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VIA E-MAIL AND FIRST CLASS MAIL

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FOIA APPEAL  
General Counsel  
ATTN: Office of the Secretary  
U.S. Consumer Product Safety Commission  
4330 East West Highway  
Bethesda, MD 20814-4408

July 10, 2008

Re: Freedom of Information Act Request 08-F-00111: FOIA Appeal

Dear General Counsel:

On Jan. 31, 2008, Public Citizen submitted a Freedom of Information Act (FOIA) request to the Consumer Product Safety Commission (CPSC) seeking records the agency had received pursuant to Section 15 of the Consumer Product Safety Act (CPSA), and any tables, spreadsheets, or databases that include data on cases pertaining to 15(b) filings. *See* Enclosure 1. The request explained that we are particularly interested in documents that describe products that were subjects of Section 15(b) filings or refer to the dates upon which the manufacturer, the CPSC, or the public learned of hazards pertaining to the products. On June 10, 2008, CPSC denied Public Citizen's request in full, [*see* Enclosure 2], citing FOIA exemptions 3, 4, 5, 7(A), and 7(E), 5 U.S.C. §§ 552(b)(3), (4), (5), (7)(A), & (7)(E), and sections 6(a)(2), 6(b)(1), 6(b)(5), and 6(e)(1) of the CPSA, 15 U.S.C. §§ 2055(a)(2), b(1), b(5), & e(1). Few, if any, of the records in which we expressed particular interest can be withheld under these exemptions. This appeal will address the exemptions in the order in which they appeared in the denial letter.

First, CPSC cannot withhold the records in which we expressed particular interest in their entirety under Section 6(a)(2) of the CPSA, which concerns trade secrets and confidential commercial information. Although discrete portions of some of the requested records may contain trade secrets or other confidential commercial information, the portions that provide basic descriptions of products or reveal dates that manufacturers, CPSC, or the public learned of hazards are not trade secrets or confidential commercial information, and these portions could

easily be segregated from those that contain exempt information. Further, most Section 15(b) filings result in voluntary recalls. In fiscal year 2007, for example, the ratio of reports received by CPSC to recalls issued was 0.83, according to data that CPSC provided to Public Citizen; in FY 2006, the ratio was 0.97. Accordingly, it is no secret that CPSC learned of potential hazards associated with these products.

Second, Section 6(b)(1) does not provide CPSC with an excuse to withhold the requested information indefinitely. Section 6(b)(1) requires the agency to take reasonable steps prior to the disclosure of information that will identify a manufacturer to ensure the information is accurate and that its disclosure is fair and reasonably related to effectuating the purposes of the CPSA. Here, disclosure of the requested information would be fair under the circumstances and would effectuate the purposes of both the CPSA and FOIA. In accordance with 6(b)(1), CPSC should release the information in which we expressed particular interest once it has taken any required reasonable steps to ensure the accuracy of information that will identify a manufacturer. Those reasonable steps should not be difficult given that most of the information sought was furnished by manufacturers about their own products. CPSC should be able to reasonably assume that information manufacturers provided about their own products is accurate. The rest of the information sought concerns dates on which CPSC issued recalls, which the agency should easily be able to confirm.

CPSC also cannot withhold all of the requested records under Section 6(b)(5) of the CPSA, which, with certain exemptions, requires withholding of records submitted pursuant to Section 15(b). One of the exemptions, Section 6(b)(5)(b), permits disclosure of records in cases in which “the Commission has accepted in writing a remedial settlement agreement dealing with such product.” This applies to records regarding products that were voluntarily recalled. Typical negotiations between a manufacturer and the CPSC for a voluntary recall conclude with both parties agreeing to written terms for the recall. Where there is such a remedial settlement agreement, the records are not exempt from disclosure.

Further, Section 6(e)(1) of the CPSA is also inapplicable to the records in which we expressed particular interest. That section exempts from disclosure documents furnished to CPSC under Section 37 of the CPSA (which concerns products that were subjects of civil actions). The records in which we expressed interest were not furnished to CPSC under that section.

Turning to general FOIA exemptions, CPSC cannot withhold the records in which we expressed particular interest under FOIA Exemption 5, which permits the withholding of inter-agency or intra-agency memoranda covered by the deliberative process privilege. The deliberative process privilege does not apply to factual information, such as descriptions of products for which manufacturers reported potential hazards to CPSC and the dates on which the manufacturer, CPSC and the public were notified of such hazards, and such factual information is easily segregable from any portions of responsive documents that may be pre-decisional and deliberative.

Finally, CPSC cannot withhold the records under FOIA Exemption 7(a), which exempts law enforcement records that “could reasonably be expected to interfere with” law enforcement

proceedings, or FOIA Exemption 7(e), which exempts law enforcement records that “would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.” Only a small percentage of Section 15(b) filings even result in civil fines against manufacturers, let alone law enforcement actions. Moreover, the manufacturers already know all of the information in the records we are requesting; therefore, releasing that information cannot interfere with law enforcement proceedings against them or disclose any new information to them. Finally, it is difficult to see how release of records describing the products and providing the dates on which different entities learned of the hazards associated with the products could interfere with law enforcement proceedings at all or divulge any enforcement techniques.

Our request should make clear that we hope to learn from the responsive records the dates on which manufacturers, CPSC, and the public were informed about the safety hazards of products that were eventually recalled. If CPSC furnishes Public Citizen with a chart indicating the name of each product that was recalled since 1993, the date on which CPSC first learned about the potential hazard addressed in the recall, the date on which the manufacturer or other entity involved first received notice of the potential hazard addressed in the recall, and the date on which CPSC announced the recall, we likely will deem our request fulfilled.

CPSC’s 2009 Performance Budget Request appears to indicate that the agency has already compiled much of the data that Public Citizen seeks. For example, the Budget Request reports that 90 percent of product recalls under the agency’s “Fast Track” program are conducted within 20 days of agency notification; likewise, the agency has published a goal for FY 2008 of taking corrective action within 60 business days in 82 percent of the cases in which it makes a preliminary determination of a fire related hazard, and of taking corrective action within 35 business days in 88 percent of the cases in which it issues a notice of violation of regulated children’s products. The charts published in the Budget Request indicate that CPSC has maintained data for these categories of performance for several years. To the extent that CPSC’s data is less complete for earlier years, Public Citizen is willing to accept data in phases in order to expedite the receipt of data for the most recent years.

Once again, Public Citizen requests that all fees in connection with this FOIA request be waived in accordance with 5 U.S.C. 552(a)(4)(iii) because Public Citizen does not seek records for a commercial purpose and because disclosure “is in the public interest because it is likely to contribute significantly to public understanding of the operations and activities of the government.” Public Citizen is a nonprofit, research, litigation and advocacy organization that represents consumer interests before Congress, the executive branch, and the courts. We regularly publish reports based on information acquired through FOIA. We disseminate these reports free of charge via publication on our website, [www.citizen.org](http://www.citizen.org), and through various newsletters distributed to consumers, lawyers, academics, and other interested parties.

Accordingly, Public Citizen requests that you waive all fees for locating and duplicating the requested records. If you deny this request for a fee waiver, then please advise us of the amount of any proposed search and reproduction charges above \$25 before those activities are carried out.

I look forward to hearing from you soon. Please contact me with any questions or if you want to further discuss this request.

Sincerely,

A handwritten signature in black ink that reads "Taylor Lincoln". The signature is written in a cursive style with a long horizontal line extending from the top of the "T".

Taylor Lincoln  
Research Director  
Public Citizen's Congress Watch Division