



U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20541

#305
6 (b) CLEARED: *Arden*
X No Mfrs Identified
Excepted *6/3/85 TP*
Mfrs Notified
Comments Processed

May 23, 1985

OFFICE OF THE
LEGAL COUNSEL

Lyle J. Wirt, Esq.
Davenport, Evans, Hurwitz & Smith
National Reserve Building
513 South Main
Sioux Falls, South Dakota 57102-0993

Re: Section 6(b)(1) of the Consumer Product
Safety Act, 15 U.S.C. § 2055(b)(1)

Dear Mr. Wirt:

By letter dated May 9, 1985, to Alan Schoem, Assistant General Counsel, you asked for an advisory opinion as to whether section 6(b)(1) of the Consumer Product Safety Act (CPSA), 15 U.S.C. § 2055(b)(1), applies to private parties in litigation. The basis for your request is a lawsuit brought by your firm on behalf of Christine Holmes against, inter alia, A. O. Smith Corporation and White-Rodgers Division of Emerson Electric Company, Inc. The defendants have resisted a motion to produce documents, inter alia, on the ground that the requested documents are privileged and confidential because of the protections against public disclosure contained in 15 U.S.C. § 2055(b)(1). Specifically, you ask whether, under the applicable statutes and regulations, defendants A. O. Smith and White-Rodgers may release materials and documents in their files without the Consumer Product Safety Commission's permission.

Generally, under section 6(b)(1), the Commission may make a public disclosure of consumer product information from which the public can readily ascertain the identity of a manufacturer or private labeler, only if it gives the manufacturer notice of its intent to disclose and the opportunity to submit comments regarding the information. Then, taking into account the manufacturer's comments, the Commission must take "reasonable steps" to assure that the information to be released is accurate and that disclosure is fair in the circumstances and reasonably related to effectuating the purposes of the Consumer Product Safety Act, 15 U.S.C. § 2055(b)(1).

ADVISORY OPINION

In determining whether section 6(b)(1) applies to private litigants, it is axiomatic that "the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).

Under the plain language of section 6(b)(1) of the CPSA, it is clear that the provisions of that section apply only to the Commission's public disclosure of information. "The Commission shall take reasonable steps . . . prior to its public disclosure . . . of information," 15 U.S.C. § 2055(b)(1) (emphasis added). In addition, by its terms, section 6(b)(1) applies to "public disclosure of any information obtained under this Act, or to be disclosed to the public in connection therewith...." 15 U.S.C. § 2055(b)(1). In the context of section 6(b)(1), only the Commission can have "obtained" information "under [the CPSA]" and, accordingly, only the Commission is in a position to disclose information "to the public in connection therewith." In our view, section 6(b)(1) does not impose, refer to, or envision restrictions on disclosure of information by private persons from, or of, their own records, even if that information may also be found in the Commission's records.

Our interpretation that section 6(b)(1) applies only to Commission disclosures is reinforced by the language of section 6(d)(2) of the CPSA, 15 U.S.C. § 2055(d)(2). Section 6(d)(2) of the CPSA provides that the provisions of section 6(b)(1) apply only to "information to be disclosed by the Consumer Product Safety Commission, any member of the mission, or any employee, agent, or representative of the Commission in an official capacity." Thus, section 6(d)(2) limits the application of the section 6(b)(1) disclosure restrictions to the mission, its employees, agents, and representatives.

In addition, the legislative history of section 6(b)(1) supports the interpretation that section 6(b)(1) applies only to Commission disclosures of information. The legislative history provides, in relevant part:

The Committee has written into section 6 of the bill detailed requirements and limitations relating to the Commission's authority to disclose information which it acquires in the conduct of its responsibilities under this Act.

* * *

Lyle J. Wirt, Esq.
Page 3

The Committee recognizes that the Commission has a responsibility to assure that the information which it disseminates is truthful and accurate.

H.R. Rep. No. 1192, 92d Cong., 2nd Sess. 31, 32 (1972) (emphasis added).

In 1981, Congress amended section 6(b) to provide additional procedural safeguards concerning Commission disclosures. This amendment serves to highlight the fact that section 6(b)(1) applies only to Commission disclosures of information. Consumer Product Safety Amendments of 1981, Title 12A of Pub. L. No. 97-35, §§ 1201-15, 95 Stat. 703-25.

In view of the plain language of the CPSA and its legislative history, section 6(b)(1) would not apply to a disclosure by private litigants such as A.O. Smith and White-Rodgers. Accordingly, those firms would not need the permission of the Commission to release documents in their possession.

You also inquired about the possibility of deposing a Commission employee with respect to any documents you obtain from A.O. Smith and White-Rodgers. Any deposition of Commission employees should be in conformance with section 6(b)(1) and Commission regulations concerning employee testimony, 16 C.F.R. Part 1016 (1985). Thus, Commission employees may be instructed during a deposition not to answer questions which elicit information concerning matters where the Commission has not complied with section 6(b). (See 48 Fed. Reg. 57431, (1983) copy enclosed.)

Sincerely yours,

A handwritten signature in dark ink, appearing to read "Daniel R. Levinson". The signature is fluid and cursive, with a long horizontal stroke at the end.

Daniel R. Levinson
General Counsel

Enclosure



U.S. CONSUMER PRODUCT SAFETY COMMISSION

WASHINGTON, D. C. 20207

June 28, 1985

OFFICE OF THE
GENERAL COUNSEL

Robert M. Sussman, Esq.
Covington and Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044

Dear Mr. ^{Bob}Sussman:

By letter dated June 20, 1985, you wrote to me concerning an advisory opinion dated May 23, 1985 that my office provided to Mr. Lyle J. Wirt. That advisory opinion responded to the question of whether under section 6(b)(1) of the Consumer Product Safety Act, 15 U.S.C. § 2055(b)(1), a firm may release records and materials in its files without the permission of the Consumer Product Safety Commission. The advisory opinion answers this question affirmatively and expresses the view that section 6(b)(1) applies only to Commission disclosures of information.

You state in your letter that you do not challenge this interpretation of section 6(b) of the CPSA. Rather, you express the view that the recipient of the advisory opinion is using certain statements out of context. Accordingly, you request that I clarify that the May 23, 1985 advisory opinion was not intended to address the issue of whether section 6(b) "creates a privilege on behalf of manufacturers for documents that the Commission has determined cannot be disclosed to the public."

The advisory opinion expresses the view that section 6(b)(1) applies "only to the Commission's public disclosure of information ... [and] does not impose, refer to, or envision restrictions on disclosure of information by private persons from, or of, their own records, even if that information may also be found in the Commission's records." (emphasis in original) I did not then, and do not now, take a position on whether section 6(b) might be held by a court to create a privilege on behalf of manufacturers for documents that the Commission has determined cannot be disclosed to the public. This is an issue to be determined by the courts.

ADVISORY OPINION # 305-A

305-A
6(b) CLEARED: 6/28/85
No Mrs. Lyle Wirt
Excepted
Mrs. Nathan
Comments Processed

Robert M. Sussman, Esq.
Page -2-

In your letter you also suggested that when the Commission is requested to issue an advisory opinion addressing an issue that has arisen in ongoing litigation, the Commission should consult with all the parties to assure that the issue is properly characterized and that the Commission's advisory opinion is not used for a purpose for which it is not intended.

The Office of the General Counsel typically issues advisory opinions concerning its interpretation of the statutes administered by the Commission. To the extent that a person in litigation seeks the views of the Office of the General Counsel or the Commission with respect to the interpretation of specific provisions of statutes administered by the Commission, I believe it is unnecessary, if not inappropriate, to consult with parties to the litigation before issuing the advisory opinion. Such consultation could needlessly embroil the Commission in the details of private litigation. Rather, I must treat a request for an advisory opinion from a party in litigation in the same way as any other request for an advisory opinion.

I trust that this clarifies my position on this matter.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "Dan Levinson", written over a horizontal line.

Daniel R. Levinson
General Counsel