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U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207
February 11, 1999

Mr. Bowman Cox
New Products Director
Washington Business Information, Inc.
Product Safety Letter
1117 North 19th Street, #200
Arlington, VA 22209

A large, stylized handwritten signature in black ink, appearing to be "Dewalt", is written across the right side of the page.

**RE: FOIA Request S-710116B:
Dewalt Industrial Tool Company; Battery Chargers**

Dear Mr. Cox:

Thank you for your Freedom of Information Act (FOIA) request seeking information from the Commission. The records from the Commission files responsive to your request have been processed and copies of the releasable responsive records are enclosed.

The enclosed records include file information generated by the Commission itself or its contractors for regulatory or enforcement purposes. These records are in file RP960170 (Black & Decker Battery Charger) and are identified as Laboratory Summaries, Hazard Assessment memoranda and other correspondence, notes and documents. The Commission has established management systems under which supervisors are responsible for reviewing the work of their employees or contractors. The file information materials are final and have been prepared and accepted by the Commission's staff under such review systems. The Commission believes that it has taken reasonable steps to assure the accuracy of the information.

Portions of this law enforcement investigatory file (designated RP960170) are being withheld pursuant to Exemptions 3 and 4 of the FOIA, 5 U.S.C. §§ 552(b)(3) and (b)(4), and section 6(a)(2) of the Consumer Product Safety Act (CPSA), 15 U.S.C. § 2055(a)(2). FOIA Exemption 3 provides for the withholding from disclosure of matters that are specifically exempted from disclosure by another statute. In applying FOIA Exemption 3 in this instance we are applying in part section 6(a)(2) of the CPSA. Section 6(a)(2) prohibits the Commission from disclosing information that is exempt from disclosure under Exemption 4 of the FOIA. That exemption protects trade secrets and confidential commercial

information. Confidential commercial information is information directly related to a firm's business that the firm has not made public and whose disclosure could give a substantial commercial advantage to a competitor. Specifically, we are withholding portions that if disclosed would reveal confidential business activities.

We are also withholding records from the files according to the Commission regulations at 16 C.F.R. § 1101.33. We must withhold these records pursuant to Exemption 3 of the FOIA and section 6(b)(1) of the CPSA, 15 U.S.C. § 2055(b)(1). In applying FOIA Exemption 3 to this material, we are relying on section 6(b)(1) of the CPSA. That section prohibits the Commission from disclosing information about a consumer product that identifies a manufacturer or private labeler unless the Commission has taken "reasonable steps" to assure that the information is accurate, that disclosure is fair in the circumstances, and that disclosure will be reasonably related to effectuating the purposes of the laws that the Commission administers. See Commission regulation, 16 C.F.R. § 1101.32. It would not be fair in the circumstances to disclose a firm's notes, drafts or minutes of meetings to discuss and negotiate settlements agreements, when the company has requested confidentiality and such records are protected from disclosure pursuant to 16 C.F.R. § 1101.33.

Finally, we must withhold other portions of this law enforcement investigatory file (designated RP92-1116) pursuant to the Exemptions 5 and 7(E) of the FOIA, 5 U.S.C. §§ 552(b)(5) and (b)(7)(E). Exemption 5 provides for the withholding from disclosure of inter-agency and intra-agency memoranda which would not be available by law to a party in litigation with the agency. FOIA Exemption 7(E) provides for the withholding from disclosure records or information compiled for law enforcement purposes, to the extent that the production of such law enforcement records or information 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. Specifically, we are withholding the staff's preliminary determination for file RP960170.

According to the Commission's regulations implementing the FOIA at 16 C.F.R. § 1015.7, a denial of access to records may be appealed to the General Counsel of the Commission within thirty (30) days of your receipt of this letter. An appeal must be in writing and addressed to: FOIA APPEAL, General Counsel, ATTN: Office of the Secretary, U.S. Consumer Product Safety Commission, Washington, D.C. 20207.

This completes the processing of your request. The cost to the Commission to perform the file searches and prepare this information was \$150.00. In this instance, we have decided to waive the charges. Thank you for your interest in consumer product safety. Should you have any questions, contact us by letter, facsimile (301) 504-0127 or telephone (301) 504-0785.

Sincerely,

Todd A. Stevenson
Deputy Secretary and
Freedom of Information Officer
Office of the Secretary

Enclosures



WASHINGTON BUSINESS INFORMATION, INC. • 1117 North 19th Street, Suite 200, Arlington, VA 22209-1798 • (703)247-3434, Fax 247-3421

August 6, 1996

PSL CODE -- Recall -- 134

Consumer Product Safety Commission
Freedom of Information Office
4330 East-West Highway
Bethesda, Md. 20207
Fax: 301/504-0127

Dear FOI Officer,

Pursuant to the federal Freedom of Information Act, 5 U.S.C. Section 552, I request access to and copies of all information to and from CPSC and Dewalt Industries on the recall of battery chargers. I would also like copies of all inter-agency memos staff may have written to each other regarding this recall.

As a member of the news media I am only required to pay for the direct cost of duplication after the first 100 pages. Please waive any additional fees. Release of the information is in public interest because it will contribute significantly to public understanding of government operations and activities.

If my request is denied in whole or part, I ask that you justify all deletions by reference to specific exemptions of the Act. I will also expect you to release all segregable portions of otherwise exempt material. I, of course, reserve the right to appeal your decision to withhold any information or to deny a waiver of fees.

As I am making this request as an editor and this information is of timely value, I would appreciate your communicating with me by phone (direct line 703/247-3423) or fax (247-3421), rather than by mail, if you have questions regarding this request. I look forward to your reply within 10 business days, as the statute requires.

Thank you for your assistance.

Sincerely,

Maureen Cislo, Editor
PRODUCT SAFETY LETTER

Receipt of this letter is acknowledged:

Signature

Date

Name (please print or type)

cc: PUB/SEC-rf, DIR
(12278974.1XX)

5710116B
[Handwritten initials]

News from

U.S. Consumer Product Safety Commission

Office of Information and Public Affairs

Washington, D.C. 20207

For Immediate Release
August 1, 1996
Release # 96-176

Contact: Ken Giles
(301) 504-0580 Ext. 1184

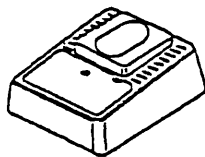
CPSC and Dewalt Announce Recall of One-Hour Battery Chargers

WASHINGTON, D.C. - In cooperation with the U.S. Consumer Product Safety Commission (CPSC), Dewalt Industrial Tool Co. of Hampstead, Md., is announcing a recall of approximately 150,000 DW9104 and DW9106 one-hour battery chargers. The charger's plastic housing could separate during a severe impact, exposing internal electrical components that could present an electric shock hazard.

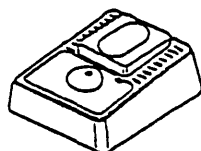
Dewalt has not received any reports of the charger breaking, or injuries involving the charger. This recall is being conducted to prevent the possibility of injury.

Only some DW9104 and DW9106 one-hour battery chargers are subject to this recall. The recalled chargers can be identified by the fact that both the top and bottom halves of the charger are black, the bottom of the charger is stamped with a date code between 9534 and 9615, and there is a circular depression 1-3/8" in diameter located under the center of the label on the top of the charger housing. DW9104 and DW9106 chargers measure approximately five inches deep, three inches high, and four inches wide, and have a label on top

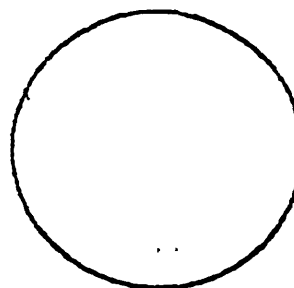
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No circular depression -
not affected by program



Circular Depression -
affected by program



Actual size of 1-3/8"
Circular Depression

-more-

(battery charger)

-2-

Hardware stores and home centers sold the chargers nationwide between August 1995 and April 1996 for between \$39 and \$59. During the same period, hardware stores and home centers also sold the chargers in kits with some rechargeable cordless tools. No other Dewalt Tool chargers are involved in this recall.

Owners of the identified chargers should return them to a Black & Decker/Dewalt Service Center for a free replacement one-hour battery charger. To locate the nearest service center, or for more information, owners should call (800) 540-2626.

Media inquiries should be directed to Jean Miskimmon at (410) 625-2621.

The U.S. Consumer Product Safety Commission protects the public from the unreasonable risk of injury or death from 15,000 types of consumer products under the agency's jurisdiction. To report a dangerous product or a product-related injury and for information on CPSC's fax-on-demand service, call CPSC's hotline at (800) 638-2772 or CPSC's teletypewriter at (800) 638-8270. To order a press release through fax-on-demand, call (301) 504-0051 from the handset of your fax machine and enter the release number. Consumers can obtain this release and recall information via Internet gopher services at cpsc.gov or report product hazards to info@cpsc.gov.

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U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, DC 20207

Todd A. Stevenson
Deputy Secretary and
Freedom of Information Officer
Office of the Secretary

Tel: 301-504-0785X1239
Fax: 301-504-0127
Email: tstevenson@cpsc.gov

May 3, 1999

Mr. David Swit
Publisher
Washington Business Information
1117 North 19th Street, Suite 200
Arlington, VA 22209

Re: FOIA Request and Appeal S804033: Stihl Chain Saws
/ CPSC Compliance file RP970074

Dear Mr. Swit:

Enclosed are copies of the records (that were previously withheld) from the referenced file, as discussed in the letter dated March 29, 1999, from the General Counsel responding to your appeal. The enclosed records include file information generated by the Commission itself or its contractors for regulatory or enforcement purposes. The Commission has established management systems under which supervisors are responsible for reviewing the work of their employees or contractors. The file information materials are final and have been prepared and accepted by the Commission's staff under such review systems. The Commission believes that it has taken reasonable steps to assure the accuracy of the information.

Sincerely,

A handwritten signature in black ink, appearing to be "Todd A. Stevenson", written over a horizontal line.

Todd A. Stevenson

Enclosures



U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, DC 20207

Jeffrey Bromme
General Counsel

Tel: (301) 504-0980
Fax: (301) 504-0403
Email: cpsc-gc@cpsc.gov

March 29, 1999

Mr. David Swit
Publisher, Product Safety Letter
Washington Business Information, Inc.
1117 North 19th Street
Suite 200
Arlington, Virginia 22209-1798

Re: FOIA Appeal S-804033
Stihl Chain Saws

Dear Mr. Swit:

By letter dated March 5, 1999, you appealed the decision of the Commission's Freedom of Information (FOI) Officer to withhold information responsive to your Freedom of Information Act (FOIA) request. Under authority delegated to me by the Commission, 16 C.F.R. § 1015.7, I have reviewed your appeal.

The FOI Officer has reconsidered his decision to withhold certain documents (including fax cover sheets, a postal return receipt, a supplement to the owner's manual, a list of newspapers announcing the recall, and sample storage documents) and they are enclosed. As to the remaining documents that he withheld, identified in the paragraphs below, I affirm his decision, based on FOIA Exemptions 3, 4, and 5. 5 U.S.C. §§ 552(b)(3), (b)(4), and (b)(5).

Exemption 3 of the FOIA provides for withholding information that is specifically exempted from disclosure by another statute. In applying Exemption 3 to the withheld information, the Commission is relying on section 6(a)(2) of the CPSA. 15 U.S.C. § 2055(a)(2). Section 6(a)(2) expressly prohibits the disclosure of information reported to or otherwise obtained by the

Mr. David Swit
March 29, 1999

Page 2

Commission that contains or relates to trade secrets or other confidential commercial information. Such information is confidential if disclosure is likely (1) to impair the government's ability to obtain the necessary information in the future or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. National Parks & Conservation Association v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974). In addition, CPSA section 6(a)(2) incorporates Exemption 4 of the FOIA which protects trade secrets and confidential commercial information obtained from a person.

Under FOIA Exemptions 3 and 4, and CPSA section 6(a)(2), the Commission is withholding correspondence between the Commission and the manufacturer relating to the settlement negotiations, customer lists, confidential financial information, engineering design and quality control information, and other company internal documents.

In applying FOIA Exemption 3, the Commission is also relying on CPSA section 6(b)(1). 15 U.S.C. § 2055(b)(1). Section 6(b)(1) requires that before disclosing information that would enable the public to identify the manufacturer or private labeler of a consumer product, the Commission "shall take reasonable steps to assure . . . that [the] information . . . is accurate, and that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes of the [CPSA]." The information that is being withheld pursuant to FOIA Exemption 3, relying on CPSA section 6(b)(1), consists of documents relating to the negotiations leading up to the settlement agreement, including letters to and from the manufacturer and telephone memoranda. It would not be fair in the circumstances to reveal such documents. 16 C.F.R. § 1101.33(b)(1) and (2).

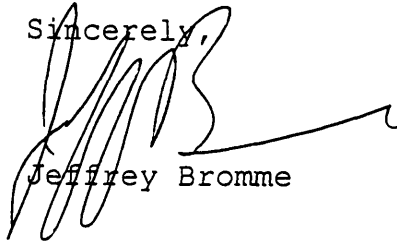
FOIA Exemption 5 provides for the withholding of certain inter-agency and intra-agency documents and incorporates the deliberative process privilege. This privilege protects advice, recommendations, and opinions which are part of the deliberative, consultative, and decision-making processes of the agency. Although this privilege applies only to the opinions or recommendations in a document and not to factual information, facts are withheld here because they are inextricably intertwined with the exempt portions. The information being withheld pursuant to Exemption 5 consists of intra-agency memoranda, draft documents, and internal notes.

Mr. David Swit
March 29, 1999

Page 3

You have the right to seek judicial review of this decision as provided by 5 U.S.C. § 552(a)(4)(B).

Sincerely,

A handwritten signature in black ink, appearing to be 'Jeffrey Bromme', written over the typed name. The signature is stylized with loops and a long horizontal stroke extending to the right.

Jeffrey Bromme

Enclosures



WASHINGTON BUSINESS INFORMATION, INC. • 1117 North 19th Street, Suite 200, Arlington, VA 22209-1798 • (703)247-3434, Fax 247-3421

March 5, 1999

FOIA APPEAL, General Counsel
Attn: Office of the Secretary
U.S. Consumer Product Safety Commission
Washington, D.C. 20207

FAX: 301/504-0127
(Page 1 of 1)

1411

Dear Sir,

Pursuant to the Freedom of Information Act, we hereby appeal the denial of major parts of FOIA Request S-804033, Stihl chain saws. We appeal because:

A -- The denial contradicts the instructions of the President and the Attorney General, as well as CPSC's own regulations, that disclosure be the rule, rather than the exception.

B -- CPSC apparently has accepted, without evaluation, the company's claim that records are confidential, and thus protected from disclosure. The company has not met its burden of establishing the basis for its claim of confidentiality here, particularly as to "other company internal records."

C -- CPSC has provided insufficient information for Requester to evaluate (a) validity of the agency's withholding 36 complete pages (9-22, 24-41, 43-46) while disclosing only 3 substantive pages; (b) extent of records involved, as CPSC notations suggest pages 23 and 42 were provided but they were not, and it is unclear if pages follow 46; and (c) omitting many records customarily disclosed in such files. Those omitted include, but are not limited to:

- (1) Form 1A -- CPSC staff's initial input and staff worksheet
- (2) Company's "Full Report" on possible hazard
- (3) Company's Corrective Action Plan Progress Reports

(4) Safety-related consumer or dealer complaints, warranty claims, reports of injury, and copies of all documents related to such complaints, claims and injuries, including court complaints and related documents filed in or associated with lawsuits involving the product, and a description of the resolution of those lawsuits, if any. If the complaints and other documents requested in this sub-paragraph are unavailable, CPSC's records should contain the reason for such unavailability and a summary of the requested items containing the name, address and phone number of the claimant or of his/her attorney.

D -- CPSC has provided no proof of its claim that disclosing some or all of these records would disclose techniques and procedures for law enforcement. Moreover, CPSC's blanket withholding of these records is inconsistent with the agency's stated policy that the invoking of these exemptions to the FOIA is discretionary, not mandatory.

E -- CPSC claims requested records are in "active law enforcement investigatory files," which seems improbable as most recall files are closed in far less than the 25 months since this one was opened. Please confirm the file is open, and estimate how long it will stay so.

Please sign below to confirm receipt of this appeal, and fax it to me at 703/247-3421.

Sincerely,

David Swit, Publisher
Product Safety Letter

Receipt of the above is acknowledged:

Lynn Carter
Signature
LYNN CARTER
Name (please print)

3/5/99
Date
SECRETARY TO
TODD STEVENSON
Title

cc: E. Koch, Esq.
SEC-rf, DIR/f, PSL



1411 STI
~~STI~~

U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, DC 20207

Todd A. Stevenson
Deputy Secretary and
Freedom of Information Officer
Office of the Secretary

Tel: 301-504-0785X1239
Fax: 301-504-0127
Email: tstevenson@cpsc.gov

February 4, 1999

CERTIFIED MAIL

Mr. Jay Tilley
Editor
Product Safety Letter
Washington Business Information
1117 North 19th Street, Suite 200
Arlington, VA 22209

Re: FOIA Request S804033: Stihl Chain Saws, Corrective Action File RP970074

Dear Mr. Tilley:

Thank you for your Freedom of Information Act (FOIA) request seeking information from the Commission. The records from the Commission files responsive to your request have been processed and copies of the releasable responsive records are enclosed. The enclosed records include file information generated by the Commission itself or its contractors for regulatory or enforcement purposes. These records are from law enforcement investigatory file designated RP970074 Stihl Series 1127 Model 029 and 039 Chain Saws and include correspondence, notes and documents. The Commission has established management systems under which supervisors are responsible for reviewing the work of their employees or contractors. The file information materials are final and have been prepared and accepted by the Commission's staff under such review systems. The Commission believes that it has taken reasonable steps to assure the accuracy of the information. Please note that the Commission's staff, not the Commissioners themselves, made the preliminary determination that this product presented a substantial risk of injury to the public as defined by the Consumer Product Safety Act (CPSA).

The remaining records responsive to your request are contained in the Commission's active law enforcement investigatory files. We must withhold the records pursuant to the Exemptions 3, 4, 5, and 7(E), 5 U.S.C. §§ 552(b)(3), (b)(4), (b)(5), and (b)(7)(E), and sections 6(a)(2) and 6(b)(1) of the CPSA, 15 U.S.C. §§ 2055(a)(2), and (b)(1).

FOIA Exemption 3 provides for the withholding from disclosure of matters that are specifically exempted from disclosure by another statute. In applying FOIA Exemption 3 to these records, we are relying in part on section on CPSA section 6(a)(2) to withhold files that contain proprietary and confidential information. We must withhold pursuant to Exemptions 3 and 4 and section 6(a)(2) of the CPSA. Section 6(a)(2) prohibits the Commission from disclosing information that is exempt from disclosure under Exemption 4 of the FOIA. That exemption protects trade secrets and confidential commercial information directly related to a firm's business that the firm has not made public and whose disclosure could give a substantial commercial advantage to a competitor. The protected records include customer lists, engineering design and quality control information, confidential financial records and other company internal records.

We must also withhold records from the files pertaining to the negotiations with the company, according to the Commission regulations at 16 C.F.R. § 1101.33, and Exemption 3 of the FOIA and section 6(b)(1) of the CPSA, which prohibits the Commission from disclosing information about a consumer product that identifies a manufacturer or private labeler unless the Commission has taken "reasonable steps" to assure that the information is accurate, that disclosure is fair in the circumstances, and that disclosure will be reasonably related to effectuating the purposes of the laws that the Commission administers. It would not be fair in the circumstances to disclose a firm's notes, drafts or minutes of meetings to discuss and negotiate settlements agreements, when the company has requested confidentiality and such records are protected from disclosure pursuant to 16 C.F.R. § 1101.33.

Certain internal staff memoranda and analyses are also being withheld pursuant to FOIA Exemptions 5, and 7(E). Exemption 5 provides for the withholding from disclosure of inter-agency and intra-agency memoranda which would not be available by law to a party other than an agency in litigation with the agency. Exemption 7(E) provides for the withholding from disclosure records or information compiled for law enforcement purposes, to the extent that the production of such law enforcement records or information 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. The staff memoranda and analyses being withheld are both predecisional and deliberative, consisting of recommendations, opinions, suggestions and analyses. Any factual materials in the memoranda not covered by some other exemption are inextricably intertwined with exempt materials or the disclosure of the factual materials would itself expose the deliberative process. We have determined that the disclosure of the law enforcement investigatory records responsive to your request would be contrary to the public interest. It would not be in the public interest to disclose these materials because disclosure would (1) impair the frank exchange of views necessary with respect to such matters, and (2) reveal the techniques, guidelines and strategies utilized by the investigative and legal staff in developing the information regarding this investigation and other on-going investigations, which if disclosed would significantly risk circumvention of the statutes and regulations that the Commission administers. .

Mr. Jay Tilley

Page 3

According to the Commission's regulations implementing the FOIA at 16 C.F.R. § 1015.7, a partial denial of access to records may be appealed to the General Counsel of the Commission within thirty (30) days of your receipt of this letter. An appeal must be in writing and addressed to: FOIA APPEAL, General Counsel, ATTN: Office of the Secretary, U.S. Consumer Product Safety Commission, Washington, D. C. 20207.

Processing this request, performing the file searches and preparing the information, cost the Commission \$200.00. In this instance, we have decided to waive all of the charges. Thank you for your interest in consumer product safety.

Sincerely,

Todd A. Stevenson

Enclosures



April 7, 1998

Consumer Product Safety Commission
Freedom of Information Office
4330 East-West Highway
Bethesda, Md. 20207
Fax: 301/504-0127

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CHAINSAW
411
EXC/
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Dear FOI Officer,

Pursuant to the federal Freedom of Information Act, 5 U.S.C. Section 552, I request access to and copies of all information to and from CPSC and Stihl Inc. on Feb. 18, 1997 recall of chain saws. I would also like copies of all inter-agency memos staff may have written to each other regarding this recall.

As a member of the news media I am only required to pay for the direct cost of duplication after the first 100 pages. Please waive any additional fees. Release of the information is in public interest because it will contribute significantly to public understanding of government operations and activities.

If my request is denied in whole or part, I ask that you justify all deletions by reference to specific exemptions of the Act. I will also expect you to release all segregable portions of otherwise exempt material. I, of course, reserve the right to appeal your decision to withhold any information or to deny a waiver of fees.

As I am making this request as an editor and this information is of timely value, I would appreciate your communicating with me by phone (direct line 703/247-3423) or fax (247-3421), rather than by mail, if you have questions regarding this request. I look forward to your reply within 10 business days, as the statute requires.

Thank you for your assistance.

Sincerely,

Sam Cristy, Editor
PRODUCT SAFETY LETTER

Receipt of this letter is acknowledged:

Signature

Date

Name (please print or type)

5-8 4033

cc: PUB/SEC-rf, DIR
(1227K074.1YY)



U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, DC 20207

Todd A. Stevenson
Deputy Secretary and Freedom of Information Officer

Office of the Secretary

Tel: (301) 504-0785 ext. 1239
Fax: (301) 504-0127
Email: tstevenson@cpsc.gov

April 27, 1999

Mr. David Swit, Publisher
Washington Business Information, Inc.
1117 North 19th Street, Suite 200
Arlington, VA 22209-1799

RE: FOIA Appeal S710140E; W.C. Wood Chest Freezers

Dear Mr. Swit:

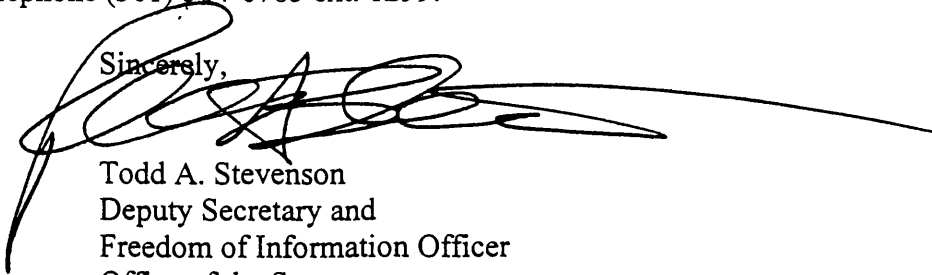
This concerns your appeal for information responsive to your Freedom of Information Act Request. By letter dated April 1, 1999, the Commission's General Counsel informed you that certain documents (primarily facsimile cover sheets containing staff notes) will be released to you upon Commission's compliance with sections 6(a) and (b) of the CPSA. 15 U.S.C. §§ 2055(a) and (b).

I have determined that the enclosed documents do not meet the criteria for confidential commercial information under CPSA section 6(a) and FOIA Exemption 4 (15 U.S.C. § 2055(a); 5 U.S.C. §552(b)(4)). Enclosed are the following pages: 3-6, 12, 14, 16, 121, 124, 126, 129, 167, 179, and 196.

As you will note, the General Counsel affirmed my decision to withhold the remaining documents. These documents are being withheld pursuant to FOIA Exemptions 3 and 4. 5 U.S.C. §§ 552(b)(3) and (4).

Should you have any questions, please contact Alberta Mills, Paralegal Specialist, by letter, facsimile (301) 504-0127 or telephone (301) 504-0785 ext. 1299.

Sincerely,



Todd A. Stevenson
Deputy Secretary and
Freedom of Information Officer
Office of the Secretary

Enclosures



U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207-0001

OFFICE OF THE GENERAL COUNSEL

Jeffrey S. Bromme
General Counsel
Tel: 301-504-0980 ext. 2299
Fax: 301-504-0403
E-Mail: jbromme@cpsc.gov

April 1, 1999

Mr. David Swit
Publisher
Washington Business Information Inc.
1117 North 19th Street
Suite 200
Arlington, VA 22209-1799

RE: FOIA Appeal S710140E
W.C. Wood Chest Freezers

Dear Mr. Swit:

By letter dated March 5, 1999, you appealed the decision of the Commission's Freedom of Information Officer to withhold information responsive to your Freedom of Information Act (FOIA) request on the recall of W.C. Wood chest freezers.

The FOI Officer has reconsidered his decision regarding some documents that are primarily facsimile cover sheets containing staff notes. He is releasing these documents, under separate cover, because the Commission has complied with sections 6(a) and (b) of the Consumer Product Safety Act (CPSA). 15 U.S.C. §§ 2055(a) and (b).

Under authority delegated to me by the Commission, 16 C.F.R. 1015.7, I have reviewed your appeal. I affirm the Freedom of Information Officer's decision to withhold documents containing confidential information furnished by W.C. Wood, meeting notes, notes of telephone conversations, draft documents prepared during settlement discussions, and correspondence with attachments between Commission staff and counsel for W.C. Wood, based on FOIA Exemptions 3, 4 and 5. 5 U.S.C. §§ 552(b)(3), (b)(4) and (b)(5).

Mr. David Swit
April 1, 1999

Page 2

Exemption 3 of the FOIA provides for withholding information that is specifically exempted from disclosure by another statute. In applying Exemption 3 to the withheld documents, I am relying on section 6(b)(1) of the Consumer Product Safety Act. 15 U.S.C. § 2055(b)(1).

Section 6(b)(1) requires that, before disclosing information that would enable the public to identify the manufacturer or private labeler of a consumer product, the Commission "shall take reasonable steps to assure . . . that [the] information . . . is accurate, and that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes of the [CPSA]." The information that is being withheld pursuant to Exemption 3, based on section 6(b)(1), consists of documents containing confidential information furnished by W.C. Wood, meeting notes, notes of telephone conversations, draft documents prepared during settlement discussions, and correspondence with attachments between Commission staff and counsel for W.C. Wood. All of these documents concern the firm's section 15 report. The Commission has determined that it is unfair in the circumstances to disclose information furnished by a firm to facilitate prompt remedial action or settlement where the firm has a reasonable expectation that the information will be maintained in confidence. 16 C.F.R. §§ 1101.32(b)(1) and (b)(2). The withheld information falls within the scope of these regulations.

In addition, under Exemption 3, the Commission is relying on section 6(a)(2) of the CPSA. 15 U.S.C. § 2055(a)(2). Section 6(a)(2) expressly prohibits the disclosure of information reported to or otherwise obtained by the Commission which contains or relates to trade secrets or other confidential commercial information. Section 6(a)(2) incorporates Exemption 4 of the FOIA. That exemption protects trade secrets and confidential commercial information obtained from a person.

Commercial information is confidential if disclosure is likely (1) to impair the government's ability to obtain the necessary information in the future or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. The information that has been withheld pursuant to Exemption 3, based on section 6(a)(2), and Exemption 4 consists of a full section 15 report containing W.C. Wood's confidential distribution data, manufacturing and price information, and other marketing and engineering data.

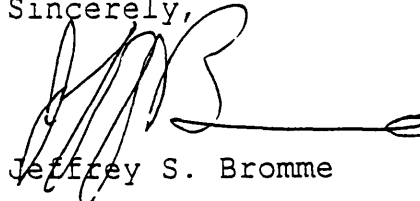
Mr. David Swit
April 1, 1999

Page 3

Exemption 5 permits agencies to withhold certain inter-agency and intra-agency documents and incorporates the deliberative process privilege. The internal memoranda and staff notes withheld in this case consist of staff recommendations containing both pre-decisional and deliberative discussions. The deliberative process privilege protects advice, recommendations, and opinions that are part of the agency's deliberative, consultative, and decision-making processes. Although this privilege applies only to the opinions or recommendations in a document and not to factual information, facts are withheld here because they are inextricably intertwined with the exempt portions. Release of this information would diminish the Commission's decisionmaking ability with respect to section 15 investigations by impairing open and frank communication within the agency.

You have the right to seek judicial review of this decision, as provided by 5 U.S.C. § 552(a)(4)(B).

Sincerely,

A handwritten signature in black ink, appearing to be 'J. Bromme', with a long horizontal line extending to the right from the end of the signature.

Jeffrey S. Bromme



WASHINGTON BUSINESS INFORMATION, INC. • 1117 NORTH 19TH STREET, SUITE 200, ARLINGTON, VA 22209-1798 • (703)247-3434. FAX 247-3421

March 5, 1999

FOIA APPEAL, General Counsel
Attn: Office of the Secretary
U.S. Consumer Product Safety Commission
Washington, D.C. 20207

FAX: 301/504-0127
(Page 1 of 1)

0276
0275

Dear Sir,

Pursuant to the Freedom of Information Act, we hereby appeal the denial of major parts of FOIA Request S-710140E, W.C. Wood chest freezers. We appeal because:

A -- The denial contradicts the instructions of the President and the Attorney General, as well as CPSC's own regulations, that disclosure be the rule, rather than the exception.

B -- CPSC apparently has accepted, without evaluation, the company's claim that records are confidential, and thus protected from disclosure. The company has not met its burden of establishing the basis for its claim of confidentiality here.

C -- CPSC has not provided sufficient information for Requester to evaluate validity of the agency's withholding 184 complete pages (2-19, 23-30, 53-111, 120-218) while disclosing only 20 substantive pages and omitting many records that customarily are disclosed in such files. Those omitted include, but are not limited to:

- (1) Form 1A -- CPSC staff's initial input and staff worksheet
- (2) Company's "Full Report" on possible hazard
- (3) Company's Corrective Action Plan Progress Reports

(4) Safety-related consumer or dealer complaints, warranty claims, reports of injury, and copies of all documents related to such complaints, claims and injuries, including court complaints and related documents filed in or associated with lawsuits involving the product, and a description of the resolution of those lawsuits, if any. If the complaints and other documents requested in this sub-paragraph are unavailable, CPSC's records should contain the reason for such unavailability and a summary of the requested items containing the name, address and phone number of the claimant or of his/her attorney.

D -- CPSC has provided no proof of its claim that disclosing some or all of these records would disclose techniques and procedures for law enforcement. Moreover, CPSC's blanket withholding of these records is inconsistent with the agency's stated policy that the invoking of these exemptions to the FOIA is discretionary, not mandatory.

We note that one Wood lawyer is a former General Counsel of CPSC, and feel he must be aware of how his claims of confidentiality far exceed the bounds of reasonableness.

Please sign below to confirm receipt of this appeal, and fax it to me at 703/247-3421.

Sincerely,

David Swit, Publisher
Product Safety Letter

Receipt of the above is acknowledged:

3/5/99
Date

LYNN CARTER
Name (please print)

SECRETARY TO
TODD STEVENSON
Title

cc: E. Koch, Esq.
SEC-rf, DIR/f, PSL

Firm: ~~0210~~ W.C. Wood Co.
Off(6a6b release), Off(part.
denial), Ex. 3, 4, 5, 7(E)
chron, spec. 3285

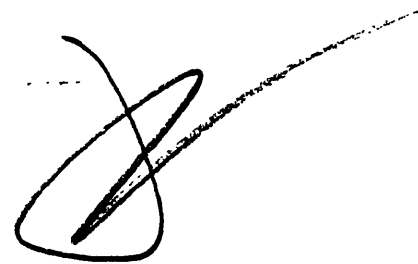


U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207

February 3, 1999

CERTIFIED MAIL

Sam Cristy, Editor
Product Safety Letter
Washington Business Information, Inc.
1117 North 19th Street, Suite 200
Arlington, VA 22209



Re: FOIA Request S-710140E: All information to and from CPSC and W.C. Wood Company Inc. on the recall of chest-freezers (CPSC Release #96-066)

Dear Mr. Cristy:

Thank you for your Freedom of Information Act (FOIA) request seeking information from the Commission (Commission). The records from the Commission files responsive to your request have been processed and copies of the releasable records are enclosed.

The enclosed records constitute file information generated by the Commission itself or its contractors for regulatory or enforcement purposes. These records are in file RP960067 and are identified as recall notices, memoranda and other notes and documents. The Commission has established management systems under which supervisors are responsible for reviewing the work of their employees or contractors. The file information materials are final and have been prepared and accepted by the Commission's staff under such review systems. The Commission believes that it has taken reasonable steps to assure the accuracy of the information. Please note that the Commission's staff, not the Commissioners themselves, made the preliminary determination that this product presented a substantial risk of injury to the public as defined by the Consumer Product Safety Act.

We must withhold portions of the investigatory files pursuant to Exemptions 3 and 4, 5 U.S.C. §§ 552(b)(3) and (b)(4) and sections 6(a)(2) and 6(b)(1) of the Consumer Product Safety Act (CPSA), 15 U.S.C. §§ 2055(a)(2), and (b)(1). FOIA Exemption 3 provides for the withholding from disclosure of matters that are specifically exempted from disclosure by another statute. The files contain proprietary and confidential information that we must withhold pursuant to Exemptions 3 and 4 and section 6(a)(2) and section 6(b)(1) of the CPSA. Section 6(a)(2) prohibits the

Commission from disclosing information that is exempt from disclosure under Exemption 4 of the FOIA. That exemption protects trade secrets and confidential commercial information directly related to a firm's business that the firm had not made public and whose disclosure could give a substantial commercial advantage to a competitor.

We are, therefore, withholding documents at pages 2-19; 23-30; 53-111; and 120-218.

We must also withhold portions of the law enforcement investigatory files pursuant to Exemptions 5 and 7 (E) of the FOIA, 5 U.S.C. §§ 552 (b)(5) and (b)(7)(E). Exemption 5 provides for the withholding from disclosure of inter-agency and intra-agency memoranda, which would not be available by law to a party in litigation with the agency. FOIA Exemption 7 (E) provides for the withholding from disclosure records or information compiled for law enforcement purposes, to the extent that the production of such law enforcement records or information 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.

The records being withheld consist of internal notes and memoranda containing recommendations, opinion, suggestions and analyses of the Commission's technical and legal staffs. The records constitute both predecisional and deliberative discussion that clearly falls within the attorney-client and attorney-work product privileges. Any factual materials in the records not covered by some other exemption are inextricably intertwined with exempt materials or the disclosure of the factual materials would itself expose the deliberative process. We have determined that the disclosure of these certain law enforcement investigatory records responsive to your request would be contrary to the public interest. It would not be in the public interest to disclose these material because disclosure would: (1) impair the frank exchange of views necessary with respect to such matters, and (2) reveal the techniques, guidelines and strategies utilized by the investigative and legal staff in developing the information regarding this investigation and other on-going investigations, which if disclosed would significantly risk circumvention of the statutes and regulations of the Commission administrators.

According to the Commission's regulations implementing the FOIA at 16 C.F.R. § 1015.7, a partial denial of access to records may be appealed to the General Counsel of the Commission within thirty (30) days of your receipt of this letter. An appeal must be in writing and addressed to: FOIA APPEAL, General Counsel, ATTN: Office of the Secretary, U.S. Consumer Product Safety Commission, Washington, D. C. 20207.

Processing this request, performing the file searches and preparing the information cost the Commission \$120.00. In this instance we waived all of the

Mr. Cristy, S710140

Page 2

charges. Thank you for your interest in consumer product safety. Should you have any questions, please contact Alberta Mills, Paralegal Specialist, by letter, facsimile (301) 504-0127 or telephone (301) 504-0785, ext. 1299.

Sincerely,

Todd A. Stevenson
Deputy Secretary and
Freedom of Information Officer
Office of the Secretary

Enclosure



WASHINGTON BUSINESS INFORMATION, INC. • 1117 NORTH 19TH STREET, SUITE 200, ARLINGTON, VA 22209-1788 • (703)247-3434, FAX 247-3421

April 8, 1996

PSL CODE -- RECALL- 068

Consumer Product Safety Commission
Freedom of Information Office
4330 East-West Highway
Bethesda, Md. 20207
Fax: 301/504-0127

Dear FOI Officer,

Pursuant to the federal Freedom of Information Act, 5 U.S.C. Section 552, I request access to and copies of all information to and from CPSC and W.C. Wood of Ottawa, Ohio on the recall of chest-freezers that were sold from January through February 1991 (release #96-066).

0275 6276

As a member of the news media I am only required to pay for the direct cost of duplication after the first 100 pages. Please waive any additional fees. Release of the information is in public interest because it will contribute significantly to public understanding of government operations and activities.

If my request is denied in whole or part, I ask that you justify all deletions by reference to specific exemptions of the Act. I will also expect you to release all segregable portions of otherwise exempt material. I, of course, reserve the right to appeal your decision to withhold any information or to deny a waiver of fees.

As I am making this request as an editor and this information is of timely value, I would appreciate your communicating with me by phone (direct line 703/247-3423) or fax (247-3421), rather than by mail, if you have questions regarding this request. I look forward to your reply within 10 business days, as the statute requires.

Thank you for your assistance.

Sincerely,

Maureen Cislo, Editor
PRODUCT SAFETY LETTER

Receipt of this letter is acknowledged:

Signature

Date

Name (please print or type)

cc: PUB/SEC-rf, DIR
(1227K074 .1XV)

5710140E



February 19, 1996

Consumer Product Safety Commission
Freedom of Information Office
4330 East-West Highway
Bethesda, Md., 20207

Dear FOI Officer,

Pursuant to the federal Freedom of Information Act, 5 U.S.C. Section 552, I request access to and copies of all information to and from CPSC and W.C. Wood of Ottawa, Ohio for their chest freezer recall.

RP960067 open J. Fitch

As a member of the news media I am only required to pay for the direct cost of duplication after the first 100 pages. Please waive any additional fees. Release of the information is in public interest because it will contribute significantly to public understanding of government operations and activities.

If my request is denied in whole or part, I ask that you justify all deletions by reference to specific exemptions of the Act. I will also expect you to release all segregable portions of otherwise exempt material. I, of course, reserve the right to appeal your decision to withhold any information or to deny a waiver of fees.

As I am making this request as an editor and this information is of timely value, I would appreciate your communicating with me by phone (direct line 703/247-3423) or fax (247-3421), rather than by mail, if you have questions regarding this request. I look forward to your reply within 10 business days, as the statute requires.

Thank you for your assistance.

Sincerely,

Maureen A. Cislo

Maureen Cislo, Editor
PRODUCT SAFETY LETTER

Receipt of this letter is acknowledged:

Signature

Date

Name (please print or type)

cc: PUB/SEC-rf, DIR
(1227K074.1XX)

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10/16/95*



U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, DC 20207

Jeffrey Bromme
General Counsel

Tel: (301) 504-0980
Fax: (301) 504-0403
Email: cpssc-gc@cpssc.gov

April 6, 1999

Mr. David Swit
Publisher, Product Safety Letter
Washington Business Information, Inc.
1117 North 19th Street, Suite 200
Arlington, Virginia 22209-1798

Re: FOIA Appeal S-710148E
Visioneer Communications, Inc.
Page Scanner Recall

Dear Mr. Swit:

By letter dated March 9, 1999, you appealed the decision of the Commission's Freedom of Information (FOI) Officer to withhold information responsive to your Freedom of Information Act (FOIA) request. Under authority delegated to me by the Commission, 16 C.F.R. § 1015.7, I have reviewed your appeal.

I affirm the FOI Officer's decision to withhold the documents identified in the paragraphs below. My decision is based on FOIA Exemptions 3, 4, 5 and 7(A). 5 U.S.C. §§ 552(b)(3), (b)(4), (b)(5) and (b)(7)(A). Exemption 3 of the FOIA provides for withholding information that is specifically exempted from disclosure by another statute. In applying Exemption 3 to the withheld information, the Commission is relying on section 6(a)(2) of the CPSA. 15 U.S.C. § 2055(a)(2). Section 6(a)(2) expressly prohibits the disclosure of information reported to or otherwise obtained by the Commission that contains or relates to trade secrets or other confidential commercial information. Such information is confidential if disclosure is likely (1) to impair the government's ability to obtain the necessary information in the future or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. National Parks & Conservation Association v. Morton, 498 F.2d 765, 770 (D.C. Cir.) 1974). In addition, CPSA section 6(a)(2)

Mr. David Swit
April 6, 1999

Page 2

incorporates Exemption 4 of the FOIA which protects trade secrets and confidential commercial information obtained from a person.

Under FOIA Exemptions 3 and 4, and CPSA section 6(a)(2), the Commission is withholding correspondence between the Commission and the manufacturer relating to the recall, engineering design and quality control information, and other company internal documents.

In applying FOIA Exemption 3, the Commission is also relying on CPSA section 6(b)(1). 15 U.S.C. § 2055(b)(1). Section 6(b)(1) requires that before disclosing information that would enable the public to identify the manufacturer or private labeler of a consumer product, the Commission "shall take reasonable steps to assure . . . that [the] information . . . is accurate, and that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes of the [CPSA]." The information that is being withheld pursuant to FOIA Exemption 3, relying on CPSA section 6(b)(1), consists of documents relating to the negotiations concerning the recall, including letters to and from the manufacturer. It would not be fair in the circumstances to reveal such documents. 16 C.F.R. § 1101.33(b)(1) and (2).

FOIA Exemption 5 provides for the withholding of certain inter-agency and intra-agency documents and incorporates the deliberative process privilege. This privilege protects advice, recommendations, and opinions that are part of the deliberative, consultative, and decision-making processes of the agency. Although this privilege applies only to the opinions or recommendations in a document and not to factual information, facts are withheld here because they are inextricably intertwined with the exempt portions. The information being withheld pursuant to Exemption 5 consists of intra-agency memoranda and internal Commission notes.

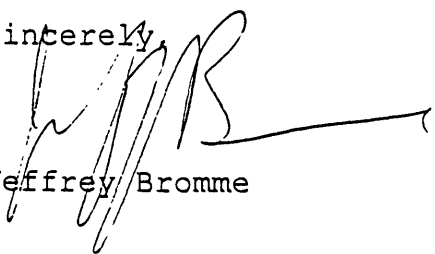
Exemption 7(A) provides for the withholding of investigatory records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information could reasonably be expected to interfere with enforcement proceedings. The documents withheld under this exemption consist of the same documents being withheld under FOIA Exemption 5 as well as external correspondence that is included in the open investigatory file. I have determined that release of these documents could reasonably be expected to interfere with law enforcement proceedings.

Mr. David Swit
April 6, 1999

Page 3

You have the right to seek judicial review of this decision as provided by 5 U.S.C. § 552(a)(4)(B).

Sincerely,



Jeffrey Bromme



WASHINGTON BUSINESS INFORMATION, INC. • 1117 NORTH 19TH STREET, SUITE 200, ARLINGTON, VA 22209-1798 • (703)247-3434, Fax 247-3421

March 9, 1999

FOIA APPEAL, General Counsel
Attn: Office of the Secretary
U.S. Consumer Product Safety Commission
Washington, D.C. 20207

FAX: 301/504-0127
(Page 1 of 1)

Dear Sir,

Pursuant to the Freedom of Information Act, we hereby appeal the denial of FOIA Request S-710148E (filed July 2, 1996), Visioneer scanner recall, release 96-143. We appeal because:

A -- The denial contradicts the instructions of the President and the Attorney General, as well as CPSC's own regulations, that disclosure be the rule, rather than the exception.

B -- CPSC claims requested records are in "active law enforcement investigatory files." That seems improbable as most recall files are closed in far under the 33-plus months since this one was opened. Please confirm the file is open, and estimate how long it will stay so.

C -- CPSC has provided no proof of its claim that disclosing some or all of these records would disclose techniques and procedures for law enforcement. Moreover, CPSC's blanket withholding of these records is inconsistent with the agency's stated policy that the invoking of these exemptions to the FOIA is discretionary, not mandatory.

D -- CPSC has provided insufficient information for Requester to evaluate validity of withholding records that are segregable from otherwise exempt material. Examples include, but are not limited to:

- (1) Form 1A -- CPSC staff's initial input and staff worksheet
- (2) Company's "Full Report" on possible hazard
- (3) Company's Corrective Action Plan Progress Reports

(4) Safety-related consumer or dealer complaints, warranty claims, reports of injury, and copies of all documents related to such complaints, claims and injuries, including court complaints and related documents filed in or associated with lawsuits involving the product, and a description of the resolution of those lawsuits, if any. If the complaints and other documents requested in this sub-paragraph are unavailable, CPSC's records should contain the reason for such unavailability and a summary of the requested items containing the name, address and phone number of the claimant or of his/her attorney.

Please sign below to confirm receipt of this appeal, and fax it to me at 703/247-3421.

Sincerely,

David Swit, Publisher
Product Safety Letter

Receipt of the above is acknowledged:

_____ Signature	_____ Date
_____ Name (please print)	_____ Title

cc: E. Koch, Esq.
SEC-rf, DIR/f, PSL



U.S. Consumer Product Safety Commission
Washington, D.C. 20207

February 26, 1999

OPEN
710148E

Certified Mail

Mr. Jeffrey W. Schomisch
Editorial Director • Product Safety Letter
Washington Business Information
1117 North 19th Street
Arlington, VA 22209-1798

**Re: FOIA Request S710148E: Visioneer Communications, Inc., Page Scanner Recall / CPSC
Compliance file RP960152**

Dear Mr. Schomisch:

Thank you for your Freedom of Information Act (FOIA) request to the Commission. We must withhold the records responsive to your request, specifically, the records from the Commission's Office of Compliance's active law enforcement investigatory files, (file RP960152), pursuant to the FOIA Exemptions 5 and 7(A), 5 U.S.C. §§ 552(b)(5) and (b)(7)(A). Exemption 5 provides for the withholding from disclosure of inter-agency and intra-agency memoranda which would not be available by law to a party other than an agency in litigation with the agency. Exemption 7(A) provides for the withholding from disclosure records or information compiled for law enforcement purposes, to the extent that the production of such law enforcement records or information could reasonably be expected to interfere with enforcement proceedings.

The records being withheld consist of internal staff memoranda and correspondence containing recommendations, opinions, suggestions and analyses of the Commission's technical and legal staffs. The records constitute both predecisional and deliberative discussion that clearly falls within the attorney-client and attorney-work product privileges. Any factual materials in the records not covered by some other exemption are inextricably intertwined with exempt materials or the disclosure of the factual materials would itself expose the deliberative process. We have determined that the disclosure of these certain law enforcement investigatory records responsive to your request would be contrary to the public interest. It would not be in the public interest to disclose these materials because disclosure would (1) impair the frank exchange of views necessary with respect to such matters, and (2) prematurely reveal information used in the investigation, thereby interfering with this and other matters by disclosing the government's basis for pursuing this matter.

According to the Commission's regulations implementing the FOIA at 16 C.F.R. § 1015.7, a denial of access to records may be appealed to the General Counsel of the Commission within thirty (30) days of your receipt of this letter. An appeal must be in writing and addressed to: FOIA APPEAL, General Counsel, ATTN: Office of the Secretary, U.S. Consumer Product Safety Commission, Washington, D.C. 20207.

You may want to resubmit your request in a few months upon completion of the case. Processing this request, performing the file searches and reviewing the information, cost the Commission \$100.00. In this instance, we have decided to waive all of the charges.

Sincerely,

Todd A. Stevenson
Deputy Secretary and
Freedom of Information Officer



WASHINGTON BUSINESS INFORMATION, INC. • 1117 NORTH 19TH STREET, SUITE 200, ARLINGTON, VA 22209-1798 • (703)247-3434, FAX 247-3421

July 2, 1996

PSL CODE -- Recall -- 117

Consumer Product Safety Commission
Freedom of Information Office
4330 East-West Highway
Bethesda, Md. 20207
Fax: 301/504-0127

Dear FOI Officer,

Pursuant to the federal Freedom of Information Act, 5 U.S.C. Section 552, I request access to and copies of all information to and from CPSC and Visioneer on the recall of computer scanners (CPSC release #96-143). I would also like copies of all inter-agency memos staff may have written to each other regarding this recall.

As a member of the news media I am only required to pay for the direct cost of duplication after the first 100 pages. Please waive any additional fees. Release of the information is in public interest because it will contribute significantly to public understanding of government operations and activities.

If my request is denied in whole or part, I ask that you justify all deletions by reference to specific exemptions of the Act. I will also expect you to release all segregable portions of otherwise exempt material. I, of course, reserve the right to appeal your decision to withhold any information or to deny a waiver of fees.

As I am making this request as an editor and this information is of timely value, I would appreciate your communicating with me by phone (direct line 703/247-3423) or fax (247-3421), rather than by mail, if you have questions regarding this request. I look forward to your reply within 10 business days, as the statute requires.

Thank you for your assistance.

Sincerely,

Maureen R. Cislo

Maureen Cislo, Editor
PRODUCT SAFETY LETTER

Receipt of this letter is acknowledged:

Signature

Date

Name (please print or type)

cc: PUB/SEC-rf, DIR
(1227X076 177)

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U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207-0001

OFFICE OF THE GENERAL COUNSEL

Jeffrey S. Bromme
General Counsel
Tel: 301-504-0980 ext. 2299
Fax: 301-504-0403
E-Mail: cpsc-gc@cpsc.gov

March 25, 1999

Mr. David Swit
Washington Business Information, Inc.
1117 North 19th Street
Suite 200
Arlington, VA 22209-1798

RE: FOIA Appeal S804024
Maytag Gas Dryers Recall

Dear Mr. Swit:

By letter dated March 9, 1999, you appealed the decision of the Commission's Freedom of Information Officer to withhold information responsive to your Freedom of Information Act (FOIA) request on the CPSC's recall of gas dryers. Under authority delegated to me by the Commission, 16 C.F.R. § 1015.7, I have reviewed your appeal. I affirm the Freedom of Information Officer's decision to withhold responsive information contained in the Commission's active law enforcement investigatory files. This decision is based on FOIA Exemptions 5 and 7(A). 5 U.S.C. §§ 552(b)(5) and (b)(7)(A).

Exemption 5 permits agencies to withhold certain inter-agency and intra-agency documents and incorporates the deliberative process privilege. The internal memoranda and staff notes withheld in this case consist of staff recommendations containing both pre-decisional and deliberative discussions. The deliberative process privilege protects advice, recommendations, and opinions that are part of the agency's deliberative, consultative, and decision-making processes. Although this privilege applies only to the opinions or recommendations in a document and not to factual information, facts are withheld here because they are inextricably intertwined with the exempt portions. Release of this information would stifle the Commission's decisionmaking ability with respect to section 15

Mr. David Swit
March 25, 1999

Page 2

investigations by impairing open and frank communication within the agency.

The documents being withheld under Exemption 5 are also being withheld under Exemption 7(A). Exemption 7(A) provides for the withholding of investigatory information compiled for law enforcement purposes, but only to the extent that the production of such information could reasonably be expected to interfere with enforcement proceedings. We have determined that disclosure of these documents could reasonably be expected to interfere with law enforcement proceedings.

At the present time, the investigatory file that contains the responsive documents is open since the investigation is ongoing. If the file is closed in the future, some of the information may be subject to disclosure under the FOIA. You may want to call our FOI office from time to time for suggestions on when to resubmit your FOIA request.

You have the right to seek judicial review of this decision, as provided by 5 U.S.C. § 552(a)(4)(B).

Sincerely,



Jeffrey S. Bromme



WASHINGTON BUSINESS INFORMATION, INC. • 1117 NORTH 19TH STREET, SUITE 200, ARLINGTON, VA 22209-1798 • (703)247-3434, Fax 247-3421

March 9, 1999

FOIA APPEAL, General Counsel
Attn: Office of the Secretary
U.S. Consumer Product Safety Commission
Washington, D.C. 20207

FAX: 301/504-0127
(Page 1 of 1)

Dear Sir,

Pursuant to the Freedom of Information Act, we hereby appeal the denial of FOIA Request S-804024 (filed April 7, 1998), Maytag dryer recall, release 97-060. We appeal because:

A -- The denial contradicts the instructions of the President and the Attorney General, as well as CPSC's own regulations, that disclosure be the rule, rather than the exception.

B -- CPSC claims requested records are in "active law enforcement investigatory files." That seems improbable as most recall files are closed in far under the 25-plus months since this one was opened. Please confirm the file is open, and estimate how long it will stay so.

C -- CPSC has provided no proof of its claim that disclosing some or all of these records would disclose techniques and procedures for law enforcement. Moreover, CPSC's blanket withholding of these records is inconsistent with the agency's stated policy that the invoking of these exemptions to the FOIA is discretionary, not mandatory.

D -- CPSC has provided insufficient information for Requester to evaluate validity of withholding records that are segregable from otherwise exempt material. Examples include, but are not limited to:

- (1) Form 1A -- CPSC staff's initial input and staff worksheet
- (2) Company's "Full Report" on possible hazard
- (3) Company's Corrective Action Plan Progress Reports
- (4) Safety-related consumer or dealer complaints, warranty claims, reports of injury,

and copies of all documents related to such complaints, claims and injuries, including court complaints and related documents filed in or associated with lawsuits involving the product, and a description of the resolution of those lawsuits, if any. If the complaints and other documents requested in this sub-paragraph are unavailable, CPSC's records should contain the reason for such unavailability and a summary of the requested items containing the name, address and phone number of the claimant or of his/her attorney.

Please sign below to confirm receipt of this appeal, and fax it to me at 703/247-3421.

Sincerely

David Swit, Publisher
Product Safety Letter

Receipt of the above is acknowledged:

_____ Signature	_____ Date
_____ Name (please print)	_____ Title

cc: E. Koch, Esq.
SEC-rf, DIR/f, PSL



U.S. Consumer Product Safety Commission
Washington, D.C. 20207

February 25, 1999

Certified Mail

Mr. Jeffrey W. Schomisch
Editorial Director • Product Safety Letter
Washington Business Information
1117 North 19th Street
Arlington, VA 22209-1798

Re: FOIA Request S804024: Maytag Gas Dryers Recall / CPSC Compliance file RP970047

Dear Mr. Schomisch:

Thank you for your Freedom of Information Act (FOIA) request to the Commission. We must withhold the records responsive to your request, specifically, the records from the Commission's Office of Compliance's active law enforcement investigatory files, (file RP~~950058~~⁸⁰⁴⁰²⁴), pursuant to the FOIA Exemptions 5 and 7(A), 5 U.S.C. §§ 552(b)(5) and (b)(7)(A). Exemption 5 provides for the withholding from disclosure of inter-agency and intra-agency memoranda which would not be available by law to a party other than an agency in litigation with the agency. Exemption 7(A) provides for the withholding from disclosure records or information compiled for law enforcement purposes, to the extent that the production of such law enforcement records or information could reasonably be expected to interfere with enforcement proceedings.

The records being withheld consist of internal staff memoranda and correspondence containing recommendations, opinions, suggestions and analyses of the Commission's technical and legal staffs. The records constitute both predecisional and deliberative discussion that clearly falls within the attorney-client and attorney-work product privileges. Any factual materials in the records not covered by some other exemption are inextricably intertwined with exempt materials or the disclosure of the factual materials would itself expose the deliberative process. We have determined that the disclosure of these certain law enforcement investigatory records responsive to your request would be contrary to the public interest. It would not be in the public interest to disclose these materials because disclosure would (1) impair the frank exchange of views necessary with respect to such matters, and (2) prematurely reveal information used in the investigation, thereby interfering with this and other matters by disclosing the government's basis for pursuing this matter.

DEN
804024
A handwritten signature, possibly "D. DEN", is written over the number "804024". Below the signature is a large, stylized scribble or mark.

According to the Commission's regulations implementing the FOIA at 16 C.F.R. § 1015.7, a denial of access to records may be appealed to the General Counsel of the Commission within thirty (30) days of your receipt of this letter. An appeal must be in writing and addressed to: FOIA APPEAL, General Counsel, ATTN: Office of the Secretary, U.S. Consumer Product Safety Commission, Washington, D.C. 20207.

You may want to resubmit your request in a few months upon completion of the case. Processing this request, performing the file searches and reviewing the information, cost the Commission \$100.00. In this instance, we have decided to waive all of the charges.

Sincerely,

Todd A. Stevenson
Deputy Secretary and
Freedom of Information Officer



April 7, 1998

Consumer Product Safety Commission
Freedom of Information Office
4330 East-West Highway
Bethesda, Md. 20207
Fax: 301/504-0127

ME74
EXL 5
D 3

Dear FOI Officer,

0107

Pursuant to the federal Freedom of Information Act, 5 U.S.C. Section 552, I request access to and copies of all information to and from CPSC and Maytag Appliances on Jan. 21, 1997 recall of gas dryers. I would also like copies of all inter-agency memos staff may have written to each other regarding this recall.

As a member of the news media I am only required to pay for the direct cost of duplication after the first 100 pages. Please waive any additional fees. Release of the information is in public interest because it will contribute significantly to public understanding of government operations and activities.

If my request is denied in whole or part, I ask that you justify all deletions by reference to specific exemptions of the Act. I will also expect you to release all segregable portions of otherwise exempt material. I, of course, reserve the right to appeal your decision to withhold any information or to deny a waiver of fees.

As I am making this request as an editor and this information is of timely value, I would appreciate your communicating with me by phone (direct line 703/247-3423) or fax (247-3421), rather than by mail, if you have questions regarding this request. I look forward to your reply within 10 business days, as the statute requires.

Thank you for your assistance.

Sincerely,

Sam Cristy, Editor
PRODUCT SAFETY LETTER

Receipt of this letter is acknowledged:

Signature Date

Name (please print or type)

5-8-98 4024

cc: PUB/SEC-rf, DIR
(1227K074.1YY)



U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207-0001

OFFICE OF THE GENERAL COUNSEL

Jeffrey S. Bromme
General Counsel
Tel: 301-504-0980 ext. 2299
Fax: 301-504-0403
E-Mail: jbromme@cpsc.gov

March 23, 1999

Mr. Joseph Hinchliffe
University of Illinois
At Urbana-Champaign
College of Liberal Arts and Sciences
361 Lincoln Hall
702 South Wright Street
Urbana, IL 61801-3696

RE: FOIA Appeal S8120059

Dear Mr. Hinchliffe:

By letter dated February 24, 1999, you appealed the decision of the Commission's Freedom of Information Officer to withhold Commission memoranda responsive to your Freedom of Information Act (FOIA) request on All-Terrain Vehicles.

Under authority delegated to me by the Commission, 16 C.F.R. 1015.7, I have reviewed your appeal. I affirm the Freedom of Information Officer's decision to withhold the memoranda based on FOIA Exemption 5. 5 U.S.C. § 552(b)(5).

Exemption 5 of the FOIA exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). I am withholding legal memoranda that are pre-decisional and that contain deliberative discussions falling within the attorney client privilege and attorney work product doctrine. Exemption 5 encourages open, frank discussions and analysis between subordinates and superiors, and protects against public confusion that might result from a disclosure of reasons or rationales that were not in fact ultimately grounds for an agency's action. The memoranda contain legal advice, recommendations, opinions, and suggestions that fall within the scope of the exemption. Although this exemption applies only to the opinions and recommendations in a

Mr. Joseph Hinchliffe
March 23, 1999

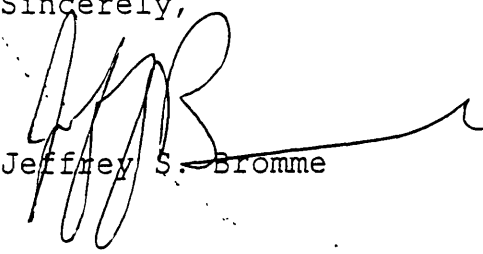
Page Two

a document, and not to factual information, the facts are withheld here because they are inextricably intertwined with the exempt portions. Disclosure of the factual information in the memoranda would itself expose the deliberative process.

You assert that in the past the Commission has voluntarily waived this exemption for other legal memoranda disclosed to Congress. However, that does not preclude assertion of it here. In addition, disclosure of requested information to a congressional committee does not waive FOIA exemption protection for that information. See e.g., Florida House of Representatives v. United States Department of Commerce, 961 F.2d 941, 946 (11th Cir.) (holding no waiver of exemption due to court-ordered disclosure, involuntary disclosure to Congress, or disclosure of related information), cert. dismissed, 506 U.S. 969 (1992).

You have the right to seek judicial review of this decision, as provided by 5 U.S.C. § 552(a)(4)(B).

Sincerely,



Jeffrey S. Bromme

UNIVERSITY OF ILLINOIS
AT URBANA-CHAMPAIGN

Department of Political Science
College of Liberal Arts and Sciences
361 Lincoln Hall
702 South Wright Street
Urbana, IL 61801-3696



CPSC/DEC OF THE SECRETARY
FREEDOM OF INFORMATION
1999 MAR -5 P 2:32

February 24, 1999

FOIA APPEAL

**Jerry Bromme, General Counsel
Attn: Office of the Secretary
U.S. Consumer Product Safety Commission
Washington, D.C. 20207**

Re: FOIA Request S-8120059

Dear Mr. Bromme:

I am writing to appeal the partial denial of my request for information pursuant to the Freedom of Information Act, 5 U.S.C. § 522 et seq. In particular, I am appealing the withholding of documents described at request 7 and 8 of my December 2, 1998, letter.

After receiving a preliminary response from Mr. Todd Stevenson of your agency, on February 11, 1999, I received from him a second letter denying my request for information from your agency. For your convenience, I enclose a copy of my original request and the articles referenced therein. I also enclose a copy of Mr. Stevenson's January 7, 1999, preliminary response and his February 11, 1999, final response.

On page 2 of his February letter, Mr. Stevenson discusses the reasons for withholding the requested materials. On pages 5 to 9 of my letter request, I outline the reasons that the requested materials should be produced regardless of whether the documents maybe lawfully withheld under §522(b)(5), and rather than repeat what I have already said, I simply would direct your attention to that portion of my letter.

Beyond noting the comments of President Clinton and Attorney General Reno that the mere existence of a privilege is not a sound reason for asserting it, I would also like to make three additional points. First, your agency's waiver of such a privilege is not unprecedented. Second, your agency's assertions of privilege are not so strong as they might seem, but regardless of whether any claimed privilege is intact, as a matter of good and provident governance, the agency should make the requested documents public.

At least once to my knowledge the Commission has elected to waive any privilege in connection with a briefing memoranda of the general counsel.¹ Although that waiver came in connection with Congressional proceedings, it came in the midst of *the Commission's activities*, not several years later. Any disruption to the deliberative process occasioned by the release of the documents would have been far greater in the matter of Tris than in the present one since my request is for documents many years after the fact.

Moreover, the privilege that might have once existed with respect to at least one of the documents I have requested may have been already waived. Regardless of whether disclosures of the requested information reported in the enclosed articles count as "leaks," there is a far more substantial basis for asserting waiver: the reported actions of the Commission chairman with respect to at least one of the requested documents. News reports suggest that Chairman Scanlon may have shown the OGC memorandum that I have requested to members of a Congressional subcommittee.² At least, there are reports that he was castigated by Mr. Florio for attempting to insert a document similar to the one I have requested into the public record.

The report, if accurate, undercuts any suggestion that there might remain any privilege in two ways. Intentional revelation of the document outside the commission amounts to a knowing waiver. Moreover, it makes untenable claims of interference with a deliberative process. I know only what the reports state. I have no personal knowledge of what document was shown to whom, under what circumstances and with what authority to do so. But on the face of things, it seems that the case for a waiver is quite strong. Certainly, the Commissioner would seem to have had authority to act as he did.

But to consider this matter on technical legal grounds misses the larger point. The release of the requested material even at the time appeared not to impair the deliberative processes of the Commission. Surely, the decision of a Congressional subcommittee to publish or not publish the document in the

¹Shakin, Alan C. Memorandum to the Commission dated February 25, 1977, enclosed for the record in letter of Byington, S. John, Chairman, U.S. Consumer Product Safety Commission, U.S. Congress. House of Representatives. Subcommittee on Commerce, Consumer and Monetary Affairs of the Committee on Government Operations. 1977. *Consumer Product Safety Commission's Ban on Tris*. 95th Cong., 1st Sess., April 4 and May 17, 1977, pp. 104-128.

²"Sports and Recreation: Florio raps Scanlon for releasing memo; Accuses Justice of failing to act on ATVs." 1987. *Prod. Safety & Liability Rptr.* 15, no. 22: 399-400.

transcript of the committee proceedings has no bearing on the impairment that release of the document might have on Commission deliberations.

Moreover, claims about any interference in deliberation occasioned by release of the memoranda are *now* are difficult to credit. At least two Congressional subcommittees held hearings related to the subject matter of the memoranda in question.³ What disruption to deliberative process disclosure to a dissertating graduate student could *now* occasion that disclosure to a Congressional subcommittee, more than a decade ago, *has not already caused* is beyond my ability to understand.

I do not make light of interests and concerns protected by the exemptions provided for in the Freedom of Information Act, but the matter of ATVs before the Commission was and is truly an exceptional case. The pertinent circumstances of that proceeding and other matters relevant to release of the requested documents, which are related in my original request at pp. 6-9, would make release of the requested materials an important exception rather than a general rule.

I thank-you for your attention to this matter. In the spirit of openness and disclosure embraced by Attorney General Reno and President Clinton, I hope, trust and expect that when you review this letter, my initial letter and the referenced materials therein, you will accede to my request for production of the requested materials.

I remain,

Very truly yours,



Joseph Hinchliffe

cc:

Paul J. Quirk

³U.S. Congress. House of Representatives. Subcommittee on Commerce, Consumer Protection and Competitiveness of the Committee on Energy and Commerce. 1987. *All-Terrain Vehicles*. 100th Cong., 1st Sess., May 12, 1987; U.S. Congress. House of Representatives. Subcommittee on Commerce, Consumer and Monetary Affairs of the Committee on Government Operations. 1988. *All-Terrain Vehicle Settlement*. 100th Cong., 2nd Sess., January 28, 1988.

OSFOI Denied in part, Off(denial)
Ex. 5, chron, spec. 3285

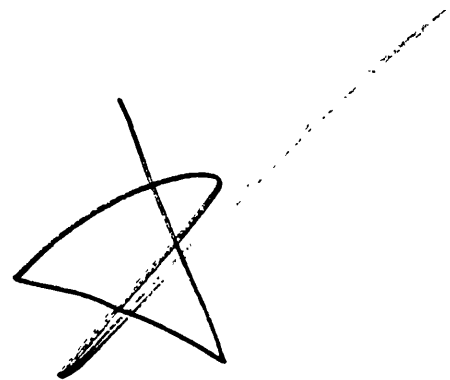


DEW
8120059

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

February 8, 1999

Joseph Hinchliffe
University of Illinois
At Urbana-Champaign
College of Liberal Arts and Sciences
361 Lincoln Hall
702 South Wright Street
Urbana, IL 61801-3696



Re: FOIA Request S-8120059: Information about TRIS and

Dear Mr. Hinchliffe:

Thank you for your Freedom of Information Act (FOIA) request seeking information from the Commission (Commission). The records from the Commission files responsive to your request have been processed and copies of the releasable records are enclosed. Enclosed are copies of the following:

Comments submitted by Suzuki Motor Corporation in response to the "All-Terrain Vehicles; Advanced Notice of Proposed Rulemaking; Request for Comments and Data," 50 F.R. 21339, May 31, 1985.

"Preliminary Report of Survey of All Terrain Vehicle Related Injuries (1985)" prepared by Rae Newman, EPHA, January 16, 1986.

"Final Report: ATV Exposure Survey, May 19, 1986," prepared for the Commission by Market Facts, Inc., under contract CPSC-C-1087.

A search of our files failed to produce the report entitled "Consumer Attitudes Survey of Children's Sleepwear and the CPSC Ban on Children's Garments Containing TBPP (TRIS), prepared by Kearney, dated January 1978. We must presume that the report is misplaced and lost. We apologize for any inconvenience. Our records also failed to indicate the existence of a prior report on survey of consumer attitudes about Tris, nor do we have any records responsive to requests 5 & 6 in your letter.

Lastly, we must withhold the following records pursuant to Exemption 5 the FOIA, 5, U.S.C. §522(b)(5).

Memorandum dated September 30, 1986, from David Schmeltzer, Compliance to Leonard Defiore, Executive Director, regarding recommendations on the ATV Briefing Package.

Memorandum dated October 15, 1986, from the Commission's General Counsel to the Commission, re: ATVs -- Substantial Evidence's

Exemption 5 provides for the withholding from disclosure of inter-agency and intra-agency memoranda, which would not be available by law to a party in litigation with the agency. The document being withheld constitutes both predecisional and deliberative discussion that clearly falls within the attorney-client and attorney-work product privileges. The material contains recommendations, opinions, suggestions and analyses. Any disclosure of the information in the memorandum would impair the frank exchange of views necessary with respect to such matters. For this reason, disclosure would not be in the public interest. Any factual material in the memorandum not covered by some other exemption are inextricably intertwined with exempt material or the disclosure of the factual material would itself expose the deliberative process.

According to the Commission's regulations implementing the FOIA at 16 C.F.R. § 1015.7, a partial denial of access to records may be appealed to the General Counsel of the Commission within thirty (30) days of your receipt of this letter. An appeal must be in writing and addressed to: FOIA APPEAL, General Counsel, ATTN: Office of the Secretary, U.S. Consumer Product Safety Commission, Washington, D. C. 20207.

Processing this request, conducting the file searches and preparing the information cost the Commission \$90.00. In this instance we have waived all of the charges. Thank you for your interest in consumer product safety. Should you have any questions, please contact Alberta Mills, Paralegal Specialist, by letter, facsimile (301) 504-0127 or telephone (301) 504-0785, ext. 1299.

Sincerely,

Todd A. Stevenson
Deputy Secretary and
Freedom of Information Officer
Office of the Secretary

Enclosure

UNIVERSITY OF ILLINOIS
AT URBANA-CHAMPAIGN

Department of Political Science
College of Liberal Arts and Sciences
361 Lincoln Hall
702 South Wright Street
Urbana, IL 61801-3696



December 2, 1998

5/1/2

Ms. Sandra K. Bradshaw
Senior FOIA Specialist
Freedom of Information Division
Office of the Secretary
United States Consumer Product Safety Commission
Washington, D.C. 20207

Dear Sandy:

I want to thank-you for delivering the documents that I requested during my visit to the CPSC offices last summer. I have already found these documents to be quite helpful in my dissertation research. As I work, I discover new things that I would like to know.

I am writing to request some additional documents. For our convenience in referring to the documents, I have numbered these requests consecutively, but I have divided the request into parts: Documents Pertaining to the Regulation of Tris; Documents Pertaining to the Regulation of ATVs; and Documents That Are ³²⁸⁷ Currently Restricted by the Commission. After each request or each group of requests, I have placed a short discussion that I believe will be of assistance to you ^{ETA} or another member of your agency in locating the sought-for document. Some I am fairly sure are available to the public. Others may be restricted -- but I thought that I may as well ask, give my reasons for asking, and ask for a waiver of any applicable ^{D.4} restriction.

Freedom of Information Act. As I have worked with you in the past, I am writing directly to you rather than to the Secretary. Moreover, I am putting all of my requests into one letter rather than splitting my request into several different parts. If I need to re-submit my request, I trust you will advise me to do so. If this request needs to be made pursuant to the provisions of the Freedom of Information Act, please deem this letter to be such a request.

Kindly mail the requested documents to me at my address above. I am willing to pay the costs of search for, photocopying of, and incidental charges related

4-5/20059

to release of the requested documents to the extent that the total cost of the requested information does not exceed two hundred fifty (\$250) dollars.

Waiver of Fees I request a waiver of any fees or costs pursuant to 16 C.F.R. §1015.9 (f)(4) because the disclosure of the requested information is in the public interest as it is likely to contribute significantly to public understanding of the operations or activities of the government and the disclosure of the requested information is not primarily in my commercial interest.

More specifically, the information sought is to be used in connection with completion of my doctoral dissertation in political science at the University of Illinois. Broadly stated, the dissertation inquires whether, and if so, how public opinion, broadly defined, affects as compared with other influences, the activities of regulatory agencies including specifically, the United States Consumer Product Safety Commission. The requested disclosures all concern information flows that affected or might have affected agency decision making.

Although publication of doctoral dissertations usually has quite limited commercial value, the results of such research cumulated with the work of other researchers in related endeavors is the primary factual predicate on which virtually all instruction about American Government is conducted at the colleges and universities. Thus, the release of the requested information is likely to increase public understanding, and quite clearly, the release is not primarily for commercial purposes.

Documents Pertaining to the Regulation of Tris

1. A January 31, 1978, memorandum and/or final report, "Consumer Attitudes Survey on Children's Sleepwear and the CPSC Ban on Children's Garments Containing TBPP (Tris)"

Discussion: This document is referred to "Tris Ban: Consumer Attitudes Found Unchanged" *Consumer Product Safety Guide* (CCH) ¶ 43,971 [Transfer Binder 1977-1979] (March, 1978). This document is *not* on the microfiche that I examined this past summer at your offices although there was another report by Kearney on that document. If the memorandum and the final report are separate documents, I would like to see either or both. If you encounter a related document in your search, please advise me. For your convenience, I enclose a photocopy of the referenced article.

2. A prior report on survey of consumer attitudes about Tris.

Discussion: I only surmise that this document exists. For a conclusion that attitudes are unchanged, there presumably must be a prior survey. I would like a copy of this prior survey if it is available.

Documents Pertaining to the Regulation of ATVs

3. Comments on "All-Terrain Vehicles; Advanced Notice of Proposed Rulemaking; Request for Comments and Data," 50 F.R. 21339 et seq. (May 31, 1985) if any, submitted by the following companies:
 - a) Polaris, whether by manufacturing or holding company affiliates
 - b) Suzuki, whether by manufacturing or distributing company affiliate

Discussion: While I was in Washington, I was able to obtain copies of the comments submitted by Honda and Kawasaki, but for some reason, I did not obtain copies of the comments by Polaris or Suzuki. Both are major manufacturers of ATVs, and I presume -- but do not know for sure -- that they submitted formal, written comments to the referenced notice. I would expect that the comments are in the public reading room. I want only their formal written comments to the rule .

4. "Preliminary Report of Survey of All Terrain Vehicle Related Injuries (1985)" prepared by Rae Newman, EPHA, January 16, 1986.
5. Analyses of Questions 34 to 39 the Market Facts, Inc. Exposure Survey OMB # 3041-0070.
6. Analysis, Evaluation or Reports of how Media Attention on ATVs or ATV-related deaths or injuries affected the market for ATVs

Discussion: Requests 4, 5 and 6 both arise from the same source: The Memorandum to Nicholas V. Marchica dated 12 Sept 1986 prepared by Gregory Rodgers, ECCP and William Zamula, ECCS. (A copy of this memoranda is enclosed in the ATV Task Force Report. The copy there includes a survey form of Market Facts, Inc, 1010 Lake Street, Oak Park, IL 60301. OMB No 3041-0070.)

Request 4 is a document identified in the September 12 memorandum, *supra*, to Mr. Marchica at page 1, footnote 1.

Requests 5 and 6 are items that I infer exist. As I understand the survey form attached to the September 12 document, this is the survey form that was used in collecting data about exposure to ATVs. So far as I can tell, no where in this September 12 report is there any analysis of Questions 38 and 39, and it does not make sense to me that this information would have been collected at very great expense and then never analyzed or reported upon. The questions of particular interest to me are:

Question 38: "Have you heard or read in the media about the possible safety problems with ATV(s)? Yes/no

Question 39: Please briefly describe what you have heard or read in the media. (Probe: As best you can, tell me specifically what you have heard on T.V. or on the radio or read in magazines or newspapers about possible ATV safety problems.)

Both of these questions are important to areas of interest in my dissertation, and I assume that at some point, someone would have, at the very least, cross-tabulated answers to those questions against other answers to questions in the survey. I would like to have a copy of any existent report of this cross-tabulation and analysis (Item 5), and I would like to have any existent reports following-up on this analysis.

If the data was collected, but never analyzed or reported upon, I would like to know that fact too. If the data were collected, but no analysis can be found, I would be very pleased to conduct the analysis myself. In this instance, I would need copies of the data on a floppy disk, zip disk or CD ROM and appropriate codebooks. In this case, I would prefer that the data provided in a STATA or SPSS file format, but I assume that I will be able to convert any widely used format into suitable files for analysis.

So to summarize, I would prefer copies of documents that CPSC has already prepared concerning this media attention and ATV exposure. If there are no such documents, I would like to have copies of the computer files and codebooks with the data from the survey identified above.

Documents That Are Currently Restricted by the Commission.

7. The "RESTRICTED briefing package" discussing enforcement options referred to on page 15 of the CPSC All-Terrain Vehicle Task Force Report. (This document, has also been identified as a September 30, 1986 memorandum to Leonard DeFiore, Executive Director from David Schmeltzer, AED Compliance and Enforcement.) A copy of an article discussing this (or these) documents is enclosed and cited more fully below.
8. The separate memorandum by the Office of General Counsel on whether there is sufficient evidence to support each specific regulatory recommendation by substantial evidence. This memorandum is referred to in the Report of the CPSC All-Terrain Vehicle Task Force at page 15. A copy of an article discussing this (or these) documents is enclosed and cited more fully below.

Discussion:

I did not see these documents when I visited the CPSC offices this past summer, and the references that I have seen of these documents indicates that they are "Restricted." Although the very identification of the documents described at Items 7 and 8 above suggests that they are exempt from disclosure on grounds of attorney-client, attorney work product, or deliberative process privilege, but I would nevertheless urge that the requested documents be made available to me as a "discretionary disclosure."

CPSC, of course, already had a long standing policy favoring "discretionary disclosure." Its regulations have long provided for disclosing even documents exempt from disclosure where the disclosure is not prohibited by law or not against the public interest. 42 C.F.R. 1015.1(b). My examination of CPSC web pages has not provided an explicit definition of when disclosure of documents is "not against the public interest," but one criteria for such disclosure might be only where CPSC "reasonably foresees that disclosure would be harmful to an interest protected" by any privileges that the agency might assert.

At the very least, statements on FOIA by President Clinton and Attorney General Reno, as detailed in the Department of Justice FOIA *Guide*, can be considered an invitation agencies like CPSC to increase disclosure by use of a

"foreseeable harm" standard for weighing discretionary disclosure of documents.¹ Examination of criteria set out for disclosure of documents exempted by attorney-work product, attorney-client or deliberative process privileges² makes a very strong case for disclosure of the documents that I have requested. Any applicable privilege is waivable, and the case that CPSC should waive any applicable privilege is quite strong. The *Guide* sets out as the standard for disclosure of documents: whether the release of documents, "would actually inhibit candor in the decision-making process' to disclose the particular information to the public at that particular time."³

The answer to this question is obviously not, and so it is quite clearly "not against the public interest" the documents should be released. Allow me to explain by putting the release of the requested documents into an appropriate historical context, by relating past partial disclosures of the documents, and by setting out how release of the documents will affirmatively advance the public interest.

The decisions of CPSC related to the regulation of all-terrain vehicles decisions were among the most controversial ever made in its history. During the pendency of regulatory proceedings on all-terrain vehicles, ATV safety, the conduct of the Commission and its Commissioners, as well as related matters formed the basis of at least one report completed by the Congressional Research Service, at least five investigations by the General Accounting Office, and nine Congressional hearings. Related matters also occupied the attention of the Department of Justice and the U.S. International Trade Commission. Outside of government, the role of the Commission and the matter of ATV safety was the subject of features on "60 Minutes," "20/20." It was the topic of editorials in both *The New York Times* and *USA Today*. Quite clearly, the level of government and media attention has considerably diminished. The matter is far less controversial now than it was even ten years ago.

In no sense would the release of the documents interfere with the deliberative process. The *contemporaneous* release of such documents is not without precedent, even in the history of the Commission. As I examined many of the materials on

¹ Office of Information and Privacy. United States Department of Justice. *Freedom of Information Act Guide & Privacy Act Overview*. (Washington, D.C.: Government Printing Office, 1997).

² *Id.*, pp. 191-234.

³ *Id.*, p. 230

regulation of Tris, for example, -- both in transcripts of Congressional hearings and in microfiche of Commission documents -- it seems evident that the *type* of memoranda that I seek has already been released. My request is for documents more than ten years old.⁴ There is no basis for believing any serious harm will result from such releases.

Although the documents requested were not released at the time, there was at least some public comment about their contents. *The Legal Times of Washington* reported on a 1985 confidential and restricted legal memorandum from the CPSC Office of General Counsel.⁵ In a similar way, the *Product Safety and Liability Reporter* discussed a memoranda from the Office of Compliance and Enforcement.⁶ Indeed, the Associate Director for Compliance and Enforcement is reportedly said, that the ATV Task Force Report "may leave some readers with the wrong impression of the underlying data," without presumably reference to the appropriate legal standard. Apparently, too at least some members of Congress were privy to the information contained in the memoranda. Given this wide dissemination of information *at the time*, it seem that release of these memoranda of an already-made decision, twelve years after they were written, could cause little interference with any deliberative processes of the Commission.

While controversial at the time they were written, the documents requested were written more than twelve years ago. The rulemaking proceeding has been withdrawn. The litigation against ATV manufacturers has been settled, and the consent decree reached apart of the settlement has now expired. All of the Commissioners involved in the decision have left the agency. Because I have not seen the documents, I cannot say whether release of the documents would harm any

⁴ Part of my inquiry centers on how expert advice, as compared with other types of information, such as about public opinion, shaped agency decisions. A release with legal opinions redacted would be of no value to me. However, details that might identify particular manufacturers or distributors are not important for my study. Their redaction will not affect the value of the document for my purposes.

⁵ Brogan, Pamela. "Big Wheels Line Up for All-Terrain Showdown," *Legal Times* 10(4): 1, 8, 9, 10 (Monday, June 22, 1987). Indeed, the article reports that CPSC Chairman Scanlon attempted to put a copy of the memoranda into the public record during a Congressional hearing.

⁶ "ATV Briefing May Be Postponed by CPSC; Compliance Head Critical of Task Force," *Product Safety & Liability Reporter* 14(41): 707-708 (October 10, 1986)

individuals remaining, but I doubt it. The General Counsel who drafted the memoranda on substantial evidence has left the agency, and the Associate Executive Director that oversaw the work on the Compliance and Enforcement memoranda is very senior and so not likely harmed by the release or very close to retirement. In short, the decision is completed, and the people who made it or shaped it are largely gone. Although the agency still retains continuing interest in the regulation of all-terrain vehicles, the process leading to the original decision is now completed.

At the least, release of these documents is "not against the public interest." Release will not create impairment of the deliberative process of a decision made twelve years ago. Although I have not seen either document, it appears that its release will not compromise any present commission member, employee or project. As versions of the memoranda appear to have already been leaked to the media, it appears that any harmful effects that might have occurred have already come to pass. Moreover, offsetting any conceivable harmful effects from the release of these documents are positive benefits.

President Clinton, in October, 1993, sent a memorandum to heads of department and agencies. In that memoranda, he wrote that the FOIA was enacted based on the principle that "the more the American people know about their government the better they will be governed."⁷

Releasing the requested documents will allow the American people and people that study its government to see how their government functions. I am requesting the release of this memoranda for research on one aspect of a doctoral dissertation in political science. I have completed my preliminary examinations, and my dissertation research will be reviewed and approved by four members of the graduate faculty, the Director of Graduate Studies and the Head of the Department before I am finished. My dissertation design allows for carefully drawn comparisons, and the opportunity to learn from release of the requested information has probably never been better. Because such academic research is the cornerstone for learning and teaching about the operation of government, cumulated with other research, the release will form some basis for instructing students and the

⁷ Clinton, William J. October 4, 1993. "Memorandum for Heads of Departments and Agencies," in Office of Information and Privacy. United States Department of Justice. *Freedom of Information Act Guide & Privacy Act Overview*. (Washington, D.C.: Government Printing Office, 1993), p. i.

Letter to Sandra K. Bradshaw
December 2, 1998
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American public about the operation of their government. If President Clinton's observation is correct, the prospects for improving governance from this small step are more favorable than ever.

Thank-you for your assistance in this matter, and I hope to hear from you in the near future.

Very truly yours,

A handwritten signature in black ink that reads "Joseph Hinchliffe". The signature is written in a cursive style with a large initial "J".

Joseph Hinchliffe

cc:
Paul Quirk

Legal Times Vol 10, #4, p 2 Monday, June 22, 1987

Big Wheels Line Up for All-Terrain Showdown

BY PAMELA BROGAN

Last December, the Consumer Product Safety Commission, alarmed by the deaths and injuries associated with some all-terrain vehicles, took a rare and bold action. In a closed meeting, the commission decided by a 2-1 vote that all three-wheeled ATVs and adult-size vehicles purchased for children less than 16 years old were "imminent hazards" under the law.

The commissioners also voted

to ask the Justice Department to represent it in a civil action against the industry to initiate a voluntary recall of such vehicles. CPSC Chairman Terrence Scanlon cast the lone dissenting vote.

The commission's action was extraordinary because it had been 10 years since the CPSC took an industry to court over a hazardous product. In 1977, the CPSC took on the aluminum wire industry, but the commission lost its case in 1982 on jurisdictional grounds.

But the ATV industry, which

manufactures three and four-wheeled vehicles used for farming and recreation, seemed a prime target for government action. According to the CPSC, at least 20 deaths and 7,000 injuries per month are associated with ATVs. The agency also says that in 1985 alone, 85,900 ATV-related injuries were treated in hospital emergency rooms.

Adding fuel to the ATV controversy, CBS News' popular television program, "60 Minutes," spotlighted the many head

and spinal injuries suffered by ATV riders whose vehicles unexpectedly tipped over.

Yet almost six months from the day the commission moved to take action against ATV manufacturers, neither the CPSC nor the Justice Department has sought any enforcement action. In fact, the Justice Department has yet to decide whether it will even agree to pursue the CPSC's case in court.

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Cutler Leads the Charge Against ATV Recall

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"The bottom line is that nothing has been done," fumes Rep. James Florio (D-N.J.), chairman of the Subcommittee on Commerce, Consumer Protection, and Competitiveness. "The political types at the Justice Department are doing what they want to do, which is nothing," asserts Florio.

ATV manufacturers, mindful of potentially whopping liability claims, are doing plenty to ensure that they get their viewpoint across at the Justice Department.

In early February, just days after the commission's vote was leaked in the *Produce Safety Letter*, a Washington-based trade publication, Honda North America hired the D.C. powerhouse firm Wilmer, Cutler & Pickering. Name partner Lloyd

Cutler was tapped by the U.S. subsidiary of the Japanese company, which commands 70 percent of the U.S. ATV market, to represent the industry before the Justice Department and to try to negotiate an out-of-court settlement, according to firm sources.

"It was a very significant move for Honda to retain Cutler," says Toni Harrington, manager of government and public relations for Honda North America in D.C.

Even lawyers who represent plaintiffs injured by ATVs acknowledge that the industry showed savvy by hiring Cutler.

"He knows how to get in doors and what buttons to push," says Sidney Gilreath of Nashville's Gilreath & Associates. Two years ago, Gilreath formed the ATV Litigation Group, a coalition of 110 plaintiffs' lawyers who represent clients injured by ATVs.

Honda's regular outside counsel in D.C., Schmeltzer, Aptaker & Sheppard, helped bring Wilmer, Cutler onto Honda's legal team. Anticipating that the Justice Department would take his client to court, Schmeltzer, Aptaker partner Michael Brown, a former CPSC general counsel, says he recommended to Honda that executives hire Cutler.

"To the extent that this case goes to trial, we had to have some help," says Brown.

Cutler, former White House counsel under President Jimmy Carter, is widely regarded for his lobbying on behalf of the auto and pharmaceutical industries as a consummate litigator/dealmaker. He is

working on the ATV case with Wilmer, Cutler partner Howard Willens, a former deputy assistant attorney general in the Justice Department's Criminal Division.

Other ATV manufacturers, worried that an enforcement action was in the works, have also lined up D.C. counsel. U.S. Suzuki Motor Corp. retained Harry Cladouhos, a partner in the D.C. office of San Francisco's Pettit & Martin. Kawasaki Motors Corp. hired Mark Gerchick of the D.C. office of Los Angeles' Paul Hastings, Janoksky & Walker. And William Barringer of the D.C. office of New York's Wilkie, Farr & Gallagher was retained to spearhead Yamaha Motor Corp. U.S.A.'s defense.

Cutler Arranges Key Meeting

In the lead role for the ATV industry, Cutler and Willens went into action quickly. Cutler arranged for a meeting at the Justice Department on May 20 that included industry counsel, including himself, CPSC General Counsel James Lacey, two CPSC staff attorneys, and Leonard Goldstein, an attorney in the agency's Litigation Division. Justice Department lawyers present were Deputy Assistant Attorney General Robert Cynkar of the Civil Division, and David Anderson and Stephen Hart, who both work for Cynkar.

According to one source, Cutler was paraded into the meeting to deliver a simple message: ATVs don't pose an imminent hazard. "He was clearly the chief spokesman for industry and everyone knew who

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Wilmer, Cutler & Pickering's Lloyd Cutler arranged a pow-wow among industry, the CPSC, and the Justice Department.

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he was, a super-lawyer like that," says the source.

Cutler declines to comment on the meeting or on his work for the industry.

The real purpose of the meeting, though, was to open the door to a settlement.

"We'd like to work out a settlement that would serve all interests," says Willens. "In that spirit, we would like to negotiate with Justice."

During the meeting, according to one source in attendance, Cynkar told Cutler he disagreed with the industry's arguments, but would discuss the possibility of settlement negotiations with the CPSC.

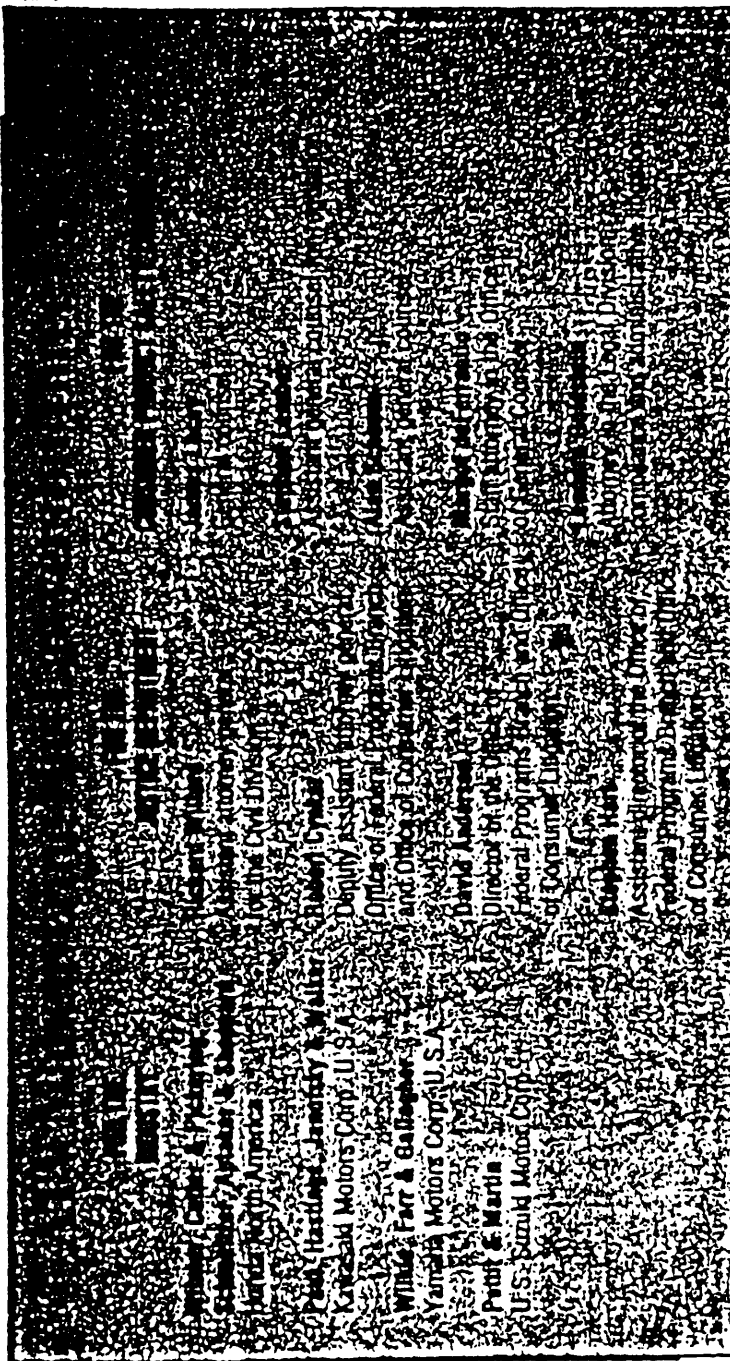
"All the major players were there to see if there was any common ground before we go to war," observes one industry lawyer.

Since the meeting, there has been little action on the ATV front. According to several sources, Justice has told the CPSC it will launch a case against the industry, but that the department may take up to eight months to file the suit because of its complexity. Justice Department spokesman Patneek Kortien declines comment.

The prospect of such a delay outrages ATV opponents. Theodore Jacobson, counsel to the House Commerce, Consumer, and Monetary Affairs Subcommittee, which held the first congressional hearings on ATVs in 1985, charges the Justice Department is "trying the entire case on paper."

According to Jacobson, Rep. Douglas Barnard Jr. (D-Ga.) is prepared to introduce a bill to require the CPSC to initiate a case on its own if the Justice Department does not take quick action. Honda's lawyers—Wilmer, Cutler and Schmelzler, Aptaker—have registered as lobbyists to oppose such legislation.

Within the CPSC itself, there are complaints about delay, even charges that



Chairman Scanlon, who opposes an enforcement action against the ATV industry, has tried to sabotage the case.

Earlier this month, Commissioner Anne Graham, in a memo to Scanlon released during recent congressional hearings, said she was "appalled" by Scanlon's attempts to "undermine and frustrate the decision of a majority of the commission on the ATV enforcement matter." She took issue with his decision to remove two experienced attorneys from the case, charging that their removal will "adversely impact our case."

The two CPSC attorneys, Philip Bechtel and Susan Birenbaum, had been instrumental in developing the CPSC enforcement action and had been present at the

May meeting with Cutler and other industry officials at the Justice Department.

Bechtel, who is now a lawyer with the Federal Energy Regulatory Commission, says his departure from the CPSC was planned and had nothing to do with his removal from the case. He adds, however, that he offered to stay at the agency until the case was wrapped up.

"It was clear that they didn't want me to work on ATVs, so I took the job at FERC," he says. Birenbaum could not be reached for comment.

Scanlon denies that he removed the lawyers to weaken his agency's case, calling such charges "ludicrous." Scanlon also maintains that the two lawyers were replaced with "more experienced" agency

attorneys, although he admits they are not expert in ATV matters.

But Scanlon denies the notion that CPSC lawyers must be familiar with ATVs to litigate effectively the agency's case. "Does Lloyd Cutler have any experience with ATVs?" he asks.

At a congressional hearing last month, however, Rep. Florio had Scanlon on the hot seat. Florio charged that Scanlon attempted to put into the public record a confidential and restricted legal memorandum from the CPSC Office of General Counsel during the hearing.

The document, written in 1985, suggests that the CPSC was required to com-