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The Impact of Restrictive Disclosure Provisions on Freedom of Information Act Requests: An Analysis of Section 6(b) (1) of the Consumer Product Safety Act

I. INTRODUCTION

The Freedom of Information Act (FOIA)\(^1\) encourages openness in government by providing citizens with direct access to documents obtained by federal agencies.\(^2\) Although the FOIA expressly exempts certain matters\(^3\) from its general disclosure provisions, it has become an invaluable tool for lawyers and consumer advocates.\(^4\) In recent years, there has been a rapid growth in the number of requests for information made under the Act.\(^5\)

Many documents in agency files contain information that private entities have been compelled to submit.\(^6\) Because of the fear that agencies might release misleading or inaccurate information\(^7\) in response to FOIA requests, information submit-


\(2.\) The stated purpose of the FOIA, as revealed by its legislative history, is "to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." S. REP. No. 813, 89th Cong., 1st Sess. 3 (1965).


\(4.\) See, e.g., Wellford v. Hardin, 444 F.2d 21, 23 (4th Cir. 1971).

\(5.\) See, e.g., Open America v. Watergate Special Prosecution Force, 547 F.2d 605, 617 & n.3 (D.C. Cir. 1976) (Leventhal, J., concurring) (documenting rapid increase in FOIA requests filed with FBI). In 1974, the FBI received 447 FOIA requests; in 1975, it received 13,875. \(\text{Id.}\) This phenomenon is due in part to a corresponding growth in information contained in large data banks controlled by federal agencies. \(\text{See generally A. MILLER, THE ASSAULT ON PRIVACY 20-23 (1971); STAFF OF SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., FEDERAL DATA BANKS AND CONSTITUTIONAL RIGHTS: A STUDY OF DATA SYSTEMS ON INDIVIDUALS MAINTAINED BY AGENCIES OF THE U.S. GOVERNMENT (1974); J. O'REILLY, FEDERAL INFORMATION DISCLOSURE ch. 1 (1979); MILLER, PERSONAL PRIVACY IN THE COMPUTER AGE: THE CHALLENGE OF A NEW TECHNOLOGY IN AN INFORMATION-ORIENTED SOCIETY, 67 MICH. L. REV. 1091 (1969); \textit{Washington Information Boom}, DUNN'S REV., Mar. 1979, at 60; Project, \textit{Government Information and the Rights of Citizens}, 73 MICH. L. REV. 971, 1222-23 (1975).}

\(6.\) See, e.g., Chrysler v. Brown, 441 U.S. 281, 292 (1979) ("much of the information within Government files has been submitted by private entities seeking Government contracts or responding to unconditional reporting obligations imposed by law").

\(7.\) \textit{See generally CLEARER RULES ON CONFIDENTIALITY}, \textit{BUS. WEEK}, June 11, 1021
ters have sought to enjoin agencies from complying with certain FOIA requests. A number of legal theories have been advanced in these “reverse FOIA” suits, including the argument that a separate statute restricts or prohibits disclosure of the information requested.

One such statute is the Consumer Product Safety Act (CPSA). Section 6(b)(1) of the Act requires that the Con-


9. Information submitters have argued that agencies are prohibited by the Trade Secrets Act, 18 U.S.C. § 1905 (1976), from disclosing submitter-generated business information. See Chrysler Corp. v. Brown, 441 U.S. 281, 294-301 (1979). They have also argued that agencies cannot disclose information falling within any of the categories of information exempted under the FOIA. Since there is no cause of action under the FOIA to enjoin disclosure, id. at 290-94, information submitters must bring such suits under the review provisions of the Administrative Procedure Act, see 5 U.S.C. § 702 (1976). Chrysler Corp. v. Brown, 441 U.S. at 317-19, Charles River Park “A”, Inc. v. HUD, 519 F.2d 935, 941 (D.C. Cir. 1975). Submitters have also raised due process issues, but these claims have generally been rejected. See, e.g., Pharmaceutical Mfrs. Ass’n v. Weinberger, 411 F. Supp. 576, 578 (D.D.C. 1976).

10. In a typical FOIA action, a requester seeks to compel an agency to disclose information. “Reverse FOIA” suits arise when submitters of information seek to enjoin the release of the material requested under the FOIA. The first reverse FOIA suit was Charles River Park “A”, Inc. v. HUD, 519 F.2d 935 (D.C. Cir. 1975). Such suits now occur with some regularity. See generally Campbell, supra note 8.


13. Id. § 2055(b)(1). Section 6(b)(1) of the CPSA states:

Except as provided by paragraph (2) of this subsection, not less than 30 days prior to its public disclosure of any information obtained under this chapter, or to be disclosed to the public in connection therewith (unless the Commission finds out that the public health and safety requires a lesser period of notice), the Commission shall, to the extent practicable, notify, and provide a summary of the information to, each manufacturer or private labeler of any consumer product to which such information pertains, if the manner in which such consumer product is to be designated or described in such information will permit the public to ascertain readily the identity of such manufacturer or private labeler, and shall provide such manufacturer or private labeler with a reasonable opportunity to submit comments to the Commission in re-
Consumer Product Safety Commission (the CPSC or the Commission) provide information submitters with notice and an opportunity to comment before their documents are released. The section also directs the CPSC to take “reasonable steps” to ensure the accuracy of information before its “public disclosure,” and to determine whether release of the information “is fair in the circumstances and reasonably related to effectuating the purposes of [the Act].”

Although section 6(b)(1) of the CPSA unquestionably controls CPSC-initiated disclosure of information, it is not clear whether the section applies to disclosure by the CPSC in response to FOIA requests. Recently, two circuit courts adjudicated this issue and reached conflicting conclusions.

This Note briefly discusses the two Acts involved and then analyzes whether section 6(b)(1) of the CPSA should apply to FOIA requests for documents that the CPSC has obtained. After concluding that section 6(b)(1) should apply, the Note discusses whether the section should qualify as a withholding statute that exempts certain matters from the FOIA general disclosure provisions.

II. THE FREEDOM OF INFORMATION ACT

In 1946, Congress enacted the first statutory provisions designed to protect the public’s right of access to information in government files: section 3 of the Administrative Procedure Act. The Act mandates that the Commission shall take reasonable steps to assure, prior to its public disclosure thereof, that information from which the identity of such manufacturer or private labeler may be readily ascertained is accurate, and that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes of this chapter. If the Commission finds that, in the administration of this chapter, it has made public disclosure of inaccurate or misleading information which reflects adversely upon the safety of any consumer product, or the practices of any manufacturer, private labeler, distributor, or retailer of consumer products, it shall, in a manner similar to that in which such disclosure was made, publish a retraction of such inaccurate or misleading information.


14. "Id."

15. "The CPSC has explicit statutory authority to "disseminate . . . information, relating to the [adverse effects of] consumer products," id. § 2054(a)(1), and it often issues findings or makes statements. See, e.g., Relco v. Consumer Prod. Safety Comm’n, 391 F. Supp. 841 (S.D. Tex. 1975)."

Act (APA).17 Section 3 granted access to documents in agency files to "persons properly and directly concerned."18 There were exceptions, however, for documents that involved government functions "requiring secrecy in the public interest," and for adjudicatory opinions and orders "required for good cause to be held confidential."19 The APA prescribed no judicial remedy for victims of wrongful nondisclosure.20

Under the provisions of the APA, the public was denied access to many agency documents.21 Aware that "an informed electorate is vital to the proper operation of a democracy,"22 Congress in 1966 amended the APA by enacting the FOIA.23 The FOIA abandoned direct interest as the condition for obtaining documents, and established a general policy of full agency disclosure.24 The Act requires that each agency publish certain information in the Federal Register,25 and that particular categories of information be available for public inspection and copying.26 Section 3(c) of the FOIA makes all other agency records available upon specific request.27 Moreover, the Act authorizes federal district courts to exercise de novo review of agency refusals to disclose.28

Initially, disclosure based on the FOIA was slow because the Act prescribed no specific deadlines for agency compliance with requests for information. In 1974, the FOIA was amended to expedite disclosure.29 Now, upon receiving a request for information, an agency has ten working days to decide whether it will comply.30 Once it decides, the agency must immediately

18. Id.
19. Id.
21. See S. Rep. No. 813, supra note 2, at 5 (APA is "used more as an excuse for withholding than as a disclosure statute").
22. Id. at 3.
26. Id. § 552(a)(2).
27. Id. § 552(a)(3).
28. Id. § 552(a)(4)(B).
notify the requester of the decision. If the decision is not to comply, the agency must inform the requester of its right to appeal to the head of the agency. If this appeal is denied, the agency must then inform the requester of the FOIA provisions for judicial review.

The short deadlines in the FOIA for agency decisions regarding compliance are complemented by provisions giving aggrieved requesters a speedy judicial remedy. If an agency fails to respond to a request within the statutory time limits, the requester may seek judicial enforcement. Once the complaint is filed, the government must answer within thirty days rather than within the sixty days allowed by the Federal Rules of Civil Procedure. Once pleading is completed, the case takes precedence over other cases on the docket and is "expedited in every way."

The FOIA lists categories of information that are exempt from its disclosure provisions. Exemption 3 permits agency nondisclosure of materials that other statutes specifically require to be withheld. Legislative history and interpretations

32. 5 U.S.C. § 552(a)(6)(A)(i) (1976). The agency head must decide the appeal within 20 days. Id. § 552(a)(6)(A)(ii). If, on the other hand, an agency determines that it will disclose the requested documents, it must "make the records promptly available to any person." Id. § 552(a)(3) (1976). A major weakness of the amended provision, however, is that it imposes deadlines only for agency determinations of whether to comply; no deadlines are set for actual disclosure once an agency has acceded to a request. Although the FOIA does not impose any direct penalty if an agency does not comply promptly, it does prescribe sanctions for egregious failure to comply. See id. § 552(a)(4)(E) (court may assess attorney's fees and litigation costs if complainant prevails); 5 U.S.C. § 552(a)(4)(F) (Supp. II 1978) (in cases in which court awards attorney's fees, Civil Service Commission shall determine whether disciplinary action is warranted against employee responsible for withholding); 5 U.S.C. § 552(a)(4)(G) (1976) (if court order is not complied with, court may punish responsible employee for contempt).
36. FED. R. CIV. P. 12(a).
38. See id. § 552(b)(1)-(3).
39. Exemption 3 states that the disclosure provisions of the FOIA do not apply to matters specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld. Id. § 552(b)(3).
by commentators and courts suggest that all nine of the exemptions are permissive. Therefore, when information falls within one of these exempt categories, the agency is not compelled to withhold the exempt material and may still release it to the extent permitted by other laws. A further restriction on FOIA disclosure requires an agency to delete identifying details when necessary to prevent a "clearly unwarranted invasion of personal privacy."

III. THE CONSUMER PRODUCT SAFETY ACT

The Consumer Product Safety Act, promulgated in 1972, establishes a single independent agency—the Consumer Product Safety Commission—to protect the public from product dangers. The Commission is directed to set safety standards for consumer products, to protect the public from imminent hazards, to study causes of product-related injuries, and to educate the public. The CPSC is also given broad authority to collect and disseminate data on product hazards and product-related injuries. In the past, other fed-

41. See, e.g., Clement, supra note 8, at 597-602; Drachsler, The Freedom of Information Act and the "Right" of Non-Disclosure, 28 AD. REV. 1, 2 (1976).
43. Usually, when one of the exemptions is applicable, an agency is still free to disclose the requested material if it determines that disclosure would be in the public interest. If, however, the requested material falls within exemption 3 because a withholding statute mandates nondisclosure, release of the material is no longer within the agency's discretion. See Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190, 1199 (4th Cir. 1976).
44. 5 U.S.C. § 552(a) (2) (1976).
46. The enactment of the CPSA represented an abrupt shift in congressional treatment of consumer hazards. Prior to enactment of the CPSA, it had been congressional practice to legislate against specific hazards and then assign to some federal agency the responsibility for enforcement. The result was fragmentation of responsibility, a diffuse and weak federal presence in the area of consumer product safety, and incomplete coverage of existing hazards. See H.R. REP. No. 1153, 92d Cong., 2d Sess. 22-24 (1972).
47. Congress believed that a strong federal presence in the field of consumer product safety necessitated an independent agency. See id. at 24-26; S. REP. No. 835, 92d Cong., 2d Sess. 3-6 (1972), reprinted in [1972] U.S. CODE CONG. & AD. NEWS 4573, 4575-78.
50. Id. § 2054.
51. Id. § 2051.
52. The CPSC has authority to receive information concerning hazards from consumers, id. § 2059(b), and to demand information on products and product hazards from manufacturers. Id. §§ 2062(a), 2064(b), 2065, 2076(b)(3).
eral agencies have used such powers to generate unwarranted, adverse publicity about certain products.\textsuperscript{53} The disclosure restrictions of section 6(b)(1) of the CPSA were designed, at least in part, to minimize the CPSC's ability to commit a similar abuse of power.\textsuperscript{54}

Section 6 of the CPSA is entitled "Public disclosure of information."\textsuperscript{55} Section 6(a)(1) specifically refers to the FOIA, indicating that section 6 does not require the release of any information exempted by the FOIA or otherwise protected by law from disclosure.\textsuperscript{56} Section 6(b)(1), without referring to the FOIA, requires that the CPSC must, at least thirty days prior to a "public disclosure" of information, notify each manufacturer or private labeler identified in the documents of the forthcoming release and give them an opportunity to submit comments.\textsuperscript{57} The section also directs the CPSC to take reasonable steps to ensure that the information eventually released is "accurate," and that the disclosure is "fair in the circumstances and reasonably related to effectuating the purposes of [the Act]."\textsuperscript{58}

Two other sections of the CPSA mention the restrictions on disclosure set forth in section 6. Section 25(c),\textsuperscript{59} an exception to section 6(a)(1), requires that accident reports produced by the CPSC be available to the public even though the reports would be exempt from disclosure under the FOIA. Section 29(e)\textsuperscript{60} provides that the Commission may release accident and investigation reports to governmental bodies engaged in activities relating to health, safety, or consumer protection. In both sections 25(c) and 29(e), however, the availability of information is subject to the accuracy and fairness requirements of section 6(b)(1).

The CPSC is also authorized to maintain a clearinghouse for information on injuries related to consumer products, and to conduct various studies. \textit{Id.} § 2054.


\textsuperscript{54} See H.R. REP. No. 1153, \textit{supra} note 46, at 31-32.


\textsuperscript{56} \textit{Id.} § 2055(a)(1).

\textsuperscript{57} See note 13 \textit{supra}.


\textsuperscript{60} \textit{Id.} § 2078(e).
IV. APPLICATION OF SECTION 6(b) (1) OF THE CPSA TO FOIA REQUESTS FOR DOCUMENTS OBTAINED BY THE CPSC

Both the FOIA and the CPSA evince a strong legislative intent to facilitate the transmission of information to the public. Yet when material is sought that is within the purview of both statutes, a number of problems arise. The most important one is whether section 6(b) (1)—a provision restricting disclosure—applies only to disclosures undertaken by the CPSA of its own initiative,\(^{61}\) or whether it also controls passive disclosures made by the CPSA in response to FOIA requests.

Two recent decisions have addressed this issue. In the first case, *Pierce & Stevens Chemical Corp. v. Consumer Product Safety Commission*,\(^ {62}\) the Court of Appeals for the Second Circuit held that section 6(b) (1) does not apply to FOIA requests for documents obtained by the CPSC.\(^ {63}\) The case arose when a consumer made an FOIA request for any information that the CPSC might have concerning deficiencies in a Pierce & Stevens cleaning product. After the CPSC notified Pierce & Stevens of the request and permitted the company to review the reports for protected information, Pierce & Stevens sought an injunction restraining disclosure. The company argued that the CPSC had failed to comply with the predisclosure procedures required by section 6(b) (1).\(^ {64}\) The court of appeals rejected this argument, holding that section 6(b) (1) applies only to agency-initiated disclosures, not to "passive" FOIA disclosures.\(^ {65}\) The court based its decision on the language of the section, on the retraction provision of the CPSA, on the CPSC's interpretation of the statute, and on the comments of the conference committee.\(^ {66}\)

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62. 585 F.2d 1382 (2d Cir. 1978).
63. Id. at 1388-89.
64. Pierce & Stevens claimed that the requested documents could not be released because the information was inaccurate and the CPSC had not fulfilled its statutory obligation to ensure the accuracy of information before disclosure. Although not required to do so by law, the CPSC offered to include in the release a statement by the manufacturer regarding the alleged inaccuracy of the documents. Pierce & Stevens felt that this procedure would not protect their reputation because the documents would still be inaccurate. The court, however, commented that the procedure was "a sensible and fair accommodation of the manufacturers' and labelers' interests." Id. at 1388 n.28.
65. Id. at 1386, 1389.
66. Id. at 1386-87.
In the second case, *GTE Sylvania, Inc. v. Consumer Product Safety Commission*, the Court of Appeals for the Third Circuit held that section 6(b)(1) does apply to disclosures made by the CPSC in response to FOIA requests. Two public interest groups had made FOIA requests for CPSC data regarding television-related accidents. One of the television manufacturers who had submitted data sought to enjoin disclosure because the CPSC had not satisfied the requirements of section 6(b)(1). Both a preliminary and a permanent injunction were granted by the lower court, and the court of appeals affirmed. The Third Circuit reasoned that the legislative history of section 6(b)(1) indicated that its provisions were intended to apply to FOIA disclosures of CPSC matters as well as to agency-initiated disclosures. The court in *GTE* further held that section 6(b)(1) contains criteria particular enough for it to be a withholding statute within the meaning of exemption 3 of the FOIA.

The *Pierce* and *GTE* courts relied on conflicting analyses of the statutory language and legislative history of section 6(b)(1). Neither court, however, fully explored the policies underlying the CPSA and the FOIA, even though policy considerations should guide courts in ascertaining the breadth of a statute’s applicability when statutory language and legislative intent are unclear. The statutory language, legislative intent, and policy considerations therefore warrant closer examination.

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68. Id. at 811-12.
69. In March 1974, the CPSC requested that manufacturers of television sets submit to the Commission all television-related accident data collected since 1969. Unsatisfied with the response, the CPSC next issued special orders and finally subpoenas duces tecum. The subpoenas required production of all available data on television-related accidents whether verified or not. This time manufacturers submitted approximately 120,000 pages of documents, which the CPSC reduced to a computer print-out organized according to accident type and manufacturer. *GTE Sylvania, Inc. v. Consumer Prod. Safety Comm’n*, 404 F. Supp. 352, 358-61 (D. Del. 1975) (granting preliminary injunction).
71. 598 F.2d at 811-12. The court noted that section 25(c) of the CPSA, 15 U.S.C. § 2074(c) (1976), applies the requirements of section 6(b)(1) to at least some of the information that could otherwise be released pursuant to an FOIA request. 598 F.2d at 804.
72. 598 F.2d at 815. See note 39 supra and accompanying text.
A. STATUTORY LANGUAGE AND LEGISLATIVE HISTORY

The language and legislative histories of the CPSA and the FOIA do not resolve the issue of whether section 6(b)(1) applies to FOIA requests for information. Since section 6(a) states that nothing in the CPSA requires the release of information otherwise exempted by the FOIA, the language reveals Congress' belief that the Commission would receive FOIA requests. Because section 6(b) does not refer to FOIA requests, there is a possibility that sections 6(a) and (b) refer to different types of disclosure. Moreover, section 6(a) covers the general "release" of information, while section 6(b) covers "public disclosure" of information. Considered in light of the CPSC's affirmative duty to "disseminate" certain information to the public, the public disclosure of information restricted by section 6(b) may refer only to material released on the CPSC's own initiative. Section 6(b)(1) also provides that disclosure be "reasonably related to effectuating the purposes of [the CPSA]." This requirement is arguably not met by FOIA requests because it is not an explicitly stated purpose of the CPSC to respond to consumer requests for information. The Senate version of the CPSA required the Commission, to respond, independent of the FOIA, to public requests for information. This requirement, however, was deleted by the conference committee. In addition, both the Commission

74. See id. § 2055(b)(1).
75. Id. § 2054(a)(1) (requiring the CPSC to establish an Injury Information Clearinghouse to collect, analyze, and disseminate information relating to consumer products).
76. Id. § 2055(b)(1).
77. The purposes of the CPSA are set forth at id. § 2051(b). Although the release of information under the FOIA is not explicitly stated as a purpose of the CPSA, it might be argued that such disclosure is incorporated in one or both of the following CPSA statements of purpose: "to protect the public against unreasonable risks of injury," or "to assist consumers in evaluating the comparative safety of consumer products." Id. 2051(b)(1), (2).
78. The Senate version of the CPSA, S. 3419, 92d Cong., 1st Sess., 118 Cong. Rec. 21333 (1972), established an Office of Consumer Information. The director of the Office was to maintain a Consumer Information Center that would respond to written inquiries from consumers, S. 3419, supra, § 109(b)(1), 118 Cong. Rec. at 21338, and ensure "public access to information concerning pending or completed actions of the Administrator." S. 3419, supra, § 109(b)(3), 118 Cong. Rec. at 21339.
80. The interpretation given a statute by the agency charged with its administration is accorded great weight by courts. See, e.g., Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969). The CPSC's interpretation of section 6(b)(1) was first reported by CPSC Chairman Simpson in a hearing on regula-
and one of the sponsors of the CPSA\textsuperscript{81} have interpreted section 6(b)(1) as applying only to agency-initiated disclosures.

On the other hand, sections 6(a) and (b) are included under a single heading: Public disclosure of information. Since the heading comprehends both sections, and since section 6(a) explicitly refers to FOIA requests,\textsuperscript{82} the phrase "public disclosure . . . of information" used in section 6(b) might reasonably be interpreted to include disclosures made under the FOIA. In fact, Congress has sometimes used similar language when discussing the release of documents under the FOIA.\textsuperscript{83} Another

\textsuperscript{81}I would not want the information available under [the CPSA] to be tied to the Freedom of Information Act guidelines. They permit too many items to be excluded from the public. I think we could draft guidelines here that would be more liberal and yet afford adequate protection where protection is really needed or desirable.

\textsuperscript{82}See text accompanying note 73 supra.

\textsuperscript{83}The Commission was directed to take steps to assure that \textit{publicly disclosed} information from which specific manufacturers or distributors could be identified was accurate and that the disclosure was fair in
consideration is that the Department of Health, Education, and Welfare—the agency that drafted the bill that eventually became the CPSA—interpreted section 6(b) as applying to both agency-initiated disclosures and responses to FOIA requests.\textsuperscript{84} Moreover, the conference committee on the bill applied the same accuracy and fairness requirements to both forms of disclosure.\textsuperscript{85} Given Congress' awareness of the FOIA's relevance to section 6(b) (1), Congress could have expressly limited the scope of the section to agency-initiated disclosures. Had Congress intended to impose such a limitation, it could have done so in section 6(b) (2), which explicitly exempts certain other documents from the provisions of section 6(b) (1).\textsuperscript{86}

Two other provisions of the CPSA, sections 25(c) and 29(e), add to the confusion. Although section 6(a) (1) of the CPSA does not require the release of any information exempt from disclosure under the FOIA, section 25(c)\textsuperscript{87} requires accident reports generated by the CPSC to be made available to the public, even if the reports would be exempt from disclosure under the FOIA.\textsuperscript{88} The reports become available, however, only after the CPSC has complied with section 6(b) (1).\textsuperscript{89} Section 25(c) thus applies the requirements of section 6(b) (1) to at least some information that Congress anticipated the CPSC might be asked to disclose under the FOIA.\textsuperscript{90} Although it is

\textsuperscript{84} See CPSA Hearings, supra note 81, pt. 1, at 188.
\textsuperscript{85} See H.R. Rep. No. 1593, supra note 79, at 40-41, reprinted in [1972] U.S. Code Cong. & Ad. News at 4633. See also 2 J. O'Reilly, supra note 5, at 25-12 n.32 (1979) ("Congress failed to define 'public disclosure'. . . but the term is intentionally broader than 'publicity'").
\textsuperscript{87} Id. § 2074(c).
\textsuperscript{89} "The availability of reports under this provision is subject to all of the restrictions of section 6 except those of section 6(a) (1)." H.R. Rep. No. 1153, supra note 46, at 49.
\textsuperscript{90} The House version of section 25(c) contained two parts. Section 25(c) (1), which was not enacted, would have permitted certain accident and investigation reports to be used in judicial proceedings. Their use would have been subject only to the trade secrets restrictions contained in section 6(a) (2) of the CPSA, 15 U.S.C. § 2055(a) (2) (1976) (incorporating 18 U.S.C. § 1905 (1976)) but would not have been subject to section 6(b) (1). See H.R. Rep. No. 1153, supra note 46, at 49. Three years later, Congress rejected a provision that
questionable whether this exception indicates that section 6(b) applies to all FOIA requests, it would be somewhat anomalous for section 6(b)(1) to apply to this category of FOIA requests and no others.91

Section 29(e)92 governs the relationship between the CPSC and other agencies. It authorizes the Commission to provide nonconfidential portions of accident and investigation reports to federal, state, or local agencies and to authorities engaged in health, safety, or consumer protection. In 1976, Congress amended this section to prohibit the agency or authority receiving the information from disclosing it to the public unless, before transmitting it, the CPSC had complied with the requirements of section 6(b)(1).93 The conferees incorporated section 6(b) into section 29(e), reporting that section 6(b) "relates to public disclosure initiated by the Federal agency while the [FOIA] relates to disclosure initiated by a specific request from a member of the public."94 Although this statement is part of the legislative history of section 29(e), it is uncertain how much weight it should be accorded in interpreting section 6(b).95

would have permitted public disclosure of information concerning a substantial public hazard without compliance with section 6(b)(1). See Consumer Product Safety Act Amendments: Hearings on H.R. 5361 and 6107 Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 1st Sess. 185 (1975). The failure of Congress to enact either of these provisions indicates that it chose not to limit the coverage of section 6(b)(1).

81. Since section 25(c) ensures that the CPSC comply with section 6(b)(1) before releasing accident reports pursuant to an FOIA request, it recognizes that the harm resulting from FOIA disclosures can be just as great as that resulting from agency-initiated disclosures. Although section 25(c) covers only documents dealing with the identity of an injured person or with the identity of a person treating an injured person, the same considerations of privacy and accuracy should apply to documents identifying manufacturers and private labelers. Moreover, section 25(c) demonstrates at a minimum the overbreadth of the CPSC's interpretation, which excepts all FOIA requests from section 6(b)(1). See generally note 80 supra and accompanying text.

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Congressional intent may be inferred not only by examining the language of the CPSA, but also by comparing that language to the disclosure provisions of the FOIA. Conflict between the provisions of the two Acts may indicate that Congress did not intend section 6(b) to apply to FOIA disclosures. There are three main conflicts between the FOIA and the CPSA: the response deadlines of both statutes, the rewrite provision of the CPSA, and the retraction provisions of the CPSA.

The FOIA requires that upon receipt of a request for agency records, the agency must determine within ten working days whether to comply and must then immediately notify the requesting party of the determination and its right to appeal. An appeal to the head of the agency must be resolved within twenty working days. If any statutorily defined "unusual circumstances" are present, either, but not both, of these two time limitations may be extended for ten additional working days. Once an agency determines that it will comply with an FOIA request, actual disclosure must be prompt.

In contrast, section 6(b)(1) provides for a thirty-day notice...
and comment period before the CPSC may disclose information that identifies individual manufacturers. The CPSC may also spend additional time to ensure that the documents are reasonably accurate. Compliance with these requirements will often lead to a conflict with the ten-day response and prompt disclosure provisions of the FOIA. Ten days might not be enough time for the CPSC to receive comments from a manufacturer. Moreover, if within the ten-day period a manufacturer challenges the accuracy of requested data, it might be impossible for the CPSC to quickly complete the required investigation. Finally, even if compliance were possible at a later date, the delay might amount to a denial of information.

The CPSA contemplates that the CPSC will consider the contents of requested documents and, if necessary, revise them prior to release. The FOIA, in contrast, was enacted to enable the public to monitor the workings of government. It therefore contemplates the release of documents in the form in which they exist in the agency's files. Requiring the CPSC to modify inaccurate data before releasing it pursuant to an FOIA request would often prevent requesters from discovering that the agency had improperly collected or maintained the information. In GTE, the manufacturers urged that the quality of the CPSC's work had been poor and that the final documents

99. Section 6(b) establishes no limit on the amount of time that the CPSC may take to ensure the accuracy of documents. See note 13 supra.

100. This is especially true in the area of consumer safety. If adequate information is not available in time to warn consumers about a product, unnecessary harm might occur. It appears that the short response times contained in the FOIA were intended to overcome the problem of bureaucratic inertia.

[T]he time restraints are difficult to comply with, and we knew that when we set the 10-day and the 20-day period. But we also felt that, given the ordinary bureaucratic desire to postpone, we would much prefer to have a statute with which it may have been difficult for the Government to comply, rather than give them time limits which might be too permissive. Business Record Exemption of the Freedom of Information Act: Hearings Before a Subcomm. of the House Comm. on Gov't Operations, 95th Cong., 1st Sess. 46 (1977) (remarks of Rep. McCloskey).

101. Pierce & Stevens Chem. Corp. v. Consumer Prod. Safety Comm'n, 585 F.2d 1382, 1388 (2d Cir. 1978). There is, however, no requirement that the CPSC do so.


were misleading.\textsuperscript{104} If this accusation were true, section 6(b) (1) would allow the CPSC to shield this incident of incompetence from public scrutiny.

If the CPSC publicly discloses inaccurate or misleading information, it must publish a retraction in a manner similar to that of the disclosure.\textsuperscript{105} Not all FOIA disclosures involve formal publication. Rather, such disclosures may involve mailing the requested information or allowing the requester to make copies on agency premises.\textsuperscript{106} The CPSA's retraction provision makes little sense when inaccurate information has been disclosed by one of these methods. Although a letter of retraction may meet the technical requirements of section 6(b) (1), the retraction will not necessarily reach all those who have learned of the inaccurate information. Moreover, since the CPSC's method of complying with an FOIA request would rarely take the form of a public statement, the CPSC would virtually never have to publicly announce a retraction when inaccurate information was released under the FOIA.\textsuperscript{107}

The conflicts between section 6(b) (1) and the FOIA could be resolved if the CPSA provisions were interpreted broadly enough to accommodate FOIA requests.\textsuperscript{108} First, the conflict between the response deadlines of the two statutes could be reconciled by having the CPSC determine within ten days whether to release the information pending its compliance with section 6(b) (1) and, on the tenth day, having it notify the requester of the preliminary decision. During this period, the CPSC could notify the manufacturer or labeler of the potential release and begin to take steps to ensure accuracy and fairness. The information would be released "promptly" after the running of the thirty-day notice and comment period. Second, to avoid rewriting data requested under the FOIA, the CPSC could, whenever possible, release original documents. If after


\textsuperscript{106} See text accompanying notes 25-27 supra.

\textsuperscript{107} Thus, an employee dissatisfied with CPSC policy might encourage a member of the public to request inaccurate information that his superiors have decided should not be released, and then disseminate it to the news media. \textit{See} note 131 infra and accompanying text. This type of dissemination could have nearly the same effect as an agency-initiated disclosure, \textit{see} text accompanying notes 126-129 infra, yet the CPSC would be under no duty to make a public retraction.

\textsuperscript{108} See Morton v. Mancari, 417 U.S. 535, 551 (1974) (when two statutes are reconcilable it is the duty of the court to treat each as effective).
complying with section 6(b)(1) the CPSC determines that certain inaccuracies cannot be corrected, it could release the incorrect material along with an explanation of the inaccuracies.\textsuperscript{109} This practice would protect the manufacturer's interest in avoiding adverse publicity, and at the same time give consumers access to actual agency documents. Finally, the requirement that the CPSC publish a retraction of any inaccurate or misleading information it has disclosed is not necessarily incompatible with the FOIA; the CPSC could "publish" corrective information to the requester in the same manner that it had released the inaccurate or misleading material.\textsuperscript{110} Furthermore, there is nothing to prevent the CPSC from publishing a more expansive retraction, even though this is not required.

B. POLICY ANALYSIS OF SECTION 6(b)'S APPLICATION TO FOIA REQUESTS

At the heart of the controversy over FOIA disclosures is the potential for unwarranted adverse publicity.\textsuperscript{111} The use of adverse publicity by federal agencies can be "desirable and necessary."\textsuperscript{112} It becomes unwarranted only when those who publicize the information fail, either intentionally or inadver-tently, to take reasonable steps to ensure the accuracy and fairness of the publicity.\textsuperscript{113}

Adverse publicity whether justified or not, can be a by-product of an agency's attempt to inform the public,\textsuperscript{114} or may be used as an enforcement device.\textsuperscript{115} Adverse publicity might also stem from other sources—a public figure, the press, or a business competitor—that might obtain damaging information

\textsuperscript{109} The court in \textit{GTE}, however, found such corrective measures insufficient in light of the affirmative duties imposed by section 6(b)(1) of the CPSA, see \textit{GTE Sylvania, Inc. v. Consumer Prod. Safety Comm'n}, 598 F.2d 790, 794, 799-800 (3d Cir. 1979), \textit{discussed in addendum p. 1059 infra}, because the information released would still be unverified.


\textsuperscript{112} Gellhorn, \textit{supra} note 53, at 1383.

\textsuperscript{113} \textit{See id.}

\textsuperscript{114} \textit{See id. at 1381, 1407-19.}

\textsuperscript{115} \textit{See id. at 1398-1406.}
through the FOIA. Widespread adverse publicity can have an immediate and irreversible impact.\textsuperscript{116}

The general absence of standards governing public statements made by federal agencies\textsuperscript{117} has unquestionably had an unwarranted adverse impact on certain products, companies, and industries.\textsuperscript{118} For example, unwarranted adverse publicity about one product might cause the public to reject other products manufactured by the same or different companies,\textsuperscript{119} or even to reject products manufactured by the entire industry.\textsuperscript{120} Certain industries are more sensitive to adverse publicity than others,\textsuperscript{121} warnings that certain foods are dangerous may have

\begin{footnotes}
\begin{enumerate}
\item In the DuPont episode discussed in note 118 \textit{infra}, the FTC eventually recanted its charge of false advertising, but the damage had already been done. After the initial FTC accusation, DuPont counted 160 newspaper accounts, 20 of which were front-page stories. After the FTC retraction only 80 newspaper accounts appeared and none of these were on front pages. \textit{See} 118 \textit{CONG. REC.} 31389 (1972). More recently, the Firestone Tire & Rubber Company suffered a similar fate. Due to an allegation that their tires were defective, Firestone recalled the product. The effect of the allegation, however, has gone far beyond the product in question. "[T]he man in the street thinks Firestone is on the ropes. 'For the next 20 years, forget it . . . . They could put out the best tire in the world and the customer will say, 'I don't want Firestone.'"" \textit{The Case for Firestone}, \textit{Forbes}, Nov. 13, 1978, at 106 (quoting Richard Segretti, a Lincoln-Mercury salesman).
\item For example, in 1971, the FTC charged DuPont with falsely advertising Zerex antifreeze. Although the charges were not formally proven, DuPont lost considerable sales and had to cope with diminished public confidence. 118 \textit{CONG. REC.} 31389 (1972). Similarly, in 1971 the FDA accused the Bon Vivant Company of maintaining unsanitary conditions and using defective equipment. Bon Vivant filed for bankruptcy one month later, even though only five cans of its soup were ever proven to be contaminated. \textit{See} Gelhorn, supra note 53, at 1413-14. In November 1959, the FDA discovered that certain cranberries grown in Washington and Oregon had been sprayed with a chemical pesticide that had been shown to induce cancer in rats. The Secretary of HEW held a press conference, urging the public not to eat the contaminated cranberries. Because of the vagueness of the Secretary's statement and because of the difficulty in determining where any particular cranberries had been grown, the statement almost destroyed the market for cranberries in 1959. \textit{See Morey}, supra note 53, at 168.
\item When the FDA recalled cans of Stokely-Van Camp beans, the sales of all other Stokely-Van Camp products suffered. \textit{See} Gelhorn, supra note 53, at 1412 n.134, 1415 n.142.
\item After warnings concerning Bon Vivant Vichysoisse were published, there was a decline in the sales of all soups. Gelhorn, supra note 53, at 1413-14. \textit{See also} note 118 supra (discussing cranberry industry).
\item \textit{See} Gelhorn, supra note 53, at 1417. Large corporations, however, are probably less damaged by adverse publicity since they have the financial resources to counteract it. In a case similar to that of Bon Vivant's, \textit{see} note 118 supra, the Campbell Soup Company discovered botulin in a can of test soup. Campbell took part in publicizing the warning and suffered little adverse effect. \textit{See} Gelhorn, supra note 53, at 1414.
\end{enumerate}
\end{footnotes}
driven at least one company into bankruptcy.\textsuperscript{122}

In the abstract, it is possible to distinguish between adverse publicity that results from agency-initiated disclosures and adverse publicity that results from responses to FOIA requests. First, information publicized directly by a governmental agency may carry more weight among consumers.\textsuperscript{123} Agency-initiated disclosures often involve important information announced by high-ranking officials. If the agency takes the time and expense to draw the public's attention to certain conditions, it is likely to be viewed as a warning. This would obviously have greater public impact than the release of raw data under the FOIA. Second, agency-initiated adverse publicity generally occurs during an investigatory period when public knowledge of the subject matter under study is minimal.\textsuperscript{124} Disclosure of information concerning a subject unfamiliar to the public may have a great impact. The public reaction to FOIA disclosures may differ from the public response to agency-initiated disclosures, because the FOIA places the burden of requesting and receiving information on the public.\textsuperscript{125} Ordinarily, the public will only request information after it knows of the agency's activity and has become interested in the subject area. FOIA disclosures are thus less likely to occur at critical investigatory stages.

When the potential for adverse publicity is the major concern, however, any distinction between agency-initiated disclosure and information released under the FOIA disappears if the requester is a member of the press. "When media coverage closely follows agency activities, affirmative publicity measures may be unnecessary because mere freedom of public access to information performs the same function."\textsuperscript{126} Once inaccurate or misleading information is released under the FOIA, the government has no control over its use.\textsuperscript{127} While it may be that little harm results since "there is no government imprimatur on

\textsuperscript{122} See note 118 supra (discussing Bon Vivant Company).
\textsuperscript{124} See Gellhorn, supra note 53, at 1421-23.
\textsuperscript{125} See 5 U.S.C. § 552(a)(4)(A) (1976) (agencies may charge reasonable fees for the document searches and duplication necessary to comply with FOIA requests).
\textsuperscript{126} Gellhorn, supra note 53, at 1422 n.164.
\textsuperscript{127} Regardless of the manner in which information is released, "it will be repeated, summarized and carried by the media and so be used in the market place under circumstances and in a manner which the government cannot control." CPSA Hearings, supra note 81, pt. 3, at 1063 (statement of James Young, Vice-President of General Electric Company).
the document," it is possible that the public might perceive any information gathered, maintained, and released by the government as carrying governmental approval.

If section 6(b)(1) is not applied to FOIA requests, information obtained by the CPSC may be improperly disclosed. For example, a member of the public, dissatisfied with a CPSC decision not to release misleading documents, could file an FOIA request for the documents. Alternatively, a CPSC employee, dissatisfied with an agency decision not to disclose, could simply ask a member of the public to file an FOIA request. The fact that these results could occur seems inconsistent with the purpose of section 6(b)(1) since Congress granted the CPSC access to many matters that would not otherwise be available to the public or to the government. Where, as here, information not normally available to the government is obtained.

129. This is especially true when an agency releases files containing information in a form generated by the agency. In GTE, see notes 67-72 supra and accompanying text, the district court observed:

   "The Commission in attempting to reduce this data [on television-related accidents] to an intelligible format has unintentionally aggravated the problem. A clear computer data listing, with its immediate impact, creates an impression of accuracy that far outshines several filing cabinets of jumbled accident reports. . . ."

   . . . "[T]he release of this information by a government agency carries with it an aura of authenticity which cannot be ignored in determining whether the disclosure is "fair.""

GTE Sylvania, Inc. v. Consumer Prod. Safety Comm'n, 404 F. Supp. 352, 372 n.87 (D. Del. 1975). Moreover, the press may treat the information as if it carried the weight of an official publication. See Gellhorn, supra note 53, at 1384-88.

130. Many industry associations, law firms, and newsletters monitor CPSC activities, and several large corporations keep an in-house FOIA specialist. The federal government also maintains the Freedom of Information Clearinghouse, which among other things dispenses advice on how one goes about investigating government files. See, e.g., Free Information for Sale, ECONOMIST, Apr. 7, 1979, at 86.

131. This argument is based on the premise that a government official might act unethically or contrary to the will of Congress. While the presumption is that agency officials would not so act, see United States v. Chemical Foundation, 272 U.S. 1, 14-15 (1926), the failure of some agencies to keep their files confidential demonstrates that the problem of misconduct exists. One such incident involved FTC staff members who, because they were "upset with the [FTC's] decision not to investigate Volkswagen's alleged practice of selling used vehicles as new . . . leaked this information to the media and some of Ralph Nader's Associates." Gellhorn, supra note 53, at 1393 n.45.

132. See H.R. REP. No. 1153, supra note 46, at 31. See also Consumer Product Safety Commission Oversight: Hearings Before the Subcomm. for Consumers of the Senate Comm. on Commerce, 94th Cong., 1st Sess. 190 (1975) [hereinafter cited as Oversight Hearings] (CPSC Chairman Simpson stated, "It has been said that this regulatory agency has more power than any other agency, and I personally believe that to be true").
through special information-gathering powers, it is reasonable that restrictions beyond the usual FOIA exemptions should apply to protect information submitters against potentially unfair disclosures.\textsuperscript{133}

The CPSA policy of educating consumers\textsuperscript{134} is a correlate of the desire to avoid unwarranted adverse publicity. The statute requires that the CPSC establish an Injury Information Clearinghouse to "disseminate" information that will assist consumers in evaluating the comparative safety of various products.\textsuperscript{135} To fulfill this task, the Commission must release information that is fair, accurate, and complete;\textsuperscript{136} the release of inaccurate or misleading information would have an effect exactly opposite to that which Congress intended. Thus, applying section 6(b)(1) to all disclosures of CPSC-collected information seems essential to the preservation of the educative policy underlying the CPSA.\textsuperscript{137}

If the CPSC had to guarantee the accuracy of all documents disclosed under the FOIA, the requirement might place an enormous administrative burden on the Commission.\textsuperscript{138}

\textsuperscript{133} The CPSC observes a policy of openness that militates against most restrictions on disclosure. \emph{See Oversight Hearings, supra} note 132, at 190. The issue, however, is whether this policy should extend beyond the CPSC's voluntary disclosure of its own documents to the release of information obtained under the compulsion of a subpoena. The CPSC's policy of openness should not be carried so far that it subverts the equally important policies of avoiding unwarranted adverse publicity and of educating the public, both of which require the release of only information that is reasonably accurate. \textsuperscript{134} \emph{See} \textsuperscript{15} \textsc{U.S.C.} \textsection 2051 (1976).

\textsuperscript{135} \emph{Id.}

\textsuperscript{136} \textit{See}, \textit{e.g.}, \textit{CPSA Hearings, supra} note 81, at 1214 (testimony of James M. Goldberg, Vice-President, Government Affairs Division of the American Retail Federation). In \textit{GTE}, \textit{see} notes 67-72 \textit{supra} and accompanying text, even the CPSC recognized that the release of the television-related accident data would not help consumers evaluate the comparative safety of the various brands of televisions. \emph{See GTE Sylvania, Inc. v. Consumer Prod. Safety Comm'n}, 404 F. Supp. 352, 362-64 (D. Del. 1975). As compiled by the CPSC, the information was misleading simply because some manufacturers submitted more complete accident records than others. \emph{Id.}

\textsuperscript{137} On the other hand, applying the procedural requirements of section 6(b) to FOIA requests would compromise two of the policies underlying the FOIA. Although the FOIA was enacted to prevent federal agencies from concealing their mistakes and abuses of power, \textit{see generally} \textit{H.R. Rep. No.} 1497, \textit{supra} note 20, at 1-6, \textit{reprinted in} [1966] \textsc{U.S. Code Cong. & Ad. News} at 2418-23, applying section 6(b)(1) to FOIA requests might permit the CPSC to hide its internal workings from public scrutiny. In addition, the application of section 6(b)(1) to FOIA requests might undercut the FOIA policy of prompt disclosure. \textit{See} text accompanying notes 99-100 \textit{supra}. \textit{But see} text accompanying note 108 \textit{supra} (discussing method of reconciling the disclosure times set by the FOIA with the accuracy and fairness provisions of the CPSA).

\textsuperscript{138} \textit{See Regulatory Reform Hearings, supra} note 80, at 8 (CPSC Chairman Simpson commented that if section 6(b) applies to FOIA requests, it would
The Commission receives numerous requests every day, and the accuracy of many of the documents requested "cannot usually be determined simply from the face of [the] record." To prevent allegations that the CPSC has failed to take "reasonable steps" to guarantee accuracy, the Commission could be forced to undertake unnecessarily painstaking investigations prior to FOIA disclosures. A further problem is that in some cases there will be no "reasonably conceivable" way to verify the requested information. That Congress has not provided the resources for lengthy investigations also militates against the view that section 6(b)(1) applies to FOIA requests.

The administrative burdens, however, should not be exaggerated. The Commission is not an absolute guarantor of the accuracy of all information that it releases. First, the accuracy requirement applies only to documents from which the identity of the manufacturer can be readily ascertained. Second, the CPSC need only take "reasonable steps" to ensure the accuracy of this information. Moreover, if the CPSC is not required to ensure the reasonable accuracy of information that it releases under the FOIA, the burden of doing so will shift to information submitters. Finally, if the CPSC is not required to ensure accuracy, companies that submit accurate information may, in effect, be disproportionately harmed since they will appear more accident-prone than submitters of inaccurate data. Such a possibility might induce information submitters to keep inaccurate records that portray their products too favorably.

Unwarranted adverse publicity could result from FOIA disclosures of CPSC files as easily as it could from agency-initiated investigations that the CPSC "must verify the accuracy of every piece of information before it can be released").

139. As of 1975, the Commission averaged 20 FOIA requests per day. Brief for the Appellant at 23, Pierce & Stevens Chem. Corp. v. Consumer Prod. Safety Comm'n, 585 F.2d 1382 (2d Cir. 1978). The number of FOIA requests has increased rapidly in recent years. See note 5 supra and accompanying text.


144. Id.

145. If the CPSC is relieved of the responsibility of releasing only records that are accurate, information submitters will be forced to invest considerable amounts of time and money checking the accuracy of records before submitting them. This is the only way in which information submitters could diminish the potential adverse impact of future releases to the public.
ated disclosures. Moreover, inaccurate FOIA disclosures—like inaccurate agency-initiated disclosures—could defeat the educative purposes of the CPSA. Section 6(b)(1), which guards against both of these dangers, should therefore be applied to "passive" FOIA disclosures as well as to "active" agency-initiated disclosures.

V. SECTION 6(b)(1) OF THE CPSA AS A WITHHOLDING STATUTE WITHIN EXEMPTION 3 OF THE FOIA

There are nine categories of information exempt from disclosure under the FOIA.\textsuperscript{146} The exemption provisions are indicative of a congressional determination that in some cases the public's interest in maintaining the confidentiality of records is greater than the public's interest in monitoring the agencies that compiled the records. These exemptions, however, must be narrowly construed.\textsuperscript{147}

Exemption 3 exempts from the disclosure provisions of the FOIA any matter that is specifically required to be withheld under a separate statute.\textsuperscript{148} Assuming that section 6(b)(1) applies to FOIA requests, it is necessary to examine whether section 6(b)(1) qualifies as a withholding statute under exemption 3. If section 6(b)(1) is not a withholding statute under exemption 3, the FOIA disclosure requirements must be met, regardless of the section 6(b)(1) accuracy and fairness provisions. If section 6(b)(1) is an exemption 3 withholding statute, however, its requirements take precedence over any conflicting FOIA provisions. Thus, whether section 6(b)(1) qualifies as an exemption 3 withholding statute determines which statute—the FOIA or the CPSA—controls when the Commission responds to FOIA requests for documents.

A. EXEMPTION 3 OF THE FOIA

1. History

As originally enacted, exemption 3 referred to matters "specifically exempted from disclosure by statute."\textsuperscript{149} The legislative history of the original enactment,\textsuperscript{150} while sparse,
shows that Congress intended to preserve at least some of the preexisting withholding statutes. It left the scope of exemption 3 far from clear, however, and the courts were unable to reach a consensus on the issue. Some courts required strict adherence to the rule that an exempting statute identify a class or category of items to be withheld, or that it contain guidelines to be followed in determining which materials were exempt from disclosure. Congressional intent and agency discretion were important factors underlying such determinations. Other courts, following a broader approach, concluded that exemption 3 simply codified the prior law regarding withholding statutes. These courts generally reasoned that if a statute mandated nondisclosure of agency documents, it qualified


151. "There are nearly 100 statutes or parts of statutes which restrict public access to specific Government records. These would not be modified by the public records provision of [the FOIA]." H.R. Rep. No. 1497, supra note 20, at 10, reprinted in [1966] U.S. Code Cong. & Ad. News at 2427. While there exists no indication of exactly which statutes the House Report was alluding to, see Cutler v. Civil Aeronautics Bd., 375 F. Supp. 722, 723 n.1 (D.D.C. 1974) (attempts to track down the "nearly 100 statutes" . . . have proved frustrating"), exemption 3 was clearly not designed to insulate all withholding statutes. The House comment is limited to those statutes that "restrict public access to specific Government records." H.R. Rep. No. 1497, supra note 20, at 10, reprinted in [1966] U.S. Code Cong. & Ad. News at 2427. Moreover, the House Report was written nearly a year after the Senate passed the FOIA. Since the House Report "represents the thinking of only one house, . . . the surer indication of congressional intent is to be found in the Senate Report, which was available for consideration in both houses." Benson v. General Servs. Administration, 289 F. Supp. 590, 595 (W.D. Wash. 1968), aff'd, 415 F.2d 878 (9th Cir. 1969). The Senate Report simply restated the exemption: "Exemption No. 3 deals with matters specifically exempt from disclosure by another statute." S. Rep. No. 813, supra note 2, at 9.


under exemption 3 of the FOIA since it expressed a congres-
sional intent to stem public access. If a statute merely per-
mitted nondisclosure at the agency's discretion, these courts
would not find it a withholding statute within the meaning of
exemption 3.156

In Administrator, FAA v. Robertson,157 the Supreme Court
adopted the broader rule and held that section 1104 of the Fed-
eral Aviation Act of 1958158 fell within exemption 3 of the
FOIA.159 Section 1104 directed the FAA Administrator to with-
hold information from public disclosure "when, in [the admin-
istrators'] judgment, a disclosure of such information would
adversely affect the interests of [a person making a written ob-
jection to disclosure] and is not required in the interest of the
public."160 Because this interpretation threatened the FOIA's
policy of full agency disclosure, Congress, in 1976, amended ex-
emption 3161 with the stated purpose of overruling Robertson.162

The amended exemption 3 reinstates the stricter approach
some courts had taken prior to Robertson.163 It exempts from
public disclosure any matter

specifically exempted from disclosure by statute (other than Section
552(b) of this title), provided that such statute (A) requires that the
matters be withheld from the public in such a manner as to leave no
discretion on the issue, or (B) establishes particular criteria for with-
holding or refers to particular types of matter to be withheld.164

Unlike the original version, the amended exemption 3 describes
the characteristics of an exempting statute. These characteris-
tics, of course, imply that some withholding statutes will not

156. The restriction on disclosure must be explicit in the language of the
statute, not merely inferable from it. Unqualified prohibitions such as "no
records" or "all records" meet this standard. See California v. Weinberger, 505
F.2d 767, 768 (9th Cir. 1974).
§ 1504 (Supp. II 1978)).
159. 422 U.S. at 261-66.
160. Federal Aviation Act of 1958, Pub. L. No. 85-726, § 1104, 72 Stat. 797 (cur-
rent version at 49 U.S.C. § 1504 (Supp. II 1978)).
version at 5 U.S.C. § 552(b)(3) (1976)).
U.S. CODE CONG. & AD. NEWS 2244, 2250.
163. See note 153 supra and accompanying text. Examples of courts follow-
ing the strict approach subsequent to the amendment of FOIA exemption 3 in-
(3d Cir. 1979), discussed in Addendum p. 1059 infra; Lee Pharmaceuticals v.
Kreps, 577 F.2d 610, 615 (9th Cir. 1978), cert. denied, 439 U.S. 1073 (1979).
qualify under exemption 3 since they are not "particular" enough.

Although the scope of exemption 3 changed several times during the amending process, there is little legislative history regarding its scope as finally enacted. Under the initially proposed amendment, exemption 3 would have applied to matters "[r]equired or permitted to be withheld from the public by any statute." The final version of the amendment, however, exempted only material covered by statutes that "required" nondisclosure. Thus, matters protected by statutes that merely permit withholding do not come within the exemption. The legislative history of amended exemption 3 gives several examples of exempt or nonexempt materials.

2. Current Interpretation

Since the 1976 amendment, few decisions have clarified the scope of exemption 3. Although the courts have examined the
language of exemption 3,\textsuperscript{170} they have for the most part focused on the statutes that purport to limit disclosure. There has been little explanation of why any particular provisions should qualify under exemption 3. Certain patterns, however, have emerged.

Statutory provisions, such as section 6(f) of the Federal Trade Commission Act (FTCA),\textsuperscript{171} that regulate disclosure but do not mandate nondisclosure are not within the scope of exemption 3.\textsuperscript{172} Section 6(f) of the FTCA empowers the Commission

\begin{quote}
[t]o make public . . . information . . . as it shall deem expedient in the public interest; and to make . . . reports to the Congress and to submit . . . recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.\textsuperscript{173}
\end{quote}

The provision does not fail for lack of specificity to meet the requirements of exemption 3; rather, section 6(f) "simply is not a statute which purports to prohibit disclosure."\textsuperscript{174} Similarly, prior to its repeal in 1978,\textsuperscript{175} section 12 of the Amtrak Improvement Act of 1973\textsuperscript{176} provided that no agency or officer can require Amtrak to submit certain documents to that agency for approval before disclosure. Although the provision established procedures for disclosing special types of documents, it did not mandate nondisclosure, and therefore was not an exempting statute.\textsuperscript{177}

Statutes that unambiguously require nondisclosure of spe-


\textsuperscript{175} Mobil Oil Corp. v. FTC, 406 F. Supp. 305, 311 (S.D.N.Y. 1976).


Specific types of documents have consistently been considered withholding statutes. Examples include sections 706(a) and 709(e) of the Civil Rights Act of 1964, which prohibit the Equal Employment Opportunity Commission from disclosing allegations of unlawful employment practices or information obtained prior to the institution of any proceeding involving such information;\textsuperscript{178} section 314(a)(3) of the Federal Election Campaign Act Amendments of 1974, which forbids public disclosure of information pertaining to an investigation of an alleged violation without the consent of the person under investigation;\textsuperscript{179} section 802 of the Omnibus Crime Control and Safe Streets Act of 1968, which prohibits disclosing the contents of some electronic surveillance;\textsuperscript{180} section 9 of the Census Act, which bars the use of census information for "any purpose other than the statistical purposes for which it is supplied;"\textsuperscript{181} and section 801 of the Federal Aviation Act of 1958, which forbids the Civil Aeronautics Board from publishing certain information relating to a foreign air route application until it is submitted to the President.\textsuperscript{182} In addition, section 102(d)(3) of the National Security Act of 1947\textsuperscript{183}—which permits the Director to protect "intelligence sources and methods from unauthorized agency disclosure"—and section 7 of the Central Intelligence Act of 1949\textsuperscript{184}—which exempts the CIA from any law requiring "disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency"—both fall within the standard of "particular types of matters" to be withheld.\textsuperscript{185} In determining whether a statute mandates nondisclo-


\textsuperscript{184} Id. § 403g.

\textsuperscript{185} The "particular types of matters" that the two sections require to be withheld are documents concerning "intelligence sources and methods." Ray v. Turner, 587 F.2d 1187, 1220 (D.C. Cir. 1978). The CIA's special knowledge and expertise regarding defense and foreign policy weighed in favor of interpreting these sections as withholding statutes for the purpose of exemption 3. Id. See, e.g., Marks v. CIA, 590 F.2d 997 (D.C. Cir. 1978); Baker v. CIA, 580 F.2d 664 (D.C. Cir. 1978); National Comm'n on Law Enforcement & Social Justice v. CIA, 576 F.2d 1373 (9th Cir. 1978). See also note 169 supra and accompanying text.
sure of particular types of documents, courts have looked to congressional intent, the purpose of the withholding provision, and the existence of any special experience or knowledge on the part of the agency involved.186

The statutes that require an agency to withhold information only after particular criteria have been met are more difficult to identify. For example, section 1104 of the Federal Aviation Act of 1958, which prohibits "disclosure [that] . . . would adversely affect the interests [of submitters] and . . . is not required in the interest of the public,"187 does not qualify under exemption 3 of the FOIA.188 Section 7(c) of the Export Administration Act of 1969 provides that the "agency shall [not] publish or disclose information . . . unless the . . . agency determines that the withholding . . . is contrary to the national interest";189 this provision allows an impermissible amount of agency discretion.190 On the other hand, section 142(a) of the Atomic Energy Act of 1954, which allows certain restricted data to be released if the information "can be published without undue risk to the common defense and security,"191 falls within the guidelines of exemption 3.192 Similarly,

(1976), requires that "investigatory files, whether or not considered closed, compiled for law enforcement purposes" be withheld from public view. Prior to the 1976 amendment of exemption 3, see text accompanying notes 161-64 supra, section 410(c)(6) was held to fall within exemption 3. See Church of Scientology v. United States Postal Serv., 593 F.2d 902 (9th Cir. 1979); Gibson v. Davis, 587 F.2d 280 (6th Cir. 1978). The current status of section 410(c)(6) is not clear since the two cases holding the section to be within the prior exemption 3 have been remanded to consider whether section 410(c)(6) falls within the amended version of the exemption. 186. See Ray v. Turner, 587 F.2d 1187, 1220 n.85 (D.C. Cir. 1978); note 196 infra.


Another statute that establishes criteria for withholding is section 1106 of the Social Security Act, 42 U.S.C. § 1306(a) (1976), which prohibits disclosure of "any information . . . except as the Secretary . . . may by regulations prescribe." This statute, however, was cited in the conference report as one not falling within the standard set by the amended version of exemption 3. See H.R. CONF. REP. No. 1441, supra note 162, at 14, reprinted in [1976] U.S. CODE CONG. & AD. NEWS at 2250. Since the statute mandates nondisclosure when certain criteria have been met, it is another example of a statute whose criteria are simply not particular enough.


section 122 of the Patents Act, which prohibits disclosure of patent applications "unless necessary to carry out the provisions of any Act of Congress or in such special circumstances as may be determined by the Commissioner,"193 comes within exemption 3.194 Finally, sections 6103(3) and 6103(e)(6) of the Internal Revenue Code provide that tax return information may be disclosed unless "the Secretary determines that such disclosure would seriously impair Federal tax administration;"195 these provisions satisfy the exemption 3 requirement of "particular criteria."196

While these decisions are not easily reconciled, they help explain when a statute establishes withholding criteria particular enough to qualify under exemption 3 of the FOIA. The main guideline is the language of the criteria. Most qualifying criteria set forth two elements that curtail agency discretion: (1) the breadth of the statute's area of concern, and (2) the degree

(The Court took special notice that Congress had expressed concern over the possible adverse effect of the disclosure of such information). See note 169 supra and accompanying text.


194. See Lee Pharmaceuticals v. Kreps, 577 F.2d 610, 617 (9th Cir. 1978), cert. denied, 439 U.S. 1073 (1979). While it appears that the court based its decision that section 122 falls within exemption 3 on the fact that section 122 provides for nondisclosure of "particular types of matters," see 577 F.2d at 616, the court also noted with approval the specificity of the section 122 criterion. See id. at 617. Moreover, since disclosure of the particular types of documents identified by section 122 is conditional on whether its criterion is met, the specificity of the criterion is crucial to eliminating agency discretion. Thus, the court's finding that section 122 qualifies under exemption 3, in conjunction with the discussion of the particularity of the section 122 criterion, implies a finding that the criterion is sufficiently specific.

195. I.R.C. § 6103(c). Section 6103(e)(6) allows disclosure "if the Secretary determines that such disclosure would not seriously impair Federal tax administration." Id. § 6103(e)(6) (emphasis added).

196. Chamberlain v. Kurtz, 589 F.2d 827, 839 (5th Cir. 1979). The court considered the purpose of the withholding provision, the parties to whom the provision applies, and congressional intent. Id. at 835-39. Although the language of sections 6103(c) and 6103(e)(6) is broad, it avoids "the evils of unfettered agency discretion with which Congress was trying to deal when it amended Exemption 3." Id. at 839.

Another interesting withholding statute is Rule 6(e) of the Federal Rules of Criminal Procedure. Rule 6(e) prohibits the disclosure of any matters occurring before grand juries except: (1) disclosure to government attorneys "for use in the performance of their duties"; (2) on court order, disclosure "preliminary to or in connection with a judicial proceeding"; and (3) on court order, disclosure to defendants seeking dismissals of indictments because of "matters occurring before the grand jury." In other words, the rule normally prohibits disclosure but establishes criteria for compelling disclosure in exceptional cases. Rule 6(e) has been held a withholding statute for the purposes of exemption 3. See Thomas v. United States, 597 F.2d 656, 657 (8th Cir. 1979). Courts applying the rule have required petitioners seeking to avail themselves of the disclosure provision to establish "particularized" need. Id.
of impact on a concern that will trigger withholding. Broad areas of concern, such as the "interest of the public"197 or the "national interest,"198 are too imprecise.199 More narrowly defined concerns, however, such as "common defense and security"200 or "Federal tax administration,"201 more closely constrain agency discretion and therefore are likely to qualify as particular criteria under the FOIA.202 Similarly, generalized statements of the minimum degree of impact required such as "adversely affects,"203 "not required,"204 or "contrary to,"205 are not sufficiently particularized,206 while more demanding degrees such as "undue risk,"207 "necessary to,"208 or "seriously impair,"209 will constitute exempting language.210 In general, the narrower the area of concern and the more demanding the degree of impact, the more likely the statute is to contain criteria particular enough to meet the standard set by exemption 3 of the FOIA. A court's task is to determine where, along the continuum of possibilities, the statutory language in question falls.

Another factor that courts consider, in addition to the specificity of the withholding criteria, is whether the application of a withholding statute is clearly limited to particular types of mat-
By referring to specific materials, the withholding criteria designate even more particularly the statute's area of concern. The specification of particular materials further restrains an agency's discretion by allowing it to apply the statute's withholding criteria to a limited number of documents.

The final factor that courts consider in determining whether a statute restricting disclosure sets forth criteria particular enough to meet the requirements of exemption 3 is the policy justification for withholding the information. It is important to recall that the FOIA was enacted so that citizens could monitor the activities of federal agencies. It is equally important that some withholding statutes protect interests—both private and public—that are more significant than the public's right to know. For example, information collected by the government concerning nuclear energy, patents, or taxes is not freely available to the public because the safety, property, and privacy interests of nonagency entities will be unnecessarily compromised. The nondisclosure provisions covering such information rise to the level of exemption 3 withholding statutes because they protect important and clearly expressed interests. In contrast, nondisclosure statutes that permit an agency to withhold "any file, record [or] paper," or "information contained in any application, report, or document" simply conceal the inner workings of federal agencies and cannot be withholding statutes under the FOIA. Whether a nondisclosure statute protects important nonagency interests is therefore essential in determining whether the statute falls within exemption 3 of the FOIA.

211. See Chamberlain v. Kurtz, 589 F.2d 827, 839 (5th Cir. 1979) ("The criterion for the withholding of information is whether disclosure would 'seriously impair Federal tax administration,' and these subsections apply only to a particular type of matter . . . . Subsections 6103(c) and 6103(e)(6) are, therefore, drawn narrowly enough . . . .") Note that the only withholding statutes establishing criteria found to fall within exemption 3 also refer to particular types of documents. See text accompanying notes 191-196 supra.

212. See notes 101-103 supra and accompanying text.


216. Exemption 3 is the only exemption that appears applicable to material affected by section 6(b)(1). Proper judicial review of an exemption 3 claim involves several steps. See Ray v. Turner, 587 F.2d 1187, 1219 (D.C. Cir. 1978). The critical issue, of course, is whether the alleged nondisclosure statute qualifies under the amended exemption 3. Exemption 3 appears to establish three standards since subsection (B) contains two conditions. See text accompanying note 164 supra. Since the withholding criteria of section 6(b)(1) allow at least
B. Section 6(b)(1) of the CPSA and Exemption 3 of the FOIA

The only case that has addressed the question whether section 6(b)(1) qualifies as a withholding statute under exemption 3 of the FOIA is GTE Sylvania, Inc. v. Consumer Product Safety Commission.217 Although the court in GTE decided that section 6(b)(1) meets the requirements of exemption 3, the court’s analysis was cursory and failed adequately to explain the factors upon which the decision was based.218

One reason that section 6(b)(1) might not qualify as a withholding statute for the purposes of exemption 3 is that section 6(b)(1) simply permits but does not mandate nondisclosure.219 In Mobil Oil v. FTC,220 the court held that section 6(f) of the Federal Trade Commission Act (FTCA),221 which on its surface is quite similar to section 6(b)(1) of the CPSA, is not a withholding statute under exemption 3.222 Section 6(f) of the FTCA affirmatively describes the information the FTC may disclose, and establishes a procedure for disclosure. The court in Mobil Oil found that section 6(f) did not fail for lack of specificity to meet the requirements of exemption 3; rather, the controlling factor was that section 6(f) “simply is not a statute which purports to prohibit disclosure.”223 There is no language in section 6(b)(1) that requires the CPSC to withhold inaccurate or unfair materials. In fact, the duty of the CPSC, like that of the FTC, is stated affirmatively. Prior to disclosure, the CPSC must notify the information submitter, provide an opportunity for comment, take reasonable steps to ensure accuracy, and, if necessary, publish a retraction. Another similarity between section 6(b)(1) of the CPSA and section 6(f) of the FTCA is that many aspects of section 6(b)(1) are essentially procedural: the notice and comment provisions, the implicit conferral of authority to correct documents before publication,

some discretion, see note 236 infra and accompanying text, the “no discretion” standard of subsection (A) is therefore not applicable. Assuming that the alleged nondisclosure statute qualifies under subsection (B), the court must then determine the scope of the withholding statute and whether the material requested under the FOIA is covered by the statute. On review, a court must consider these questions de novo. See Brandon v. Eckard, 569 F.2d 683, 687-90 (D.C. Cir. 1977).


218. See 598 F.2d at 814-15.

219. See text accompanying note 156 supra.


223. Id. at 311.
and the requirement that the CPSC "take reasonable steps" to ensure accuracy and fairness before disclosure.

The affirmative criteria of section 6(b)(1), however, can be distinguished from the affirmative procedural guidelines of section 6(f) of the FTCA. Although there is no language in section 6(b)(1) that specifically requires the CPSC to withhold information, mandatory nondisclosure is implicit in its command that certain requirements be met "prior to . . . public disclosure." The FTCA has no comparable command implying mandatory nondisclosure; the Act was designed to provide a procedure for agency disclosure rather than to limit agency disclosure. Another distinguishing factor is that section 6(f) of the FTCA does not designate the particular documents to which it applies. In contrast, the procedural guidelines of section 6(b)(1) apply only to particular types of information.

Section 6(b)(1) refers to "particular types of matters" because its restrictive provisions apply only to materials that identify a manufacturer or private labeler. This category of documents and records, however, is not as tightly limited as the categories in the other statutes that have been held to fall within exemption 3 of the FOIA. Another difficulty with this

224. In determining whether a withholding statute refers to specific types of matter, courts usually examine whether the statute identifies information comparable to that withheld by the other FOIA exemptions, see 5 U.S.C. § 552(b) (1976), or by other statutes already known to satisfy exemption 3. Another approach to analyzing the status of withholding statutes under exemption 3, however, would be to begin by determining whether the agency involved has broad or special information-gathering powers. If so, as in the case of the CPSC, it would be highly unlikely that any effective nondisclosure provision could refer to particular types of matter based on subject matter. Congress simply could not contemplate all the various types of information that such an agency would seek.

In such a case, a more effective withholding statute would contain somewhat vague withholding criteria capable of adapting to any type of information the agency chooses to gather. Moreover, if the statute were to identify the particular matters to which it applied, it would be preferable to use a means of identification more adaptable than the subject matter of the information. A statute drafted in this manner would be better suited to guarding against the special dangers—such as unwarranted adverse publicity—presented by agencies with extremely broad information-gathering powers.

225. See note 13 supra.

226. Most withholding statutes that fall within exemption 3 deal with documents having a certain subject matter. Some examples are patent applications and restricted data, see text accompanying note 211 supra, raw census data, the contents of some electronic surveillance, allegations of unfair employment practices, information pertaining to the investigation of an alleged campaign violation, and information relating to foreign air route applications. See text accompanying notes 178-182 supra. Section 6(b)(1), on the other hand deals with a less tangible category of documents: those from which the identity of a manufacturer or private labeler is readily ascertainable by members of the public.
analogy is that section 6(b)(1) allows the CPSC to withhold these documents only if certain other conditions are present: if the documents are inaccurate or unfair, or if their disclosure will not effectuate the purposes of the Act. Therefore, the more important question seems to be whether the presence of these conditions is the type of "particular criteria" that exemption 3 requires of a withholding statute.\textsuperscript{227}

Withholding criteria should indicate not only the statute's area of concern but also the degree of impact on the concern that will trigger withholding.\textsuperscript{228} The withholding criteria specified in section 6(b)(1) establish both these elements. The statute's area of concern is tripartite: (1) that the "information . . . is accurate," (2) that disclosure is "fair in the circumstances," and (3) that disclosure "effectuates the purposes of [the Act]."\textsuperscript{229} The requisite degree of impact is based on a reasonableness standard.\textsuperscript{230} The CPSC's duty to withhold documents from public view is triggered only if the documents are not reasonably accurate, reasonably fair, or reasonably related to effectuating the purposes of the Act.

It is not clear, however, whether these criteria are specific enough to meet the "particular criteria" standard of exemption 3. In other contexts, a concern for effectuating the purposes of the Act has been held to be a sufficiently particular criterion.\textsuperscript{231} In the case of the CPSA, this standard may be too imprecise because the purposes of the Act are so numerous and varied.\textsuperscript{232}

\textit{See note 13 supra.} Whether a member of the public may be able to "ascertain readily" the identity of a manufacturer from the information contained in a document might, in some cases, be a matter about which reasonable persons could differ. On the other hand, it is virtually impossible that there could be a similar dispute as to whether a document was a patent application of a formal complaint filed with the EEOC, alleging unfair employment practices.\textsuperscript{227}

\textit{See text accompanying note 164 supra.}

\textit{See text accompanying notes 197-210 supra.}

\textit{See note 13 supra.}

\textit{See text accompanying notes 193-196 supra.}

\textit{The purposes of the CPSC include protecting the public against unrea-
Even if this single criterion were particular enough, the conjunctive listing of the three criterion in section 6(b)(1) seems to require that each criterion must meet the requisite level of specificity. While the concern that information made available to the public be accurate appears sufficiently particular, the same cannot be said for the concern that it be fair in the circumstances. The latter will vary greatly depending on the type of consumer product involved and the method in which information was gathered. Moreover, the term "circumstances" may be so broad as to deprive the term "fair" of any guiding value whatsoever. As for the degree of impact required by section 6(b)(1), the term "reasonable" implies a fairly wide spectrum of possible interpretations and hardly serves as a precise indicator of congressional intent.

In general, the language of the three conjunctive criteria of section 6(b)(1) is not very particular. The criteria unquestionably give the CPSC some latitude in withholding information. Congress, however, did not exclude from exemption 3 of the reasonable risk of injury from consumer products, assisting consumers in evaluating the comparative safety of consumer products, minimizing conflicting state and local regulations, and promoting research and investigation into the causes and prevention of product-related deaths and injuries. See 15 U.S.C. § 2051 (1976).

Even the meaning of the term "accuracy," however, may be multifaceted and subjective. It may simply mean procedural accuracy, in that the data were gathered pursuant to established procedures and in that resulting documents are consistent with or conform to those data. On the other hand, it could refer to substantive accuracy, in that the material is truthful, complete, and correct.

In GTE Sylvania, Inc. v. Consumer Prod. Safety Comm'n, 404 F. Supp. 352 (D. Del. 1975), some television manufacturers responded to the CPSC subpoenas with extremely thorough accident reports, while other manufacturers submitted far less revealing reports. See id. at 361. Although all of this material may have been "accurate," the varying degrees of detail raise the issue whether a complete release of the information would be fair under the circumstances. The effect of complete release would be to prejudice most severely those manufacturers who had cooperated fully with the CPSC, and to indirectly reward those who had been recalcitrant. Although such a comparison of the equities of various information submitters seems germane to the question of fairness, it hardly rises to the level of a particular withholding criteria.

It is arguable that the vagueness of the reasonableness requirement taints each of the three withholding criteria with the very imprecision that Congress sought to eliminate through the 1976 amendment. See text accompanying notes 157-164 supra.

Section 6(b)(1) appears to leave a great deal of discretion with the CPSC because the three withholding criteria are vague when read together. Such deference to an agency may be acceptable when the agency has special expertise in fulfilling the policies of the exempting statute. See Ray v. Turner, 587 F.2d 1187, 1220 (D.C. Cir. 1978) (CIA has special expertise in protecting "intelligence sources and methods"). The CPSC, however, has no special expertise in controlling adverse publicity as it pertains to information submitters.
FOIA all withholding statutes that confer some measure of discretion on the affected agency. The purpose of the 1976 amendment was simply to segregate out those statutes that conferred too much discretion.\textsuperscript{237} The withholding criteria of section 6(b)(1) fall in the middle of the specificity continuum. The criteria are not as specific as those observed in other exemption 3 statutes. On the other hand, it would be difficult to devise more particular provisions that would still accomplish the special purpose of section 6(b)(1).\textsuperscript{238} Moreover, section 6(b)(1) further narrows the CPSC's discretion in applying the criteria by permitting only particular types of matter to be withheld. Courts have found that even when withholding criteria are arguably broad, a statute may still fall within exemption 3 of the FOIA if it limits the agency's ability to withhold certain types of documents.\textsuperscript{239}

Because of its imprecise language, it cannot be said that section 6(b)(1) falls unambiguously within the standard set by exemption 3. It appears, however, that the combination of section 6(b)(1)'s fairly particular withholding criteria and the narrow scope of documents to which it applies should enable it to fall within the developing case law standard\textsuperscript{240} for determining whether a withholding statute satisfies the requirements of exemption 3. Since the language of section 6(b)(1)—although more vague than that of some withholding statutes—does not necessarily disqualify it from satisfying exemption 3, the policies underlying section 6(b)(1) should be accorded considerable weight in determining its status.

The relevant policy factors support classifying CPSA section 6(b)(1) as an exemption 3 withholding statute. Congressional intent is a critical factor in determining whether a statute qualifies under exemption 3 of the FOIA.\textsuperscript{241} In enacting section 6(b)(1), Congress believed that it was establishing "detailed requirements and limitations relating to the [CPSC's] authority to disclose information."\textsuperscript{242} Furthermore, Congress


\textsuperscript{238} See note 224 supra (special information-gathering powers of CPSC should be offset with flexible withholding standards).

\textsuperscript{239} See note 211 supra and accompanying text.

\textsuperscript{240} See text accompanying notes 170-216 supra.

\textsuperscript{241} American Jewish Congress v. Kreps, 574 F.2d 624, 628-29 (D.C. Cir. 1978).

\textsuperscript{242} H.R. Rep. No. 1153, supra note 46, at 31.
has voiced its concern over the special adverse effects of disclosures.\textsuperscript{243} Congress gave the CPSC particularly broad information-gathering powers and included section 6(b)(1) as a modifying force that would prevent the CPSC from publicizing unwarranted adverse information. Congress’ desire to forestall the possibility that the CPSC’s special information-gathering powers may—inadvertently or not—cause unwarranted damage to the interests of innocent information submitters suggests that section 6(b)(1) should fall within exemption 3.\textsuperscript{244}

Another important policy that must be considered is that the FOIA was enacted primarily to help citizens monitor the workings and competence of federal agencies, not to give them unbridled access to information that concerns nongovernmental entities. Section 6(b)(1) permits the withholding of only those documents that both identify and unfairly prejudice certain private information submitters. This section applies only when interests more compelling than the CPSC’s own self-interest are implicated. In this respect, the classification of section 6(b)(1) as a withholding statute would certainly not undercut the effectiveness of the FOIA.

VI. CONCLUSION

Congress delegated extraordinarily broad information-gathering powers to the CPSC. As a result, an FOIA request for information stored in the CPSC’s files may place significant interests of the information submitters at stake. There will undoubtedly be occasions when the information submitter’s interest in nondisclosure is more important to society than the information requester’s interest in monitoring the activities of the CPSC. Section 6(b)(1) of the CPSA—a withholding provision—strikes a balance between these two competing concerns. It implicitly mandates nondisclosure when the requested material identifies a manufacturer or private labeler and the CPSC has failed to make a reasonable effort to ensure the accuracy and fairness of the material. The legislative history of section 6(b)(1) does not make clear whether Congress intended section 6(b)(1) to apply to “passive” FOIA disclosures of CPSC files, or whether its application was to be restricted to agency-initiated disclosures. The policies underlying section 6(b)(1), however, indicate that the provision should also apply to infor-

\textsuperscript{243} See American Jewish Congress v. Kreps, 574 F.2d 624, 629 (D.C. Cir. 1978).

\textsuperscript{244} See id.
mation released under the FOIA. If it does not apply, the virtually unbridled access provisions of the FOIA could lead to the precise abuse of the CPSC's information-gathering powers that section 6(b)(1) was intended to mitigate.

Assuming that section 6(b)(1) does apply to FOIA requests, the question becomes whether it is a withholding statute within the meaning of FOIA exemption 3. Again, the statutory language and legislative history are not dispositive of the issue. An analysis of the developing case law standard, however, indicates that section 6(b)(1) fits one of the paradigms of an exemption 3 withholding statute: it contains reasonably specific withholding criteria, and its application is limited to particular types of information. Moreover, there are a number of policy reasons for recognizing section 6(b)(1) as an exemption 3 withholding statute. First, and most importantly, by stemming the flow of misleading information, such an interpretation furthers the CPSA goals of educating the public and avoiding the unwarranted imposition of adverse publicity. Second, because of the defined category of documents to which section 6(b)(1) applies and the manner in which the withholding criteria are drawn, the recognition of section 6(b)(1) as an exemption 3 withholding statute only marginally frustrates the public's ability to monitor the operation of the CPSC. Finally, such an interpretation eliminates the need for reconciling the otherwise conflicting provisions of the CPSA and the FOIA.

ADDENDUM

As this issue went to print, the Supreme Court announced its decision in Consumer Product Safety Commission v. GTE Sylvania, Inc., 48 U.S.L.W. 4658 (June 9, 1980). In GTE Sylvania, the Court held that section 6(b)(1) of the CPSA governs the disclosure of records by the CPSC pursuant to a request under the FOIA. The Court also stated that section 6(b)(1) establishes sufficiently definite standards to fall within the scope of exemption 3 of the FOIA.