



November 12, 2013

VIA E-MAIL

Ms. Alberta E. Mills
FOIA Officer
U.S. Consumer Product Safety Commission
4330 East West Highway, Room 502
Bethesda, MD 20814-4408
E-mail: cpsc-foia@cpsc.gov

Dear Ms. Mills:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, Cause of Action, Inc. (COA), a 501(c)(3) government accountability organization, hereby requests the following records.

I. COA'S RECORDS REQUESTS.

On August 27, 2012, the U.S. Consumer Product Safety Commission (CPSC) issued a news release stating that "CPSC staff estimates that small, high powered magnet sets were associated with 1,700 emergency room-treated injuries between 2009 and 2011. The majority of injuries (70 percent) have been to children 4 to 12 years of age."¹

- A. Please produce all records (including but not limited to documents and emails) underlying CPSC's estimate. These records should include, but are not limited to, all responsive Epidemiologic Investigations Reports (also known as IDIs), all responsive "reports of harm" submitted to SaferProducts.gov, all responsive cases reported through the National Electronic Surveillance System (NEISS) database, responsive information contained in the Injury or Potential Injury Incident (IPII) database, responsive information contained in the In-depth Investigation (INDP) database, and relevant incident data received from the North American Society for Pediatric Gastroenterology, Hepatology and Nutrition (NASPGHAN).

¹ News Release, U.S. Consumer Prod. Safety Comm'n, CPSC Starts Rulemaking to Develop New Federal Standard for Hazardous, High-Powered Magnet Sets (Aug. 27, 2012), *available at* <http://www.cpsc.gov/en/newsroom/news-releases/2012/cpsc-starts-rulemaking-to-develop-new-federal-standard-for-hazardous-high-powered-magnet-sets/> (last visited Nov. 7, 2013).

To expedite your response, COA does not seek the identity of any manufacturers other than Maxfield & Oberton or Strong Force, Inc. that are named in any responsive record. Consequently, a Section 6(b) review is not required. Records identifying Maxfield & Oberton (or “Buckyballs”) or Strong Force, Inc. (or “NeoCube”) do not require Section 6(b) review, because both of these companies are out of business. *See* 16 C.F.R. § 1101.26(b)(1).

- B. All records (including but not limited to documents and emails) related to the drafting, preparation, and clearance of the April 12, 2013 CPSC recall release regarding the recall of Buckyballs® and Buckycubes® by six retailers (CPSC Recall Release 13-168).
- C. All records (including but not limited to documents and emails) comprising the monthly progress reports of the six retailers who agreed to participate in the Buckyballs® and Buckycubes® magnet recall that was announced on April 12, 2013 (CPSC Recall Release 13-168).
- D. All records (including but not limited to documents and emails) reflecting, regarding, or referencing, and all communications between, CPSC staff and Strong Force, Inc. regarding the product marketed as NeoCube magnet sets. Because Strong Force, Inc. is no longer in business, there is no need for a Section 6(b) review of these documents. *See* 16 C.F.R. § 1101.26(b)(1).
- E. All records (including but not limited to documents and emails) generated, downloaded, or created by CPSC and/or its staff containing, discussing, reflecting, regarding, or referencing expressions of public criticism or concern with respect to: (1) their conduct concerning the recall of Buckyballs®, Buckycubes®, NeoCube or any other magnet sets; and/or (2) their actions against Maxfield & Oberton and/or Mr. Craig Zucker.
- F. All records (including but not limited to documents and emails) generated, downloaded, or created by CPSC and/or its staff referencing or concerning Mr. Craig Zucker.

II. COA REQUESTS “NEWS MEDIA” STATUS.

For fee purposes, COA is a “representative of the news media” under 5 U.S.C. § 552(a)(4)(A)(ii)(II). COA is organized and operated, among other things, to publish and broadcast news, *i.e.*, information that is about current events or that would be of current interest to the public. It gleans the information that it regularly publishes from a wide variety of sources and methods, including whistleblowers/insiders, government agencies, universities, scholarly works, and FOIA requests. COA routinely and systematically disseminates information acquired from such sources to the public through various media. For example, COA distributes articles, blog posts, published reports, and newsletters about current events of interest to the general public

through its website.² COA also disseminates news to the public via Twitter and Facebook, and it provides news updates to subscribers via e-mail. As a result of these activities, federal agencies have continually recognized COA's news media status in connection with its FOIA requests.³

III. COA IS ENTITLED TO A PUBLIC INTEREST FEE WAIVER.

COA also requests a waiver of any and all applicable fees pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). This provision provides that requested records shall be furnished free of charge or at reduced charge if “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”⁴ This two-pronged fee waiver standard is “liberally construed in favor of waivers for noncommercial requesters”⁵ so as to avoid “roadblocks and technicalities” imposed by agencies.⁶ As discussed below, COA meets the statutory standard for a fee waiver.

A. Disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of government operations or activities.

In determining whether a request satisfies the requirements of public interest, CPSC has enumerated four factors to be considered, all of which are satisfied.⁷

i. The subject of the requested records concerns the operation or activities of the federal government.

The records requested by COA consist of records pertaining to CPSC's activities concerning small, high-powered magnet sets. The CPSC is “an independent regulatory commission” consisting of five commissioners appointed by the President of the United States, “by and with the advice and consent of the [U.S.] Senate.”⁸ It is “charged with protecting the public from unreasonable risk of injury or death associated with the use of the thousands of types of consumer products under [its]

² See <http://www.causeofaction.org>.

³ See, e.g., FOIA Request 2014-010-F, Consumer Fin. Prot. Bureau (Oct. 7, 2013); FOIA Request 2013-01234-F, Dep't of Energy (July 1, 2013); FOIA Request 2013-073, Dep't of Homeland Sec. (Apr. 5, 2013); FOIA Request 2012-RMA-02563F, Dep't of Agric. (May 3, 2012); FOIA Request 2012-00270, Dep't of Interior (Feb. 17, 2012); Dep't of Commerce (Mar. 1, 2012); FOIA Request No. 12-00455-F, Dep't of Educ. (Jan. 20, 2012).

⁴ 5 U.S.C. § 552(a)(4)(A)(iii); see also 16 C.F.R. § 1015.9(f)(4) (incorporating FOIA's public interest factors into CPSC regulations).

⁵ *Federal CURE v. Lappin*, 602 F. Supp.2d 197, 201 (D.D.C. 2009).

⁶ *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Educ.*, 593 F. Supp.2d 261, 268 (D.D.C. 2009) (quoting *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987)).

⁷ 16 C.F.R. § 1015.9(f)(5)(i)-(iv).

⁸ 15 U.S.C. § 2053(a).

jurisdiction,” such as “toys, cribs, power tools, cigarette, lighters, and household chemicals.”⁹ Accordingly, the request in question directly concerns the operation or activities of the federal government.

ii. The disclosure of the requested records is likely to contribute to an understanding of CPSC’s operations or activities.

The CPSC conducts research and releases injury estimates pursuant to its rulemaking authority. In the present case, CPSC staff released estimates of injuries suffered by children due to the misuse of small, high-powered magnet sets in tandem with a report of the Commission’s unanimous notice of proposed rulemaking “aimed at developing a new federal standard” for this allegedly inherently dangerous product.¹⁰ It is reasonable to conclude that CPSC staff’s research and estimates influenced the Commissioners in issuing a proposed rulemaking. Accordingly, COA’s request concerns records that would contribute to an understanding of CPSC’s operations and activities.

iii. Disclosure of the requested documents is likely to contribute to public understanding of CPSC’s operation or activities.

Disclosure of the requested records is likely to contribute to the public’s understanding of CPSC’s operation or activities. These records have not previously been made available to the public. COA seeks to educate the public through its news reporting, and it possess the editorial and analytical skills necessary to create effective and original news material that can inform the general public about CPSC’s activities.

COA intends to make the results of the requests in question available to the public in various ways. Insofar as COA’s ability to disseminate information to a reasonably broad audience is concerned, non-traditional media, including websites and electronic newsletters, have “consistently [been] found . . . sufficiently broad to demonstrate that the disclosure of requested information will contribute to a greater understanding on the part of the public at large.”¹¹ A requester need not disseminate information to a “broad cross-section of the public in order to benefit the public at large.”¹² It is sufficient, rather, that COA’s original content is distributed to, or accessed by, prominent universities (*e.g.*, Harvard, Columbia, Georgetown, NYU, Stanford, Notre Dame, USC, Boston University, Vanderbilt, Georgia Tech, American, UC Davis, *etc.*), think-tanks (*e.g.*, Center for American Progress, Mercatus, Heritage Foundation, *etc.*), media organizations (*e.g.*, Fox News, Associated Press, NY Times, Bloomberg, AOL, Congressional Quarterly, NBC, *etc.*), corporations (*e.g.*, Bank of America, Facebook, Amazon, *etc.*), and government entities (*e.g.*, DOI, CPSC, House

⁹ *About Us*, U.S. CONSUMER PROD. SAFETY COMM’N, <http://www.cpsc.gov/en/About-CPSC/> (last visited Oct. 25, 2013).

¹⁰ CPSC News Release, *supra* note 1.

¹¹ *In Defense of Animals v. Nat’l Insts. of Health*, 543 F. Supp.2d 83, 110 (D.D.C 2008).

¹² *Carney v. U.S. Dep’t of Justice*, 19 F.3d 807, 814 (2d Cir. 1994).

of Representatives, U.S. Senate, Executive Office of the President, DOD, FBI, DHS, DOE, DOT, USGS, *etc.*).¹³

iv. Disclosure of the requested documents is likely to significantly contribute to the understanding of a reasonably broad audience of persons, as opposed to the understanding of COA alone.

First and foremost, “obtaining information to act as a ‘watchdog’ of the government is a well-recognized public interest in the FOIA.”¹⁴ It is for this reason that COA uses public advocacy and legal reform strategies—as well as other investigative, legal, and communications tools—to educate the public on how greater government transparency and accountability protects economic opportunity for American taxpayers. Disclosure of the information requested by COA in this instance is likely to contribute significantly to the understanding by the public at large, rather than simply the understanding of COA or its staff.

Second, CPSC is funded with taxpayer dollars. As a result, the public has a moral and financial interest in knowing whether the CPSC is appropriately and fairly executing its duties and responsibilities. Because of this, the information requested will benefit the public as opposed to the individual understanding of COA or a narrow segment of interested persons. Disclosure of the requested documents—which, again, are not publically available—would be valuable to the public.

Finally, COA intends to make the results of the requests in question available to the public in various ways. COA uses a combination of research, litigation, advocacy, and regularly disseminated publications to advance its mission. Its staff possesses expertise in government oversight, investigative reporting, and federal public interest litigation. These professionals will analyze the information responsive to the instant request, use their editorial skills to turn raw materials into a distinct work, and share the resulting analysis with the public, whether through COA’s regularly published online newsletter, memoranda, reports, press releases, *etc.* In addition, COA will disseminate relevant news and opinion through its frequently visited website, www.causeofaction.org. Lastly, after the production of the requested information, and depending upon the content thereof, COA intends to use such information to produce a report on the CPSC’s research and rulemaking activities as relates to safety standards for the manufacturing and/or sale of neodymium magnet sets. These efforts will significantly enhance the public’s understanding of the content of the documents requested.

B. Disclosure of the requested records is not primarily in COA’s commercial interest.

CPSC defines a commercial use request as one “that seek information for a use or purpose that furthers commercial, trade, or profit interests.”¹⁵ In deciding whether a request is primarily

¹³ Google Analytics for CAUSEOFACTION.ORG (Jan. 1, 2013 – Oct. 7, 2013) (on file with COA).

¹⁴ *Baltimore Sun v. U.S. Marshals Serv.*, 131 F. Supp. 2d 725, 729 (D. Md. 2001); *see also Ctr. to Prevent Handgun Violence v. U.S. Dep’t of the Treasury*, 981 F. Supp. 20, 24 (D.D.C. 1997) (“This self-appointed watchdog role is recognized in our system.”).

¹⁵ 16 C.F.R. § 1015.9(c)(5).

motivated by commercial interest, CPSC considers two factors: (1) “whether a requester has a commercial interest that would be furthered by the requested disclosure”; and, (2) “whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.”¹⁶

COA does not have any commercial interest in making this request. Further, any and all information that COA would gain would benefit the public interest. Other commercial benefits that could arise—such as charitable contributions—would be incidental and would not vitiate COA’s primary educational and advocacy goals.¹⁷ Even if COA were to possess a limited commercial interest, this interest would still be outweighed by the benefit to public interest and understanding of CPSC’s rulemaking activities, and the research activities it conducts in furtherance thereof. Additionally, media or scholars can have a profit motive, as long as the dissemination of the requested information is made in their professional capacity and, again, would further the public interest.¹⁸

IV. RECORD PRODUCTION AND CONTACT INFORMATION.

In an effort to facilitate record production, please provide the responsive records in electronic format (*e.g.*, e-mail, PDF). If a certain set of responsive records can be produced more readily, we respectfully request that those records be produced first and that the remaining records be produced on a rolling basis as circumstances permit.

If you have any questions about this request, please contact me by email at reed.rubinstein@causeofaction.org, or by telephone at (202) 499-4232. Thank you for your attention to this matter.

REED D. RUBINSTEIN
SENIOR VICE PRESIDENT, LITIGATION

¹⁶ *Id.* § 1015.9(f)(5)(v)-(vi).

¹⁷ *Ctr. for Medicare Advocacy, Inc. v. U.S. Dep’t of Health & Human Servs.*, 577 F. Supp.2d 221, 242 (D.D.C. 2008) (finding that a non-profit organization that educated and advocated on behalf of Medicare beneficiaries was still entitled to a public interest fee waiver).

¹⁸ *See Campbell v. U.S. Dep’t of Justice*, 164 F.3d 20, 38 (D.C. Cir. 1998).