thus, materials incorporated by reference are reasonably available to those affected by the regulations because the regulations clearly state at least three entities from which the materials can be either purchased or examined.

As you note in your letter, we do not distribute copies of materials incorporated by reference. We do allow individuals and entities to examine these materials in our office. We have also posted detailed instructions on how to request an appointment with our office to examine IBR'd materials and the locations where the materials are housed. These instructions to examine these materials can be found at <http://www.archives.gov/federal-register/cfr/ibr-locations.html#find>.

Please note that beginning a few years ago, the OFR began accessioning materials incorporated by reference to our parent agency, NARA, under our approved records schedule. This means that some of the materials you may wish to inspect are located at other NARA facilities. We have posted information on our records schedule on our website. <http://www.archives.gov/federal-register/cfr/ibr-locations.html#find>. If you have questions regarding where certain standards are stored, please contact the Legal Affairs and Policy staff, who maintain box indexes of accessioned standards incorporated by reference into the CFR. You may contact the legal staff at the OFR by telephone 202-741-6030 or email [fedreg.legal@nara.gov](mailto:fedreg.legal@nara.gov).


Because of the large amount of materials you are requesting to examine and the limited staff resources at our office, we strongly recommend that you contact the agency that incorporated the materials to examine them at their offices. However, if you wish to review the materials at the OFR, please contact the Legal Affairs and Policy staff to make prearrangements to inspect our holdings.

We are aware of the 5<sup>th</sup> Circuit's decision in *Veeck v. Southern Building Code Congress*, 293 F.3d 791 (5<sup>th</sup> Circuit 2002). We follow NARA's policy as set out in its regulations on archived copyrighted materials. See, 36 CFR 1254.62. Although many of our library holdings are in the public domain as products of employees or agents of the Federal Government, some documents incorporated by reference do or may have copyright protection. You are responsible for obtaining any necessary permission for use, copying, and publication from copyright holders and for any other applicable provisions of the Copyright Act (Title 17, United States Code).

Although these IBR materials are available to the public and will be made available to you for examination in our office as described above, this letter constitutes a denial of your FOIA request. If you want to appeal the decision of the Office of the Federal Register, you must put your appeal in writing and send it to:

Deputy Archivist of the United States  
National Archives & Records Administration  
(ATTN: FOIA Appeals Staff)  
Room 4200, 8601 Adelphi Road  
College Park, MD, 20740-6001.

Sincerely,

  
RAYMOND A. MOSLEY  
Director of the Federal Register

U.S. mail address: 8601 Adelphi Road, College Park, MD 20740-6001  
Office location: 800 North Capitol Street, NW, Suite 700, Washington, DC 20002-4244  
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