

U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207

ANNUAL REPORT
CALENDAR YEAR 1996

THE ADMINISTRATION OF
THE FREEDOM OF INFORMATION ACT

MARCH 1, 1997

Transmitted in Accordance with Section 552(e)
of the Freedom of Information Act to:

The President of the Senate
Speaker of the House of Representatives

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This document reports on the activities of the Consumer Product Safety Commission in administering the Freedom of Information Act (FOIA), 5 U.S.C. § 552 et seq., during calendar year 1996. This report is submitted in accordance with the provisions of section 552(e) of the FOIA.

I. TOTAL NUMBER OF INITIAL DENIALS OF REQUESTS FOR RECORDS

During calendar year 1996, the Consumer Product Safety Commission responded to 15,351 formal requests made pursuant to the Freedom of Information Act. There were 394 initial determinations not to comply in whole or in part with requests for Commission records, invoking the FOIA Exemptions from disclosure a total of 629 times.

II. AUTHORITY FOR EACH SUCH DETERMINATION

A. Exemptions from Disclosure in the FOIA

(1) Section 552(b)(2) - matters related solely to the internal personnel rules and practices of an agency.

Exemption 2 was cited in one partial denial involving a request for the scheduling calendars of the Chairman and Commissioners. The requested calendars were substantially released with portions removed that would have revealed personal and personnel information and information identifying manufacturers or their products. (Exemptions 3 and 6 were also cited in the response.)

(2) Section 552(b)(3) - matters that are specifically exempted from disclosure by statute, provided that the statute requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue or establishes particular criteria for withholding or refers to particular types of matters to be withheld.

Exemption 3 was cited in 401 partial denials and 63 full denials invoking sections of the Consumer Product Safety Act (CPSA), as explained in Part II. B. of this report.

(3) Section 552(b)(4) - matters that are trade secrets and commercial or financial information obtained from a person and privileged or confidential.

Exemption 4 was cited in 80 partial denials and 14 full denials. The denials involved requests for information pertaining to Commission inspections of firms, Commission files on possible product hazards under section 15 of the CPSA and other Commission files containing submitted proprietary data. Substantial portions of the materials requested were disclosed. Deletions were made of information determined to be proprietary or confidential, consisting of sales volumes or other financial totals, manufacturing processes, formulas, supplier and dealer identities, pricing and distribution information, and technical and engineering specifications. (FOIA Exemption 3 was also cited in all responses, Exemption 5 in 40 responses, Exemption 7(A) in 22, and Exemption 7(E) in 27 responses.)

(4) Section 552(b)(5) - matters that are inter-agency or intra-agency memoranda or letters and privileged.

Exemption 5 was the basis for 94 partial denials and 30 full denials. The denials involved staff advice to the Commission on specific enforcement, regulatory and policy matters or staff analysis and attorney-work product related to enforcement matters or staff and attorney opinions and advice to the Commission relating to the administrative decision-making process prior to agency action. In the partial denials, requested records concerning the matters were released after deleting portions or entire documents containing legal analyses, enforcement strategies, recommendations and predecisional advice. (Of these denials, FOIA Exemption 3 was also cited in 78 responses, Exemption 4 in 43, Exemption 7(A) in 65, Exemption 7(D) in one and Exemption 7(E) in 72.)

(5) Section 552(b)(6) - matters pertaining to a clearly unwarranted invasion of personal privacy.

Six partial denials and two full denials were based on Exemption 6. Three of the denials involved requests for investigation reports of incidents involving deaths or other personal information about injured persons contained in the reports. The persons involved or their families had requested either confidentiality for their identities or consent had not otherwise been obtained. One partial denial involved a request seeking the scheduling calendars of the Chairman and Commissioners that contained personal and personnel information. Four of the denials involved a third party request for employees' personnel files. (Exemption 2 was cited in one response and Exemption 3 was also cited in four responses.)

(6) Section 552(b)(7)(A) - pertaining to law enforcement investigatory records, the disclosure of which could reasonably be expected to interfere with enforcement proceedings.

Exemption 7(A) was the basis for 41 partial denials and 30 full denials. All of the denials involved requests for investigatory files on active enforcement matters, on-going corrective actions or product hazard investigations regarding specific firms. In instances where partial denials occurred, substantial portions of the files were released after deleting portions and documents constituting enforcement strategies and legal analyses and advice. (Exemption 3 was also cited in 31 responses, Exemption 4 in 22 responses, Exemption 5 in 65 responses and Exemption 7(E) in ten responses.)

(7) Section 552(b)(7)(D) - pertaining to law enforcement investigatory records and confidential sources.

One partial denial was based in part on Exemption 7(D). The denial involved request for the identities of the sources of trade complaints against specific firms and confidential statements made during investigations. (Exemptions 3, 4, 5 and 7(A) were also cited in the denial.)

(8) Section 552(b)(7)(E) - pertaining to law enforcement investigatory records and investigative techniques, procedures and guidelines.

Exemption 7(E) was the basis for 55 partial denials and three full denials. The denials involved materials from investigatory files, the disclosure of which would reveal investigative techniques and procedures, as well as enforcement strategies and guidelines, and would also interfere with on-going enforcement proceedings. In most cases, substantial portions of the files were released. (FOIA Exemption 3 was also cited in 42 instances, Exemption 4 in 27, Exemption 5 in 72 and Exemption 7(A) in ten instances.)

B. Statutes Invoked Pursuant to Section 552(b)(3)

(1) Section 6(a)(2) of the CPSA, 15 U.S.C. § 2055(a)(2), prohibits the disclosure of all information containing or relating to trade secrets or other matters referred to in 18 U.S.C. § 1905 or subject to FOIA Exemption 4. This statutory prohibition on release of information was invoked in 80 partial denials and 14 full denials of requests for records. The denials were also based on FOIA Exemption 4.

(2) Section 6(b)(1) of the CPSA, 15 U.S.C. § 2055(b)(1), prohibits the disclosure of information from which the identity of a manufacturer or private labeler of a consumer product can be readily ascertained, less than 30 days after providing, to the extent practicable, the firms an opportunity to comment. The Commission must then take reasonable steps to assure that the information is accurate, that disclosure is fair in the circumstances, and that disclosure is reasonably related to effectuating the purposes of the statutes that the Commission administers. This statutory prohibition on release of information was invoked in 240 partial denials and 24 full denials. In each case, the section was applied after extensive review and examination of the responsive information and after it was determined that the accuracy of the information was uncorroborated by an investigation by the Commission or other independent evaluation, or the information was not otherwise confirmed, or the disclosure would not be fair in the circumstances or would not effectuate the purposes of the acts the Commission administers.

(3) Section 6(b)(5) of the CPSA, 15 U.S.C. § 2055(b)(5), prohibits the disclosure of information submitted under section 15(b) of the CPSA¹ unless the Commission has issued a complaint, the Commission has accepted in writing a remedial settlement agreement, or the firm agrees to the disclosure. This prohibition on release of information was invoked in 23 partial denials and ten full denials of records submitted by firms pursuant to section 15(b) of the CPSA.

(4) Section 6(e)(1) of the CPSA, 15 U.S.C. § 2055(e)(1), prohibits the disclosure of information submitted under section 37 of the CPSA.² This prohibition on release of information was invoked in one partial denial.

(5) Section 25(c) of the CPSA, 15 U.S.C. § 2074(c), prohibits the disclosure of information contained in Commission accident reports and investigations identifying injured parties and persons treating the injured parties without their consent. This statutory prohibition on release of information was invoked in 174 partial denials of requests seeking the identities of injured persons.

¹ Section 15(b) of the CPSA, 15 U.S.C. § 2064(b), requires manufacturers, distributors and retailers of consumer products to notify the Commission of certain hazardous products.

² Section 37 of the CPSA, 15 U.S.C. § 2084, requires manufacturers to submit information to the Commission where their products are the subject of civil court actions involving deaths or grievous bodily injuries.

C. Other Authority for Denials

In calendar year 1996, there were no denials on the basis of any authority other than the Freedom of Information Act and the Consumer Product Safety Act.

III. PERSONS RESPONSIBLE FOR INITIAL DENIALS AND THE NUMBER OF INSTANCES OF PARTICIPATION OF EACH

Todd A. Stevenson, Freedom of Information Officer, was responsible for 394 initial denials.

IV. TOTAL NUMBER OF ADMINISTRATIVE APPEALS FROM ADVERSE INITIAL DECISIONS MADE PURSUANT TO SECTION 552(a)(6)

In calendar year 1996, there were 14 appeals of initial denials of requests for records. One appeal was considered moot when it was determined that the records being processed were not responsive to the request. In one appeal the Commission reconsidered the initial denial and processed the requested records for release.

Two appeals were regarding the delay in responding. In one appeal about the delay, the requested materials were provided after receipt of the appeal. In the other appeal about the processing delay, the General Counsel denied any special handling for the request and denied any fee waivers for the request.

After full consideration by the Commission's delegate, the General Counsel, the initial determinations in the remaining ten appeals were decided as follows:

In two appeals, the Commission affirmed the initial denials of requests seeking product complaints or reported incidents where the Commission has not taken any steps to confirm or corroborate the accuracy of the information in the documents. Exemption 3 was cited in both denials, applying section 6(b)(1) of the CPSA, to withhold the uncorroborated incident data. In one case section 25(c) was also cited to withhold the identities of injured persons.

In eight appeals, the Commission affirmed the initial denials of requests seeking records from the Commission's law enforcement investigatory files that included submissions from manufacturers made pursuant to section 15(b) of the CPSA. In four cases the Commission reconsidered the withholding of portions of the requested materials and processed those portions for release. Exemption 3 was cited in five instances, applying one or more of the following sections of the CPSA: section 6(a)(2) to protect trade secret and confidential business information; section 6(b)(1) to

deny uncorroborated complaint information; section 6(b)(5) to protect information involving submissions from manufacturers; section 6(e) to protect information from manufacturers; and section 25(c) to protect information about injured persons. Exemption 4 was cited in four instances involving trade secret and confidential business information. Exemption 5 was cited in five cases to protect predecisional advice materials, including internal memoranda and staff notes. Exemption 7(A) was cited in three cases where disclosure of documents could have interfered with the active investigations before the Commission. Exemption 7(E) was cited in two cases where disclosure would have revealed law enforcement investigatory records and investigative techniques, procedures and guidelines.

V. STATUTORY AUTHORITY AND NUMBER OF INSTANCES EACH WAS RELIED UPON FOR DENIALS OF APPEALS

<u>FOIA Exemptions</u>	<u>Number of Instances</u>
Section 552(b)(3)	7
Section 552(b)(4)	4
Section 552(b)(5)	5
Section 552(b)(7)(A)	3
Section 552(b)(7)(E)	2

In six of the denials of appeals, more than one FOIA Exemption was cited.

VI. PERSONS RESPONSIBLE FOR DENIALS OF APPEALS

Eric A. Rubel, General Counsel, was responsible for ten denials of appeals.

VII. PROCEEDINGS CONDUCTED PURSUANT TO SECTION 552(a)(4)(F)

There were no proceedings conducted pursuant to section 552(a)(4)(F) of the FOIA during calendar year 1996.

VIII. AGENCY RULES AND REGULATIONS IMPLEMENTING THE FREEDOM OF INFORMATION ACT

A copy of the Commission's Freedom of Information Act regulations, 16 C.F.R. § 1015, is provided as an attachment to this report. The regulations were published at 42 Fed. Reg. 10490 (1977) and amendments were published at 45 Fed. Reg. 22021 (1980), 50 Fed. Reg. 7753 (1985), 52 Fed. Reg. 28977 (1987), 52 Fed. Reg. 44596 (1987) and 52 Fed. Reg. 45631 (1987).

IX. FEE SCHEDULE AND TOTAL DOLLAR AMOUNT OF FEES COLLECTED IN CALENDAR YEAR 1996

In calendar year 1996, the Commission assessed \$33,565 in fees for providing records in response to Freedom of Information Act requests and collected \$27,764. The disparity between assessed and collected fees is the result of fees assessed late in one calendar year that are not collected until the following calendar year and delinquent billings. The Commission conducts an on-going project to collect delinquent fees. The Commission, according to its regulated fee waiver policies, waived over \$273,000 in fees. The Commission's fee schedule is set forth below.

The Commission's regulations permit certain routine information to be provided to the public at no charge. For other responses to information requests, fees charged and any fees to be waived depend on the type of requester or the requester's need for the information. A commercial use request may incur charges for duplication, search and review, and no automatic fee waiver shall apply to such requests. A request from an educational institution or a non-commercial scientific institution for records, not sought for commercial use, or from a representative of the news media may incur charges only for duplication, and the first \$10.00 of duplication costs shall be waived. Any other request may incur charges for duplication and search, and the first \$10.00 of duplication costs and the first \$40.00 of search costs shall be waived.

The Commission's fee schedule is as follows:

- (1) Reproduction of Documents: \$0.10 per page;
- (2) File Searches Conducted by Clerical Personnel:
\$3.00 per one-quarter hour;
- (3) File Searches Conducted by Professional Personnel:
\$4.90 per one-quarter hour;

- (4) Review of Records: \$4.90 per one-quarter hour;
- (5) Computerized Records:
 - Central Processing: \$0.32 per second of central processing unit time;
- (6) Postage: Direct-cost basis;
- (7) Microfiche: \$0.35 for each frame;
- (8) Materials requiring special reproducing or handling, such as photographs, slides, blueprints, video and audio tape recordings, or other unusual items or services: Direct-cost basis.

X. ADDITIONAL INFORMATION INDICATIVE OF EFFORTS TO FULLY ADMINISTER THE ACT

A. Availability of Records

The Commission's Freedom of Information Act regulations affirm the policy behind congressional enactment of the FOIA: disclosure is the rule and withholding is the exception. The regulations specifically provide that the Commission will make available, as a matter of discretion, records that are authorized to be withheld under exemption provisions of the Freedom of Information Act unless disclosure is prohibited by law or the Commission determines that disclosure is contrary to the public interest.

As discussed at pages 3 and 4 of this annual report, the CPSA contains the following provisions that either require withholding or establish certain criteria for withholding within the meaning of Exemption 3 of the FOIA:

Section 6(a)(2) of the CPSA, 15 U.S.C. § 2055(a)(2), prohibits the disclosure of trade secrets or other matters referred to in 18 U.S.C. § 1905 or the FOIA Exemption 4. Sections 6(a)(3) and 6(a)(5) also require notification to submitters of information prior to disclosure of any potential confidential information. During 1996, the Commission made 162 notices under section 6(a)(3). Section 6(a)(5) notices are reported below.

Section 6(b)(1) of the CPSA, 15 U.S.C. § 2055(b)(1), prohibits the disclosure of information from which the identity of a manufacturer or private labeler of a consumer product can be readily ascertained by the public, less than thirty days after notification of the manufacturer or private labeler. To fulfill this requirement the Commission made 769 such notices during 1996.

Section 6(b)(1) also requires the Commission to take reasonable steps to assure, prior to disclosure, that the information to be disclosed is accurate, that the disclosure is fair in the circumstances and that disclosure is reasonably related to effectuating the purposes of the statutes that the Commission administers. Section 6(b)(2) requires the Commission to notify a firm ten days prior to disclosure of information that the firm claims is inaccurate, but for which the Commission believes it has complied with the requirements of section 6(b)(1). Upon completion of notifications and other requirements of sections 6(b)(1) and 6(b)(2), the Commission disclosed materials in 1,500 instances where section 6(b)(1) applied to the requested materials. The Commission's rule, 16 C.F.R. Part 1101, interpreting section 6(b) of the CPSA is attached.

Section 25(c)(1) of the CPSA, 15 U.S.C. § 2074(c)(1), prohibits certain disclosures of information contained in Commission accident reports and investigations. The identities of injured parties or persons treating the injured parties may not be disclosed without their authorization.

Additionally, section 6(b)(5) of the CPSA, 15 U.S.C. § 2055(b)(5), prohibits the disclosure of certain information submitted by firms unless certain specific circumstances exist. Sections 6(a)(5) and 6(b)(2) of the CPSA, 15 U.S.C. §§ 2055(a)(5) and (b)(2), prohibit the release of information designated as confidential or claimed to be inaccurate by identified firms for at least ten days after the Commission has notified the firms of the intended release. During 1996, the Commission made 51 such notifications to firms and subsequent releases to requesters.

The Commission's FOIA regulations provide that unrestricted staff briefing packages and excised portions of restricted packages will be made available in the Commission's public reading room after transmittal to the Commissioners. The regulation also provides that the Commissioners may decide initially on the public availability of documents in order that full Commission consideration can be given to novel issues of law or policy and to public interest determinations.

Section 29(e) of the CPSA, 15 U.S.C. § 2078(e), permits the Commission to release to state and local safety, health and consumer agencies, after deleting any confidential information, copies of accident and investigation reports identifying injured parties and persons treating the injured parties and identifying manufacturers or private labelers on assurance that the identifying information will not be released by the receiving agency.

B. Costs

The principal incremental costs incurred by the Commission during calendar year 1996 are as follows: (1) costs related to the volume of requests handled -- 9,371 formal requests responded to by the Division of Freedom of Information in the Office of the Secretary and 5,980 additional requests for injury data responded to by the Commission's National Injury Information Clearinghouse; (2) costs associated with applying the requirements of section 6(b) of the Consumer Product Safety Act; and (3) costs associated with administering the fee regulations as amended in 1987 that resulted in increased charges to some requesters.

C. Compliance with the Time Limitations for Agency Determinations

In general, during the past year, the Commission has succeeded in providing prompt and thorough acknowledgments or responses to requests for records. The Commission responded fully to 78 percent of its FOIA requests within the ten working day period. In many instances, for which no reliable figures are available, the Freedom of Information staff has also filled requests immediately on a "walk-in, pick-up" basis.

The Freedom of Information staff maintains close telephone contact with requesters. Usually, when it becomes apparent that the Office of the Secretary will be unable to provide a timely determination on the public availability of requested records, the requester is contacted, informed of the reason for the anticipated delay, and advised of the date by which a determination on release or nonrelease of the records is anticipated. The requester is also informed that the failure to provide a timely response may be considered a denial and that the requester may appeal this denial to the Commission. In the staff's experience, requesters have generally agreed to reasonable delays and have reacted favorably to the relatively short delay in providing a response.

In instances where a timely determination was not made, the request involved one or more of the following: voluminous records or records which were not easily accessible and had to be collected from several Commission offices; proprietary data; privacy concerns; part of an investigatory file; or review required by section 6(b) of the CPSA. Additionally, under Commission regulations, the evaluation of restricted documents is preceded by providing the affected parties within the agency the opportunity to communicate their position on the public availability of records.

The Commission's efforts to satisfy the statutory requirements in the CPSA have necessarily delayed many responses. On June 9, 1980, the U.S. Supreme Court ruled that section 6(b) of the CPSA applies to FOIA requests, CPSC v. GTE Sylvania, 447 U.S. 102 (1980). Section 6(b) requires that, with certain exceptions, the Commission notify manufacturers or private labelers of consumer products before disclosing information from which their identities can be readily ascertained by the public. Section 6(b) prohibits the disclosure of information less than thirty days after notification to identified firms to allow the firms to make claims and comments. Firms must be given ten days to file suit to block the disclosure if they claim that the information is confidential or inaccurate. The FOIA, on the other hand, provides for disclosure within ten working days. The Commission's final rule containing its policies and procedures for processing of requests pursuant to section 6(b) is located at 16 C.F.R. Part 1101.

The Commission reviews all agency records which are responsive to FOIA requests in strict adherence to the requirements of section 6(b). The Commission made 901 notifications pursuant to sections 6(b)(1) and 6(b)(2) during 1996. These notifications and the extensive analyses they require are in addition to procedures routinely conducted pursuant to the FOIA. The process not only involves the staffs of the Offices of the Secretary and the General Counsel, but frequently involves other technical staffs where their expertise is required for an understanding of the materials being processed. The time-consuming reviews and material preparations of FOIA requests involving section 6(b) caused delays in the processing of these requests.

D. Reading Room

To assist the public in locating Commission records, the Office of the Secretary maintains a public Reading Room in its headquarters Information Center, Room 419, 4330 East West Highway, Bethesda, Maryland 20814. Reading Room materials include a general index of advisory opinions, a summary record of Commission decisions, agency directives, nonrestricted briefing packages on matters before the Commission, documents filed in adjudicatory proceedings, and logs of meetings between Commission staff and outside parties on matters of substantial interest. A staff person is available to assist the public in locating information or in preparing an FOIA request for information.

During 1996 the Commission developed an Internet Website (address: cpsc.gov) that contains information regarding its regulatory and compliance activities, decisions, press releases, safety alerts, the Public Calendar of meetings and briefings, publications, contracting activities, job vacancies and many other matters.

Attachments

CONSUMER PRODUCT SAFETY COMMISSION

Title 16, Code of Federal Regulations:

Part 1015 - Procedures for Disclosure or Production of Information under the Freedom of Information Act

Part 1101 - Information Disclosure under Section 6(b) of the Consumer Product Safety Act