

COVINGTON

BEIJING BOSTON BRUSSELS DUBAI FRANKFURT
JOHANNESBURG LONDON LOS ANGELES NEW YORK
PALO ALTO SAN FRANCISCO SEOUL SHANGHAI WASHINGTON

Covington & Burling LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001-4956
T +1 202 662 6000

Via Electronic Mail

May 21, 2024

The Honorable Alexander Hoehn-Saric, Chair
The Honorable Richard L. Trumka, Jr., Commissioner
The Honorable Peter A. Feldman, Commissioner
The Honorable Mary T. Boyle, Commissioner
The Honorable Douglas Dziak, Commissioner
U.S. Consumer Product Safety Commission
4330 East-West Highway
Bethesda, MD 20814

Secretary Alberta Mills
U.S. Consumer Product Safety Commission
4330 East-West Highway
Bethesda, MD 20814

Re: The CPSC's Failure to Disclose Adjudication Decisions

Secretary Mills, Chair Hoehn-Saric and Commissioners Feldman, Trumka, Boyle, and Dziak:

We write on behalf of Amazon.com, Inc. ("Amazon") regarding the U.S. Consumer Product Safety Commission's ("CPSC" or the "Commission") failure to make publicly available "final opinions . . . as well as orders, made in the adjudications of cases," as required by the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(a)(2). In addition, the Commission has failed to "maintain and make available for public inspection in an electronic format current indexes" of such decisions. *Id.*

These records are not available on the CPSC's website, as required by 16 C.F.R. § 1015.2(b). Consequently, Amazon submitted a July 22, 2022 Freedom of Information Act ("FOIA") request, numbered 22-F-00391 (the "FOIA Request"), seeking decisional documents from mandatory recall adjudication proceedings and other agency records. Nearly two years have passed since Amazon's request, and the agency still has failed to produce to Amazon any recall adjudication records or otherwise make them available to the public.

In a pending mandatory recall adjudication against Amazon, CPSC Complaint Counsel has nevertheless relied on certain Commission final decisions in similar prior proceedings to support its remedial arguments. *See, e.g., In the Matter of Amazon.com, Inc.*, CPSC Docket No. 21-1, DE 79 at 26, 28-29, 31, 35, 40, 43, 44, 49 (citing *In re Dye & Dye*, CPSC Dkt. No. 88-1, and *In re Relco, Inc. (Wel-Dex Welder Mfg. Co.)*, CPSC Dkt. No. 74-4). The Commission plainly

COVINGTON

U.S. Consumer Product Safety Commission
May 21, 2024
Page 2

relies on these decisions as “the law itself, and as such should be made available to the public.” *Sterling Drug, Inc. v. F.T.C.*, 450 F.2d 698, 708 (D.C. Cir. 1971). When an agency retains and refers to decisional documents as precedent without public disclosure, the agency improperly “has promulgated a body of secret law which it is actually applying in its dealings with the public but which it is attempting to protect.” *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 869 (D.C. Cir. 1980).

The Commission is legally required—by FOIA, the Administrative Procedure Act (“APA”), and CPSC regulations—to make adjudication decisions publicly accessible. *See, e.g., N.Y. Legal Assistance Grp. v. BIA*, 987 F.3d 207, 224 (2d Cir. 2021) (Congress imposed a duty on agencies to “make a record of agency adjudications available to the general public by general publication.”); *Animal Legal Def. Fund v. U.S. Dep’t of Agriculture*, 935 F.3d 858, 875 (9th Cir. 2019) (Section 552(a)(2) “impos[es] a mandatory duty for agencies to make certain records available for public inspection,” including “final opinions in agency adjudication” (internal quotation marks omitted)).

Public access to final decisions in adjudications is especially important in adversarial, trial-like proceedings in which the Commission both authorizes the commencement of the proceeding and serves as the final agency decision-maker. As the Supreme Court has made clear, “[a]gencies should provide regulated parties fair warning of the conduct [it] prohibits or requires.” *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012) (internal citation and quotation marks omitted). One-sided access to Commission precedent violates this principle by depriving respondents and the public of the ability to review and challenge the law invoked by the Commission. *See ACLU v. Dep’t of Just.*, 880 F.3d 473, 490 (9th Cir. 2018) (the public is “vitally concerned” with document’s reflecting agency policy that has the force and effect of law and the agency’s reasoning for those policies (internal quotation marks and citation omitted)); *Smith v. NTSB*, 981 F.2d 1326, 1328 (D.C. Cir. 1993) (the purpose of FOIA’s public disclosure requirement is “obviously to give the public notice of what the law is so that each individual can act accordingly”).

Instead of promptly disclosing past Commission decisions in identical proceedings, the agency continues to keep them shrouded from public view, even while it presumably considers these decisions in preparing its Final Decision in the Amazon matter. But the Commission is expressly prohibited by FOIA from using any “final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public” against private parties unless such documents have been “indexed and either made available or published as provided by this paragraph,” or “the party has actual and timely notice of the terms thereof.” 5 U.S.C. § 552(a)(2).

Amazon respectfully requests that this Commission comply with its legal obligation to disclose all recall adjudication decisions immediately. Furthermore, Amazon objects to any use of the Commission’s prior adjudication decisions in the Commission’s pending adjudication against Amazon absent full disclosure of all mandatory recall adjudication decisions.

COVINGTON

U.S. Consumer Product Safety Commission
May 21, 2024
Page 3

I. Background

Under FOIA, the Commission is required to make available for public inspection all “final opinions, including concurring and dissenting opinion, as well as orders, made in the adjudication of cases.” 5 U.S.C. § 552(a)(2). The Commission is vested with an affirmative obligation to make decisional adjudication documents available to the public; such records should be ever-ready, without the need for the public or a party to request access. *See* 5 U.S.C. § 552(a)(3)(A) (excepting final orders from the category of agency records to which the public may need to request access through a FOIA request). The Commission has not complied with its legal obligation, so Amazon filed its July 2022 FOIA Request in an effort to obtain these and other agency records.

Amazon’s FOIA Request sought disclosure of eight distinct categories of records, including, in relevant part, “[a]ny opinion, order, or other decisional document entered by a Presiding Officer or the Commission in any CPSC adjudicative proceeding, or brief or motion filed by Complaint Counsel in, any CPSC adjudicative proceeding.” Exhibit A, Amazon FOIA Request (July 22, 2022). The request excluded documents accessible through the “Recall Lawsuits: Adjudicative Proceedings” page on the CPSC website, which can be accessed by visiting <https://www.cpsc.gov/Recalls/Recall-Lawsuits-Adjudicative-Proceedings>, as well as any documents maintained by the agency under seal. *Id.*

A month later, the CPSC’s Division of Information Access denied the FOIA Request in full and, with respect to the above-described request, redirected Amazon to the “Recall Lawsuits: Adjudicative Proceedings” page, which it claimed housed “all decisional documents related to adjudicative proceedings.” Exhibit B, CPSC Determination Letter (Aug. 29, 2022). As Amazon noted in its November 11, 2022 administrative appeal of the FOIA decision, that assertion was inaccurate. *See* Exhibit C, Amazon FOIA Appeal at 3 (Nov. 11, 2022). The referenced page on the CPSC website only contains materials from 2012 to the present. *Id.* As this Commission is well-aware, the Commission has conducted adjudications since its inception, long before 2012. *See id.* (listing pre-2012 CPSC adjudications). Indeed, to our knowledge, the Commission has been conducting administrative adjudications since at least 1974. *See, e.g.,* Settlement, *McCulloch Corporation*, CPSC Dkt. 74-1 (Mar. 14, 1974). The CPSC’s claim regarding the comprehensiveness of the Recall Adjudications webpage is further belied by the absence of available decisional documents that are referenced in public adjudication records. *See, e.g., In the Matter of Zen Magnets, LLC*, CPSC Docket No. 12-2, Final Decision and Order (Oct. 26, 2017) (citing *In re Dye & Dye*, CPSC Docket No. 88-1; *In the Matter of Francis Alonso, Jr. d/b/a/ Mylar Star Kites*, CPSC Docket No. 75-16, (June 18, 1976)).

In response to Amazon’s administrative appeal, on December 12, 2022, CPSC’s Office of General Counsel remanded Amazon’s request for decisional adjudication documents to the Division of Information Access for “further processing.” Exhibit D, CPSC’s Appeal Determination Letter (Dec. 12, 2022). But on remand, the CPSC did not produce any decisional documents to Amazon and, instead, asserted that “[t]he Office of Compliance’s search of its files and indices failed to reveal any records” responsive to Amazon’s request. Exhibit E, CPSC’s Final Response to Amazon’s FOIA Request on Remand (Feb. 23, 2023).

COVINGTON

U.S. Consumer Product Safety Commission
May 21, 2024
Page 4

On May 19, 2023, Amazon appealed to the CPSC and challenged the adequacy of the agency's actions on remand, including its assertion that the CPSC does not possess any other records of adjudications that were not already on the CPSC website. Exhibit F, Amazon's FOIA Appeal at 4 (May 19, 2023). The CPSC did not respond to Amazon's May 2023 appeal letter. Nevertheless, in January 2024, without any notice, the CPSC began uploading some adjudication records to its online archive at <https://www.cpsc.gov/archivepage>.

Having received no response from the CPSC, on March 4, 2024, Amazon sent the Office of the General Counsel a follow-up letter regarding Amazon's May 2023 appeal. Exhibit G, Amazon's Follow Up Letter (Mar. 4, 2024). Instead of addressing the May 2023 appeal, the Division of Information Access simply referred Amazon back to the CPSC's earlier assertion that there were no other responsive records in the agency's possession. Exhibit H, Emails Between A. Oyewole and S. Wilson (Mar. 19, 2024). When counsel for Amazon clarified that the May 2023 appeal challenged the adequacy of that response, the Division of Information Access represented that it would make processing Amazon's request "a high priority," *id.* Yet, to date, the agency has failed to provide a substantive response to Amazon's May 2023 appeal. Nor has it made any adjudication records available in response to Amazon's FOIA Request.

II. The CPSC Must Disclose Its Adjudicative Records

The CPSC may not withhold prior opinions, orders, or other decisional documents in CPSC adjudicative proceedings. FOIA requires agencies to make available for public inspection all "final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases." 5 U.S.C. § 552(a)(2). Agencies also are required to "maintain and make available for public inspection in an electronic format current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967." *Id.* § 552(a)(2)(E). Furthermore, regulations require the CPSC to "maintain an electronic reading room on the internet at <https://www.cpsc.gov> for records that are required by 5 U.S.C. § 552(a)(2) to be available by computer telecommunications." 16 C.F.R. § 1015.2(b). These records generally "consist of those documents which contain what the agency has treated as authoritative indications of its position on legal or policy questions." Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act 19 (Feb. 1975). In other words, the Commission must make publicly available all "documents which have 'the force and effect of law.'" *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 153–54 (1975).

This requirement serves several important purposes. "The basic purpose of FOIA is to ensure an informed citizenry"—a necessary condition "to hold[ing] the governors accountable to the governed." *Zaid v. Dep't of Just.*, 96 F.4th 697, 703 (4th Cir. 2024) (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)). Pursuant to that purpose, the proactive disclosure of decisional documents "affords the private citizen the essential information to enable him to deal effectively and knowledgeably with the Federal agencies."¹

¹ U.S. Department of Justice Office of Information Policy, Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (June 1967), [https://www.justice.gov/oip/attorney-generals-memorandum-public-information-section-\(continued...\)](https://www.justice.gov/oip/attorney-generals-memorandum-public-information-section-(continued...))

COVINGTON

U.S. Consumer Product Safety Commission
May 21, 2024
Page 5

As the Administrative Conference has advised, agency adjudications impact “many individuals and businesses engaged in regulated activities.” Administrative Conference of the United States, Public Availability of Adjudication Materials, Information Interchange Bulletin No. 032 (Sept. 2023). Public access to adjudicative decisions promotes transparency and informs the public of the agency’s position on certain issues, including agency positions that have “precedential value” in future proceedings. *Skelton v. U.S. Postal Service*, 678 F.2d 35, 41 (5th Cir. 1982) (quoting H.R. Rep. No. 89-1497, at 8 (1966)). Such transparency “open[s] agency action to the light of public scrutiny” and allows the public to assess whether agency action conforms to its statutory duties. *U.S. Dep’t of Just. v. Repts. Comm. for Freedom of the Press*, 489 U.S. 749, 772–73 (1989) (quoting *Dep’t of Air Force v. Rose*, 425 U.S. 352, 372 (1976)).

Perhaps most importantly, public access “prevent[s] the creation of ‘secret law’” by government agencies. *Sears*, 421 U.S. at 138; see also *Am. Immigration Laws. Ass’n v. Exec. Off. for Immigr. Rev.*, 830 F.3d 667, 680 (D.C. Cir. 2016) (describing the “core purpose” of § 552(a)(2)(A)’s affirmative disclosure requirement as the prevention of “secret (agency) law” (citation omitted)). Indeed, the idea that an agency “may adopt a legal position while shielding from public view the analysis that yielded that position is offensive to FOIA.” *Nat’l Council of La Raza v. Dep’t of Just.*, 411 F.3d 350, 360 (2d Cir. 2005) (internal citation and quotation marks omitted). See also Easterbrook, Privacy and the Optimal Extent of Disclosure Under the Freedom of Information Act, 9 J. Legal Studies 775, 777 (1980) (“The act’s indexing and reading-room rules indicate that the primary objective is the elimination of ‘secret law.’”).

The CPSC’s failure to make these records available, while simultaneously relying on prior adjudication decisions to support arguments adverse to Amazon, undermines these important goals. Both CPSC Complaint Counsel and the Presiding Officer cited final decisions from other recall adjudications that are not posted on the Recall Adjudications website page.² It is fundamentally unfair for the Commission to rely on certain adjudicatory decisions while failing to make *all* such decisions public. In addition, the precedential value that the agency obviously places on these records makes clear that they are precisely the type of documents that FOIA requires the Commission to make available for public inspection. “[T]o prevent the development of secret law within the Commission,” it must “disclose orders and interpretations which it actually applies in cases before it.” *Sterling Drug*, 450 F.2d at 708. These decisional documents “represent interpretations of established policy on which the agency relies in discharging its regulatory responsibilities” and, thus, “withholding them would serve no legitimate policy interest of the government.” *Coastal States*, 617 F.2d at 869. Finally, the APA

[administrative-procedure-act](#); see also *id.* (publication of decisional documents enables the public to “deal . . . upon equal footing with the Federal agencies”).

² CPSC Complaint Counsel cited decisional documents from *In re Dye & Dye*, CPSC Dkt. No. 88-1 (Mar. 30, 1989), and *In re Relco, Inc. (Wel-Dex Welder Mfg. Co.)*, CPSC Dkt. No. 74-4 (Oct. 27, 1976), in their motion for summary decision. See *In Re Amazon.com, Inc.*, CPSC Docket 21-2, DE 79 at 26, 28–29, 31, 35, 40, 43, 44, 49. The Presiding Officer, Administrative Law Judge Jason S. Patil, cited the same documents. *Id.*, DE 109 at 30-31, 41-42.

COVINGTON

U.S. Consumer Product Safety Commission
May 21, 2024
Page 6

requires that such decisions be made available to parties in an adjudication to ensure the CPSC is acting in compliance with prior decisions. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (an agency may not “depart from a prior policy sub silentio or simply disregard rules that are still on the books”).

The Commission has an affirmative duty to make these decisional documents available for public inspection, regardless of their age. *See Sears*, 421 U.S. at 153 (describing § 552(a)(2) as an “affirmative portion of the act” imposing an obligation on agencies). Indeed, the indexing obligation expressly applies to any such records created “after July 4, 1967.” 5 U.S.C. § 552(a)(2). Nevertheless, Covington also sought these records from the National Archives and Records Administration (“NARA”). To our surprise, NARA has restricted access to accessioned CPSC adjudication records because they have inexplicably been marked wholesale as FOIA-exempt under the theory that the materials were “compiled for law enforcement purposes. . . [and] could reasonably be expected to constitute an unwarranted invasion of personal privacy.”³

Decisional documents should not be subject to such wholesale withholding and, absent an exemption, FOIA compels their public disclosure. 5 U.S.C. § 552(a)(2). To the extent this exemption might apply to portions of these documents, it does not justify the Commission withholding such documents in their entirety. *See* 5 U.S.C. § 552(a)(2) (agencies may withhold identifying information from published opinions only “[t]o the extent required to prevent a clearly unwarranted invasion of personal privacy”); *id.* § 552(a)(8)(A)(ii)(II) (agencies must “take reasonable steps necessary to segregate and release nonexempt information”). Covington has not to date obtained any such records from NARA. In any event, Amazon should not bear the burden of filing requests with multiple parties, and waiting several years, to receive documents that the Commission “must make available on an ongoing basis, *no request necessary.*” *Animal Legal Def. Fund*, 935 F.3d at 862 (emphasis added). *See also N.Y. Legal Assistance Grp.*, 987 F.3d at 224 (rejecting interpretation of the FOIA that would effectively limit the availability of such records to “those individual members of the public who have the resources to seek them out”).

Keeping decisional documents secret undermines FOIA’s purpose of “open[ing] agency action to the light of public scrutiny,” and hinders Amazon’s ability to evaluate its litigation position based on past agency practice. *Reps. Comm. for Freedom of the Press*, 489 U.S. at 772–73 (quoting *Rose*, 425 U.S. at 372). Such conduct risks the creation of a body of “secret [CPSC] law,” in which regulated parties are left guessing as to the Commission’s mandatory recall reasoning and decisions. *Sears*, 421 U.S. at 153.

Almost three years after the Commission voted to commence a mandatory recall lawsuit against Amazon, nearly two years after Amazon made its initial plea for public access to the Commission’s decisional law, and as it continues to prepare its Final Decision, past decisions remain hidden from public view. Such secrecy befits a star chamber and not an independent federal agency with sweeping powers to prosecute as well as adjudicate matters in which it is an

³ 5 U.S.C. § 552(b)(7)(c). *See, e.g.*, National Archives Catalog, Records of the Consumer Product Safety Commission, Public Hearing Files, 1962–1984 (NAID 16438900), <https://catalog.archives.gov/id/16438900> (invoking Exemption 7(c)).

COVINGTON

U.S. Consumer Product Safety Commission
May 21, 2024
Page 7

interested party. Fundamental fairness requires the Commission to immediately make available to the public all of its past mandatory recall decisions.

* * *

The purpose of this letter is to offer the agency the opportunity to comply with its obligations under FOIA, the APA, and its regulations to disclose the above-described documents at its earliest opportunity. “FOIA is intended to work without court intervention,” and “any involvement by the courts in a FOIA dispute is burdensome.” *Landmark Legal Foundation v. Environmental Protection Agency*, 272 F. Supp. 2d 70, 85 (D.D.C. 2003). Nevertheless, Amazon reserves its right to pursue alternative forms of relief if the Commission fails to promptly disclose the requested records. Amazon also objects to any use of adjudicatory documents in the pending litigation against Amazon unless all mandatory recall adjudicatory decisions are disclosed.

If you have any questions, please do not hesitate to contact me.

Respectfully,



Sarah L. Wilson

Enclosures: Exhibit A, Amazon FOIA Request (July 22, 2022)
Exhibit B, CPSC Determination Letter (Aug. 29, 2022)
Exhibit C, Amazon FOIA Appeal (Nov. 11, 2022)
Exhibit D, CPSC’s Appeal Determination Letter (Dec. 12, 2022)
Exhibit E, CPSC’s Final Response on Remand (Feb. 23, 2023)
Exhibit F, Amazon’s FOIA Appeal (May 19, 2023)
Exhibit G, Amazon’s Follow Up Letter (Mar. 4, 2024).
Exhibit H, Emails Between A. Oyewole and S. Wilson (Mar. 19, 2024)

cc: General Counsel Jessica L. Rich
Executive Director Austin Schlick
Director of Compliance Robert Kaye
Senior Executive Director of Litigation Mary Murphy
Senior Trial Attorney John C. Eustice
Trial Attorney Serena Anand
Trial Attorney Liana G.T. Wolf
Trial Attorney Thomas J. Mendel

CERTIFICATE OF SERVICE

I hereby certify that, on May 21, 2024, a true and correct copy of the foregoing document was served on the Secretary of the U.S. Consumer Product Safety Commission and all parties and participants of record in the Matter of Amazon.com, Inc., CPSC Docket No. 21-2, in the following manner:

One copy by electronic mail and four copies by U.S. Mail, first-class and postage prepaid, to the Secretary of the U.S. Consumer Product Safety Commission, Alberta Mills:

Secretary Alberta Mills
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814
(301) 504-7479
amills@cpsc.gov

One copy by electronic mail and one copy by U.S. Mail, first-class and postage prepaid, to Complaint Counsel for the U.S. Consumer Product Safety Commission in the above-referenced matter:

John C. Eustice
Liana G.T. Wolf
Serena Anand
Thomas J. Mendel
Division of Enforcement and Litigation
Office of Compliance and Field Operations
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814
(301) 504-7809
jeustice@cpsc.gov
lwolf@cpsc.gov
sanand@cpsc.gov
tmendel@cpsc.gov



Sarah L. Wilson

Exhibit A

COVINGTON

BEIJING BRUSSELS DUBAI FRANKFURT JOHANNESBURG
LONDON LOS ANGELES NEW YORK PALO ALTO
SAN FRANCISCO SEOUL SHANGHAI WASHINGTON

Sarah L. Wilson

Covington & Burling LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001-4956
T +1 202 662 5397
swilson@cov.com

Via Email

July 22, 2022

Chief FOIA Officer
Secretariat
U.S. Consumer Product Safety Commission
4330 East West Highway, Room 820
Bethesda, MD 20814
CPSCFOIARequests@cpsc.gov
cpsc-foia@cpsc.gov

Dear Chief FOIA Officer:

We write on behalf of Amazon.com, Inc. (“Amazon”) to request records pursuant to the Freedom of Information Act, 5 U.S.C. § 552 and the 16 C.F.R. part 1015 regulations promulgated by the Consumer Product Safety Commission (“CPSC” or “Commission”).

Specifically, we request copies of all records, regardless of the form or format of such records, regarding, relating to, or falling within any of the following categories:

1. Documents related to the Government Accountability Office (“GAO”) report entitled *Consumer Product Safety Commission: Actions Needed to Improve Processes for Addressing Product Defect Cases* (GAO-21-56) (the “Report”), or the GAO performance audit related to that report (the “Audit”), including, without limitation, communications between GAO and CPSC regarding the Report or Audit.¹ The start date for Request No. 1 is October 1, 2019.
2. Staff briefing packages or other documents provided to the Commission in connection with votes or deliberations on or about July 14, 2021 relating to the decision to initiate an administrative lawsuit against Amazon. This includes, but is not limited to, the briefing package dated June 23, 2021, OS No. 0070. The start date for Request No. 2 is January 1, 2020.

¹ The report is available at <https://www.gao.gov/assets/gao-21-56.pdf>.

3. Documents and communications relating to the proposed Recalls Pledge between CPSC and Amazon related to recalls of products sold by third-party sellers on Amazon.com.² The start date for Request No. 3 is January 1, 2020.
4. Documents and communications relating to the proposed Memorandum of Understanding between CPSC and Amazon relating to recalls of products sold by third-party sellers on Amazon.com, a Final Draft of which was dated April 28, 2021. The start date for Request No. 4 is January 1, 2020.
5. All prior versions and all unpublished versions of CPSC's *Product Safety Planning, Reporting, and Recall Handbook*, <https://www.cpsc.gov/s3fs-public/CPSCRecallHandbookSeptember2021.pdf>. The start date for Request No. 6 is August 14, 2008.
6. A copy of the current version of CPSC's Section 15 Procedures Manual, as well as all prior versions and all unpublished versions of that Manual dating back to August 14, 2008.
7. Any CPSC guidance, policy, handbook, or practice or procedure document describing (i) the circumstances in which CPSC will seek a mandatory recall; (ii) factors bearing on whether or when CPSC will seek a mandatory recalls; (iii) the appropriate scope of a mandatory recall order from the Commission; or (iv) the Commission's or CPSC staff's interpretation of section 15(c) or 15(d) of the Consumer Product Safety Act ("CPSA"), 15 U.S.C. § 2064(c), (d), including those sections' references to the "required in order to adequately protect the public" or "in the public interest" standards. The start date for Request No. 6 is August 14, 2008.
8. Any opinion, order, or other decisional document entered by a Presiding Officer or the Commission in any CPSC adjudicative proceeding, or brief or motion filed by Complaint Counsel in, any CPSC adjudicative proceeding. This request excludes (i) any document accessible on CPSC.gov;³ and (ii) any document filed and maintained under seal.

The cut-off date for each request is the date on which CPSC conducts its search(es) for responsive records.

² A copy of the proposed Recalls Pledge was made public by CPSC. See <https://www.cpsc.gov/s3fs-public/CPSC%20Letter%20to%20Commissioners%20Signed.pdf>.

³ *I.e.*, the material from the period 2014 to present, accessible from <https://www.cpsc.gov/Recalls/Recall-Lawsuits-Adjudicative-Proceedings>. We understand that documents from pre-2014 adjudications are not online.

We **do not include** within the scope of our requests any documents that falls within one or more of the following categories:

- A. Documents that identify particular manufacturers or private labelers and are therefore subject to the provisions of Section 6(b) of the CPSA, 15 U.S.C. § 2055(b).
- B. Communications to or from Amazon.
- C. Documents previously provided by CPSC to Amazon under a Bates stamp in the pending adjudication *In the Matter of Amazon.com, Inc.* (CPSC No. 21-2).
- D. Documents publicly available at <https://www.cpsc.gov>.
- E. Documents published in the *Federal Register*.
- F. Provisions of the United States Code or Code of Federal Regulations.

If you determine that any record subject to this request will not be disclosed because it meets any FOIA nondisclosure criteria, please specifically identify such documents in accordance with *Vaughn v. Rosen*, 484 F.2d 820, 826–28 (D.C. Cir. 1973). Pursuant to 16 C.F.R. § 1015.3(d), please inform us if a requested record has been “known to have been destroyed or otherwise disposed of.”

We request responsive records from any office, subdivision, employee, appointee, representative, officer, or agent of CPSC. This includes, but is not limited to, former officers, subdivisions, employees, appointees, representatives, officers, or agents.

We request that CPSC provide responsive records as soon as they can be identified and produced on a rolling basis. Please provide a copy of responsive records, preferably via email or secure file transfer protocol (“FTP”). If such records cannot be provided by email or FTP, please produce them via physical media (such as a flash drive or hard drive) sent to my attention at Covington & Burling LLP, One CityCenter, 850 10th Street NW, Washington, DC 20001.

We do not wish to inspect such records before receiving copies of them. We agree to pay for the actual search, duplication, and review costs (if any) in connection with this request, up to the amount of \$7,000. If you anticipate that the total costs will exceed this amount, please contact me before proceeding and provide an estimate of the total costs.

Amazon respectfully requests that this request be processed on the fastest possible basis. See 16 C.F.R. § 1015.3. We look forward to your prompt response within the time limits set by Section 1015.5.

We appreciate your assistance and prompt response to this request. Please contact me if you have any questions or if you wish to seek clarification of this request in any respect.

Respectfully,

A handwritten signature in black ink that reads "Sarah Wilson". The signature is written in a cursive style with a long horizontal flourish at the end.

Sarah L. Wilson

Exhibit B



August 29, 2022

Via Email Only

Sarah L. Wilson
Covington & Burling LLP
One CityCenter
850 Tenth Street NW
Washington, DC 20001-4956
swilson@cov.com

RE: Freedom of Information Act Request #22-F-00391

Dear Ms. Wilson:

Thank you for your Freedom of Information Act (FOIA) request to the U.S. Consumer Product Safety Commission (CPSC). In your letter, you requested “all records, regardless of the form or format of such records, regarding, relating to, or falling within any of the following categories”:

1. Documents related to the Government Accountability Office (“GAO”) report entitled Consumer Product Safety Commission....;
 2. Staff briefing packages or other documents provided to the Commission;
 3. Documents and communications relating to the proposed Recalls Pledge between CPSC and Amazon;
 4. Documents and communications relating to the proposed Memorandum of Understanding between CPSC and Amazon;
 5. All prior versions and all unpublished versions of CPSC’s Product Safety Planning, Reporting, and Recall Handbook;
 6. A copy of the current version of CPSC’s Section 15 Procedures Manual;
 7. Any CPSC guidance, policy, handbook, or practice or procedure document describing a mandatory recall; and
 8. Any opinion, order, or other decisional document entered by a Presiding Officer or the Commission in any CPSC adjudicative proceeding.”
- [See FOIA Request for details]

The records you requested are from the CPSC's Office of Compliance and Field Investigation's active law enforcement investigatory files. Under FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A), we must withhold from disclosure most of the records responsive to your request.

Exemption 7(A). FOIA Exemption 7(A) permits withholding from disclosure “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[.]” 5 U.S.C. § 552(b)(7)(A). Agencies are authorized to withhold these records under two conditions: “there must be a ‘reasonable likelihood’ of a pending or contemplated law enforcement proceeding [; and] release of the information must be reasonably expected to cause some articulable harm to that proceeding.” *U.S. Dep’t of Justice Guide to the Freedom of Information Act*, Exemption 7(A), 2-3 (Aug. 21, 2019).

The records that we are withholding are related to pending administrative litigation, and consist of the records sought under items 1-7 of FOIA request #22-F-00391. CPSC determined that disclosing these records would cause an articulable harm to this administrative litigation.

You may file another FOIA request for these records at a later date, once the administrative litigation is complete.

With regard to item 8 of FOIA request #22-F-00391, all decisional documents related to adjudicative proceedings can be found on CPSC's website at: <https://www.cpsc.gov/Recalls/Recall-Lawsuits-Adjudicative-Proceedings>.

FOIA Administrative Procedures

Right to appeal. If you are not satisfied with the response to this request, you may administratively appeal in writing, addressed to FOIA APPEAL, Office of the General Counsel, ATTN: Division of Information Access, U.S. Consumer Product Safety Commission, 4330 East West Highway, Room 820 Bethesda, MD 20814-4408. Your appeal must be postmarked or electronically transmitted (cpscfoiarequests@cpsc.gov) within 90 days of the date of the response to your request. You may also fax your appeal to 301-504-0127. You may contact us Monday – Friday from 8:00AM – 4:30PM ET, by telephone at 1-800-638-2772, by fax to 301-504-0127, or by email addressed to cpsc-foia@cpsc.gov.

Before filing a formal appeal with the CPSC, you may contact me or CPSC's other FOIA Public Liaison, Marjorie Cole (mcole@cpsc.gov), at 1-800-638-2772, for any further assistance, or to discuss any aspect of your request. Assistance may include guidance on possible reformulation of your request or an alternative time frame for processing the request.

Right to Mediation. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, MD 20740-6001; email at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile to 202-741-5769.

Fees. We are not charging you fees in this instance to cover the costs to the CPSC in processing this request, performing the file searches and preparing the information.

Sincerely,

Korinne Super Digitally signed by Korinne Super
Date: 2022.08.29 11:41:58 -04'00'

Korinne I.B. Super
Attorney Advisor
Office of the General Counsel
Division of Information Access
301-504-7416
ksuper@cpsc.gov

Exhibit C

COVINGTON

BEIJING BRUSSELS DUBAI FRANKFURT JOHANNESBURG
LONDON LOS ANGELES NEW YORK PALO ALTO
SAN FRANCISCO SEOUL SHANGHAI WASHINGTON

Covington & Burling LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001-4956
T +1 202 662 6000

By Electronic Mail

November 11, 2022

FOIA APPEAL

Office of the General Counsel

ATTN: Austin Schlick

U.S. Consumer Product Safety Commission

4330 East West Highway

Room 820

Bethesda, MD 20814-4408

cpscfoiarequests@cpsc.gov

cpsc-foia@cpsc.gov

Dear Mr. Schlick:

I am writing on behalf of Amazon, Inc. (“Amazon”) to appeal Freedom of Information Act request number 22-F-00391, which was denied in full on August 29, 2022 (see attached). For the reasons set forth below, that denial was erroneous and the CPSC should promptly conduct a reasonable search for and provide the requested records.

Amazon’s July 22, 2022 FOIA request sought documents relating to (1) GAO report 21-56; (2) the Commission’s decision to initiate an administrative lawsuit against Amazon; (3) the proposed Recalls Pledge between CPSC and Amazon; (4) the proposed Memorandum of Understanding between CPSC and Amazon; (5) prior versions of the CPSC Recall Handbook; (6) CPSC’s Section 15 Procedures Manual; (7) CPSC guidance documents relating to mandatory recalls; and (8) decisional documents issued by a Presiding Officer or the Commission in CPSC adjudications. On August 29, the CPSC denied the request in full, claiming that requests one through seven were withheld pursuant to FOIA Exemption 7(A)’s law enforcement privilege because they relate to pending administrative litigation and “would cause an articulable harm to th[e] administrative litigation.” The CPSC denied request eight on the grounds that “all decisional documents related to adjudicative proceedings can be found on CPSC’s website.”

The CPSC’s denial of requests one through seven appears to be based solely on the contention that because Amazon may benefit by using the requested files in a pending administrative litigation, all of those documents—even documents that have nothing specifically to do with Amazon—are “records or information compiled for law enforcement purposes,” the production of which “could reasonably be expected to interfere with enforcement proceedings.” 5 U.S.C. § 552(b)(7). The threshold question for documents withheld pursuant to FOIA Exemption 7 is “whether the files sought relate to anything that can fairly be characterized as an enforcement proceeding.” *Bartko v. DOJ*, 898 F.3d 51, 64 (D.C. Cir. 2018) (quoting *Jefferson v. DOJ*, 284 F.3d 172, 177 (D.C. Cir. 2002)). The government is required to show that investigatory

COVINGTON

November 11, 2022

Page 2

files “arise out of investigations which focus directly on specifically alleged illegal acts.” *Bartko* 838 F.3d at 64 (quoting *Rural Hous. All. v. U.S. Dep't of Agric.*, 498 F.2d 73, 81 (D.C. Cir. 1973) (internal quotations omitted)). Thus, the agency must establish the documents are related to an incident that may constitute a violation of federal law. *Id.* The focus is “on how and under what circumstances the requested files were compiled,” not the purpose for which the requesting party requested the files. *Id.* Accordingly, the CPSC cannot simply withhold documents because their release may benefit Amazon in a pending administrative proceeding—if the documents were not compiled for law-enforcement purposes, they are not within the scope of the exemption.

Indeed, courts have made clear that an entity’s status as a respondent or defendant in a proceeding does not circumscribe their rights under FOIA: “FOIA rights are unaffected by the requester’s involvement in other litigation; an individual may therefore obtain under FOIA information that may be useful in non-FOIA litigation, even when the documents sought could not be obtained through discovery. . . . In this sense, FOIA is itself a congressionally-approved resource open to every person, regardless of the requester’s status as a criminal defendant.” *North v. Walsh*, 881 F.2d 1088, 1099 (D.C. Cir. 1989). *See also, e.g., Penn. Dep’t of Pub. Welfare v. HHS*, 2006 WL 3792628, at *29 (W.D. Pa. Dec. 21, 2006) (rejecting similar argument and explaining that FOIA does not “prevent[] a party to an administrative proceeding or a lawsuit from submitting a FOIA request for information that relates to the subject matter of those proceedings, nor does this authority prevent the agency from processing and responding to such a FOIA request. . . . Moreover, this authority does not suggest that a plaintiff may not use FOIA to request information needed for an underlying civil case . . .”).

Even assuming some records were compiled for law enforcement purposes, the CPSC has not provided a sufficient explanation as to why their release “could reasonably be expected to interfere with enforcement proceedings.” 5 U.S.C. § 552(b)(7). To properly withhold documents pursuant to Exemption 7(A), the agency must provide “more than [a] conclusory statement, [explaining] how the particular kinds of [] records requested would interfere with a pending enforcement proceeding.” *Campbell v. HHS*, 682 F.2d 256, 259 (D.C. Cir. 1982); *Citizens for Responsibility and Ethics in Washington v. DOJ*, 746 F.3d 1082, 1098 (D.C. Cir. 2014) (“[I]t is not sufficient for the agency to simply assert that disclosure will interfere with enforcement proceedings.”). The government must show that disclosure of the documents would “in some particular, discernible way, disrupt, impede, or otherwise harm the enforcement proceeding.” *North*, 881 F.2d at 1097. The CPSC’s conclusory assertion that disclosure would “cause an articulable harm,” is insufficient because it fails to provide an adequate explanation of any particular harm that may result from disclosure of the requested documents.

Further, the documents withheld in response to requests one through seven are not exempt from disclosure because they would not give rise to the type of “interference” that Exemption 7(A) contemplates. Exemption 7(A) protects from disclosure information that would permit the target of an investigation to, for example, destroy relevant evidence, fabricate a fraudulent alibi, or allow the target of an investigation to intimidate witnesses. *See, e.g., Goodrich Corp. v. U.S. EPA.*, 593 F. Supp. 2d 184, 193-94 (D.D.C. 2009), *North*, 881 F.2d at 1097. No such risks are presented by the disclosure of documents responsive to requests one through seven. For example, none of the requested documents would reveal confidential witnesses or allow litigants to destroy or fabricate relevant evidence, and are therefore not properly withheld pursuant to Exemption 7(A). More fundamentally, while Section 15 confers certain remedial powers on the

COVINGTON

November 11, 2022

Page 3

CPSC, it does not pertain to law enforcement, because the prohibitions under Section 15(b) are narrow, and the prohibited acts that are subject to investigation and penalties are referenced in Section 19 of the CPSA, e.g. failing to provide information under Section 15(b) or failing to comply with an order under Section 15(b). *See* 15 U.S.C. §§ 2068(a)(2), (4), (5), (13), (15). Accordingly, a proceeding under Section 15 does not constitute a “law enforcement” proceeding to which Exemption 7(A) might apply.

Finally, the agency denied request eight because “all decisional documents related to adjudicative proceedings can be found on CPSC’s website at: <https://www.cpsc.gov/Recalls/Recall-Lawsuits-Adjudicative-Proceedings>.” But that is not true. The referenced CPSC website only contains administrative litigation documents from 2012 to the present. However, there were administrative litigations prior to 2012. *See e.g., In re Dye & Dye*, CPSC Docket No. 88-1 (March 30, 1989); *In re G.L. Elec. Flashheat Co.*, CPSC Docket No. 78-2 (Mar. 24, 1978); *In re National Mattress Co.*, CPSC Docket no. 76-9 (Aug. 26, 1977); *In re Ambroy Corp.*, CPSA Docket No. 77-5 (Oct. 26, 1977); *In re Northwick Carpet Mills, Inc.*, CPSC Docket No. 76-6 (Sept. 7, 1976); *In re Ups ‘n Downs, Inc.*, CPSC Docket No. 76-4 (June 20, 1977); *In re Barrett Carpet Mills, Inc.*, CPSC Docket No. 75-5 (July 8, 1976); *In re: Francis Alaonso, Jr., d/b/a Mylar Star Kites*, CPSC Docket No. 75-16 (June 21, 1976); *In re White Consolidated Industries, Inc. (kelvinator)*, CPSC Docket No. 75-1 (Nov. 3, 1975); *In re Relco, Inc. (Wel-Dex Welder Mfg. Co.)*, CPSC Docket No. 74-4 (Oct. 27, 1976). Although we are aware these adjudications occurred, none of the documents relating to these and any other CPSC adjudications prior to 2012 are available at the listed CPSC webpage.

Accordingly, we request that the CPSC promptly conduct a search for documents responsive to all eight of our requests and produce them under FOIA. Thank you for your consideration of this appeal.

Sincerely,

/s/ Sarah L. Wilson

Sarah L. Wilson

August 29, 2022

Via Email Only

Sarah L. Wilson
Covington & Burling LLP
One CityCenter
850 Tenth Street NW
Washington, DC 20001-4956
swilson@cov.com

RE: Freedom of Information Act Request #22-F-00391

Dear Ms. Wilson:

Thank you for your Freedom of Information Act (FOIA) request to the U.S. Consumer Product Safety Commission (CPSC). In your letter, you requested “all records, regardless of the form or format of such records, regarding, relating to, or falling within any of the following categories”:

1. Documents related to the Government Accountability Office (“GAO”) report entitled Consumer Product Safety Commission....;
 2. Staff briefing packages or other documents provided to the Commission;
 3. Documents and communications relating to the proposed Recalls Pledge between CPSC and Amazon;
 4. Documents and communications relating to the proposed Memorandum of Understanding between CPSC and Amazon;
 5. All prior versions and all unpublished versions of CPSC’s Product Safety Planning, Reporting, and Recall Handbook;
 6. A copy of the current version of CPSC’s Section 15 Procedures Manual;
 7. Any CPSC guidance, policy, handbook, or practice or procedure document describing a mandatory recall; and
 8. Any opinion, order, or other decisional document entered by a Presiding Officer or the Commission in any CPSC adjudicative proceeding.”
- [See FOIA Request for details]

The records you requested are from the CPSC's Office of Compliance and Field Investigation's active law enforcement investigatory files. Under FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A), we must withhold from disclosure most of the records responsive to your request.

Exemption 7(A). FOIA Exemption 7(A) permits withholding from disclosure “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[.]” 5 U.S.C. § 552(b)(7)(A). Agencies are authorized to withhold these records under two conditions: “there must be a ‘reasonable likelihood’ of a pending or contemplated law enforcement proceeding [; and] release of the information must be reasonably expected to cause some articulable harm to that proceeding.” *U.S. Dep’t of Justice Guide to the Freedom of Information Act*, Exemption 7(A), 2-3 (Aug. 21, 2019).

The records that we are withholding are related to pending administrative litigation, and consist of the records sought under items 1-7 of FOIA request #22-F-00391. CPSC determined that disclosing these records would cause an articulable harm to this administrative litigation.

You may file another FOIA request for these records at a later date, once the administrative litigation is complete.

With regard to item 8 of FOIA request #22-F-00391, all decisional documents related to adjudicative proceedings can be found on CPSC's website at: <https://www.cpsc.gov/Recalls/Recall-Lawsuits-Adjudicative-Proceedings>.

FOIA Administrative Procedures

Right to appeal. If you are not satisfied with the response to this request, you may administratively appeal in writing, addressed to FOIA APPEAL, Office of the General Counsel, ATTN: Division of Information Access, U.S. Consumer Product Safety Commission, 4330 East West Highway, Room 820 Bethesda, MD 20814-4408. Your appeal must be postmarked or electronically transmitted (cpscfoiarequests@cpsc.gov) within 90 days of the date of the response to your request. You may also fax your appeal to 301-504-0127. You may contact us Monday – Friday from 8:00AM – 4:30PM ET, by telephone at 1-800-638-2772, by fax to 301-504-0127, or by email addressed to cpsc-foia@cpsc.gov.

Before filing a formal appeal with the CPSC, you may contact me or CPSC's other FOIA Public Liaison, Marjorie Cole (mcole@cpsc.gov), at 1-800-638-2772, for any further assistance, or to discuss any aspect of your request. Assistance may include guidance on possible reformulation of your request or an alternative time frame for processing the request.

Right to Mediation. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, MD 20740-6001; email at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile to 202-741-5769.

Fees. We are not charging you fees in this instance to cover the costs to the CPSC in processing this request, performing the file searches and preparing the information.

Sincerely,

Korinne I.B. Super
Attorney Advisor
Office of the General Counsel
Division of Information Access
301-504-7416
ksuper@cpsc.gov

Exhibit D



December 12, 2022

Sarah L. Wilson, Esq.
Covington & Burling L.L.P.
One City Center
850 Tenth St., NW
Washington, D.C. 20001-4956

swilson@cov.com

RE: FOIA Appeal 23-A-00001 (FOIA Request 22-F-00391)

Dear Ms. Wilson:

By a November 11, 2022 e-mail from Thomas Brugato attaching a letter from you, you appealed (“FOIA Appeal”) the August 29, 2022 Freedom of Information Act response (“FOIA Decision Letter”) of the U.S. Consumer Product Safety Commission’s Division of Information Access. The FOIA Decision Letter addressed FOIA request 22-F-00391, received July 25, 2022 (“FOIA Request”). Your FOIA Request sought, on behalf of Amazon.com, Inc. (“Amazon”), information related to (1) Government Accountability Office report 21-56 (“GAO Report”), including communications between GAO and CPSC regarding the report, with a start date of October 1, 2019; (2) Staff briefing packages or other documents provided to the Commission related to the Commission’s decision to initiate an administrative lawsuit against Amazon, with a start date of January 1, 2020; (3) documents and communications related to a proposed Recalls Pledge between CPSC and Amazon, with a start date of January 1, 2020; (4) documents and communications related to a proposed Memorandum of Understanding between CPSC and Amazon, with a start date of January 1, 2020; (5) prior and unpublished versions of CPSC’s Product Safety Planning, Reporting, and Recall Handbook (“Recall Handbook”), with a start date of August 14, 2008; (6) current and prior versions of CPSC’s Section 15 Procedures Manual (“Procedures Manual”), with a start date of August 14, 2008; (7) CPSC guidance, policy, handbook, or practice or procedure documents relating to mandatory recalls, with a start date of August 14, 2008; and (8) any opinion, order, or other decisional document issued by a Presiding Officer or the Commission in any CPSC adjudicative proceeding, or brief or motion filed by Complaint Counsel, in any CPSC adjudicative proceeding prior to 2014.

On August 29, 2022, the Division of Information Access advised that with respect to items (1)-(7) “[t]he records you requested are from the CPSC’s Office of Compliance and Field Investigation’s active law enforcement investigatory files. Under FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A), we must withhold from disclosure most of the



records responsive to your request.” FOIA Decision Letter at 1. With respect to item (8), the Division advised that all decisional documents related to adjudicative proceedings can be found on CPSC’s website. *Id.*

Your FOIA Appeal states the following grounds with respect to items (1)-(7).

- CPSC’s denials appear to be based solely on the contention that because Amazon may benefit by using the requested files in a pending administrative litigation, all of those documents—even documents that have nothing specifically to do with Amazon—are “records or information compiled for law enforcement purposes,” the production of which “could reasonably be expected to interfere with enforcement proceedings.”
- CPSC has not provided a sufficient explanation as to why release “could reasonably be expected to interfere with enforcement proceedings,” and “CPSC’s conclusory assertion that disclosure would ‘cause an articulable harm,’ is insufficient because it fails to provide an adequate explanation of any particular harm that may result from disclosure of the requested documents.”
- The documents withheld are not exempt from disclosure because they would not give rise to the type of “interference” that Exemption 7(A) contemplates.

For item (8), your appeal states that there were administrative litigations prior to 2012 for which documents are not available at the listed CPSC webpage.

Under authority delegated to me by the Commission, 16 C.F.R. § 1015.7, I have reviewed your appeal. For the reasons explained below, I am granting your appeal in part and denying it in part.

I. Remand of Items (3), (4), (5), (7) and (8) of the FOIA Request for Further Processing

I am reversing the Division of Information Access’s determination to withhold records responsive to items (3) and (4) under Exemption 7(A), 5 U.S.C. § 552(b)(7)(A). I am remanding these request items to the Division of Information Access for further processing of documents and communications related to a proposed Recalls Pledge and a proposed Memorandum of Understanding between CPSC and Amazon. The Division of Information Access will contact you under separate cover regarding this processing.



Regarding item (5), I am remanding to the Division of Information Access for additional search and review of CPSC files for any prior, published versions of the Recall Handbook for the period 2008–2012.¹

Similarly for item (7), I am remanding to the Division of Information Access for additional search and review of CPSC files for any CPSC guidance, policy, handbook, or practice or procedure document related to mandatory recalls. You will be receiving separate correspondence from the Division of Information Access related to such further processing.

For item (8), I am also remanding this matter to the Division of Information Access for additional search and review of the specific CPSC files identified in the FOIA request for any opinion, order, or other decisional document issued by a Presiding Officer or the Commission, as well as similar opinions, orders, or other decisional documents in any other CPSC adjudicative proceeding, or brief or motion filed by Complaint Counsel in any CPSC adjudicative proceeding, not already available at the website <https://www.cpsc.gov/Recalls/Recall-Lawsuits-Adjudicative-Proceedings>. You will be receiving separate correspondence from the Division of Information Access related to such further processing.

As discussed below, I am affirming the Division of Information Access's decision to withhold all other responsive records, specifically items (1), (2), and (6), pursuant to FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A), and on additional grounds under FOIA Exemptions 3, 4, and 5, 15 U.S.C. § 552(b)(3), (b)(4), (b)(5), and CPSC Section 6, 15 U.S.C. § 2055.

II. For Items (1), (2), and (6), the Withheld Records Are Compiled for Law Enforcement Purposes and Their Release Could Reasonably Be Expected to Interfere with Enforcement Proceedings

Records withheld pursuant to FOIA Exemption 7(A) must be compiled for law enforcement purposes. Records that are compiled for law enforcement purposes may be withheld pursuant to Exemption 7(A) to the extent that the production of such records could reasonably be expected to interfere with enforcement proceedings. 5 U.S.C. § 552(b)(7)(A). The reasonable expectation of interference with enforcement proceedings requires both (1) a reasonable likelihood of a pending or contemplated enforcement proceeding and (2) a reasonable likelihood that production of records would cause some articulable harm to the proceeding. *Am. Civil Liberties Union of Mich. v. FBI*, 734 F.3d 460, 466 (6th Cir. 2013).

¹ Office of Compliance and Field Operations Staff has indicated that you have already obtained or have access to copies of the 2012 and 2021 versions CPSC's Recall Handbook disclosed during discovery *In the Matter of Amazon.com*, CPSC Docket No 21-2.



A. The Records Were Compiled for Law Enforcement Purposes

As the Division of Information Access explained, records responsive to items (1), (2) and (6) – relating to the GAO Report, Briefing Packages, and the Procedures Manual – are contained in active law enforcement investigatory files and pertain to pending administrative litigation. These records were compiled for law enforcement purposes, and as explained below I affirm the Division of Information Access’s decision to withhold these records under Exemption 7(A).

Documents and Communications Related to GAO Report

The withheld documents and communications related to the GAO Report were compiled for law enforcement purposes. The withheld records include investigatory files and other information in CPSC’s internal electronic case management system. These materials are compiled in the course of particular CPSC investigations and relate to the enforcement of CPSC regulations and laws. They are therefore compiled “for law enforcement purposes” under Exemption 7(A). *See Butler v. U.S. Dep’t of Labor*, 316 F. Supp. 3d 330, 336 (D.D.C. 2018) (records regarding OSHA investigation of workplace safety standards in wake of accident were compiled for law enforcement purposes); *see also Env’tl. Prot. Servs., Inc. v. U.S. Env’tl. Prot. Agency*, 364 F. Supp. 2d 575, 587 (N.D. W.Va. 2005) (law enforcement exception applies to “investigatory materials relating to the enforcement of civil laws such as regulations promulgated pursuant to statutes”); *Schiller v. INS*, 205 F. Supp. 2d 648, 659 (W.D. Tex. 2002) (“law enforcement” for purposes of FOIA includes regulatory proceedings).

Communications with GAO about CPSC’s internal electronic case management system and about other internal enforcement processes and procedures were also compiled for a law enforcement purpose – to participate in assessing the agency’s effectiveness in addressing product safety hazards and its use of available enforcement tools. The responsive records are related to particular CPSC investigations and relate to enforcement of CPSC’s laws and regulations. Accordingly, the communications are also compiled for law enforcement purposes.

Briefing Packages

Briefing Packages related to the Commission’s decision to initiate an administrative proceeding against Amazon were created to support an active law enforcement investigation and are contained in the CPSC’s Office of Compliance and Field Investigation’s active law enforcement investigatory files. They contain the advice and recommendations of CPSC staff concerning enforcement options. As such, these staff briefing packages constitute records compiled for law enforcement purposes. Administrative adjudications qualify as law enforcement proceedings under the FOIA. *See, e.g., Gray v. U.S. Army Crim. Investigation Command*, 742 F. Supp. 2d 68, 73



(D.D.C. 2010) (pending administrative proceeding "does qualify as a law enforcement proceeding" for Exemption 7(A)); *Carter, Fullerton & Hayes v. FTC*, 637 F. Supp. 2d 1, 9-10 (D.D.C 2009) (FTC investigations qualify as law enforcement proceeding for Exemption 7(A)); *Env'tl. Prot. Servs. v. EPA*, 364 F. Supp. 2d 575, 588 (N.D. W. Va. 2005) (disclosure of investigatory records would reveal case in pending administrative proceeding).

Procedures Manual

The Procedures Manual is an internal CPSC document that describes the internal processes and procedures CPSC staff should follow when conducting product defect investigations. Such investigations are reasonably likely to result in administrative or enforcement proceedings pursuant to Commission statutes and regulations. See, e.g., 16 C.F.R. § 1115.20 - .22; 15 U.S.C. §§ 2064, 2068, & 2069. The Procedures Manual is therefore compiled "for law enforcement purposes" under the definition of Exemption 7(A).

B. Disclosure of the Withheld Records Could Reasonably Interfere with Law Enforcement Proceedings

An agency is not required to establish on a document-by-document basis the interference with an investigation that would result from release. *Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978). Rather, it can satisfy Exemption 7(A) through a broader showing that release of records would interfere with an enforcement proceeding. See, e.g., *Lazardis v. Dep't of State*, 934 F. Supp. 2d 21, 37 (D.D.C. Mar. 27, 2013) ("Under exemption 7(A) the government is not required to make a specific factual showing with respect to each withheld document that disclosure would actually interfere with a particular enforcement proceeding"). An agency is also not required to release details regarding an investigation when that disclosure could compromise proceedings related to the investigation. *Blackwell v. FBI*, 680 F. Supp. 2d 79, 94 (D.D.C. 2010) (an agency "need not submit declarations that reveal the exact nature and purpose of its investigations in order to satisfy FOIA exemption 7(A)"); see also *Swan v. SEC*, 96 F.3d 498, 500 (D.C. Cir. 1996) (upholding the application of Exemption 7(A) where release "could reveal much about the focus and scope of the Commission's investigation").

Courts similarly recognize that providing a detailed justification for withholding particular records under Exemption 7(A) during the pendency of an investigation could defeat the purpose of the exemption itself. *Cuban v. SEC*, 744 F. Supp. 2d. 60, 86 (D.D.C. 2010) ("[T]he defendant's showing is sufficient even though it has not specifically described the basis for the non-disclosure in each instance, because extensive specificity is not required for Exemption 7(A) where providing such detail would undermine the precise reason for the non-disclosure."); see *Juarez v. Dep't of Justice*, 518 F.3d 54, 59 (D.C.



Cir. 2008) (“[T]he release of information in investigatory files prior to the completion of an actual, contemplated enforcement proceeding was precisely the kind of interference that Congress continued to want to protect against.”). Accordingly, it is sufficient for the agency to “represent[] that release of the records . . . might reveal its investigative strategy and findings concerning the investigation before they are finalized.” *Cuban*, 744 F. Supp. 2d at 87. The requested records are maintained in active law enforcement investigatory files and are properly withheld under Exemption 7(A) on that basis. Further detail is not required.

C. Disclosure of the Withheld Records Would Cause Articulate Harm to the Ongoing Administrative Litigation

The Division of Information Access’s August 29, 2022 letter to you stated that “[t]he records that we are withholding are related to pending administrative litigation[.] CPSC determined that disclosing these records would cause an articulable harm to this administrative litigation.” FOIA Decision Letter at 2. The letter additionally stated, “[y]ou may file another FOIA request for these records at a later date, once the administrative litigation is complete.” *Id.*

There is a reasonable likelihood that production of CPSC investigatory records at this stage would cause some articulable harm to the pending administrative litigation because their release could reveal methods and data related to the underlying investigation. See *Am. Civil Liberties Union of Mich. v. FBI*, 734 F.3d 460, 466 (6th Cir. 2013) (release of demographic data “directly reveals a targeting priority, and indirectly reveals the methodologies and data used to make that selection”; thus withholding is proper because disclosure could interfere in investigation by revealing selection process, leads, and scope); *Solar Sources, Inc. v. U.S.*, 142 F.3d 1033, 1039 (7th Cir. 1998) (disclosure could interfere by revealing “scope and nature” of investigation).

III. Additional Grounds with Withholding Items (1), (2) and (6)

As discussed below, responsive records for items (1), (2), and (6) will also be withheld on additional grounds under FOIA Exemptions 3, 4, and 5, 15 U.S.C. §§ 552(b)(3), (b)(4), (b)(5), and Section 6 of the CPSA, 15 U.S.C. § 2055.

A. For Item (1), the Withheld Records Are Also Prohibited from Disclosure Under Exemption 3 in Reliance on Section 6 of the CPSA

I am withholding the documents and communications relating to the GAO Report under Exemption 3 of the FOIA, which incorporates Section 6 of the CPSA. As noted, these materials relate to and discuss particular CPSC investigations. My additional reliance on Exemption 3 for these records is consistent with the Commission’s overall statutory restrictions on the disclosure of manufacturer-provided information. Section 6 of the



CPSA regulates the Commission's disclosure of information to the public. Section 6(a)(2), 15 U.S.C. § 2055(a)(1), prohibits the Commission from releasing trade secrets and privileged or confidential commercial or financial information subject to FOIA Exemption 4. FOIA Exemption 4 protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). Where the information permits the public to ascertain readily the identity of a manufacturer, private labeler, or importer of a consumer product, Section 6(a)(3) of the CPSA, 15 U.S.C. § 2055(a)(3), requires the Commission to offer the identified firm the opportunity to mark the information as confidential and barred from disclosure under Section 6(a)(2). In general, the Commission shall not disclose any information that a firm marks as confidential unless the Commission determines that such information is not confidential. 15 U.S.C. § 2055(a)(4) and (5).

Additionally, under Section 6(b)(1) of the CPSA, 15 U.S.C. § 2055(b)(1), the Commission, to the extent practicable, must provide pre-disclosure notification to each manufacturer, importer, or private labeler of information to be disclosed that "pertains" to a consumer product, if the information "will permit the public to ascertain readily the identity of" the firm. Prior to disclosing such information, Section 6(b)(1) of the CPSA requires the Commission to "take reasonable steps to assure" that the information to be disclosed "is accurate, and that [its] disclosure is fair in the circumstances and reasonably related to effectuating the purposes of [the CPSA]." *Id.* The Commission has determined that it is not fair to disclose (1) information furnished by a firm to facilitate prompt remedial action or settlement of a case and (2) drafts of documents prepared during settlement negotiations, where the firm has a reasonable expectation that the Commission would maintain the confidentiality of such information. 16 C.F.R. § 1101.33(b)(1), (2). Because the records concerning the GAO Report are contained in Office of Compliance and Field Operations' active investigatory files and pertain to confidential and manufacturer-specific information, I am withholding these records under Exemption 3, in reliance on Section 6 of the CPSA and the Commission's implementing rules, which prohibit the disclosure of these records.

The fact that responsive information may have been provided to the GAO does not alter the confidentiality of the information. Disclosure to GAO in response to their request to the CPSC is not a public disclosure under Section 6 of the CPSA, nor under the GAO's organic statute. Statutory provisions governing the GAO's treatment of confidential information received from federal agencies provide for maintenance of confidentiality where confidentiality restrictions attached to the provision of information to GAO in response to a GAO request. See 31 U.S.C. § 716(e)(1) ("The Comptroller General shall maintain the same level of confidentiality for a record . . . as is required of the head of the agency from which it is obtained.").



B. For Item (2), the Withheld Records Are Inter-Agency Memorandums Exempt From Disclosure Under Exemption 5

In addition to affirming the FOIA Officer's decision under Exemption 7(A), I am also withholding the Briefing Packages pursuant to the deliberative process privilege under Exemption 5 of the FOIA. Exemption 5 protects "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). The deliberative process privilege exists to protect the decision making processes of government agencies, *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975), in order to allow open, frank discussions on matters of policy. *Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982). The privilege may be applied to "not only communications which are themselves deliberative in nature, but all communications which, if revealed, would expose to public view the deliberative process of an agency." *Id.* at 1048. When "disclosure of even purely factual material would reveal an agency's decision-making process Exemption (b)(5) applies." *Id.* The withheld information must be pre-decisional, meaning it must be generated within the continuing process of agency decision making. *NLRB* at 151 n.18. The information must also be deliberative, but factual material may be withheld under Exemption 5 when it is so intertwined with factual material that it is not feasible to release meaningful portions of a document. *Elec. Privacy Info. Ctr. v. DHS*, 892 F. Supp. 2d 28, 49 (D.D.C. 2012).

The Briefing Packages that I am withholding under Exemption 5 are comprised of pre-decisional internal agency memorandums, the substance of which contain CPSC staff's opinions, recommendations, and considerations that are part of an internal pre-decisional deliberative process concerning possible enforcement action(s). Disclosure of these pre-decisional and deliberative documents would harm the agency's interests by discouraging the frank exchange of views with respect to CPSC's decision-making processes in current and future enforcement matters.

C. For Item (6), the Withheld Records Comprise Law Enforcement Information Exempt From Disclosure Under Exemption 7(E)

Also in addition to Exemption 7(A), I am withholding the Procedures Manual under Exemption 7(E) of the FOIA, which protects from disclosure "records or information compiled for law enforcement purposes, but only 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." 5 U.S.C. § 552(b)(7)(E). The scope of FOIA Exemption 7(E) encompasses "both civil and criminal matters," *Tax Analysts v. IRS*, 294 F.3d 71, 77 (D.C. Cir. 2002), and encompasses the withholding of a wide range of techniques and procedures. See, e.g., *Frank LLP v. Consumer Fin.*



Prot. Bur., 480 F. Supp. 3d 87, 103-04 (D.D.C. 2020) (application of Exemption 7(E) to agency’s interview techniques was proper because the information is confidential and not generally known by the public). Exemption 7(E) “sets a relatively low bar for the agency to justify withholding.” *Blackwell v. FBI*, 646 F.3d 37, 42 (D.C. Cir. 2011). To clear this relatively low bar, an agency must demonstrate only that release of the requested information could “increase the risks that a law will be violated or that past violators will escape legal consequences.” *Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1193 (D.C. Cir. 2009) (emphasis in original).

Here, release of the Procedures Manual would disclose how staff manages product defect cases and conducts recall investigations, which would likely jeopardize CPSC staff’s enforcement of the laws administered by CPSC and could allow manufacturers, importers, and distributors to evade agency efforts to detect product safety hazards. Disclosure of the Procedures Manual could “reasonably be expected to risk circumvention of the law.” For this reason, CPSC treats the Procedures Manual as confidential and does not disclose the manual to the public. Inasmuch as Amazon received a copy of the Procedures Manual marked “confidential” during the discovery phase of the administrative proceeding, Amazon is not permitted to disclose it to the public. To the extent that Amazon continues to seek prior or unpublished versions of the Procedures Manual under the FOIA, I affirm the Division of Information Access’s decision to withhold the manual under Exemption 7(E) as well as Exemption 7(A).

* * * * *

Accordingly, I am affirming the Division of Information Access’s determination to withhold the above-referenced records pursuant to FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A), and confirming that action on additional grounds under FOIA Exemptions 3, 4, and 5 and CPISA Section 6, 5 U.S.C. § 552(b)(3), (b)(4), (b)(5) and 15 U.S.C. § 2055. Your appeal therefore is denied with respect to records related to the GAO Report, Briefing Packages, and the Procedures Manual. You may file new FOIA requests for the documents at a later date once the litigation has completed.

Amazon has the right to contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road – OGIS
College Park, Maryland 20740-6001
Email: ogis@nara.gov
Telephone: 202-741-5770 or toll free at 877-684-6448
Fax: 202-741-5769



Amazon also has the right to seek judicial review of this decision to the extent it upholds the withholding of documents, as provided by 5 U.S.C. § 552(a)(4)(B).

Sincerely,

**AUSTIN
SCHLICK**
Austin C. Schlick
General Counsel

Digitally signed by
AUSTIN SCHLICK
Date: 2022.12.12
16:10:04 -05'00'

Exhibit E



February 23, 2023

Via Email

Sarah Wilson
One City Center
Washington, District of Columbia 20001-4956
swilson@cov.com

RE: Freedom of Information Act Request #22-F-00391, categories 5 and 8 of the Appeal Response

Dear Ms. Wilson:

Thank you for your Freedom of Information Act (FOIA) request seeking information from the U.S. Consumer Product Safety Commission (CPSC). This is a final response. In his December 12, 2022, letter (Appeal Response) responding to your appeal of CPSC FOIA request 22-F-00391, CPSC's General Counsel, *inter alia*, remanded five categories of records to the FOIA Office for processing. On January 27, 2023, we responded to categories 5 and 7. On February 13, 2023, we responded to categories 3 and 4. This is a final response regarding the remaining category 8 regarding "any opinion, order, or other decisional document issued by a Presiding Officer or the Commission, as well as similar opinions, orders, or other decisional documents in any other CPSC adjudicative proceeding, or brief or motion filed by Complaint Counsel in any CPSC adjudicative proceeding, not already available at the website <https://www.cpsc.gov/Recalls/Recall-Lawsuits-Adjudicative-Proceedings>."

The Office of Compliance's search of its files and indices failed to reveal any records regarding category 8. The FOIA Office has now completed its processing of categories 3, 4, 5, 7 and 8 of the Appeal Response.

FOIA Administrative Procedures

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

Right to Mediation. You may also contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, MD 20740-6001; email at: ogis@nara.gov; telephone at: 202-741-5770; toll free at: 1-877-684-6448; or facsimile to: 202-741-5769.

Fees. No fees were charged.

Sincerely,

Abioye Oyewole
Assistant General Counsel
Office of the General Counsel
Division of Information Access
P: 240-429-6113
E: aoyewole@cpsc.gov

Exhibit F

COVINGTON

BEIJING BRUSSELS DUBAI FRANKFURT JOHANNESBURG
LONDON LOS ANGELES NEW YORK PALO ALTO
SAN FRANCISCO SEOUL SHANGHAI WASHINGTON

Sarah L. Wilson

Covington & Burling LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001-4956
T +1 202 662 5397
swilson@cov.com

By Electronic Mail

May 19, 2023

FOIA APPEAL

Office of the General Counsel
ATTN: Division of the Secretariat
U.S. Consumer Product Safety Commission
cpscfoiarequests@cpsc.gov

To the Division of the Secretariat:

We write on behalf of Amazon.com, Inc. (“Amazon”) to appeal the response of the Division of Information Access addressing the items of FOIA Request 22-F-00391 (the “FOIA Request”) that were remanded by the General Counsel in the decision to Appeal 23-A-00001. For the reasons set forth below, the response of the Division of Information Access did not adequately address the remanded items, and thus amounts to an improper partial denial of the FOIA Request.¹

I. Background

As you are aware, the FOIA Request sought documents relating to (1) GAO report 21-56; (2) the Commission’s decision to initiate an administrative lawsuit against Amazon; (3) the proposed Recalls Pledge between CPSC and Amazon; (4) the proposed Memorandum of Understanding between CPSC and Amazon; (5) prior versions of the CPSC Recall Handbook; (6) CPSC’s Section 15 Procedures Manual; (7) CPSC guidance documents relating to mandatory recalls; and (8) decisional documents issued by a Presiding Officer or the Commission in CPSC adjudications.

On August 29, 2022, the Division of Information Access denied the FOIA Request in full, claiming that responsive records to requests (1) through (7) were withheld pursuant to FOIA Exemption 7(A), and claiming that all documents related to request (8) “can be found on CPSC’s website.” FOIA Initial Decision Letter at 1-2.

On November 11, 2022, Amazon appealed and, on December 12, 2022, the General Counsel granted the appeal in part, reversing the decision in relation to requests (3), (4), (5), (7) and (8). Accordingly, those requests were remanded to the Division of Information Access for additional processing, search and review. Decision of General Counsel in Appeal 23-A-00001.

¹ Attached to this letter are FOIA Request 22-F-00391 dated July 22, 2022, the Decision of the General Counsel in Appeal 23-A-00001 dated December 12, 2022, and the two letters sent by the Division of Information Access addressing the remanded items dated January 27, 2023 and February 13, 2023, and the final response letter sent by the Division of Information Access dated February 23, 2023.

From January 27, 2023 through February 23, 2023, the Division of Information Access provided Amazon with 206 pages of documents responsive to some of the remanded requests. In its responses, the Division of Information Access did not invoke any FOIA exemptions or claim to withhold any documents. Specifically, Amazon was provided with the following materials and responses:

- In response to requests (3) and (4), the CPSC produced 183 pages of documents and communications related to a proposed Recall Pledge and a proposed Memorandum of Understanding between CPSC and Amazon. These documents included email threads between Amazon and the CPSC, as well as drafts of the proposed Memorandum of Agreement and other documents attached to the emails sent to Amazon by the CPSC. Internal documents or communications between members or employees of the CPSC, or any communications with any parties other than Amazon, were not produced. *See* FOIA Second Interim Response of February 13, 2023.
- In response to requests (5) and (7), the CPSC produced a single document, the 1999 Recall Handbook. *See* FOIA First Interim Response of January 27, 2023.
- In response to request (8), the Division of Information Access did not produce any documents and stated that “[t]he Office of Compliance’s search of its files and indices failed to reveal any records regarding category 8.” *See* FOIA Final Response of February 23, 2023 at 1.

As explained below, these responses were not sufficient to adequately address the remanded items of the FOIA Request, amounting to a partial denial of the request.

II. Insufficiency of the CPSC’s Responses

After reviewing the records and responses provided by the Division of Information Access, we respectfully submit that the CPSC has not adequately addressed those requests in compliance with FOIA.

A. Requests (3) and (4)

Regarding requests (3) and (4), the CPSC has produced only a very narrow set of documents, without invoking any FOIA exceptions, which appears to be unjustified. Those requests seek documents related to the proposed Recall Pledge and the proposed Memorandum of Understanding (“MOU”). The CPSC only produced 183 pages of documents relating to these requests, and *none* of those documents are internal discussions within the CPSC or communications with any party other than Amazon. It is a near impossibility that no internal materials or communications were created or circulated by CPSC staff in the context of their discussions and negotiations with Amazon (aside from the communications and documents exchanged between Amazon and the CPSC.)

The CPSC has not explained why it has declined to produce such materials, nor has it asserted any FOIA exemption. We have not received any indication that additional records were withheld from disclosure or the reasons that would justify it, even though this is an obligation

under FOIA and CPSC regulations. Accordingly, the CPSC's response to these requests on remand appears to be inadequate.

Pursuant to 5 U.S.C. § 552(a)(6)(A)(i)(I), agency FOIA responses shall include their "determination and the reasons therefor." Thus if the CPSC decides to withhold records in reliance on a FOIA exemption, it must so inform the requester. Indeed, 16 C.F.R. § 1015.6(b)(2) provides that if the CPSC invokes a FOIA exemption to withhold material, CPSC shall provide a response that includes "[a] reference to the specific exemption or exemptions under the Freedom of Information Act authorizing the withholding of the record with a brief explanation of how the exemption applies to the record withheld." No such explanation was provided here.

In addition, when withholding responsive records pursuant to FOIA exemptions, the CPSC must provide "[a]n estimation of the volume of requested material withheld." 16 C.F.R. § 1015.6(b)(3); *see also* 5 U.S.C. § 552(a)(6)(F) (stating that, when denying a request, "an agency shall make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person making the request.") Here, however, none of this information was provided to Amazon.

If the CPSC decided to withhold materials from Amazon related to requests (3) and (4), the CPSC should have described the existence of these materials, the FOIA exemption that justifies the decision to withhold them, and provided an estimated volume of the withheld materials.

To the extent the CPSC only searched for and produced Amazon-CPSC communications in response to this request, that would be an improper interpretation of the request.

Request (3) called for "[d]ocuments and communications relating to the proposed Recalls Pledge between CPSC and Amazon related to recalls of products sold by third-party sellers on Amazon.com." Request (4) sought "[d]ocuments and communications relating to the proposed Memorandum of Understanding between CPSC and Amazon relating to recalls of products sold by third-party sellers on Amazon.com."

The use of "between CPSC and Amazon" clearly was designed to identify the relevant Recalls Pledge and Memorandum of Understanding; it did not qualify or limit the relevant "documents and communications" to those that were exchanged between the CPSC and Amazon. That is reinforced by the fact that the requests expressly *excluded* "[c]ommunications to or from Amazon"—which makes sense, as Amazon would not need to seek via FOIA communications to which it was a party. FOIA Request at 4. Thus, the request unambiguously sought internal CPSC communications and documents, as well as CPSC communications and documents relating between the CPSC and third parties other than Amazon, relating to the Recalls Pledge and the Memorandum of Understanding. To the extent the agency interpreted the request otherwise, we ask that the Division of Information Access be ordered to promptly conduct a search for any responsive records falling into these categories.

We also note that even if requests (3) and (4) could be viewed as ambiguous, the failure to search for internal CPSC materials sought by Amazon's FOIA request was improper. Agencies must carefully consider the nature of FOIA requests and give a reasonable interpretation to their all of their terms and overall content, even when the request is not a "model of clarity." *LaCedra v. EOUSA*, 317 F.3d 345, 346 (D.C. Cir. 2003). If doubt existed regarding the scope of these requests, the agency should have contacted Amazon for clarification. Indeed, the CPSC is required

to clarify the scope of requests with the requester when necessary. *See* 16 C.F.R. § 1015.3(b) (establishing that the requester will be contacted by the CPSC for clarification when “the information supplied ... is not sufficient to permit identification and location of the records.”); *see also Stockton E. Water Dist. v. United States*, No. 08-0563, 2008 WL 5397499, at *2 (E.D. Cal. Dec. 19, 2008) (noting that, if defendants believed request did not sufficiently describe records sought, they were required to contact plaintiff to clarify what records were sought.)

Accordingly, if the CPSC interpreted items (3) and (4) to mean that Amazon was seeking only documents and communications exchanged between the CPSC and Amazon, we request that the Division of Information Access be directed to adjust its search in accordance with the meaning of our original requests and provide a prompt response after conducting such a search. *See Rocky Mountain Wild, Inc. v. U.S. Forest Serv.*, No. 15-0127, 2016 WL 362459, at *6 (D. Colo. Jan. 29, 2016) (finding that “when an agency learns that it has misunderstood the scope of a request, it has a duty to adjust its records search accordingly.”) (citing *Truitt v. Dep’t of State*, 897 F.2d 540, 545-546 (D.C. Cir. 1990)).

If the CPSC neither withheld materials based on a FOIA exemption nor misinterpreted the request, we respectfully request that the Division of Information Access be ordered to explain the reason why no responsive records are claimed to exist in connection with requests (3) and (4).

B. Request (8)

Regarding request (8), we were quite surprised to hear that the Office of Compliance has no records of adjudications that are not currently posted on the CPSC’s website. As mentioned in our appeal, we are aware of the existence of numerous adjudications that are not currently included on that website.² *See* FOIA Appeal 23-A-00001 at 3. Two of these decisions were cited by the Office of Compliance in its litigation against Amazon,³ as well as the presiding officer’s decision on Summary Decision Motions.⁴

It is astounding that the CPSC apparently has two decisions that are *not* posted on its website—and the CPSC believes both of those decisions favor its litigating position—but literally no other documents relating to any other prior CPSC adjudications. Indeed, given the significance that the CPSC has attached to these decisions, it seems unreasonable that the documents related to these adjudications (including the final order and decisions, as well as briefs and motions filed by Complaint Counsel) are reportedly not in the CPSC’s possession. It is also concerning that

² *In re Dye & Dye*, CPSC Docket No. 88-1 (Mar. 30, 1989); *In re G.L. Elec. Flashheat Co.*, CPSC Docket No. 78-2 (Mar. 24, 1978); *In re National Mattress Co.*, CPSC Docket no. 76-9 (Aug. 26, 1977); *In re Ambroy Corp.*, CPSC Docket No. 77-5 (Oct. 26, 1977); *In re Northwick Carpet Mills, Inc.*, CPSC Docket No. 76-6 (Sept. 7, 1976); *In re Ups ‘n Downs, Inc.*, CPSC Docket No. 76-4 (June 20, 1977); *In re Barrett Carpet Mills, Inc.*, CPSC Docket No. 75-5 (July 8, 1976); *In re: Francis Alaonso, Jr., d/b/a Mylar Star Kites*, CPSC Docket No. 75-16 (June 21, 1976); *In re White Consolidated Industries, Inc. (kelvinator)*, CPSC Docket No. 75-1 (Nov. 3, 1975); *In re Relco, Inc. (Wel-Dex Welder Mfg. Co.)*, CPSC Docket No. 74-4 (Oct. 27, 1976).

³ CPSC has cited decisional documents related to the following matters: *In re Dye & Dye*, CPSC Docket No. 88-1 (March 30, 1989), and *In re Relco, Inc. (Wel-Dex Welder Mfg. Co.)*, CPSC Docket No. 74-4 (Oct. 27, 1976).

⁴ Presiding officer, Administrative Law Judge Jason S. Patil, cited *In re Dye & Dye*, CPSC Docket No. 88-1 (March 30, 1989) in pages 21, 26 and 28; and *In re Relco, Inc. (Wel-Dex Welder Mfg. Co.)*, CPSC Docket No. 74-4 (Oct. 27, 1976), at pages 30-31, 41-42.

other decisions or cases that were not cited by the CPSC, but that may be equally relevant, are also apparently not within in the CPSC's possession.

In general, all past decisions in adjudications should be included in the CPSC's website. 5 U.S.C. § 552(a)(2)(A) requires that agencies shall make available for public inspection in an electronic format "final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases." Likewise, 16 C.F.R. § 1015.2(b) establishes that the CPSC "will maintain an electronic reading room on the internet at: <https://www.cpsc.gov> for records that are required by 5 U.S.C. § 552(a)(2) to be available by computer telecommunications."

In general, the material that require public disclosure in accordance with U.S.C. § 552(a)(2) "consist of those documents which contain what the agency has treated as authoritative indications of its position on legal or policy questions." Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act 19 (Feb. 1975). The disclosure of this material is relevant as it "help[s] the citizen find agency statements 'having precedential significance' when he becomes involved in 'a controversy with an agency.'" *Skelton v. U.S. Postal Service*, 678 F.2d 35, 41 (5th Cir. 1982) (quoting H.R. Rep. No. 89-1497, at 8 (1966)). *See also NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975) (holding that "[t]he affirmative portion of the Act, expressly requiring indexing of 'final opinions,' ... represents a strong congressional aversion to 'secret (agency) law,' ... and represents an affirmative congressional purpose to require disclosure of documents which have 'the force and effect of law.'"). This is precisely the type of information Amazon is entitled to access via FOIA: decisions and materials that have precedential significance for the CPSC, some of which are currently being used against Amazon in litigation and have been cited by the presiding officer in that litigation, but others of which have been hidden from view, preventing Amazon from ascertaining whether they may support any of Amazon's litigation positions.

There is no indication that such information can be disposed of or destroyed by the CPSC. At a bare minimum, FOIA expressly requires the CPSC to maintain an index of final opinions "issued, adopted, or promulgated after July 4, 1967." 5 U.S.C. § 552(a)(2). No such index was provided, and none appears on the CPSC's website. We also note that it is the CPSC's duty to conduct a search that is "reasonably calculated to uncover all relevant documents." *Campbell v. SSA*, 446 F. App'x 477, 480 (3d Cir. 2011) (quoting *Weisberg v. DOJ*, 705 F.2d 1344, 1351 (D.C. Cir. 1983)). We question whether a reasonable search was conducted here, given that Complaint Counsel has access to two opinions that are not on the referenced website, and such opinions were cited by the presiding officer in his order.

Finally, if records of these cases are "known to have been destroyed or otherwise disposed of," the CPSC is obligated to inform the requester of such fact in accordance with 16 C.F.R. § 1015.3(d). The response to our FOIA request contained no such information.

* * * * *

Accordingly, we respectfully request that the CPSC promptly conduct a search for documents responsive to the remanded requests and produce them under FOIA. We appreciate your consideration of this appeal.

Respectfully,

/s/ Sarah L. Wilson

Sarah L. Wilson

Exhibit G

COVINGTON

BEIJING BOSTON BRUSSELS DUBAI FRANKFURT
JOHANNESBURG LONDON LOS ANGELES NEW YORK
PALO ALTO SAN FRANCISCO SEOUL SHANGHAI WASHINGTON

Sarah L. Wilson

Covington & Burling LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001-4956
T +1 202 662 5397
swilson@cov.com

By Electronic Mail

March 4, 2024

FOIA APPEAL

Office of the General Counsel
ATTN: Division of the Secretariat
U.S. Consumer Product Safety Commission
cpscfoiarequests@cpsc.gov

To the Division of the Secretariat:

We write on behalf of Amazon.com, Inc. (“Amazon”) regarding the status of an appeal filed by Amazon relating to a Freedom of Information Act (“FOIA”) request. Specifically, Amazon appealed the response of the U.S. Consumer Product Safety Commission’s (“CPSC”) Division of Information Access addressing the items of FOIA Request 22-F-00391 (the “FOIA Request”) that were remanded by the General Counsel in the decision of Appeal 23-A-00001. Amazon’s appeal letter was timely submitted to the Division of the Secretariat on May 19, 2023, and is appended hereto as Exhibit A.

To date, Amazon has not received a response from the CPSC regarding its May 19, 2023 appeal letter. For the reasons set forth in the May 19, 2023 appeal letter, Amazon respectfully renews its request that the CPSC promptly conduct a search for documents responsive to the remanded requests and produce them under FOIA.

The procedural history of Amazon’s FOIA request is described in Amazon’s appeal letter, which was filed on May 19, 2023. That appeal request complied with all relevant requirements.

First, the appeal was timely, as it was submitted within 90 days of the CPSC’s February 23, 2023 letter completing the CPSC’s response to the remanded FOIA requests. 16 C.F.R. § 1015.7(a).

Second, the appeal was properly submitted, as it was submitted by email to cpscfoiarequests@cpsc.gov, and the subject line of the email was marked “Freedom of Information Act Appeal.” See Email to CPSC (May 19, 2023) (attached as Exhibit B).

To date, Amazon has not received a response to this appeal letter, even though the agency was required by law to respond within 20 business days. See 5 U.S.C. 552(a)(6)(A); 16 C.F.R. § 1015.7(b). Amazon respectfully requests that the CPSC promptly process this appeal.

Finally, the CPSC’s FOIA regulations state that if the agency does not respond “to the requester within 20 working days or any extension thereof, the requester may consider his/her administrative remedies exhausted and seek judicial relief in a United States district court.”

COVINGTON

March 4, 2024
Page 2

16 C.F.R. § 1015.7(f); *see also* 5 U.S.C. § 552(a)(6)(A)(ii). The CPSC has far exceeded the 20-day timeline to respond to Amazon's May 19, 2023 letter.

* * * * *

For the reasons stated herein and in its letter of May 19, 2023, Amazon respectfully requests that the CPSC promptly process Amazon's appeal, which should result in a further search for documents responsive to the remanded requests and their prompt production to Amazon. We appreciate your consideration of and response to this letter.

Respectfully,



Sarah L. Wilson

Exhibit H

From: Mosheim Oyewole, Abioye <AOyewole@cpsc.gov>
Sent: Wednesday, April 3, 2024 5:19 PM
To: Wilson, Sarah; Magcale, Jamie Dominique U
Cc: King, Kevin; Brugato, Thomas; Murchison, Keisha; CPSC FOIA Requests
Subject: RE: Freedom of Information Act Appeal of Request 22-F-00391, Remanded in Appeal 23-A-00001

Importance: High

[EXTERNAL]

Hi Sarah,

An update on your request – because you are asking for an additional search of categories 3, 4, and 8 of 22-F-00391, and that was the basis of your FY23 appeal, we decided to reopen 22-F-00391 and ask Compliance to conduct another search for those categories of records.

We are making it a high priority to process this request. Please feel free to touch base with me if you have any questions.

Regards,
Abi

Abioye Mosheim Oyewole

Assistant General Counsel, Division of Information Access

U.S. Consumer Product Safety Commission | Office of the General Counsel

4330 East West Highway | Bethesda, MD 20814

Phone: (301) 504-7454

Follow Us: [Facebook](#), [Twitter](#), [Instagram](#), [YouTube](#)

From: Wilson, Sarah <swilson@cov.com>
Sent: Wednesday, March 20, 2024 4:45 PM
To: Mosheim Oyewole, Abioye <AOyewole@cpsc.gov>; Magcale, Jamie Dominique U <JMagcale@cov.com>
Cc: King, Kevin <KKing@cov.com>; Brugato, Thomas <tbrugato@cov.com>; Murchison, Keisha <KMurchison@cpsc.gov>; CPSC FOIA Requests <CPSCFOIARequests@cpsc.gov>
Subject: RE: Freedom of Information Act Appeal of Request 22-F-00391, Remanded in Appeal 23-A-00001

Thank you, Abi.

Sarah Wilson

Covington & Burling LLP
One CityCenter, 850 Tenth Street, NW
Washington, DC 20001-4956

COVINGTON

This message is from a law firm and may contain information that is confidential or legally privileged. If you are not the intended recipient, please immediately advise the sender by reply e-mail that this message has been inadvertently transmitted to you and delete this e-mail from your system. Thank you for your cooperation.

From: Mosheim Oyewole, Abioye <[AOyewole@cpsc.gov](mailto:Aoyewole@cpsc.gov)>
Sent: Wednesday, March 20, 2024 4:40 PM
To: Wilson, Sarah <swilson@cov.com>; Magcale, Jamie Dominique U <JMagcale@cov.com>
Cc: King, Kevin <KKing@cov.com>; Brugato, Thomas <tbrugato@cov.com>; Murchison, Keisha <KMurchison@cpsc.gov>; CPSC FOIA Requests <CPSCFOIARequests@cpsc.gov>
Subject: RE: Freedom of Information Act Appeal of Request 22-F-00391, Remanded in Appeal 23-A-00001
Importance: High

EXTERNAL

Thank you, Sarah, for clarifying. We will make it a priority to process this appeal to your appeal.

Regards,
Abi

Abioye Mosheim Oyewole

Assistant General Counsel, Division of Information Access

[U.S. Consumer Product Safety Commission](http://www.cpsc.gov) | Office of the General Counsel
4330 East West Highway | Bethesda, MD 20814

Phone: (301) 504-7454

Follow Us: [Facebook](#), [Twitter](#), [Instagram](#), [YouTube](#)

From: Wilson, Sarah <swilson@cov.com>
Sent: Wednesday, March 20, 2024 1:33 PM
To: Mosheim Oyewole, Abioye <[AOyewole@cpsc.gov](mailto:Aoyewole@cpsc.gov)>; Magcale, Jamie Dominique U <JMagcale@cov.com>
Cc: King, Kevin <KKing@cov.com>; Brugato, Thomas <tbrugato@cov.com>; Murchison, Keisha <KMurchison@cpsc.gov>; CPSC FOIA Requests <CPSCFOIARequests@cpsc.gov>
Subject: RE: Freedom of Information Act Appeal of Request 22-F-00391, Remanded in Appeal 23-A-00001

Ms. Oyewole,

Thank you for your email. Amazon's May 19, 2023 letter, which postdates the CPSC's February 23, 2023 response, is an appeal of the Division of Information Access' response to Amazon's FOIA request on remand. In particular, Amazon's May 2023 appeal challenged the adequacy of the CPSC's response to remanded items (3), (4), (5), (7), and (8) in Amazon's FOIA request as insufficient. As explained in our March 15, 2024 letter, Amazon has not received a response to its May 2023 appeal. The March 2024 letter, which attaches the May 2023 appeal, is enclosed again for your reference.

We would appreciate your clarification of the CPSC's disposition of Amazon's May 2023 appeal, including whether it is the CPSC's position that there is no further administrative appeal available within the agency.

Best regards,

Sarah

Sarah Wilson

Covington & Burling LLP
One CityCenter, 850 Tenth Street, NW
Washington, DC 20001-4956
T +1 202 662 5397 | swilson@cov.com
www.cov.com

COVINGTON

This message is from a law firm and may contain information that is confidential or legally privileged. If you are not the intended recipient, please immediately advise the sender by reply e-mail that this message has been inadvertently transmitted to you and delete this e-mail from your system. Thank you for your cooperation.

From: Mosheim Oyewole, Abioye <[AOyewole@cpsc.gov](mailto:Aoyewole@cpsc.gov)>
Sent: Tuesday, March 19, 2024 12:28 PM
To: Magcale, Jamie Dominique U <JMagcale@cov.com>
Cc: Wilson, Sarah <swilson@cov.com>; King, Kevin <KKing@cov.com>; Brugato, Thomas <tbrugato@cov.com>; Murchison, Keisha <KMurchison@cpsc.gov>; CPSC FOIA Requests <CPSCFOIARequests@cpsc.gov>
Subject: FW: Freedom of Information Act Appeal of Request 22-F-00391, Remanded in Appeal 23-A-00001
Importance: High

[EXTERNAL]

Good afternoon,

Thank you for your follow up inquiry. Please see the final response attached, originally sent to Sarah Wilson on February 23, 2023.

Regards,
Abi

Abioye Mosheim Oyewole

Assistant General Counsel, Division of Information Access
U.S. Consumer Product Safety Commission | Office of the General Counsel
4330 East West Highway | Bethesda, MD 20814
Phone: (301) 504-7454

Follow Us: [Facebook](#), [Twitter](#), [Instagram](#), [YouTube](#)

From: Magcale, Jamie Dominique U <JMagcale@cov.com>
Sent: Friday, March 15, 2024 4:00 PM

To: CPSC FOIA Requests <CPSCFOIARequests@cpsc.gov>; CPSC FOIA <cpsc-foia@cpsc.gov>
Cc: Wilson, Sarah <swilson@cov.com>; King, Kevin <KKing@cov.com>; Brugato, Thomas <tbrugato@cov.com>
Subject: Freedom of Information Act Appeal of Request 22-F-00391, Remanded in Appeal 23-A-00001

Good afternoon:

On behalf of Amazon.com, Inc. ("Amazon"), please see the attached letter regarding Amazon's May 19, 2023 Freedom of Information Act Appeal of Request 22-F-00391, as remanded in Appeal 23-A-00001.

We would appreciate if you could confirm receipt of this email and the attached letter.

Best regards,

Jamie Magcale

Covington & Burling LLP
The New York Times Building, 620 Eighth Avenue
New York, NY 10018-1405
T +1 212 841 1243 | jmagcale@cov.com
www.cov.com

COVINGTON

*****!!! Unless otherwise stated, any views or opinions expressed in this e-mail (and any attachments) are solely those of the author and do not necessarily represent those of the U.S. Consumer Product Safety Commission. Copies of product recall and product safety information can be sent to you automatically via Internet e-mail, as they are released by CPSC. To subscribe or unsubscribe to this service go to the following web page: <http://www.cpsc.gov/en/Newsroom/Subscribe> *****!!!