

Comment from Senior Fellow Peter L. Strauss in response to Request for Information for
Disclosure of Agency Legal Materials
May 17, 2022

Among the agency records that should be considered to be “agency legal materials” are industrial standards that, with the permission of the Office of the Federal Register have been “incorporated by reference” as binding legal obligations. Section 552 of the Freedom of Information Act permits agencies to adopt binding regulations in this fashion without requiring that those standards be freely available to the regulated bodies they govern or to the public who may be interested in the adequacy of the protection they provide. OFR regulations provide some incentive to their general availability, particularly during the notice and comment process that attends their adoption, but do so inadequately. Even during the notice and comment process, commenters may be obliged to obtain relevant text from the websites of the organizations responsible for their adoption, and may be limited in the freedom with which they can capture text to inform their commentary, or to the data and organizational reasoning underlying the standard sought to be incorporated by reference.

The statutory language arose at a time when these standards were available only in paper copies, often voluminous, and when it was imagined that commercial publishers (like Commerce Clearing House) would be likely to assure library access to them.

In the electronic age, any concern that the pages of the Federal Register would be swamped if these materials had to be published in them has become irrelevant, and it has become clear that the expected publication of adopted standards by commercial publishers has not occurred. The only "guarantee" of public access remains the ephemeral requirements that single copies of the standards be kept in the National Archives and in the adopting agency's physical library. The result has been the creation of massive amounts of secret law. Binding public legal obligations should be freely available to the regulated and to the general public on agency websites. Increasingly it is being recognized, as it should be, that private organizations have no claim to copyright public law; or, to put essentially the same proposition in another way, that an agency's incorporation of a standard -- frequently just an excerpt from a larger body of standards private standards organizations may have adopted -- can be treated as a "fair use" of that material.

These standards that have been incorporated by reference are legal materials agencies are not making publicly available, and they would be valuable to all in a legal system that abjures secret law. Availability in an agency's electronic library, which has in effect replaced its physical library and which creates possibilities of universal access for all who may be interested, would be adequate to create public availability. The obvious and simple means to accomplish this would be to create links between, first, the proposal to incorporate a standard as a binding legal obligation and, then, the ultimate regulation incorporating the standard by reference to the standard itself, in a published format permitting easy capture by any interested to do so.