

ORIGINAL

In the

Supreme Court of the United States

CONSUMER PRODUCT SAFETY
COMMISSION ET AL.,

PETITIONER

v.

GTE SYLVANIA, INC., ET AL.,

RESPONDENTS

No. 79-521

Washington, D. C.
April 14, 1980

Pages 1 thru 39

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CONSUMER PRODUCT SAFETY :
4 COMMISSION ET AL., :
5 :
6 Petitioners :
7 :
8 v. :
9 :
10 GTE SYLVANIA, INC., ET AL., :
11 :
12 Respondents :
13 -----x

No. 79-521

9 Washington, D. C.

10 Monday, April 14, 1980

11 The above-entitled matter came on for oral argument
12 at 10:05 o'clock a.m.

13 BEFORE:

14 WARREN E. BURGER, Chief Justice of the United States
15 WILLIAM J. BRENNAN, JR., Associate Justice
16 POTTER STEWART, Associate Justice
17 BYRON R. WHITE, Associate Justice
18 THURGOOD MARSHALL, Associate Justice
19 HARRY A. BLACKMUN, Associate Justice
20 LEWIS F. POWELL, JR., Associate Justice
21 WILLIAM H. REHNQUIST, Associate Justice
22 JOHN PAUL STEVENS, Associate Justice

19 APPEARANCES:

20 PETER BUSCEMI, ESQ., Assistant to the Attorney
21 General, Department of Justice, Washington,
22 D.C. 20530; on behalf of the Petitioners

23 BERNARD G. SEGAL, ESQ., Schnader, Harrison, Segal &
24 Lewis, 1719 Packard Building, Philadelphia,
25 Pennsylvania 19102; on behalf of the Respondents

C O N T E N T S

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17
18
19
20
21
22
23
24
25

	PAGE
ORAL ARGUMENT OF	
PETER BUSCEMI, ESQ., on behalf of the Petitioners	3
BERNARD G. SEGAL, ESQ., on behalf of the Respondents	24
REBUTTAL ARGUMENT OF	
PETER BUSCEMI, ESQ., on behalf of the Petitioners	36

P R O C E E D I N G S

1
2 MR. CHIEF JUSTICE BURGER: We will hear arguments
3 first this morning in Consumer Product Safety Commission and
4 others against GTE Sylvania.

5 Mr. Buscemi, you may proceed whenever you are ready.

6 ORAL ARGUMENT OF PETER BUSCEMI, ESQ.,

7 ON BEHALF OF THE PETITIONERS

8 MR. BUSCEMI: Thank you Mr. Chief Justice, and may
9 it please the Court:

10 This case concerns the relationship Act and Section
11 6(b)(1) of the Consumer Product Safety Act.

12 The case is here because two Federal Courts of
13 Appeals have disagreed over the way in which the two statutes
14 should be applied.

15 The Second Circuit in *Pierce & Stevens Chemical*
16 *Corporation v. United States Consumer Products Safety*
17 *Commission* adopted the Commission's view that Section 6(b)(1)
18 does not apply when the Commission responds to an FOIA request.
19 Four months later in the present case the Third Circuit reached
20 a contrary result.

21 The Commission petitioned for certiorari to resolve
22 the conflict. And the facts here are straightforward. In
23 March of 1974 the Commission published a notice in the Federal
24 Register announcing the time and place of a public hearing
25 to discuss television receiver safety with emphasis on shock and

1 fire hazards. The notice asked manufacturers to submit a
2 variety of information concerning television safety including
3 all TV-related accident reports collected since 1969.

4 When the manufacturers' response to this informal
5 request proved unsatisfactory the Commission sought to obtain
6 the same materials through the special order and subpoena
7 procedures provided in Section 27(b) of the Consumer Products
8 Safety Act.

9 Eventually television manufacturers submitted a
10 large volume of information to the Commission, the vast
11 majority of which consisted of TV accident data. And the
12 Commission received more than 7,600 TV-related accident
13 reports concerning accidents occurring between 1969 and 1974.

14 And soon after the manufacturers began to submit
15 the requested materials Consumers Union of the United States
16 and Public Citizens Health Research Group filed FOIA requests
17 to inspect and copy the information submitted, including the
18 TV accident reports.

19 In response to those requests the Commission made
20 available all the material submitted by the manufacturers as
21 to which no claim of confidentiality had been made. The
22 Commission then notified the manufacturers of the outstanding
23 FOIA requests and asked them to substantiate the earlier
24 claims of confidentiality that they had made at the time they
25 submitted the information.

1 The manufacturers responded by asserting that the
2 accident reports and some of the materials were exempt from
3 mandatory disclosure under the FOIA under Exemption 4, so-
4 called trade secret exemption; and Exemption 7, the exemption
5 for investigatory files compiled for law enforcement purposes.
6 They also asserted that some of the material, including some
7 of the material within the accident reports could not be
8 released because to release it would be to violate the
9 criminal provisions of the Trade Secrets Act, 18 U.S.C. 1905.

10 The Commission then reviewed the accident reports
11 and the manufacturers' submissions on confidentiality and
12 determined that the bulk of the material was not exempt from
13 mandatory disclosure under the FOIA.

14 The Commission notified the manufacturers of its
15 determination and told them they would withhold three categories
16 of information. Accident data that identified the name and
17 address of an accident victim or included other personal
18 information, the release of which might result in invasion
19 of privacy, accident data in the form of legal material such
20 as legal memoranda and correspondence with an attorney
21 privilege because of the attorney-client relationship or the
22 attorney-work product doctrine and finally technical data
23 that the submitting company had kept secrets and the release
24 of which might cause substantial harm to the company.

25 The Commission also informed the manufacturers that

1 because of the apparent variations in the way the manufacturers
2 had maintained their accident records over the years between
3 1969 and 1974 that the release of those records under the FOIA
4 would be accompanied by a statement to the effect that because
5 of the variations some of the data could be misleading.

6 Now, there has never been any dispute in this
7 litigation about anything but the accident reports because in
8 May 1975 the requestors agreed to limit their requests to
9 their reports edited to eliminate the personal information about
10 the accident victims and the legal materials.

11 After the Commission announced its decision,
12 respondents, who are 12 of the affected television manufacturers,
13 filed separate lawsuits in the United States District Court
14 for the District of Delaware and three other District Courts.
15 All 12 suits were eventually consolidated in the District of
16 Delaware.

17 In addition to repeating their contentions regarding
18 the FOIA exemptions in the Trade Secrets Act, respondents for
19 the first time alleged that the Commission's proposed release
20 of the accident reports would violate Section 6(b)(1) of the
21 Consumer Products Safety Act. The District Court accepted
22 this argument and permanently enjoined the Commission from
23 releasing the material without complying with the procedural
24 requirements of Section 6(b)(1).

25 The Court of Appeals for the Third Circuit affirmed,

1 rejecting the analysis of the Second Circuit in Pierce &
2 Stevens Chemical Corporation.

3 Now, because both courts have decided this case in
4 reliance on Section 6(b)(1), neither has ever addressed the
5 allegations by respondents that the accident reports are
6 axempt from mandatory disclosure under the Freedom of
7 Information Act.

8 So the case comes to the Court in the posture that
9 disclosure is required under the FOIA, unless respondents are
10 correct about the proper interpretation of Section 6(b)(1).

11 Now, Section 6(b)(1) applies to public disclosures
12 of information by the Commission. The statute provides that
13 when the Commission proposes to make a public disclosure of
14 information --

15 QUESTION: Could I ask if we agreed with you we just
16 reverse, or is there anything open on remand?

17 MR. BUSCEMI: Yes, we think that --

18 QUESTION: You would think the FOIA question is open
19 on remand?

20 MR. BUSCEMI: That is right.

21 QUESTION: O.K.

22 MR. BUSCEMI: Now, the statute provides that when
23 the Commission proposes to release information from which the
24 public could readily ascertain the identity of a particular
25 consumer product and the manufacturer or labeler of that

1 product the Commission must follow four procedural rules.

2 The first one is that the Commission must notify the
3 affected manufacturer, it must provide him with a summary of
4 the information to be disclosed and it must afford him a
5 reasonable opportunity to comment on that information.

6 The second requirement is that the Commission must
7 take reasonable steps to assure the accuracy of the information.

8 The third requirement is that the Commission must
9 take reasonable steps to insure that disclosure would be fair
10 under the circumstances and reasonably related to effectuating
11 the purposes of the Act.

12 And the fourth requirement is that if the Commission
13 discovers after a disclosure has been made that some of the
14 information disclosed is inaccurate or misleading it must
15 publish a retraction "in a manner similar to that in which the
16 original disclosure was made."

17 QUESTION: Are you referring then, Mr. Buscemi, to
18 the language of 6(b)(1) itself or to the regulation?

19 MR. BUSCEMI: Language of 6(b)(1) itself, Mr. Justice.

20 Now, the Commission's position is that these four
21 requirements of Section 6(b)(1) do not apply when the
22 Commission responds to an FOIA request. Stated in a different
23 way, the Commission believes that Congress did not intend the
24 phrase "public disclosures of information" under Section
25 6(b)(1) to include releases of information in response to the

1 mandatory disclosure provisions of the FOIA.

2 The Commission arrived at this interpretation of the
3 statute that it administers for three principal reasons that
4 I would like to discuss in turn.

5 The first one --

6 QUESTION: Before you get to that, you concede that
7 this interpretation is one of the so-called Skidmore v.
8 Swift & Company type of interpretations where the Commission
9 has not been granted the authority to fill in blanks, it is
10 simply an interpretation by the agency charged with the
11 administration of the statute?

12 MR. BUSCEMI: That is right. And the Commission was
13 confronted with a situation in which it had to decide -- it
14 receives many FOIA requests and it therefore had to decide
15 whether or not, and if so, how Section 6(B)(1) applied in that
16 context. So it was necessarily required to make this kind of
17 interpretation.

18 QUESTION: But it is not as if Congress had authorized
19 the Commission to define particular items or to make rules and
20 regulations pertaining to disclosure which would have taken it
21 outside of the Swift and Skidmore type of regulation and into
22 the simply is it rational type of thing which you frequently
23 find where Congress has left the Commission the job of filling
24 in blanks which it didn't want to fill itself?

25 MR. BUSCEMI: No, I think the critical consideration

1 here is Congressional intent although the Commission is
2 certainly authorized to promulgate regulations to explain how
3 it is going to interpret and apply the statute.

4 Now, the first of the principal reasons or the set
5 of reasons that I want to discuss are the contrasting structure
6 and purpose of the Consumer Products Safety Act on the one
7 hand and the Freedom of Information Act on the other.

8 Now, when Congress used the phrase "public disclosure
9 of information" in Section 6 of the Consumer Products Safety
10 Act it was referring to the sorts of affirmative disclosures
11 made at the Commission's initiative and with the Commission's
12 endorsement that are mandated elsewhere in the Act. The Act
13 taken as a whole makes clear and respondents have never
14 disputed that the primary function assigned to the Commission
15 by statute is the collection, analysis and dissemination of
16 consumer products safety information.

17 We have listed in our brief at pages 15 to 17 a number
18 of the Act's provisions that direct the Commission to make
19 public disclosures or to require such disclosures by others.
20 The most important example of those provisions is Section 5(a)(1)
21 of the Act which directs the Commission to maintain an
22 injury information clearinghouse, to collect, investigate,
23 analyze and distribute injury data and information relating to
24 the causes of death, injury and illness associated with
25 consumer products.

1 The Commission is thus under a statutory obligation
2 to investigate possible safety hazards and to disclose the
3 results of its investigations even if no one asks for those
4 results.

5 And Section 6 of the Act follows immediately after
6 Section 5. And the Commission believes that even the place-
7 ment of the two sections in the statute supports its view that
8 the public disclosures of information to which Section 6
9 refers are those undertaken by the Commission in the perform-
10 ance of its statutory duties. This interpretation makes sense
11 in light of the purpose of the Consumer Products Safety Act,
12 which is to educate the public with respect to product safety
13 hazards.

14 When the Commission makes a public disclosure of
15 the kind described in the Act it wants and expects the
16 consuming public to trust the accuracy of the information
17 disclosed and to rely on it in making purchasing decisions
18 with respect to consumer products.

19 The protections required by 6(b)(1) fit perfectly
20 in this context. Indeed, the statute was designed specifically
21 to protect against the harm that a manufacturer might suffer
22 if the Commission threw its weight behind a public disclosure
23 of information that reflected adversely on a particular
24 product and that subsequently proved to be erroneous. That
25 was the danger that Congressman Crane stressed on the House

1 floor in his discussion of the FTC's treatment of Xerox anti-
2 freeze that we print in the brief at pages 34 and 35, and it
3 was the danger against which the representative of respondent
4 General Electric Company warned when he testified at the
5 House subcommittee hearing on the consumer products safety
6 legislation that --

7 QUESTION: Are you suggesting that that is the only
8 precaution that the Congress took, the retraction?

9 MR. BUSCEMI: I am sorry, Mr. Chief Justice, the
10 retraction is only one of the four requirements in Section
11 6(b)(1).

12 QUESTION: I got the impression you were suggesting
13 this took care of everything.

14 MR. BUSCEMI: No, I didn't mean to do that. I meant
15 to say that the four requirements of Section 6(b)(1) have
16 particular application and the Commission argues exclusive
17 application when the Commission is making an affirmative public
18 disclosure of information. That is the time at which there is
19 some danger that a manufacturer will be injured if the
20 Commission discloses inaccurate or misleading information.
21 And that is why Section 6(b)(1) was included, all four require-
22 ments of Section 6(b)(1).

23 By contrast, when the Commission releases information
24 under the compulsion of an FOIA request the Commission does not
25 vouch for its accuracy. There is no distribution to the public

1 at large, much less is there any expectation or intention that
2 the public will learn of the information or rely on it. And
3 indeed to forestall any such reliance the Commission frequently
4 accompanies FOIA releases with the kind of disclaimer proposed
5 in this case, telling the requester that the information he
6 or she has requested may for one reason or another be mislead-
7 ing.

8 QUESTION: Well, Mr. Buscemi, don't you think that
9 in Chrysler Corporation last year we recognized some difference
10 between agency materials generated by the agency and materials
11 in the possession of the agency which had been furnished by
12 outside suppliers?

13 MR. BUSCEMI: Well, that may be so but it does not
14 in any way detract from the distinction between the FOIA
15 release and the release at the Commission's initiative that
16 I am trying to make here. I mean there may be distinctions
17 between the kinds of information that the Commission possesses
18 but those distinctions are different than the distinction
19 between an FOIA release and a release at the Commission's
20 initiative or with the Commission's approval such as the kinds
21 the Commission is directed to make under the statute.

22 Now, the FOIA applies to all Government agencies.
23 It is not concerned with instructing the public about the
24 dangers of consumer products. It is concerned with opening
25 the processes of Government to public scrutiny and the accuracy

1 of the information in the Government's possession is irrelevant
2 to that purpose.

3 The Commission's only duty under the FOIA, the duty
4 that it shares with every other Government agency, is to release
5 those documents reasonably described in an FOIA request that
6 happen to be within its possession and control.

7 QUESTION: If not, otherwise exempt it?

8 MR. BUSCEMI: Well, the exemptions under the FOIA
9 really give the Commission discretion to make a decision as to
10 whether or not to release them under the FOIA. Now, as this
11 case comes to the Court neither court below has ruled on the
12 question of whether any of this material is exempt from
13 mandatory disclosure. The Commission has determined it is
14 not exempt and I think that that is the premise from which we
15 have to begin here.

16 The only question presented here and the only question
17 decided below is whether Section 6(b)(1) applies in the FOIA
18 context.

19 QUESTION: You mean it hasn't been decided that
20 standing alone the FOIA exempts it?

21 MR. BUSCEMI: That is right, it hasn't been decided
22 that any of the FOIA exemptions are applicable.

23 QUESTION: The Commission has decided that.

24 MR. BUSCEMI: Excuse me?

25 QUESTION: The Commission has made that decision.

1 MR. BUSCEMI: Well, the Commission has. But I mean
2 by either of the courts below.

3 QUESTION: Right.

4 QUESTION: The question is whether some other statute
5 exempts it?

6 MR. BUSCEMI: The question is whether procedures
7 mandated by Section 6(b)(1) must be followed in this context.

8 QUESTION: So you think you must argue the FOIA in
9 order to interpret 6(b) like you are doing --

10 MR. BUSCEMI: The Commission has received FOIA
11 requests. The question is how does the Commission respond,
12 must it follow 6(b)(1) in doing so. So the case only arises
13 because of the FOIA request. That is the context in which we
14 discuss the FOIA.

15 QUESTION: But you seem to be arguing because of the
16 policy of the FOIA and what is trying to do that that bears
17 on how you should construe 6(b).

18 MR. BUSCEMI: Well, the reason for discussing the
19 FOIA is merely to point out that the statute is completely
20 different from the Consumer Products Safety Act and whereas
21 the procedural protections under the Act make sense in the
22 context of the Act they don't make sense in the context of the
23 FOIA which is designed to serve a completely different purpose.

24 QUESTION: Well, what was 6(b) trying to do? You
25 say one thing it is trying to do, I suppose, is to keep the

1 Commission itself from putting its stamp of approval on
2 inaccurate information. But part of that purpose is to keep
3 inaccurate information from being distributed, isn't it, or
4 not?

5 MR. BUSCEMI: Well, the purpose is to keep inaccurate
6 information from being distributed by the Commission at its
7 initiative and with its approval. The FOIA applies to all
8 Government agencies and there are many other Government agencies
9 that have very significant information gathering power, very
10 similar if not broader --

11 QUESTION: But you would think Congress would intend
12 the Commission although if it wanted to put its imprimatur
13 on it that it would have to have a hearing. But if it just
14 wanted to respond to a request from an outsider, it could
15 distribute the most inaccurate information without any safe-
16 guards at all.

17 Do you think Congress intended that?

18 MR. BUSCEMI: Well, it is not a question --

19 QUESTION: The power to gather inaccurate information
20 and then turn it over to anybody?

21 MR. BUSCEMI: Well, it is not a question of what
22 the Commission wants to do, the FOIA request must come in and
23 the Commission is compelled under the FOIA to --

24 QUESTION: You are arguing the FOIA. Let us talk
25 about 6(b), which is the subpoena power.

1 MR. BUSCEMI: Well, 6(b) doesn't give a subpoena
2 power. That is elsewhere in the statute. But the point is
3 that in the Commission's view Section 6(b) --

4 QUESTION: Well, if you want to talk 6(b), why don't
5 we just stick to it?

6 MR. BUSCEMI: Well --

7 QUESTION: And again I ask you, what was 6(b) trying
8 to do? Keep inaccurate information from being distributed, or
9 not?

10 MR. BUSCEMI: It was trying to keep inaccurate
11 information from being distributed by the Commission at its
12 own initiative and with its approval, with the intention that
13 the public should rely on it.

14 When the Commission --

15 QUESTION: Never mind any other kind of distribution
16 under the FOIA, however inaccurate it might be; collect it and
17 distribute it.

18 MR. BUSCEMI: Well, Section 6(b) does not direct the
19 Commission to collect information and distribute it under the
20 FOIA. Section 6(b) applies only to public disclosures of
21 information within the meaning of the Act.

22 Other provisions in the Act direct the Commission --

23 QUESTION: You don't say that this isn't a public
24 disclosure that is at issue.

25 MR. BUSCEMI: We say that a response to an FOIA

1 request is not a public disclosure of information within the
2 meaning of Section 6(b)(1).

3 QUESTION: But the subpoena power is what enables the
4 Consumer Products Safety Commission to have all these supplier
5 information in its hands in order to respond to an FOIA
6 request.

7 MR. BUSCEMI: That is right. And the very same kind
8 of subpoena power, indeed perhaps even greater subpoena power
9 is vested in many other Government agencies, none of whom
10 are required to comply with a provision like Section 6(b)(1).
11 And that is --

12 QUESTION: Well, none of them have 6(b)(1) in it.

13 QUESTION: Assuming that this consumer agency has
14 made a study and has concluded that this microphone is dangerous.
15 and they are just about to release that and they get an FOIA
16 request for it. And FOIA had no responsibility for it, under
17 the regulatory procedure they don't have to comply with Section
18 6(b)?

19 MR. BUSCEMI: That is absolutely right and that is
20 because there is a major difference --

21 QUESTION: Does that seem right to you?

22 MR. BUSCEMI: Well, I think there is a major
23 distinction between letting it out under the Consumer Products
24 Safety Act with the Commission's imprimatur on it telling the
25 public, rely on this, don't use that kind of microphone than

1 there is in releasing it to an FOIA requestor under the
2 compulsion of the FOIA and just saying this is what we have,
3 we don't make any statements with respect to its accuracy at
4 all.

5 QUESTION: Do you really think when it gets out to
6 the public that any significant faction of the public would
7 know whether it did or did not have some kind of approval of
8 the Commission?

9 MR. BUSCEMI: Well, I think that there is no vouching
10 for it by the Consumer Products Safety Commission and any
11 representation that there was is simply something outside of
12 the Commission's control. The Commission has never approved
13 it or said that it was correct.

14 QUESTION: Yes. But when that cat is out of the bag
15 how many people are going to make that kind of analysis of where
16 it came from?

17 MR. BUSCEMI: Well, Mr. Chief Justice, if you simply
18 look at the information that is at issue in this case, we are
19 talking about accident reports, many of which were submitted
20 to the television manufacturers by individual consumers, hand-
21 written letters, very tight letters, "My television exploded,
22 my television caught on fire," this is not the sort of material
23 that is likely to engender public trust just because it is
24 released by the Commission.

25 The point is that the Commission in responding to

1 the FOIA request for this material said absolutely nothing about
2 whether these reports of accidents from individual consumers
3 are accurate or not.

4 QUESTION: But when Congress authorized the
5 Commission to withhold these under certain circumstances, then
6 you are really arguing that in another Act Congress went in the
7 other direction.

8 MR. BUSCEMI: Well, the FOIA exemptions have some
9 application in this context but they have not yet been adjudicated
10 in any way. The respondents have made arguments with respect
11 to the abuse of discretion under the Administrative Procedure
12 Act. They have also made arguments under the Trade Secrets
13 Act. Those are the appropriate arguments, we submit, to be
14 considered in this case. Those are the arguments that would
15 have to be made with respect to any Government agency. Those
16 are the kind of arguments that were considered by this Court
17 in Chrysler v. Brown.

18 QUESTION: Those were rejected by the Commission here,
19 were they not?

20 MR. BUSCEMI: The Commission has found that this
21 material is not exempt from mandatory disclosure under the
22 FOIA, the fact finding is not at issue here, it may be right,
23 it may be wrong. The Commission believes it is correct. And
24 that is precisely the kind of inquiry that ought to be made
25 under the FOIA. It is precisely the kind of inquiry that

1 Congress has regarded as sufficient to protect submitters of
2 information to all other Government agencies. And I think that
3 Chrysler v. Brown demonstrates that it is the kind of require-
4 ment that can protect submitters.

5 QUESTION: Do we know whether the accident reports are
6 accurate or not?

7 MR. BUSCEMI: No, we do not.

8 QUESTION: Well, if they are inaccurate would they be
9 misleading?

10 MR. BUSCEMI: Well, it depends what you mean by
11 "misleading." I think that we know that the respondents
12 received these accident reports from individual consumers.
13 They are accurate and not misleading.

14 QUESTION: Would the requestors have the legal right
15 to republish them?

16 MR. BUSCEMI: Yes.

17 QUESTION: And is there not a danger that that would
18 be misleading if they are inaccurate?

19 MR. BUSCEMI: Well, there is a danger that it would
20 be misleading.

21 QUESTION: This case has been going on for about five
22 years, hasn't it. Why hasn't the Commission up to now made the
23 kind of investigation that would lead to a proper disclosure of
24 this material?

25 MR. BUSCEMI: Well, because, Mr. Justice Stevens,

1 there are over 7,600 accident reports involved in this case
2 and that is one of the points that I would like to address just
3 briefly. There are enormous practical problems involved here
4 in --

5 QUESTION: You don't know whether they are accurate
6 or not.

7 MR. BUSCEMI: -- in going out and finding each
8 individual consumer who has submitted a report, checking his
9 television or her television, making certain that the --

10 QUESTION: There is a substantial risk of inaccuracy
11 and therefore a deception, is there not?

12 MR. BUSCEMI: Well, there is a disclosure, first of
13 all, not to the public at large and not with the Commission's
14 approval. And there is no risk that anyone will think that
15 that Commission puts its imprimatur on these reports, because
16 the Commission has not done so.

17 QUESTION: Do you think it makes much difference to
18 a consumer who reads some publication that there were 4,000
19 accidents of a certain description whether or not the
20 Commission says we agree or we disagree, they just say this
21 material came out of the Commission's files. Isn't there a
22 deception there?

23 MR. BUSCEMI: I think that --

24 QUESTION: Well, that is true of all material turned
25 over by -- in accord with the FOIA, isn't it? FBI reports and --

1 MR. BUSCEMI: Presicely. It is true of material
2 collected by the FTC and the FCC pursuant to those agencies'
3 investigative powers. And that is the critical point here.
4 Congress has provided adequate protections with respect to that
5 material, protections that apply to all Government agencies.
6 6(b)(1) is addressed to a different matter and it involves
7 only public disclosures of information under the Act in the
8 performance of the Commission's duties under the Act.

9 QUESTION: You haven't mentioned, or if you did I
10 missed it, the matter of the definition of what is a TV
11 accident. Has the Commission got a regulation defining what
12 they mean by a TV accident?

13 MR. BUSCEMI: No, Mr. Chief Justice, the Commission
14 does not.

15 QUESTION: Do you think that --

16 MR. BUSCEMI: That is precisely why the Commission
17 proposed to attach a disclaimer to the release of information,
18 stating that there were different recording and collecting
19 procedures followed by the different manufacturers and there-
20 fore the reports submitted by the different manufacturers
21 might differ and be misleading in that way.

22 I would like to save the rest of my time for rebuttal
23 if the Court has no further questions at this time.

24 MR. CHIEF JUSTICE BURGER: Very well.

25 Mr. Segal.

1 ORAL ARGUMENT OF BERNARD G. SEGAL, ESQ.,

2 ON BEHALF OF THE RESPONDENTS

3 MR. SEGAL: Mr. Chief Justice, and may it please the
4 Court:

5 I would like to respond to Justice Stevens' question,
6 because I am afraid it wasn't really answered. And to do so,
7 I need to quote only two sentences and a response in the oral
8 argument in the Third Circuit.

9 Judge Higginbotham asked counsel for the Commission:

10 "So you concede that it" --

11 referring to all this material --

12 "is deceptive, a melange of errors and a whole series
13 of other words which Judge Latchum found. He said it
14 was deceptive, misleading, and he used three or four
15 other words.

16 "Mr. Mutterperl. We have not disputed that,
17 Your Honor. That is correct."

18 And that is a major key.

19 QUESTION: Is that partly related, Mr. Segal, to the lack
20 of a definition of what is a TV accident?

21 MR. SEGAL: Your Honor, it is one of the big problems here,
22 Mr. Chief Justice, that the industry begged the Commission to
23 define what a TV-related accident was. It simply refused.
24 They begged them to define what they meant by various types
25 of things they were asking. They refused. And so you have

1 just what Judge Higginbotham described as a melange of errors.
2 You have some people who gave TV accidents when it happened
3 within the set. You have some TV manufacturers who gave it
4 only if it went beyond the set. And you have some who frankly
5 said that if I were sitting on a sofa and I caused a fire on
6 the sofa, then with respect to the TV that was a TV-related
7 accident.

8 QUESTION: Or if you stumbled over it walking across
9 the room.

10 MR. SEGAL: Yes, or if you suffered hang nail carrying
11 the set.

12 So, Your Honors, for that reason the project director
13 for the Commission in testifying said that he really couldn't
14 say that this was of any use to the public except for a general
15 picture of TV's. He said you couldn't use it for comparison
16 among companies. And the expert that they called upon, he
17 said, well, he didn't see that he would give them much of any-
18 thing to the public in view of the factor. That is in the
19 record and specific, if it please the Court.

20 The facts that were given by the representative of
21 the Commission disregards all of this, which is a basic. He
22 says that we didn't raise Section 6 until very late, it was
23 just an error. We raised that as our first objection to the
24 disclosure of the material. Section 6 is absolutely categorical.
25 It says that if the identity of a manufacturer is to be closed,

1 and only then, if that is to be disclosed, this could all
2 have been completely obliterated from the record if they had
3 simply agreed not to disclose individual manufacturers tied
4 into individual data. Having admitted it wouldn't be any good
5 for comparison, having admitted that it would be a melange of
6 errors, having admitted that each answered in a different way,
7 they categorically refused to put out the testimony without
8 disclosing the manufacturers. Had they done that, we wouldn't
9 be here today. Why they didn't do it, is beyond me, Your
10 Honors.

11 Now, the argument that is used that the Chief Justice
12 addressed himself to, whether when the Commission releases
13 information -- let me take an example. Suppose The New York
14 Times comes to the Commission and says, "Give us this material,"
15 and the Commission gives it. Instead The New York Times goes
16 under the Federal FOIA and asks for the information. What
17 difference can there be in the public conception when that is
18 published?

19 In this case one of the requestors is the Consumers
20 Union. It publishes the consumers reports monthly. What
21 difference will it make when it publishes it? I have read it,
22 it never gives the source, it always gives the facts, it always
23 would state this came from the Commission. What difference is
24 it to the public if he says, "Oh, I got this as an FOIA
25 requestor" or "I got this by asking it directly from the

1 Commission."

2 The Commission is the source, in any event.

3 QUESTION: In republishing what might be released
4 under FOIA, the republisher isn't required to put on a little
5 warning that this may be misleading?

6 MR. SEGAL: Indeed, no agency is permitted to request
7 that or require it. And I might say to Your Honors, I am sure
8 you know the Legal Times of Washington each week publishes a
9 whole list of the FOIA requests. In Pierce & Stevens Judge
10 Feinberg expressly contrasted the industrial nature of the
11 supplier and the single person character of the requestor.

12 You had a very appealing case, Your Honors, and who
13 came to the Commission with not information supplied by others
14 but as a woman who had suffered her house completely burning
15 down, herself being injured and an examination by the agency
16 itself and she said, "Can I have the result of that examination."

17 It was a rather easy case and Judge Feinberg said,
18 "Well, when you have all of these industrials and a person
19 asks for it, isn't it fair to give it to the person."

20 I think he lost sight of the fact that most often --
21 by the way, it is not individuals who go to the FOIA, it is
22 of course industry, it is of course the press, it is of course
23 interested parties, it is of course consumer groups. And as
24 the Chief Justice pointed out to say that it is as an imprimatur
25 if it comes directly from the Commission but it has no

1 imprimatur that goes through the FOIA, even though the
2 Commission hasn't the right to say it comes from the FOIA.
3 It is in my mind, Your Honors, simply to state a fact that
4 beggars belief.

5 Now, as to why it was that Section 6(b)(1) was put
6 into this particular statute, I must say to Your Honors that
7 sometimes doubting the wisdom of Congress, as some of us do,
8 perhaps unwisely, this was one time when it acted with great
9 statesmanship. What happened? The Commission foresaw that
10 it would require, or its particular assignment -- you must
11 remember, if it please the Court, that this came in 1972 when
12 consumerism was enveloping the Nation, and this was an
13 endeavor and the biggest thing the consumers were asking
14 protect the consumer by the Congress to answer that persistent
15 demand, pounding at its doors with representatives crowding
16 its galleries. And the House report, the Commission studiously
17 avoids going into the legislative history. And as our brief
18 discloses, and obviously I won't have time to do it, the
19 House report, the conference reports really answer all of the
20 questions.

21 For example, Mr. Justice Rehnquist, to answer you,
22 there never have been regulations ever issued by the Commission
23 in the eight years that it has been in existence. They issued
24 a form of regulation to be discussed and never issued the
25 regulation. So there is none.

1 The Congress said it recognized that the Commission
2 would need, and now I quote:

3 "The means of gaining access" --

4 this is in the House report --

5 "gaining access to a great deal of information which
6 would not otherwise be available to the public or to
7 government as the quid pro quo" --

8 QUESTION: Mr. Segal, on page 52 of your brief, the
9 last paragraph starts:

10 "Not surprisingly, when the CPSC's 'administrative
11 interpretation' was presented to Judge Latchum in
12 October of 1977, he refused to accord any
13 significant weight to it, nothing that it 'did not
14 arise until after the present controversy began.'"

15 You are suggesting that that was not a matter that
16 had been --

17 MR. SEGAL: Oh, no, that refers to subsequent
18 legislative history which the Commission endeavored. There
19 was an Act of little consequence. It was endeavored to be
20 able to incorporate cities into the Act, and so on. And then,
21 undoubtedly at the request of the Commission, they put in a
22 statement that we intended the Consumer Products Safety Act
23 to apply only to affirmative disclosures, only to their
24 disclosures. It was an endeavor by the Congress, years after
25 the Act, to say what had been meant.

1 Now, as Your Honors well know, the law is crystal
2 clear as pronounced by this Court that you can do that only
3 by legislation. You can do it only by a specific legislative
4 declaration.

5 QUESTION: The brief refers refers to the
6 Commission's "administrative interpretation presented to Judge
7 Latchum."

8 MR. SEGAL: That is correct, Your Honor. The
9 Commission appeared asking that this be incorporated, and I
10 might say that they asked for a specific provision saying
11 what they now are urging. And what do you think happened to
12 it? It died in committee.

13 Can anything be more conclusive?

14 Now, to get back, if you please --

15 QUESTION: Mr. Justice Rehnquist was referring to
16 something that was presented to the judge, the district judge,
17 suggesting that this administrative interpretation was a late
18 bloomer.

19 MR. SEGAL: That was presented to the judge, Your
20 Honor, and is indeed a late bloomer.

21 QUESTION: It was only after this dispute.

22 MR. SEGAL: It was years after the dispute was in the
23 courts.

24 Now, just to get back to what the legislative history
25 shows was the desire under this Act, it said we would need

1 the means of gaining access to a great deal of information
2 which would not otherwise be available to the public or the
3 Government and the quid pro quo for this was Section 6. And
4 I again quote from the House report as to what they felt they
5 gave. They gave detailed requirements and limitations relating
6 to the Commission's authority to disclose information which
7 it acquired in the conduct of its responsibilities under this
8 Act, not gave only if it did it directly, not gave only as to
9 this magic word "affirmative." It didn't say disclosure except
10 through the FOIA. It could well have done that. Section 6
11 does specifically refer to the FOIA. Section 6 does
12 specifically refer to things that could not be disclosed.
13 And it was an amendment to that that the Commission asked in
14 1977 and the Congress just wouldn't pay any attention to it,
15 because that was completely adverse to what they wanted.

16 What they realized was that the industry was unlikely
17 to cooperate and release all this vast data from its files
18 if it felt that the Commission was merely a conduit to the
19 public, whether by FOIA or directly from the Commission.

20 And second, I must say for the Congress that the
21 debates indicate that it recognized that it would be unfair
22 if the names of manufacturers -- and I emphasize to Your Honors
23 that Section 6(b)(1) does not apply unless the name of a
24 manufacturer is clearly named, is given or can be gleaned from
25 the information.

1 If that is not so, then Section 6 has no application
2 whatever.

3 Now, the statutory language itself, this word
4 "public," let me just say to Your Honors in a word the title
5 of Section 552 of FOIA is "Public Information."

6 What do you think is the title of 25(c) of the
7 Consumer Products Safety Act? "Public Information."
8 Identical.

9 What is the title of Section 6 which we are discuss-
10 ing? "Public Disclosure of Information."

11 The Acts use identical "Information." How they can
12 argue that one applies and the other doesn't, really is
13 certainly beyond the language of the Act, it is certainly
14 beyond the legislative history of the Act. And that is
15 categorical and our brief again and again quotes that. And
16 except for having quoted to Your Honors what I think is the
17 most important I will not quote the legislative history any
18 longer, in the interest of time.

19 The problem here is the interaction of two statutes
20 and a kind of endeavor to have the philosophies differentiated
21 by the Commission.

22 In the first place, that cannot be done because of
23 the clear language.

24 Your Honors, all these words that have been used by
25 my friend, this word "affirmative," that is nowhere in the

1 statute. The evidence of exclusivity appears nowhere in
2 this statute. The whole argument is because Congress hasn't
3 introduced the Section 6(b)(1) in the Federal Trade Commission
4 Act, how can there be a Section 6(b)(1) in this Act? Well,
5 it is there. And why the Congress did it is there. And I
6 might say to Your Honors that in my judgment if the Federal
7 Trade Commission Act had been passed under the same pressures
8 of the consumers that this was and there had been the same
9 knowledge, that that is the way they get the information.

10 I am a practicing lawyer, as Your Honors know, and
11 let me tell you, if not for Section 6(b)(1), when RCA asked
12 our advice and we said, "Give them everything they want," we
13 would have said, "Give them nothing." Then what would have
14 happened? Years of litigation would have ensued and years of
15 litigation would have ensued as to every endeavor by the
16 Commission, and that is what Congress recognized in its
17 wisdom. And that is what was avoided here. They got really
18 everything in the files of RCA pertaining to -- we didn't know
19 what, pertaining to anything that remotely relates to it.

20 Now, we could show if they are in conflict rules of
21 statutory construction. I could say to Your Honors, the
22 obvious, since this is a 1972 Act of course it prevails over
23 a 1966 Act. I could say to Your Honors, since this is specific
24 it prevails over the general.

25 But I have tried to give you what I regard as really

1 a very much more basic underlying reason for this Act, because
2 I do believe that the consumers are entitled when you get
3 into this kind of thing. First they are entitled to a different
4 kind of treatment than the Commission gave the whole subject.
5 They are entitled to deliberate consideration. The Commission
6 can't now endeavor to remedy its errors by saying, well, there
7 is no difference, we will just ask for it through the FOIA
8 and then everything will be cleared up, don't worry about the
9 fact that it is deceptive, don't worry about its being a
10 melange of errors, don't worry about its being abysmally
11 unfair to the manufacturers, don't worry about how it could
12 hurt a manufacturer who turned over all his files on the
13 assumption that the Act meant what it said.

14 If the Commission hadn't done that but had acted
15 here deliberately, statesmanlike, we wouldn't be here. And
16 as I said earlier, we wouldn't be here, if it please the Court,
17 if they had simply removed the names of the manufacturers.
18 What use could that be, since the project director said he
19 had to say frankly that it would be no good for that purpose
20 at all. It couldn't be any good for comparisons among
21 companies. And why would you give names of companies, just
22 a kind of obstinacy, just a kind of adherence. Well, this is
23 FOIA so we are in the clear, we don't need to abide by even
24 rules of decency.

25 Now, the Pierce case, Your Honors, was a very

1 compelling case. The Pierce case was a case in which a
2 woman had had her house burned down, had been severely injured,
3 and she asked for the labels to see whether the label on her
4 bottle was the same as the other label. And the Department
5 advised her that there were questions about it, it had an
6 investigation. But we have to go to the manufacturer.

7 Now, I suggest to Your Honors that if that case
8 had not gone the way it did and the information had been
9 supplied, no court in the land would have undone or would have
10 referred that action.

11 And to show you how much Judge Feinberg's emphasis
12 was on the incident and not the law, I might say to Your
13 Honors with the greatest of deference to a court of which I
14 hold the highest regard, I am sure if it rereads that opinion
15 it would not warrant its standing in the legal community to
16 be determined by that opinion. It simply doesn't address the
17 legislative history. It simply doesn't address the questions.
18 But to show you the unitary attitude, I just quote you one
19 statement.

20 "We believe that in this statute affecting
21 only commercial enterprises, Congress did not intend
22 to reduce disclosure called for by the FBI when a
23 person requests documents."

24 Now, a person requested in that case but the case
25 applies if a corporation asks it. If an organization asks it.

1 If the New York Times asks it. And somehow the sympathy for
2 the case, I am afraid, overrode the kind of analysis and the
3 kind of opinion that the Second Circuit has become admired
4 for.

5 Now, Your Honors, there is a great deal I could talk
6 about concerning the language of the courts but I don't see
7 any reason why to take Your Honors' time unless there is a
8 question.

9 MR. CHIEF JUSTICE BURGER: Very well.

10 Mr. Buscemi, do you have anything further?

11 REBUTTAL ARGUMENT OF PETER BUSCEMI, ESQ.

12 ON BEHALF OF THE PETITIONERS

13 MR. BUSCEMI: Thank you, Mr. Chief Justice. I have
14 only two brief points.

15 This case is purely a case of congressional intent.
16 Respondents have not replied to either of two points that the
17 Commission relies on in both of its briefs.

18 The first is respondent has not explained why
19 Congress would have decided to place a provision like Section
20 6(b)(1) in the Consumer Products Safety Act but not in any
21 other statute that creates an agency and empowers an agency
22 to require private parties to produce information submitted to
23 the agency.

24 All Government agencies are subject to the FOIA and
25 that includes Government agencies created by statutes even after

1 1972 when there has been this atmosphere of avoiding over-
2 regulation. The Commodities Futures Trading Commission is just
3 one example.

4 And there is no indication anywhere in respondent's
5 argument or in the brief what the explanation would be for
6 applying 6(b)(1) to the Consumer Products Safety Commission
7 alone.

8 Moreover, there is a second point where there is no
9 explanation.

10 There is something special about the Consumer
11 Products Safety Commission and that is that it has this
12 obligation to make disclosures to the public. That is why
13 Section 6(b)(1) has to be there, because that is why the
14 Consumer Products Safety Commission is different.

15 QUESTION: The question is what kind of disclosures
16 and under what limitations, isn't it, under the Consumer Safety
17 Act?

18 MR. BUSCEMI: That is right.

19 QUESTION: Which is quite different from FOIA. FOIA
20 has no concern in that area.

21 MR. BUSCEMI: That is right and that is why we say
22 6(b)(1) under the FOIA.

23 QUESTION: Let me see if I have got it clear.

24 In the Pierce case you had a situation where the
25 woman used a cleaning fluid, if I have that case correctly, and

1 that caused a fire and burned down her home and injured her.
2 Now, that would clearly be reported as an accident of some
3 kind.

4 Now, suppose the housewife is watching television in
5 the morning and forgets to turn off her oven and not only burns
6 the cake but sets the house afire, would that be conceivably
7 reported as a TV-related accident?

8 MR. BUSCEMI: I don't see how, Mr. Chief Justice.

9 QUESTION: Well, then how did they report the fellow
10 who got the hernia because he lifted his heavy television set;
11 was that a TV-related accident?

12 MR. BUSCEMI: That was submitted to the Commission by
13 one of the manufacturers. Why they submitted it, I don't
14 know. I mean the Commission is not responsible --

15 QUESTION: Perhaps they did it in an abundance of
16 caution, because the Commission has declined apparently to define
17 what they mean by an accident.

18 MR. BUSCEMI: The Commission did state to the
19 manufacturers that it wanted them to submit the broadest possible
20 spectrum of materials, that they would be the largest possible
21 data base to determine whether there should be a proceeding
22 initiated to promulgate a safety rule related to television
23 sets.

24 The Commission did not say to report every accident
25 that occurred any time a television was on within a hundred feet

1 or something. I mean it just was not done.

2 I want to just briefly mention the second point that
3 I had and that is I would like to direct the Court's attention
4 to the 1976 amendment to the Act in Section 29(e). This is
5 discussed in our brief and I don't have time to go into it
6 but I submit to the Court that the conference committee report
7 of that section makes it absolutely clear that Congress
8 believes that there is no obligation to comply with the
9 procedures in Section 6(b)(1) when the Commission or another
10 Federal agency responds to an FOIA request.

11 Thank you.

12 MR. CHIEF JUSTICE BURGER: Thank you gentlemen. The
13 case is submitted.

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