



U.S. Chamber of Commerce

1615 H Street, NW
Washington, DC 20062-2000
uschamber.com

December 2, 2021

VIA EMAIL: FOIA@FTC.GOV

Freedom of Information Act Request
Office of General Counsel
Federal Trade Commission
Washington, DC 20580

RE: Freedom of Information Act Request; Expedited Treatment Requested

To Whom it May Concern:

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552, and 16 C.F.R. § 4.11, the U.S. Chamber of Commerce (“the Chamber”) hereby requests the following information:

All records related to counting votes of Former Commissioners for a period of time after their departure from the Commission. This request includes, but is not limited to, any legal analysis performed or received by the FTC; any and all internal guidance or rules governing voting procedures; how long the agency counts votes following a Commissioner’s departure and what actions can extend or reopen a motion to vote; the history of this practice; any communications between the FTC and the White House; and any press statements or drafts of press statements. The timeframe for this request is November 23, 2020 (the start of the presidential transition period) to the present. The term “records” as used in this request includes emails, handwritten or typed notes, phone calls, meeting minutes, meeting agendas, calendar entries, electronic chats, instant messages, encrypted or self-destructing messages, messages sent via Facebook messenger, text messages, voice messages, and other hard copy documents stored on official or personal devices.

We further request that the FOIA officer responsible for the processing of this request issue an immediate hold on all records responsive, or potentially responsive, to this request, so as to prevent their disposal until such time as a final determination has been issued on the request and any administrative remedies for appeal have been exhausted.

In an effort to facilitate document review, please provide the responsive documents in electronic form in lieu of a paper production. If a certain portion of responsive records can be produced more readily, I request that those records be produced first and the remaining records be produced on a rolling basis as circumstances permit.

The Chamber requests a fee waiver because disclosure of this information is in the public interest as it is likely to contribute significantly to public understanding of the operations or activities of the government. The Chamber is a non-profit organization organized under Section 501(c)(6) of the Internal Revenue Code. Disclosure of this information is not primarily in the Chamber’s commercial interest because it seeks to use this

information to educate itself and the public about the FTC's ongoing activities. *See* 16 C.F.R. § 4.8(e)(2). The FTC's activities affect a broad swath of the United States economy and business entities across the country—many of whom are members of the Chamber. The disclosure of these documents will allow the Chamber, its members, and the public to better understand the FTC's recent and future activities and the potential impact of these actions. If this request for a fee waiver is denied, the Chamber is willing to pay fees up to \$2,500.

The Chamber also requests expedited treatment of this request because the Chamber's mission involves disseminating information—to both its membership and the public—regarding economic issues in the United States, especially as they relate to the Federal Government. The FTC's actions impact the Chamber's members and other members of the public. *See* 16 C.F.R. § 4.11(a)(1)(G). The Chamber must be able to provide information regarding the FTC's activities to its members given their significant impact—so its members may comply with new regulations and policies, so they may protect their rights, and so they may order their own affairs. The impact of these actions is far-reaching, requiring the urgent release of documents and information related thereto in order to understand the FTC's activities and their potential impact on the Chamber's members.

Federal law requires that the FTC produce these records within twenty (20) business days or, in unusual circumstances, within thirty (30) business days. *See* 5 U.S.C. § 552(a)(6)(A)-(B); *see also* 16 C.F.R. § 4.11(a)(1)(ii). If the Chamber's request is denied in whole or in part, please justify all denials by reference to specific exemptions under the FOIA.

If you have any questions about this request, please contact me by email. Thank you for your prompt attention to this matter.

Sincerely,



Sean Heather
Senior Vice President
International Regulatory Affairs & Antitrust
U.S. Chamber of Commerce
(202) 463-5368
SHeather@USChamber.com



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

January 10, 2022

Mary Carter
US Chamber of Commerce
1615 H Street, NW
Washington, DC 20062

Re: FOIA-2022-00324

Dear Ms. Carter:

This is in response to your request dated December 2, 2021 under the Freedom of Information Act seeking access to:

All records related to counting votes of Former Commissioners for a period of time after their departure from the Commission. This request includes, but is not limited to, any legal analysis performed or received by the FTC; any and all internal guidance or rules governing voting procedures; how long the agency counts votes following a Commissioner's departure and what actions can extend or reopen a motion to vote; the history of this practice; any communications between the FTC and the White House; and any press statements or drafts of press statements. The timeframe for this request is November 23, 2020 (the start of the presidential transition period) to the present. The term "records" as used in this request includes emails, handwritten or typed notes, phone calls, meeting minutes, meeting agendas, calendar entries, electronic chats, instant messages, encrypted or self-destructing messages, messages sent via Facebook messenger, text messages, voice messages, and other hard copy documents stored on official or personal devices.

Your request did not indicate an agreement to pay any fees associated with the processing of your request. In the future, please provide a fee agreement to facilitate the processing of your request.

Your request creates an undue burden on the agency because it creates an unreasonable hardship for the agency to process, even if the specificity requirements are met. *See Nat'l Sec. Counselors v. CIA*, 960 F. Supp. 2d 101, 147 (D.D.C. 2013) (quoting *Am. Fed'n of Gov't Emps., Local 2782 v. U.S. Dept. of Commerce*, 907 F.2d 203, 209 (D.C. Cir. 1990)). The courts have opined that even if a request reasonably describes the records being sought, the request can still be considered improper if the request is "so broad as to impose an unreasonable burden upon the agency." *Id.*

Overbroad and unreasonably burdensome requests are considered invalid because "FOIA was not intended to reduce government agencies to full-time investigators on behalf of

requesters.” *Ass’n Archives & Research Ctr., Inc. v. CIA*, 720 F. Supp. 217, 219 (D.D.C. 1989). Even if the request meets the FTC FOIA “precise description” requirement, it can still be unduly burdensome on the agency to process. Therefore, we are denying your request.

If you have any questions about the way we are handling your request or about the FOIA regulations or procedures, please contact Anthony Ellis at rellis@ftc.gov. If you are not satisfied with this response to your request, you may appeal by writing to Freedom of Information Act Appeal, Office of the General Counsel, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580, or via email at FOIAAppeal@ftc.gov, within 90 days of the date of this letter. Please enclose a copy of your original request and a copy of this response.

You also may seek dispute resolution services from the FTC FOIA Public Liaison Richard Gold via telephone at 202-326-3355 or via e-mail at rgold@ftc.gov; or from the Office of Government Information Services via email at ogis@nara.gov, via fax at 202-741-5769, or via mail at Office of Government Information Services (OGIS), National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740. Please note that the FOIA Public Liaison’s role relates to comments, questions or concerns that a FOIA Requester may have with or about the FOIA Response.

Sincerely,

A handwritten signature in cursive script that reads "Dione J. Stearns".

Dione J. Stearns
Assistant General Counsel



January 14, 2022

VIA EMAIL (FOIAAppeal@ftc.gov)

Freedom of Information Act Appeal
Office of the General Counsel, Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

RE: Freedom of Information Act Appeal in Case No. FOIA-2022-00324

To Whom it May Concern:

Pursuant to 16 C.F.R. § 4.11, the Chamber of Commerce of the United States of America (“Chamber”) appeals the determination of Assistant General Counsel Dione Stearns (dated January 10, 2022) regarding the Freedom of Information Act (“FOIA”) request identified above (dated December 2, 2021). The Chamber filed a specific, tailored, and reasonable FOIA request, yet the Commission simply refused to process it. The FTC should promptly reverse this determination.

As explained further below, the Chamber sought the release of all records from a one-year period related to counting the votes of Former Commissioners. That request is specific, seeking a discrete set of documents. That request is narrow, seeking only documents from November 23, 2020, to December 2, 2021. Yet the Commission refused even to *respond*—summarily claiming that answering the request would take too much work. This is the second time in two weeks that the Commission has flouted its obligations under FOIA and refused to provide the transparency that the public deserves and the law demands. We trust you will put an end to this stonewalling, reverse this baseless denial, and direct the processing of the Chamber’s request forthwith. If the FTC refuses to provide transparency on its own, we are confident the courts will require it to.

In the Chamber’s December 2, 2021 FOIA request, we sought the following:

All records related to counting votes of Former Commissioners for a period of time after their departure from the Commission. This request includes, but is not limited to, any legal analysis performed or received by the FTC; any and all internal guidance or rules governing voting procedures; how long the agency counts votes following a Commissioner’s departure and what actions can extend or reopen a motion to vote; the history of this practice; any communications between the FTC and the White House; and any press statements or drafts of press statements. The timeframe for this request is November 23, 2020 (the start of the presidential transition period) to the present. The term “records” as used in this request includes emails, handwritten or typed notes, phone calls, meeting minutes, meeting agendas, calendar entries, electronic chats, instant messages, encrypted or self-destructing

messages, messages sent via Facebook messenger, text messages, voice messages, and other hard copy documents stored on official or personal devices.

December 2, 2021 FOIA Request, Ex. A.

As simply reading this request makes clear, the Chamber sought a discrete and straightforward category of records—those related to counting the votes of Former Commissioners—over a limited period of just over one year. Rather than process this request as FOIA requires, on January 3, 2022, Assistant General Counsel Stearns invoked “exceptional circumstances” to give the Commission additional time to respond, and then proceeded to summarily deny the request as overly burdensome. In the denial letter’s words, the “request creates an undue burden on the agency because it creates an unreasonable hardship for the agency to process, even if the specificity requirements are met.” January 10, 2022 Stearns Letter, Ex. B. Assistant General Counsel Stearns’s letter provided no explanation for why processing this request creates an “undue burden,” nor did Assistant General Counsel Stearns say whether the Commission even attempted to process the request—over the course of the month that the request was pending—before concluding that processing it would be too much trouble.

* * *

The Commission’s refusal to process the Chamber’s request is unfounded and should be reversed. Without waiving any other bases for disclosure of the material that the Chamber requested, reversal is required because the Chamber’s request was not unduly burdensome. The Chamber requested records on a single topic in a date range of just over one year. The bulk of these records—procedural rules, internal and external emails, text messages, and the like—are almost certainly stored electronically and can thus be easily located through searches of computers and mobile phones.

FOIA is a vital statute that provides “a means for citizens to know what their Government is up to.” *Pub. Emps. for Env’t Resp. v. U.S. Env’t Prot. Agency*, 314 F. Supp. 3d 68, 73 (D.D.C. 2018) (cleaned up). It “was enacted to promote the broad disclosure of Government records by generally requiring federal agencies to make their records available to the public on request.” *Id.* To this end, FOIA requires that agencies make “promptly available to any person” records that are not otherwise exempt in response to “any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed” 5 U.S.C. § 552(a)(3)(A).

FOIA imposes an extremely heavy burden on agencies who seek to deny FOIA requests because the requests are too burdensome to answer. Such agencies “bear[] the burden to provide [a] sufficient explanation as to why such a search would be unreasonably burdensome.” *Ayuda, Inc. v. FTC*, 70 F. Supp. 3d 247, 275 (D.D.C. 2014). This is a “substantial” burden for the agency to carry. *Tereshchuk v. Bureau of Prisons*, 67 F. Supp. 3d 441, 455–56 (D.D.C. 2014).

-2-

Assistant General Counsel Stearns’s summary denial of the Chamber’s request provides no explanation for the Commission’s denial and thus comes nowhere close to carrying the agency’s significant burden of establishing an unreasonable burden. Courts have consistently refused to find that a request is unreasonably burdensome based on an agency’s “conclusory statements,” *Hall v. CIA*, 881 F.Supp.2d 38, 53 (D.D.C. 2012)—requiring instead that an agency “articulate its reasons for nondisclosure ‘with reasonably specific detail,’” *Shapiro v. Cent. Intelligence Agency*, 170 F. Supp. 3d 147, 156 (D.D.C. 2016) (citation omitted). But “conclusory statements” are all that Assistant General Counsel Stearns provided. For that reason alone, reversal is required.

Even if the Commission had tried to explain, though, it is clear that there would be no basis to deem the Chamber’s request unduly burdensome. *First*, the Chamber’s request seeks nothing close to an unreasonable volume of documents. The “dominant objective of FOIA is disclosure,” and courts are accordingly “skeptical that a FOIA request may be denied based on sheer volume of records requested alone.” *Keeping Gov’t Beholden, Inc. v. Dep’t of Just.*, 2021 WL 5918627, at *6 (D.D.C. Dec. 13, 2021) (citing *Yeager v. DEA*, 678 F.2d 315, 322, 326 (D.C. Cir. 1982)). Again, the Chamber’s request seeks a discrete set of documents related to the narrow topic of “counting votes of Former Commissioners for a period of time after their departure from the Commission.” December 2, 2021 FOIA Request, Ex. A. That request is unlikely to yield an avalanche of records and is well within the norms of FOIA—a statute that, in any event, “‘puts no restrictions on the quantity of records that may be sought.’” *Tereshchuk*, 67 F. Supp. 3d at 454; *see also, e.g.*, Dep’t of Justice, Office of Info. Privacy, *FOIA Update Vol. IV, No. 3*, at 5 (1983) (“The sheer size or burdensomeness of a FOIA request, in and of itself, does not entitle an agency to deny that request on the ground that it does not ‘reasonably describe’ records”).

Second, the Chamber’s request seeks documents that are almost certainly stored electronically—another reason the request is not unduly burdensome. Performing electronic searches of computers and mobile phones is much less time consuming than digging through dusty boxes for paper files. Courts have recognized as much, rejecting claims of an unreasonable burden where “emails and their attachments can be searched using an eDiscovery tool without needing to open each email and its attachments individually.” *Leopold v. National Security Agency*, 196 F. Supp. 3d 67, 75 (D.D.C. 2016).

Finally, a legion of judicial decisions have rejected agency attempts to deny FOIA requests as unreasonably burdensome in circumstances involving requests that were far more burdensome than the Chamber’s. For example, courts have found that requests are not unduly burdensome when processing them would require:

- searching documents for “roughly 2,200 hours,” *Kwoka v. Internal Revenue Serv.*, 2018 WL 4681000, at *5 (D.D.C. Sept. 28, 2018);
- reviewing 24,840 pages of information, *Tereshchuk*, 67 F. Supp. 3d at 455;

- reviewing 1,212 pages of manuals, *Brown v. Washington Metro. Area Transit Auth.*, 2020 WL 806197, at *10 (D.D.C. Feb. 18, 2020); or
- searching through nearly 17,0000 hard-copy file folders. *Hall v. C.I.A.*, 881 F. Supp. 2d 38 (D.D.C. 2012).

The Chamber's request is far more limited than any of these.

* * *

Sunshine is the best disinfectant and Congress enacted FOIA to prohibit agencies like the FTC from operating in the shadows. The FTC's refusal thus far to comply with that vital transparency statute does a disservice to the public and the rule of law. We trust that you will follow the law and promptly remedy this error.

Sincerely,



Daryl Joseffer
Executive Vice President and Chief Counsel
U.S. Chamber Litigation Center
U.S. Chamber of Commerce
1615 H Street, NW
Washington, D.C. 20062
202-463-5495 (phone)
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DJoseffer@USChamber.com



Office of the General Counsel

~

Elizabeth Tucci

Deputy General Counsel for Legal Counsel

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

February 14, 2022

Sent Via Email

Daryl Joseffer
U.S. Chamber of Commerce
1615 H Street, NW
Washington, DC 20062
DJoseffer@USChamber.com

Re: Freedom of Information Act (“FOIA”) Appeal | FOIA Request No. 2022-00324

Dear Mr. Joseffer:

I am writing as the official designated to review FOIA appeals for the Federal Trade Commission (“FTC”).

On December 2, 2021, you submitted a request to the FTC FOIA Unit seeking the following information:

All records related to counting votes of Former Commissioners for a period of time after their departure from the Commission. This request includes, but is not limited to, any legal analysis performed or received by the FTC; any and all internal guidance or rules governing voting procedures; how long the agency counts votes following a Commissioner’s departure and what actions can extend or reopen a motion to vote; the history of this practice; any communications between the FTC and the White House; and any press statements or drafts of press statements. The timeframe for this request is November 23, 2020 (the start of the presidential transition period) to the present. The term “records” as used in this request includes emails, handwritten or typed notes, phone calls, meeting minutes, meeting agendas, calendar entries, electronic chats, instant messages, encrypted or self-destructing messages, messages sent via Facebook messenger, text messages, voice messages, and other hard copy documents stored on official or personal devices.¹

On January 10, 2022, Assistant General Counsel Dione J. Stearns closed your request as improper because of the “undue burden” it placed on the FTC.²

¹ 2022-00324 Initial Request dated Dec. 2, 2021.

² 2022-00324 Final Determination Letter dated Jan. 10, 2022.

On January 14, 2022, you submitted a timely appeal, contesting the FTC’s “unduly burdensome” determination.³ You state that your initial request was narrowly tailored to one category of records related to counting the votes of former Commissioners, and the time period was limited to a one year period.⁴

A FOIA request is categorized as an “undue burden” if it would create an unreasonable hardship for the agency to process, even if the specificity requirements are met.⁵ Overbroad and unreasonably burdensome requests are considered invalid because “FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters.”⁶ However, even if a request reasonably describes the records being sought, the request can still be considered improper if the request is “so broad as to impose an unreasonable burden upon the agency.”⁷

After reviewing your initial FOIA request, I agree that it does not rise to the “undue burden” standard. Therefore, I am granting your appeal and remanding to the FOIA Unit with instructions to perform the necessary searches to uncover responsive records. Please note, however, that FOIA exemptions may apply to any responsive records reviewed on remand. If you would like to inquire about the status of this remanded request or to receive an estimated date of completion, please contact Anthony Ellis at rellis@ftc.gov.

If you are dissatisfied with my action on your appeal, FOIA permits you to file a lawsuit in accord with 5 U.S.C. § 552(a)(4)(B), in a United States District Court in the district where you reside or have your principal place of business, or in the District of Columbia.

Finally, I note that the 2007 FOIA amendments created the Office of Governmental Information Services (“OGIS”) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. *See* <https://ogis.archives.gov>. Using OGIS services does not affect your right to pursue litigation. OGIS’s contact information is as follows:

³ Daryl Joseffer Appeal re: 2022-00324 dated Jan. 14, 2022.

⁴ *Id.*

⁵ *See Nat’l Sec. Counselors v. CIA*, 960 F. Supp. 2d 101, 147 (D.D.C. 2013) (quoting *Am. Fed’n of Gov’t Emps., Local 2782 v. U.S. Dep’t. of Commerce*, 907 F.2d 203, 209 (D.C. Cir. 1990)); *see also Yeager v. DEA*, 678 F.2d 315 (D.C. Cir. 1982).

⁶ *Ass’n Archives & Research Ctr., Inc. v. CIA*, 720 F. Supp. 217, 219 (D.D.C. 1989); *see also Blakey v. Dep’t of Justice*, 549 F.Supp. 362 (D.D.C. 1982), *aff’d* 720 F.2d 215 (D.C. Cir. 1983) (Agencies are not required to maintain their records or perform searches which are not compatible with their own document retrieval systems).

⁷ *See* cases cited *supra* note 5.

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road – OGIS
College Park, MD 20740-6001
ogis@nara.gov
phone: 202-741-5770, or toll-free 1-877-684-6448
fax: 202-741-5769.

Sincerely,

Elizabeth Tucci
Deputy General Counsel for Legal Counsel



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

March 18, 2022

Mary Carter
US Chamber of Commerce
1615 H Street, NW
Washington, DC 20062

Re: FOIA-2022-00611 (Remand of FOIA-2022-00324)

Dear Ms. Carter:

This is in response to your request dated December 2, 2021, under the Freedom of Information Act seeking access to:

All records related to counting votes of Former Commissioners for a period of time after their departure from the Commission. This request includes, but is not limited to, any legal analysis performed or received by the FTC; any and all internal guidance or rules governing voting procedures; how long the agency counts votes following a Commissioner's departure and what actions can extend or reopen a motion to vote; the history of this practice; any communications between the FTC and the White House; and any press statements or drafts of press statements. The timeframe for this request is November 23, 2020 (the start of the presidential transition period) to the present. The term "records" as used in this request includes emails, handwritten or typed notes, phone calls, meeting minutes, meeting agendas, calendar entries, electronic chats, instant messages, encrypted or self-destructing messages, messages sent via Facebook messenger, text messages, voice messages, and other hard copy documents stored on official or personal devices.

In accordance with the FOIA and agency policy, we have searched our records February 14, 2022.

The Commission's fee regulations specify that fees less than \$25 will be waived. *See* 16 C.F.R. § 4.8(b)(4). Because the fees associated with the processing of your request did not exceed \$25, we have processed your request free of charge.

We have located 564 pages of responsive records. In consideration of the foreseeable harm standard, I am granting partial access to the accessible records. *See* 5 U.S.C. § 522(a)(8)(A)(1). Portions of these pages fall within one or more of the exemptions to the FOIA's disclosure requirements, as explained below.

Some of the records contain staff analyses, opinions, and recommendations. Those portions are deliberative and pre-decisional and are an integral part of the agency's decision-making process. They are exempt from the FOIA's disclosure requirements by FOIA Exemption 5, 5 U.S.C. § 552(b)(5). *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975). Additionally, the records also contain information prepared by an attorney in contemplation of litigation which is exempt under the attorney work-product privilege.

Some records are exempt from disclosure under FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A), because disclosure of that material could reasonably be expected to interfere with the conduct of the Commission's law enforcement activities. *See Robbins Tire & Rubber Co. v. NLRB*, 437 U.S. 214 (1978).

Additional information regarding your request can be found in the Office of the Secretary Procedures Manual and the Policy regarding Counting Votes of Departing and Arriving Commissioners provided on the Frequently Requested FOIA Records page at www.ftc.gov.

If you have any questions about the way we handled your request or about the FOIA regulations or procedures, please contact Anthony Ellis at rellis@ftc.gov.

If you are not satisfied with this response to your request, you may appeal by writing to Freedom of Information Act Appeal, Office of the General Counsel, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580, or via email at FOIAAppeal@ftc.gov, within 90 days of the date of this letter. Please enclose a copy of your original request and a copy of this response.

You also may seek dispute resolution services from the FTC FOIA Public Liaison Richard Gold via telephone at 202-326-3355 or via e-mail at rgold@ftc.gov; or from the Office of Government Information Services via email at ogis@nara.gov, via fax at 202-741-5769, or via mail at Office of Government Information Services (OGIS), National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740. Please note that the FOIA Public Liaison's role relates to comments, questions or concerns that a FOIA Requester may have with or about the FOIA Response. The FOIA Public Liaison's role does not relate to taking action in matters of private controversy nor can he resolve individual complaints.

Sincerely,



Dione J. Stearns
Assistant General Counsel



May 23, 2022

VIA EMAIL (FOIAAppeal@ftc.gov)

Freedom of Information Act Appeal
Office of the General Counsel, Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

RE: Freedom of Information Appeal in Case No. FOIA-2022-00611 (Remand of FOIA-2022-00324)

Pursuant to 16 C.F.R. §4.11, the Chamber of Commerce of the United States of America (“Chamber”) appeals the determination of Assistant General Counsel Dione Stearns (dated March 18, 2022) regarding the Freedom of Information Act (“FOIA”) request identified above (dated December 2, 2021).

The Chamber submitted the following request to obtain all records from a limited timeframe relating to the Commission’s practice of counting the votes of Former Commissioners.

All records related to counting votes of Former Commissioners for a period of time after their departure from the Commission. This request includes, but is not limited to, any legal analysis performed or received by the FTC; any and all internal guidance or rules governing voting procedures; how long the agency counts votes following a Commissioner’s departure and what actions can extend or reopen a motion to vote; the history of this practice; any communications between the FTC and the White House; and any press statements or drafts of press statements. The timeframe for this request is November 23, 2020 (the start of the presidential transition period) to the present. The term “records” as used in this request includes emails, handwritten or typed notes, phone calls, meeting minutes, meeting agendas, calendar entries, electronic chats, instant messages, encrypted or self-destructing messages, messages sent via Facebook messenger, text messages, voice messages, and other hard copy documents stored on official or personal devices.

Ex. A, at 1 (FOIA Request).

Initially, Assistant General Counsel Dione J. Stearns concluded that the Chamber’s request was unreasonably burdensome. Ex. B, at 1-2 (Initial Denial). The Chamber timely appealed. Ex. C, at 1-4 (Appeal Letter). And this Office agreed that the blanket assertion of burden was erroneous and remanded to perform the necessary searches to find the records responsive to the Chamber’s request. Ex. D, at 2 (Appeal Decision).

On remand, on March 18, 2022, Assistant General Counsel Stearns stated that 564 pages of responsive records were located. Ex. E, at 1 (Remand Determination). Assistant General

Counsel Stearns produced 72 pages of records, which included a few pages of media reports, Congressional letters, and the Chamber’s appeal regarding this request. Assistant General Counsel Stearns withheld the rest of the records after invoking Exemption 5 (deliberative-process privilege, attorney-client privilege, and work-product privilege) and Exemption 7(A) (law-enforcement activities). *Id.* at 1-2.

Without waiving any other bases for disclosure of the material the Chamber requested, there are at least four reasons why the responsive documents in the Commission’s possession must be produced. First, the invocation of Exemption 5 based on the deliberative-process privilege is dubious because the Chamber has requested documents that are neither deliberative nor pre-decisional. Second, the Remand Determination’s reliance on Exemption 5 based on attorney-client or attorney-work-product privilege is unpersuasive because the Chamber’s request implicates records that are outside those privileges. Third, the Remand Determination’s conclusory assertion regarding Exemption 7 based on purported law enforcement activities lacks any force. Finally, the Remand Determination has categorically failed to make segregability findings, let alone produce reasonably segregable records.

* * *

1. The Remand Determination’s invocation of Exemption 5 based on the deliberative-process privilege is dubious. There are two elements to the deliberative-process privilege. The material must be pre-decisional and deliberative. *See Petroleum Info. Corp. v. U.S. Dep’t of Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992). “Deliberative” means “the give-and-take of the consultative process.” *Id.* “Pre-decisional” means before “an agency decisionmaker ... arriv[ed] at his decision,” rather than materials used after the decision was made “to support a decision already made.” *Id.* (cleaned up). Moreover, “factual information generally must be disclosed, but materials embodying officials’ opinions are ordinarily exempt.” *Id.* at 1434. Here, as a threshold matter, other than a conclusory assertion, the Remand Determination fails to explain how the withheld documents are deliberative and pre-decisional. This alone was error. In addition, any records pertaining to the rules, processes, and procedures concerning counting the votes of Former Commissioners must have been decided and set prior to the Commission counting the votes of Former Commissioners. And any background or factual information on the votes contained in the records and communications that were generated during the limited timeframe cannot be exempt to the extent that they are not connected to any specific agency decisions. Moreover, any records and communications containing background or factual information that were generated after specific agency decisions, by definition, are *post*-decisional and cannot be withheld under Exemption 5.

2. The Remand Determination’s reliance on Exemption 5 based on the attorney-client and work-product privileges is also unfounded. To invoke the attorney-client privilege, the agency must show that the document it seeks to withhold “(1) involves ‘confidential communications between an attorney and client’ and (2) relates to ‘a legal matter for which the client sought professional advice.’” *Jud. Watch, Inc. v. U.S. Postal Serv.*, 297 F. Supp. 2d 252, 267 (D.D.C. 2004) (quoting *Mead Data Cent.*, 566 F.2d at 252). And to invoke the work-product privilege, the agency must show that a document was prepared “in contemplation of litigation.” *Id.* at 268. But it does not protect “every written document generated by an attorney.” *Id.* (quoting *Senate of P.R. v. U.S. Dep’t of Just.*, 823 F.2d 574, 586 (D.C. Cir. 1987)).

Here, the Remand Determination’s invocation of the attorney-client and work-product privileges is woefully insufficient. There is hardly any reasoning or explanation provided to justify the invocation of these privileges. *See, e.g., Am. Oversight v. U.S. Gen. Servs. Admin.*, 311 F. Supp. 3d 327, 344 (D.D.C. 2018) (requiring “a fulsome explanation with sufficient information” regarding attorney-client privilege); *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep’t of Just.*, 955 F. Supp. 2d 4, 20 (D.D.C. 2013) (“Exemption 5 requires that the agencies make a good-faith effort to describe the nature of each individual document and the particular circumstances that make its use in litigation foreseeable.”). This alone was error.

Furthermore, the Chamber’s requests do not implicate these privileges. Its request focuses on records regarding the counting of votes of Former Commissioners within a limited timeframe—a factual matter. *See Cause of Action Inst. v. U.S. Dep’t of Just.*, 330 F. Supp. 3d 336, 348 (D.D.C. 2018) (rejecting claims of privilege when the information could not “even be fairly construed as a solicitation of legal advice”). The burden is on the Commission to show that the documents it seeks to withhold implicate (1) *legal* advice sought by a client (2) in a confidential communication. *See Jud. Watch*, 297 F. Supp. 2d at 267; *see also Cause of Action Inst.*, 330 F. Supp. 3d at 348 (the “primary purpose” must be securing legal advice). The failure to prove any of these elements is fatal to the attorney-client privilege. And there’s little indication that the requested records will implicate documents generated in anticipation of litigation. Rather, the Remand Determination appears to have erroneously understood the work-product privilege as a blanket shield that exempts every document generated by an attorney. *But see Jud. Watch*, 297 F. Supp. 2d at 267.

3. The Remand Determination’s invocation of Exemption 7(A) also falls short. FOIA exempts from disclosure “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information could reasonably be expected to interfere with enforcement proceedings.” 5 U.S.C. §552(b)(7)(D). To justify withholding, the agency must show that “disclosure (1) could reasonably be expected to interfere with (2) enforcement proceedings that are (3) pending or reasonably anticipated.” *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep’t of Just.*, 746 F.3d 1082, 1096 (D.C. Cir. 2014). (quoting *Mapother v. Dep’t of Just.*, 3 F.3d 1533, 1540 (D.C. Cir. 1993)). “[I]t is not sufficient for the agency to simply assert that disclosure will interfere with enforcement proceedings; ‘it must rather demonstrate *how* disclosure’ will do so.” *Id.* at 1098 (quoting *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1114 (D.C. Cir. 2007)). Here, the Remand Determination fails to justify the invocation of Exemption 7(A). This alone constituted error. Furthermore “[i]n the typical case ..., the requested records relate to a specific individual or entity that is the subject of the ongoing investigation, making the likelihood of interference readily apparent.” *Id.* But here, the Chamber requests, in part, information regarding the Commission’s rules and procedures concerning counting the votes. Such information cannot be shielded from disclosure under Exemption 7(A). In addition, any background or factual information contained in the records would not be exempt to the extent they are unconnected to any law enforcement proceedings.

4. Even if some of the information contained in the requested records were exempt from disclosure, the Commission has an obligation to segregate and produce all nonprivileged material. The statute does not mince words: “Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt.” 5 U.S.C. § 552(b). The general rule has long been that “non-exempt portions of a document must be

disclosed unless they are inextricably intertwined with exempt portions.” *Kimberlin v. Dep’t of Just.*, 139 F.3d 944, 949 (D.C. Cir. 1998) (quoting *Mead Data Cent., Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977)); *cf. Smith v. Sessions*, 247 F. Supp. 3d 19, 28 (D.D.C. 2017) (“The Court errs if it ‘simply approve[s] the withholding of an entire document without entering a finding on segregability, or the lack thereof.’” (quoting *Powell v. U.S. Bureau of Prisons*, 927 F.2d 1239, 1242 n.4 (D.C. Cir. 1991))).

The Remand Determination contains no segregability analysis at all. It “asserts only that entire documents are exempt from disclosure,” but “an agency cannot justify withholding an entire document simply by showing that it contains *some* exempt material.” *Kimberlin*, 139 F.3d at 950 (quoting *Mead Data Cent.*, 566 F.2d at 260); *see also Am. Immigr. Council v. U.S. Dep’t of Homeland Sec.*, 950 F. Supp. 2d 221, 248 (D.D.C. 2013) (explaining the agency’s “obligation to carry its evidentiary burden and fully explain its decisions on segregability”). Indeed, the Commission “must demonstrate that all reasonably segregable, nonexempt information was released.” *Abdelfattah v. U.S. Dep’t of Homeland Sec.*, 488 F.3d 178, 186 (3d Cir. 2007); *see also Davin v. Dept. of Just.*, 60 F.3d 1043, 1052 (3d Cir. 1995) (“The statements regarding segregability are wholly conclusory, providing no information that would enable [plaintiff] to evaluate the FBI’s decisions to withhold.”); *Chesapeake Bay Found. v. U.S. Army Corps. of Eng’rs.*, 677 F. Supp. 2d 101, 109 (D.D.C. 2009) (requiring agency to supplement its declarations and exhibits because there was “no evidence to support” that agency complied with its segregability obligation and refusing “to take on faith” agency’s assertions that it had complied). The Remand Determination has provided no analysis regarding segregability. This was error. And, in all events, the Chamber’s request makes it readily apparent that nearly all of its non-exempt information will be easily segregable.

* * *

For all these reasons, the Chamber requests that you reverse the invocation of Exemptions 5 and 7(A). And the Chamber respectfully asks that you promptly order the immediate release of the requested documents. To the extent that there are exempt documents, the Chamber requests that you provide adequate and sufficient justifications for withholding those documents.

Sincerely,



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~

Elizabeth Tucci

Deputy General Counsel for Legal Counsel

UNITED STATES OF AMERICA
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WASHINGTON, D.C. 20580

June 22, 2022

Sent Via Email

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Re: Freedom of Information Act (“FOIA”) Appeal | FOIA Request No. 2022-00324/2022-00611 on Remand

Dear Mr. Joseffer:

I am writing as the official designated to review FOIA appeals for the Federal Trade Commission (“FTC”). On December 2, 2021, you submitted a request to the FTC FOIA Unit seeking the following information:

All records related to counting votes of Former Commissioners for a period of time after their departure from the Commission. This request includes, but is not limited to, any legal analysis performed or received by the FTC; any and all internal guidance or rules governing voting procedures; how long the agency counts votes following a Commissioner’s departure and what actions can extend or reopen a motion to vote; the history of this practice; any communications between the FTC and the White House; and any press statements or drafts of press statements. The timeframe for this request is November 23, 2020 (the start of the presidential transition period) to the present. The term “records” as used in this request includes emails, handwritten or typed notes, phone calls, meeting minutes, meeting agendas, calendar entries, electronic chats, instant messages, encrypted or self-destructing messages, messages sent via Facebook messenger, text messages, voice messages, and other hard copy documents stored on official or personal devices.¹

On January 10, 2022, Assistant General Counsel Dione J. Stearns denied your request as improper.² I granted your appeal of this determination and remanded the request back to the

¹ Initial Request re: 2022-00324 dated Dec. 2, 2021.

² Initial Determination Letter re: 2022-00324 dated Jan. 10, 2022.

FOIA Unit to perform adequate searches for responsive records.³ On March 18, 2022, Ms. Stearns' released 72 pages of responsive records and withheld 492 pages of responsive records in full under FOIA Exemptions 5 and 7(A).⁴ You appealed this second determination, contesting the FTC's withholding of the responsive records under FOIA Exemption 5 deliberative process privilege, attorney client and work-product privileges, failure to justify the application of FOIA Exemption 7(A), and failure to perform a proper segregability analysis of the responsive records.⁵

I have reviewed the records and affirm the decision. FOIA Exemption 5 protects "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency" fulfilling the request.⁶ In deciding whether a record can be withheld under the deliberative process privilege of FOIA Exemption 5, the record must be: (1) inter-agency or intra-agency communication, and (2) pre-decisional and deliberative.⁷ A record is pre-decisional "if it was 'prepared in order to assist an agency decisionmaker in arriving at [their] decision,' rather than to support a decision already made," and it is deliberative if it "reflects the give-and-take of the consultative process."⁸ As the legislative history indicates, the purpose of FOIA Exemption 5 is to encourage the "frank discussion of legal policy issues" when "disclosure could chill discussion [while] agency opinions are fluid and tentative."⁹ Moreover, the U.S. Supreme Court has further explained that the deliberative process privilege is "based on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front-page news."¹⁰

Additionally, FOIA Exemption 5 incorporates the attorney work-product privilege, which protects from disclosure documents or other memoranda prepared by an attorney in contemplation of litigation.¹¹ The D.C. Circuit stated that this privilege "extends to documents prepared in anticipation of foreseeable litigation, even if no specific claim is contemplated."¹²

³ First Daryl Joseffer Appeal re: 2022-00324 dated Jan. 14, 2022. Appeal Determination Letter re: 2022-00324 dated Feb. 14, 2022.

⁴ Second Determination Letter re: 2022-00324/2022-00611 on remand dated March 18, 2022.

⁵ Second Daryl Joseffer Appeal re: 2022-00324/2022-00622 on remand dated May 23, 2022.

⁶ *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975); see generally *Tigue v. DOJ*, 312 F.3d 70, 80 (2d Cir. 2022) (describing the types of exempt documents under Exemption 5, including but not limited to: "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.")

⁷ *ACLU v. Nat'l Sec. Agency*, 925 F.3d 576, 592 (2d Cir. 2019); see also *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997).

⁸ *Petroleum Info. Corp. v. Dep't of Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992).

⁹ S.Rep. No. 813, 89th Cong., 1st Sess. 9 (1965).

¹⁰ *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8-9 (2001) (citations omitted); see generally *U.S. v. Nixon*, 418 U.S. 683, 705 (1974) (providing guidance that the "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision-making process").

¹¹ See *Hickman v. Taylor*, 329 U.S. 495, 509-10 (1947).

¹² *Schiller v. NLRB*, 964 F.2d 1205, 1208 (D.C. Cir. 1992), abrogated on other grounds by *Milner v. Dep't of the Navy*, 131 S. Ct. 1259 (2011); see also *ACLU of N. Cal. v. DOJ*, 880 F.3d 473, 487-88 (9th Cir. 2018) (concluding that portions of USABook that detail DOJ's developed legal arguments regarding process of obtaining court authorization for certain investigative techniques fall within attorney work product privilege, and declining to hold that attorney work product must be prepared in anticipation of specific litigation to be privileged).

After reviewing the responsive records, I find that the FOIA Unit properly invoked the deliberative process privilege and the attorney work-product privilege under FOIA Exemption 5 to the responsive records.

Next, I considered your argument that the FOIA Unit failed to justify the invocation of FOIA Exemption 7(A). An agency does not have a duty to justify its FOIA request withholding decision on a document-by-document basis at this stage. This duty arises only after a requester has exhausted all administrative remedies and filed a lawsuit in federal district court.¹³ At the administrative stage, the agency's response to a FOIA request need only provide "the reasons" for its determination,¹⁴ which includes, "most obviously, the specific exemptions that may apply."¹⁵ A decision to deny an initial request must only inform the requester of a brief reason for the denial with the volume of records located, the right to appeal, the right to seek dispute resolution services from the FOIA Public Liaison at the agency or OGIS, and the name and title of each person responsible for the denial.¹⁶ Here, the second determination letter shared the total number of responsive records located, the FOIA Exemption used to protect the withheld documents, and a brief explanation of those exemptions.¹⁷ Accordingly, the FOIA Unit met its obligations with regard to descriptions of withheld records at this stage of the administrative process.

In response to your argument that the FOIA Unit failed to segregate all non-exempt portions of the records, the FOIA requires "any reasonably segregable portion of a record [to] be provided to any person requesting such a record after deletion of the portions which are exempt."¹⁸ However, an agency is not required to provide partially redacted documents, leaving only the factual information, if the document is "so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations."¹⁹ In some circumstances, "even material that could be characterized as 'factual' would so expose the deliberative process that it must be covered by the privilege."²⁰ In this case, I find that the FOIA Unit properly applied FOIA Exemptions 5 and 7(A) to the responsive records in their entirety because the protected information is inextricably intertwined that disclosure would necessarily reveal internal deliberations or could reasonably impact ongoing investigations.

If you are dissatisfied with my action on your appeal, FOIA permits you to file a lawsuit in accord with 5 U.S.C. § 552(a)(4)(B), in a United States District Court in the district where you reside or have your principal place of business, or in the District of Columbia.

¹³ See, e.g., *Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 11 (D.D.C. 1995) (explaining that agencies need not provide a *Vaughn* Index until ordered by a court after the plaintiff has exhausted the administrative process).

¹⁴ 5 U.S.C. § 552(a)(6)(A)(i).

¹⁵ *Citizens for Responsibility & Ethics in Washington v. FEC*, 711 F.3d 180, 186 (D.C. Cir. 2013).

¹⁶ See 5 U.S.C. § 552(a)(6)(A)(i), (a)(6)(C)(I).

¹⁷ Amended Final Response at 2.

¹⁸ 5 U.S.C. § 552(b).

¹⁹ *In re Sealed Case*, 121 F.3d 550 at 737 (D.C. Cir. 1997); see, e.g., *Wilderness Soc'y v. U.S. Dep't of Interior*, 344 F. Supp.2d 1, 18 (D.D.C. 2004) (quoting *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977)).

²⁰ *Wolfe v. Dep't of Health and Human Servs.*, 839 F.2d 768, 774 (D.C. Cir. 1988).

Finally, I note that the 2007 FOIA amendments created the Office of Governmental Information Services (“OGIS”) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. *See* <https://ogis.archives.gov>. Using OGIS services does not affect your right to pursue litigation. OGIS’s contact information is as follows:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road – OGIS
College Park, MD 20740-6001
ogis@nara.gov
phone: 202-741-5770, or toll-free 1-877-684-6448
fax: 202-741-5769.

Sincerely,

Elizabeth Tucci
Deputy General Counsel for Legal Counsel