UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of	CPSC Docket No. 21-2
Amazon.com, Inc.	August 22, 2022

Order Granting Motion to Compel in Part

This order concerns the parties' ongoing discovery dispute. The parties engaged in a months' long back-and-forth as they tried to resolve the dispute and, after their discussions failed to bear fruit, they asked for my assistance.

Amazon directed a number of requests for production to the Consumer Product Safety Commission. Complaint Counsel objected to requests 15 and 19 through 26. After a pre-motion conference, I directed the parties to brief their dispute and, based on the parties' agreement entered an accelerated briefing schedule. After the parties submitted their filings, I directed Amazon to respond to three issues the Complaint Counsel raised in its opposition. Briefing is complete and the motion is ripe for decision.

Reviewing the parties' filings, I'm left with the impression that the parties are talking about two different disputes. Amazon says that it seeks six "narrowed categories of documents." Mot. at 2–3. Complaint Counsel says that these are "six newly characterized discovery requests." Opp'n at 8. Amazon, while listing the six categories, broadly describes its dispute with Complaint Counsel, but doesn't specifically tie its broader concerns to the six categories. For its part, Complaint Counsel discusses each category sequentially, but doesn't discuss Amazon's overarching arguments about relevance.

Left with a mismatch between the parties' arguments, I will first discuss the broader points and then rule on what, so far as I can tell, is at issue.

General points

As I previously stated, "Amazon is entitled to learn, 'to the fullest practicable extent,' the evidence that supports or refutes its defenses." Order for Reply Letter Brief at 1 (quoting *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682–83 (1958)). This includes evidence related to whether remedies are in the public interest and evidence related to its potential arbitrary-and-capricious affirmative defense. *Id.* at 1–2.

Complaint Counsel has asserted that Amazon's requests are not proportional to the needs of the case and are unduly burdensome. Opp'n at 13, 14, 23, 25. But Complaint Counsel presents these arguments in a perfunctory, boilerplate manner. The same goes for its relevance objections. Because conclusory assertions lack the required specificity, Complaint Counsel has failed to establish that Amazon's requests are not proportional to the needs of the case and are unduly burdensome. *See McLeod, Alexander, Powel & Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1485 (5th Cir. 1990); *Melendez v. Greiner*, No. 01-7888, 2003 WL 22434101, at *1 (S.D.N.Y. Oct. 23, 2003). It has also failed to establish its relevance objection.[1]

With these principles in mind, Amazon asserts that, "[a]s established" earlier in its motion to compel, "the policy and practice' documents sought by Amazon are relevant and discoverable." Mot. at 14. But which documents *are* the *policy and practice documents*? Based on the parties' somewhat murky filings, I think the *policy and practice* documents at issue are the Commission's Section 15 Defect Investigation Procedures Manual, Mot. at 6–7, the Commission's Regulatory Enforcement Division Standard Operating Procedure Manual, an internal operating procedures document of the Office of Communications, *id.* at 8, possibly a "list of Notices of Violation submitted to GAO," *id.* at 8, *see* Opp'n at 7, and Corrective Action Plans.[2]

Complaint Counsel argues that the law enforcement privilege shields from disclosure its Standard Operating Procedure Manual and the undisclosed portions of its Section 15 Manual. Opp'n at 25–27. It bears the burden to establish the privilege's existence. *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1341 (D.C. Cir. 1984). Complaint Counsel supports its claim with a declaration from Robert Kaye, who appears to be a person with the authority to assert the privilege. *See Landry v. FDIC*, 204 F.3d 1125, 1136 (D.C. Cir. 2000), *abrogated on other grounds by Lucia v. SEC*, 138 S. Ct. 2044 (2018).

A party seeking to invoke the law enforcement privilege must do so with "sufficient specificity and particularity." *In re Sealed Case*, 856 F.2d 268, 272 (D.C. Cir. 1988). This requirement partly serves to allow an adjudicator to weigh any "public interest in nondisclosure … against the need of a particular litigant for access to the privileged information." *Id.* The bar for invoking the

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[1] For the reasons stated in Amazon's response to my order for reply letter brief, I reject Complaint Counsel's argument that Amazon's motion to compel is untimely.

[2] There may be other policy and practice documents but Amazon has presented nothing to suggest what they might be.

privilege is low. *Blackwell v. FBI*, 646 F.3d 37, 42 (D.C. Cir. 2011). Even so, an invoking party must give an adjudicator something on which to base a decision; conclusory assertions without explanation aren't enough. *See Woodward v. U.S. Marshals Serv.*, 534 F. Supp. 3d 121, 130–31 (D.D.C. 2021); *see also Bartko v. U.S. Dep't of Justice*, 898 F.3d 51, 65 (D.C. Cir. 2018).

Under these principles, Kaye's declaration is insufficient. It is neither specific nor particular. In the three-sentence fifth paragraph of his declaration, Kaye generally describes *both* documents, which together aggregate over 130 pages. Kaye Decl. at 3; *see* Complaint Counsel In Camera Exs. A, B. In the three-sentence sixth paragraph, he opines that "the effective functioning of" two Commission enforcement divisions "requires that" referenced portions of the documents "be preserved." *Id*. To this, Kay adds that disclosure would "inhibit Commission staff's ability to conduct" certain investigations and would allow investigated companies to alter their behavior, thereby evading enforcement efforts and thwarting the Commission's mission. *Id*. This is simply not enough to invoke the privilege. *See Hansten v. DEA*, No. CV 21-2043 (RC), 2022 WL 2904151, at *2 (D.D.C. July 22, 2022); *Dent v. Exec. Off. for U.S. Att'ys*, 926 F. Supp. 2d 257, 272 (D.D.C. 2013) ("Notwithstanding the categorical protection to law enforcement techniques and procedures afforded under the first clause of Exemption 7(E) ... no agency can rely on declarations written in vague terms or in a conclusory manner."). And that's it for substance.

What's more, in separate, prior litigation, the Commission disclosed a previous version of the Section 15 Manual with only a few pages redacted. *See* Amazon's Reply at 4–5. This fact casts doubt on Complaint Counsel's present assertion that the current manual should be protected. And, having seen the manuals, Amazon's overbreadth challenge to Complaint Counsel's privilege claim, *id*. at 4–5, is well taken.

As to the internal operating procedures of the Office of Communications, Amazon says that its Exhibit BB shows that the communications office has certain "guidelines" set by the Office in evaluating press release language. Mot. at 20. That's a bit of a stretch. The only guidelines that Exhibit BB suggests that the communications might have are non-substantive and have to do the office's use of "AP style" and different social media platforms. Whether the Office uses "short and concise sentences" chooses Twitter or Facebook, Ex. BB, isn't particularly relevant to matters at issue. And considering that Complaint Counsel's assertion that it has disclosed "guidelines the Office of Communications uses for recall press releases and recall alerts," I'm not inclined, without more, to compel Complaint Counsel to supply more from the Office of Communications.

As to the Notices of Violation and Corrective Action Plans, Amazon has limited its request to documents involving children's sleepwear, hair dryers and air brushes, and carbon monoxide detectors—the consumer goods that are the subject of the allegation against Amazon—from 2015 to the present. Amazon's Reply at 2–4. As part of it narrowed request, Amazon represents that it is willing to accept compilations or other tracking records of the remedies accepted by the Commission in similar cases to the extent such documents exist and sufficiently encompass the requested discovery. *Id*. at 2–3. And if the Commission hasn't created compilation documents showing remedies accepted across multiple Corrective Action Plans, Amazon would limit its request to "documents" in "each [Corrective Action Plan] file" that "memorializ[e] the remedies that the [Commission] agreed to accept in that case." *Id*. at 3. In light of Complaint Counsel's failure to preserve relevance and burdensomeness objections, Amazon's proposal is sensible.[3]

Amazon asserts that "[i]t is a near-certainty, however, that [the Commission] possesses additional internal documents reflecting the agency's practices and policies regarding recall remedies." Mot. at 6. Amazon notes that the Commission's inspector general issued a report in 2019 noting that the Commission "maintains a database of at least 165 directives containing 'descriptions of agency programs, policies, and procedures.'" *Id*. And based on the nature of the Commission's mission, Amazon doubts "Complaint Counsel's unverifiable claim that just one of those 165 directives relate to recall remedies." *Id*.

Maybe so. But Amazon needs to give me something to work with. Simply stating its suspicions is not enough. *See e.g.*, *Kinetic Concepts, Inc. v. ConvaTec Inc.*, 268 F.R.D. 226, 252 (M.D.N.C. 2010) (finding that "even an informed suspicion that additional non-privileged documents exist ... cannot alone support an order compelling production of documents."); *In re Lorazepam & Clorazepate Antitrust Litig.*, 219 F.R.D. 12, 17 (D.D.C. 2003) (stating that "federal courts are often confronted with a party's complaint that its opponent must have documents that it claims not to have. Such suspicion is, however, insufficient to warrant granting a motion to compel.").

Amazon's motion to compel is granted in part.

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[3] Based on an email interaction between the parties' counsel, it appears that Complaint Counsel has produced certain documents "to avoid issues with respect to 15 U.S.C. § 2055." Amazon's Reply Ex. B. I take this and other comments in the exhibit to mean that Complaint Counsel is no longer relying on Section 2055 to protect evidence from disclosure.

I ORDER Complaint Counsel to disclose the tables of contents for the Standard Operating Procedure Manual and undisclosed portions of its Section 15 Manual. By August 29, 2022, Complaint Counsel must either disclose the rest of the manuals, subject to protective orders or file a new, more comprehensive declaration supporting the assertion of the law enforcement privilege.

As to Corrective Action Plans and Notices of Violation involving children's sleepwear, hair dryers and air brushes, and carbon monoxide detectors from 2015 to the present, Complaint Counsel must disclose compilations or other tracking records of the remedies accepted by the Commission. If the Commission has not created compilation documents, Complaint Counsel should disclose documents in each file that show the remedies that the Commission agreed to accept in each case.

/s/ James E. Grimes
Administrative Law Judge