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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

PUBLIC.RESOURCE.ORG, INC., Petitioner, v. CALIFORNIA OFFICE OF ADMINISTRATIVE LAW, and the CALIFORNIA BUILDING STANDARDS COMMISSION Respondents.	Case No. 34-2021-80003612 **PUBLIC.RESOURCE.ORG, INC.'S OPPOSITION TO NATIONAL FIRE PROTECTION ASSOCIATION, INC. AND INTERNATIONAL CODE COUNCIL, INC.'S MOTION TO INTERVENE** Date: August 27, 2021 Time: 10:00 a.m. Dept.: 27 Judge: Hon. Steven M. Gevercer Filed: March 17, 2021

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I. INTRODUCTION

In this public records petition, Public.Resource.Org ("Public Resource") seeks a complete electronic copy of the California Code of Regulations ("CCR") as maintained by the state agencies charged with administering the CCR. National Fire Protection Association, Inc. ("NFPA") and International Code Council, Inc. ("ICC") seek to intervene to prevent the State of California from providing a copy of its own laws to Public Resource because they claim to own copyrights in parts of California's laws. Their copyright ownership claim is mistaken, and even if it were valid, it still would not be a proper basis for intervention. NFPA and ICC therefore fail to satisfy the legal standards for both mandatory intervention and permissive intervention.

First, mandatory intervention is unwarranted because NFPA and ICC lack the requisite interest in this proceeding. They do not own copyrights in the laws of California because model codes enter the public domain when they are enacted as law. And even if they could assert ownership of copyrights in California's laws (and they cannot), they still would have no valid basis to intervene. They argue that Public Resource intends to infringe their alleged copyrights by copying and disseminating the CCR, but this argument fails because the State may not withhold a public record "based upon the purpose for which the record is being requested" or the motives of the party making the request. Cal. Gov't Code § 6257.5. NFPA and ICC also fail to show that the disposition of this action would impair their ability to enforce their alleged copyrights, because the outcome here has no bearing on the alleged copyrights NFPA and ICC are interested in enforcing. And, in any event, NFPA and ICC's interest is adequately represented by the respondents in this action.

Second, the Court should not allow permissive intervention because NFPA and ICC have no direct and immediate interest in this proceeding. If the Court rules in favor of Public Resource and directs the agencies to disclose the CCR, that disclosure in itself could not infringe any alleged copyright in the CCR. Copyright infringement could only occur if there is a separate, intermediate step, such as impermissible copying or distribution. California case law is clear on this issue: this type of indirect interest cannot satisfy the legal standard for permissive intervention. Additionally, permissive intervention is inappropriate because it would unduly

enlarge the issues in this litigation (by introducing copyright issues that the Court need not address to resolve the underlying dispute), and NFPA and ICC's reasons for intervening do not outweigh the parties' interests in resolving this proceeding without third-party intervention.

II. BACKGROUND

Public Resource is a California nonprofit that seeks to improve public access to government records and primary legal materials. *See generally* Pet'n for Writ of Mandate, filed Mar. 17, 2021, at 7–13. In December 2020, Public Resource submitted requests under California's Public Records Act ("PRA") to the Office of Administrative Law ("OAL") and the Building Standards Commission ("BSC") seeking electronic copies of the CCR. The agencies refused on several grounds, including that the CCR is available online on a proprietary platform operated by West; paper copies of the CCR are available for inspection at certain public libraries; print editions of the CCR can be purchased (in whole or part) from private entities; parts of Title 24 of the CCR are available online on various private websites (with restrictions on their access and use); and BSC "does not have the publishing rights to Title 24 and therefore cannot provide free copies to the public" because "Title 24 is based on an includes model codes produced by the publishing entities, and they then publish California's codes, retaining copyright protections." Pet'n for Writ of Mandate, Ex. G.

In response, Public Resource explained that these justifications do not relieve the agencies of their obligations to disclose public records under the PRA, including the duty to provide records in "any electronic format in which it holds the information" and any format "used by the agency to create copies for its own use or for provision to other agencies." Cal. Gov't Code § 6253.9(a)(1)–(2). After the agencies continued to refuse, Public Resource filed a petition asking this Court to issue a writ commanding OAL and BSC to produce electronic copies of the CCR.

NFPA and ICC are private entities that facilitate the development of building codes, electrical codes, and other technical standards. *See generally* Mot. to Intervene ("Mot."), filed May 24, 2021, at 4–5. Some of the standards that NFPA and ICC publish are incorporated by reference in the CCR. For example, elements of NFPA's National Electrical Code are

incorporated by reference in the California Electrical Code at Title 24, Part 3 of the CCR,[1] and elements of ICC's International Fire Code are incorporated by reference in the California Existing Building Code at Title 24, Part 10 of the CCR. This is no accident; NFPA and ICC actively promote the incorporation of those standards into state law. Because these standards are incorporated by reference in the CCR, they constitute binding law that California citizens must understand and obey. Among other revenue sources, NFPA and ICC make money by selling access to these parts of the law.[2]

NFPA and ICC now seek to intervene in this proceeding to attempt to prevent OAL and BSC from disclosing the CCR to the public.

III. ARGUMENT

A. There is no basis for mandatory intervention.

A court must allow a third party to intervene when (1) it files a timely motion to intervene, (2) it has an interest in the property or transaction at issue, (3) it shows that the disposition of the action may impair its ability to protected that interest, and (4) its interest is not adequately represented by an existing party. Cal. Code Civ. Proc. § 387(d)(1); *Edwards v. Heartland Payment Sys., Inc.*, 29 Cal. App. 5th 725, 732 (2018). Here, NFPA and ICC's motion is timely, but it fails to satisfy the other three factors.

1. NFPA and ICC lack the requisite interest in this proceeding.

NFPA and ICC do not have a legitimate interest in this case because they do not own copyrights in the laws of California. The CCR is created by agencies at the direction of the state legislature, and under the government edicts doctrine, "copyright does not vest in works that are (1) created by judges and legislators (2) in the course of their judicial and legislative duties."

[1] Every three years, NFPA's National Electrical Code undergoes an intensive review process in which several California government agencies participate under the guidance of BSC. The review process includes extensive hearings involving the participation of local governments and the public. The result is a heavily amended and revised document, which then becomes Part 3 of Title 24 of the CCR.

[2] Among several lucrative revenue streams—including training, certification, and accreditation—NFPA and ICC also make money by selling access to these parts of the law. *See, e.g.*, https://www.bostonglobe.com/metro/2017/03/12/fire-protection-association-nonprofit-doesn-mean-low-pay/ftUqM2eCbEbvFxfeAcMnZP/story.html (reporting that NFPA had amassed a $207 million cash surplus and that its president earned $4.1 million in one year).

Georgia v. Public.Resource.Org, Inc., 140 S. Ct. 1498, 1508 (2020) (holding that even though a state commission hired private publishers to draft annotations in the law, the finished work was not copyrightable due to the government edicts doctrine).

Even though it incorporates parts of certain model codes authored by private entities, the full text of CCR is unambiguously in the public domain. The Fifth Circuit has decided this very issue:

> The issue in this *en banc* case is the extent to which a private organization may assert copyright protection for its model codes, after the models have been adopted by a legislative body and become "the law". Specifically, may a code-writing organization prevent a website operator from posting the text of a model code where the code is identified simply as the building code of a city that enacted the model code as law? Our short answer is that as *law*, the model codes enter the public domain and are not subject to the copyright holder's exclusive prerogatives.

Veeck v. S. Bldg. Code Cong. Int'l, Inc., 293 F.3d 791, 793 (5th Cir. 2002) (*en banc*). Other courts across the country have reached the same conclusion. *See, e.g.*, *Int'l Code Council, Inc. v. UpCodes, Inc.*, No. 17 Civ. 6261 (VM), 2020 WL 2750636, at *7 (S.D.N.Y. May 27, 2020) (explaining that "a private party cannot exercise its copyrights to restrict the public's access to the law" and concluding that a plaintiff "cannot claim actionable infringement based only on Defendants' accurate posting of the [plaintiff's codes] as [a]dopted, which are essentially enacted state and local laws"); *Building Officials & Code Adm'rs v. Code Tech., Inc.*, 628 F.2d 730, 734 (1st Cir. 1980) ("The citizens are the authors of the law, and therefore its owners, regardless of who actually drafts the provisions, because the law derives its authority from the consent of the public, expressed through the democratic process."); *Am. Soc'y for Testing & Materials v. Public.Resource.Org, Inc.*, 896 F.3d 437, 451 (D.C. Cir. 2018) ("the express text of the law falls plainly outside the realm of copyright protection"). So too here: NFPA and ICC cannot use copyright to restrict the public's access to the CCR.

In addition, even if NFPA and ICC could show that they own valid copyrights in the laws of California (which, under federal law, they cannot), they would have no valid basis to intervene in this case. The only issue in this proceeding is whether Public Resource is entitled to a copy of the CCR in response to its PRA request. NFPA and ICC claim to have an interest because Public

Resource could subsequently reproduce or distribute copies of the CCR if it prevails in this action, which NFPA and ICC assert would implicate their alleged copyrights in the law. But under the PRA, an agency cannot withhold a public record "based upon the purpose for which the record is being requested." Cal. Gov't Code § 6257.5; *L.A. Unified Sch. Dist. v. Superior Ct.*, 228 Cal. App. 4th 222, 242 (2014) (citing *Connell v. Superior Ct.*, 56 Cal. App. 4th 601, 616 (1997)); *Caldecott v. Superior Ct.*, 243 Cal. App. 4th 212, 219 (2015); *Cnty. of L.A. v. Superior Ct. (Axelrad)*, 82 Cal. App. 4th 819, 826 (2000). The law is clear: "The motive of the particular requester in seeking public records is irrelevant, and the CPRA does not differentiate among those who seek access to them." *L.A. Unified*, 228 Cal. App. 4th at 242 (citing *Cnty. of Santa Clara v. Superior Ct.*, 170 Cal. App. 4th 1301, 1324 (2009), *as modified* (Feb. 27, 2009)).

The justification for this rule is that "[t]here is no practical way of limiting the use of the information, once it is disclosed, to the purpose asserted by the requestor." *Cnty. of L.A.*, 82 Cal. App. 4th at 826 (quoting *Hughes Salaried Retirees v. Adm'r of Hughes*, 72 F.3d 686, 693 (9th Cir. 1995)). Nor is there any way of "assuring that the information will not be used by the requestor for other purposes, or, for that matter, will not be used by third parties who manage to obtain the information once it has been disclosed to [the requestor]." *Id.*

Indeed, the PRA requires disclosure even when the "requesting party is a commercial entity using the information for strictly commercial purposes." *Connell*, 56 Cal. App. at 617. To be clear, Public Resource is not a commercial entity. Unlike NFPA and ICC, it does not sell access to the law; its mission is to make the law more accessible to the public. Regardless of how NFPA and ICC characterize Public Resource's activities, however, their arguments are unavailing because Public Resource's motives have no bearing on the PRA analysis. NFPA and ICC's purported interest in this proceeding—to protect their alleged copyrights from possible future infringement—is not a valid basis for intervention. Tellingly, NFPA and ICC cite no case law showing that this purported interest is sufficient. Nor can they, because no California court has permitted a third party to intervene based on claims that it owns copyrights in the public records at issue.

2. The disposition of this action will not impair NFPA and ICC's ability to enforce their alleged copyrights.

The adjudication of Public Resource's PRA request will have no effect on NFPA and ICC's ability to enforce their alleged copyrights. If Public Resource prevails, NFPA and ICC may continue to seek any remedy that copyright law provides.

Ignoring the extensive federal case law holding that there can be no copyright in the law, NFPA and ICC appear to argue that copyright infringement will inevitably occur if the state discloses the CCR to Public Resource. Mot. at 5, 9. Even if that were true (and it is not), it is not a basis to intervene. Whether or not the state agencies provide the requested electronic copy of the CCR has no immediate bearing on NFPA's and ICC's alleged copyrights.

NFPA and ICC's motion, the ultimate goal of which is to prevent OAL and BSC from releasing the CCR to the public, seeks to put the copyright cart before the PRA horse. This is not a proper basis for intervention because the outcome of these proceedings will have no impact on NFPA and ICC's ability to enforce their alleged copyrights, which could only be properly enforced in a federal action.[3] If Public Resource prevails in this action and the Court orders the agencies to disclose the CCR, no copyright infringement will have occurred (even assuming for the sake of argument that NFPA and ICC own valid copyrights in CCR). Any potential infringement can only occur *after* the agencies disclose the CCR to the public. And if Public Resource does not prevail and the State does not disclose the CCR, NFPA and ICC's concerns are moot. Either way, after the Court enters its judgment in this action, NFPA and ICC will remain free to seek an injunction (or any other available relief) in federal court if they have a legitimate claim for copyright infringement—which they do not, because, as discussed above, they cannot claim a copyright interest in the laws of the State of California.

3. Respondents adequately represent NFPA and ICC's interests.

As explained above, NFPA and ICC's purported interest in this litigation—to protect their

[3] Notably, since 2013, NFPA has been engaged in federal litigation with Public Resource regarding distribution to the public of standards incorporated by reference into law, and therefore NFPA and ICC are well aware of the correct avenues to seek an injunction for alleged copyright infringement. *Am. Soc'y for Testing & Materials v. Public.Resource.Org, Inc*., United States District Court for the District of Columbia, Case No. 1:13-cv-01215-TSC.

alleged copyrights from potential future infringement—is not a valid basis for intervention. But even it if were, the respondents in this proceeding—OAL and BSC—are capable of adequately representing their interest. NFPA and ICC contend that BSC has a contractual obligation not to disclose their allegedly copyrighted materials. Mot. at 9. They then assert, without explanation or support, that BSC lacks the ability to fulfill its contractual obligation. *Id.* There is simply no basis for this assertion, and it is undermined by the fact that the state agencies declined to provide the requested records in response to Public Resource's PRA requests. As a result, NFPA and ICC fail to carry their burden of showing that their interests are not adequately represented.

B. The Court should not allow permissive intervention.

Alternatively, a court has discretion to allow a third party to intervene when (1) it files a timely motion to intervene, (2) it has a direct and immediate interest in the litigation, (3) intervention will not enlarge the issues in the case, and (3) the reasons for intervention outweigh opposition by the existing parties. Cal. Code Civ. Proc. § 387(d)(2); *Edwards*, 29 Cal. App. 5th at 736. Here, NFPA and ICC's motion is timely but legally deficient.

1. NFPA and ICC have no direct and immediate interest in this proceeding.

As discussed above, NFPA and ICC lack a valid interest in this proceeding because they do not own copyrights in the CCR and because Public Resource's purpose for requesting the records is irrelevant to the PRA analysis. *See* section III.A.1.

In addition, the Court should not allow permissive intervention because NFPA and ICC's purported interest in this proceeding is too speculative and remote. Permissive intervention is appropriate only when a third party establishes that its interest is "direct and immediate." *Edwards*, 29 Cal. App. 5th at 736 (citing *Siena Ct. Homeowners Ass'n v. Green Valley Corp.*, 164 Cal. App. 4th 1416, 1428 (2008)). A "direct and immediate" interest exists when the moving party "will either gain or lose by the direct legal operation and effect of the judgment." *Siena*, 164 Cal. App. 4th at 1428 (quoting *City & Cnty. of S.F. v. State of Cal.*, 128 Cal. App. 4th 1030, 1037 (2005). Conversely, an interest is "consequential and thus insufficient for intervention when the action in which intervention is sought does not directly affect it although the results of the action

may indirectly benefit or harm its owner." *Id.*

Here, the result of this action will not directly affect NFPA or ICC. There are two possible outcomes of this writ proceeding: the Court will order the agencies to disclose the CCR, or it will not. Neither outcome will immediately and directly affect NFPA and ICC's alleged copyright interest. As NFPA and ICC concede, any alleged copyright infringement could occur only if their copyrighted works are subsequently unlawfully copied and disseminated in a way that violates federal law. Mot. at 5. And, critically, no copying or dissemination could occur as a result of the "direct legal operation" of the outcome of this action. *Siena*, 164 Cal. App. 4th at 1428. For any alleged copyright infringement to occur, there must be a separate, intermediate step constituting impermissible copying or distribution (or a violation of one of the other exclusive rights enumerated in 17 U.S.C. § 106). NFPA and ICC may be able to identify *indirect* interests flowing from the outcome of this proceeding—for example, they contend that a judgment in Public Resource's favor could lead to the CCR being disclosed to the public, which could enable members of the public to copy or disseminate it, which could impact the "market" for NFPA and ICC's products and their "incentive[s]" within that market. Mot at 10. But those potential effects do not justify intervention because they do not result from the direct legal operation of the judgment. Instead, if they happen at all, they would flow indirectly from the judgment's downstream effects. That is not enough to justify intervention. *See, e.g.*, *Royal Indem. Co. v. United Enters., Inc.*, 162 Cal. App. 4th 194, 204 (2008), *as modified* (May 7, 2008) (prospective intervenor's interest was insufficient where "the threatened injury will not inevitably result from the judgment but rather from something done afterwards, pursuant to or as a consequence of the judgment"); *City of Burlingame v. Cnty. of San Mateo*, 103 Cal. App. 2d 885, 890 (1951) (prospective intervenor's interest was "remote and consequential" and therefore insufficient); *City of Malibu v. Cal. Coastal Comm'n*, 128 Cal. App. 4th 897, 905 (2005) (prospective intervenors' interest was insufficient because it was based on remote and speculative harms to their property); *Siena*, 164 Cal. App. 4th at 1428 (a "consequential" interest in an action is not enough, even when the "results of the action may indirectly benefit or harm its owner" (citation omitted)).

Courts permit intervention where the judgment itself would directly affect the proposed

intervenors' interests. For example, a court allowed employee unions to intervene in a PRA case involving requests for public records that would disclose the salaries of government employees. *Int'l Fed'n of Pro. & Tech. Eng'rs, Loc. 21, AFL-CIO v. Superior Ct.*, 42 Cal. 4th 319, 328 (2007). Similarly, a court allowed bar associations to intervene in a PRA case involving requests for state bar admissions records that would disclose applicants' undergraduate GPAs, LSAT scores, bar exam performance, and other information. *Sander v. State Bar of Cal.*, 26 Cal. App. 5th 651, 656–57 (2018). These cases are distinguishable in two ways.

First, in both cases, the judgment itself would have directly and immediately affected intervenors' interests. For example, employees' privacy interests would be directly affected as soon as their salary information is disclosed to the public. Here, by contrast, disclosure of the CCR would have no direct effect on NFPA or ICC. There may be *indirect*, downstream effects, but those are not enough to satisfy the legal standard for permissive intervention. And in that scenario, as explained above, NFPA and ICC would not be without remedy. If they believe copyright infringement has occurred (or will occur), they would remain free to pursue the full panoply of remedies that copyright law provides, including injunctive relief to prevent threatened infringement.

Second, the prospective intervenors in those cases cited PRA exemptions that would have prevented disclosure. *Sander*, 26 Cal. App. 5th at 657 (intervenors sought "to protect privacy and reputational interests" of bar applicants under Cal. Gov't Code § 6254(c), which exempts "personal, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy"); *Int'l Fed'n*, 42 Cal. 4th at 328–29 (intervenors sought to prevent disclosure of the salaries of government employees under Cal. Gov't Code § 6254(c)). In contrast, NFPA and ICC cite no PRA exemption here. The PRA is clear: public records must be disclosed in response to PRA requests "unless a statutory exception is shown." *City of San Jose v. Superior Ct.*, 2 Cal. 5th 608, 616 (2017) (citation omitted); Cal. Gov't Code § 6255(a). Thus, a proposed intervenor must tie its interest to a specific statutory exemption that would justify withholding the public record at issue. In some limited circumstances, copyright can be a basis to withhold public records in response to a PRA request, but only when expressly authorized by specific a specific

statutory provision. *See, e.g.*, *Cnty. of Santa Clara*, 170 Cal. App. 4th at 1333, 1335 (because no "express authorization to secure copyrights" existed for GIS data, the county could not assert copyright protection as a basis for nondisclosure); *City of Inglewood v. Teixeira*, No. CV1501815MWFMRWX, 2015 WL 5025839, at *4 (C.D. Cal. Aug. 20, 2015) (because the city could identify "no affirmative grant of authority that permits it to obtain and assert a copyright for the City Council Videos," the city could not withhold the videos on copyright grounds); *see also* Pet'n for Writ of Mandate at 16–17.

No such provision exists here. Accordingly, NFPA and ICC's alleged copyright interest has no relevance to whether OAL and BSC must disclose the CCR in response to Public Resource's request, and they have no basis to intervene.

2. NFPA and ICC's intervention will unduly enlarge the issues in this litigation.

NFPA and ICC seek to introduce an array of new issues into this proceeding, including whether they hold valid copyrights in parts of the CCR, whether disclosure of the CCR would have an impact on the market for their works or their incentives to develop new standards, and whether any of those interests provide a legal basis to compel the agencies to withhold the CCR from disclosure to the public.

There is no need for the Court to address these issues in order to resolve Public Resource's writ petition. Further, California courts are not the proper venues to address the questions of federal law that NFPA and ICC seek to introduce. Accordingly, intervention would unduly enlarge the issues in this litigation, which weighs against granting permissive intervention.

3. NFPA and ICC's reasons for intervention do not outweigh Public Resource's reasons for opposing intervention.

Ultimately, this case is about whether the State of California has an obligation to make its laws accessible to its citizens. Public Resource seeks nothing more than a complete electronic copy of the CCR, and in this writ proceeding, the Court will decide whether the agencies must produce the CCR in response to Public Resource's PRA requests. NFPA and ICC seek to intervene to prevent the public from accessing the law, based on the theory that they own

copyrights in parts of it. This is not a legitimate basis for intervention; rather, it is a peripheral concern that has no bearing on the legal issues at stake in this proceeding.

IV. CONCLUSION

NFPA and ICC have failed to satisfy the legal standards for mandatory and permissive intervention. Accordingly, Public Resource respectfully requests that the Court deny their motion to intervene.

Dated: August 16, 2021

COOLEY LLP

By: /s/ Joseph D. Mornin
Joseph D. Mornin

Attorneys for Petitioner
Public.Resource.Org, Inc.

PROOF OF SERVICE

I am a citizen of the United States and a resident of the State of California. I am employed in San Francisco County, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years, and not a party to this action. My business address is Cooley LLP, 3 Embarcadero Center, 20th floor, San Francisco, CA 94111-4004. On August 16, 2021, I served the documents described below in the manner described below:

- **PUBLIC.RESOURCE.ORG, INC.'S OPPOSITION TO NATIONAL FIRE PROTECTION ASSOCIATION, INC. AND INTERNATIONAL CODE COUNCIL, INC.'S MOTION TO INTERVENE**

☒ (BY OVERNIGHT MAIL – CCP § 1013(c)) I am personally and readily familiar with the business practice of Cooley LLP for collection and processing of correspondence for overnight delivery, and I caused such document(s) described herein to be deposited for delivery to a facility regularly maintained by for overnight delivery.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on August 16, 2021, at Oakland, California.

Adriana R. Vera