



U.S. Chamber of Commerce

FOIA-2022-00588

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

February 4, 2022

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

Dear Sir/Madam:

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 (“Chamber”) hereby requests the following information:

All records related to communications between the FTC and the European Commission or other foreign jurisdictions regarding the Illumina-Grail transaction. This request includes, but is not limited to, all such communications between or among the FTC and the European Commission or other non-U.S. agencies or authorities; communications between the FTC and members of the Biden transition team; and any press statements or drafts of press statements. The timeframe for the Chamber’s 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 any other electronic or hard copy records stored on official or personal devices or in official or personal accounts.

I 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.

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.

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

April 14, 2022

Sean Heather
U.S. Chamber of Commerce
1615 H Street NW
Washington, DC 20062

Re: FOIA-2022-00588

Dear Mr. Heather:

This is in response to your request dated February 4, 2022, under the Freedom of Information Act seeking access to communication records between the FTC and the European Commission or international organizations related to the Illumina/Grail matter. In accordance with the FOIA and agency policy, we have searched our records on February 9, 2022.

We have located 2582 pages of responsive records. I am granting partial access to 1,009 pages of those records. Portions of these pages fall within one or more of the exemptions to the FOIA disclosure requirements, as explained below.

Some responsive 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). Moreover, some records are protected by the consultant corollary doctrine, which extends Exemption 5 protection to communication between agencies and qualifying third parties. *Am. Oversight v. U.S. Dep't of the Treasury*, 474 F. Supp. 3d 251, 262 (D.D.C. 2020).

If you have any questions about the way we handled your request or about the FOIA regulations or procedures, please contact Lindsay Robinson at lrobinson@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.



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

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,

A handwritten signature in blue ink that reads "Dione J. Stearns".

Dione J. Stearns
Assistant General Counsel

Invoice Summary



600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Requester Details

Mr. Sean Heather
Senior Vice President
U.S. Chamber of Commerce

Requester Invoice

Request No : FOIA-2022-00588
Invoice No : 00000004723
Invoice Date : 04/05/2022
Requester Name : Sean Heather

Fee Item	Quantity	Unit (\$)	Extended (\$)	Not Charged (\$)	Charged (\$)
PROFESSIONAL HOURS					
a. SEARCH	8.00	\$52.00	\$416.00	\$0.00	\$416.00
ATTORNEY/ECONOMIST					
a. SEARCH	3.50	\$80.00	\$280.00	\$0.00	\$280.00
b. REVIEW/EXCISING	10.00	\$80.00	\$800.00	\$0.00	\$800.00
c. COORDINATION/APPROVAL/DENIAL	3.00	\$80.00	\$240.00	\$0.00	\$240.00
Total Amount					\$1,736.00
Amount Paid					\$0.00
Balance Due					\$1,736.00

Request Description

Communications between the FTC and European Commission

Sub Requests

Default

Invoice Memo

Federal Trade Commission



April 19, 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-2022-00588

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 April 14, 2022) regarding the Freedom of Information Act (“FOIA”) request identified above (dated February 4, 2022).

As explained further below, the Chamber sought records related to communications between the FTC and the European Commission or other foreign jurisdictions regarding the Illumina-Grail transaction. Over two months after the Chamber’s request, the Commission finally responded. The Commission explained that it possesses 2582 pages of responsive records, but will not produce more than half of them—producing only voluminous public information that was unrelated to our e-mailed clarification of what our request is seeking. *See* April 14, 2022 Stearns Letter, Ex. C (citing 5 U.S.C. § 552(b)(5)). That decision was incorrect and we ask that you promptly reverse it. We also ask that you reverse the Commission’s attempt to charge us \$1,736 in fees for producing non-responsive materials. *See* April 5, 2022 FTC Invoice, Ex. D.

In the Chamber’s February 4, 2022 FOIA request, we sought the following:

All records related to communications between the FTC and the European Commission or other foreign jurisdictions regarding the Illumina-Grail transaction. This request includes, but is not limited to, all such communications between or among the FTC and the European Commission or other non-U.S. agencies or authorities; communications between the FTC and members of the Biden transition team; and any press statements or drafts of press statements. The timeframe for the Chamber’s 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 any other electronic or hard copy records stored on official or personal devices or in official or personal accounts.

February 4, 2022 FOIA Request, Ex. A. We provided additional clarity in an email communication with the Commission on March 4, which explained that the Chamber was most interested in:

- Communications between FTC personnel about outreach to any foreign jurisdiction, non-U.S. agency, or non-U.S. authority regarding the Illumina-Grail transaction;
- Communications between FTC personnel and any foreign jurisdiction, non-U.S. agency, or non-U.S. authority regarding the Illumina-Grail transaction;
- Scheduled meetings or phone conversations with any foreign jurisdiction, non-U.S. agency, or non-U.S. authority regarding the Illumina-Grail transaction;
- Communications between the FTC and members of the Biden transition team about outreach to any foreign jurisdiction, non-U.S. agency, or non-U.S. authority regarding the Illumina-Grail transaction;
- Any draft press statements concerning any foreign jurisdiction, non-U.S. agency, or non-U.S. authority and the Illumina-Grail transaction the Illumina-Grail transaction.

March 4, 2022 Email, Ex. B.

As our correspondence made clear, the Chamber’s request focuses on records related to the FTC’s *communications with* foreign jurisdictions and its discussions with others *about those communications*—not the irrelevant and public material you produced, chiefly a lengthy transcript. Communications with foreign jurisdictions are not communications between or within “agencies” and they therefore must be produced in full. Internal documents can be withheld only to the extent that they are deliberative and pre-decisional; documents cannot be categorically withheld whenever they contain a snippet of deliberation. Yet despite all this, Assistant General Counsel Stearns nonetheless withheld nearly 1500 pages of material. That decision is manifestly and substantially overbroad. We ask that you reverse it and direct the production of all non-privileged material forthwith.

* * *

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 FTC’s possession must be produced. *First*, a foreign jurisdiction is not an “agency” and communications with a foreign jurisdiction are therefore—by definition—not “inter-agency” or “intra-agency” communications. 5 U.S.C. § 552(b)(5). *Second*, the “consultant corollary” doctrine that sometimes treats non-agency personnel as adjuncts to the Executive Branch plainly does not apply to communications with foreign jurisdictions. *Third*, the Commission must turn over any communications related to a foreign jurisdiction’s decisions because records about a *foreign* decision—unlike records about an *agency* decision—are not “pre-decisional” for FOIA purposes. *Fourth*, the Commission is required to segregate and produce all non-privileged information. *Finally*, you should also reverse the Commission’s erroneous attempt to charge us \$1,736 in fees for an irrelevant production that ignored our March 4, 2022, prioritization of our request.

1. The Chamber’s request primarily seeks communications between the Commission and foreign jurisdictions, and the Commission has claimed that over half of those documents are protected under Exemption 5. That is wrong. Exemption 5 applies only to “inter-agency or intra-agency” records. 5 U.S.C. § 552(b)(5) (emphasis added). The word “agency” does not include foreign governments. The statute could not be more clear: “agency” includes “each authority of the Government of the United States.” 5 U.S.C. § 551(1)(A) (emphasis added). Communications with foreign jurisdictions are thus not communications between “agencies” and so cannot be withheld. *See, e.g., Ctr. for Int’l Env’t L. v. Off. of U.S. Trade Representative*, 237 F. Supp. 2d 17, 25 (D.D.C. 2002) (“[C]ommunications between agencies and outside parties are not protected under Exemption 5.”); *Brownstein Zeidman & Schomer v. Dep’t of the Air Force*, 781 F.Supp. 31, 35 (D.D.C. 1991) (“While FOIA exemption 5 does protect intragovernmental deliberations, it does not cover negotiations between the government and outside parties.”).

The Sixth Circuit has already rejected the precise argument the Commission appears to embrace: “[H]owever important it may be for the [agency] to have frank communications with the Central Authority of Austria and an unnamed foreign government [and] however common the interest between the [agency] and its international partners, the Central Authority of Austria and an unnamed foreign government are not, so far as Congress has defined the term, *agencies*.” *Lucaj v. Fed. Bureau of Investigation*, 852 F.3d 541, 549 (6th Cir. 2017). So too here.

2. The Commission also invokes the so-called “consultant corollary” doctrine that deems certain communications with individuals outside the Executive Branch to be inter-agency records. But whatever the merits of that doctrine as a general matter, it does not apply here. Foreign jurisdictions—which serve the interests of *their* citizens rather than *our* citizens—are not in any sense “consultants” to the Commission.

The so-called “consultant corollary” originated from the idea that federal agencies may sometimes have “a special need for the opinions and recommendations of temporary consultants,”

Soucie v. David, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971), and the recognition that “persons [acting] in an advisory role would be able to express their opinions freely to agency decisionmakers without fear of publicity.” *Ryan v. DOJ*, 617 F.2d 781, 789 (D.C. Cir. 1980). Twenty years ago, the Supreme Court strongly suggested that this doctrine—which has no basis in the text of FOIA—is wrong. In *DOI v. Klamath Water Users Protective Ass’n*, the Court assumed that consultants’ reports “may qualify” as internal agency communications, but went out of its way to emphasize that the words “inter-agency or intra-agency” in Exemption 5 are not “purely conclusory term[s]” and that there exists no “textual justification for draining the [inter-agency or intra-agency requirement] of independent vitality.” 532 U.S. 1, 12 & n.4 (2001). Following the Supreme Court’s lead, the Sixth Circuit has held that this doctrine does not exist. *See Lucaj*, 852 F.3d at 546 (no Exemption 5 protection for communications sent or received outside the government).

Even if some aspect of the consultant corollary doctrine has survived *Klamath*, though, it would not apply to the Commission’s communications with foreign jurisdictions. That doctrine protects communications with *consultants*—*i.e.*, outside experts who advise the agency on agency business. It applies only where non-agency parties “effectively function[] as agency employees, providing the agencies with advice similar to what [they] might have received from an employee.” Dep’t of Justice Guide to the Freedom of Information Act, Exemption 5 at 5 n.27 (May 7, 2014) (citing *Klamath*, 532 U.S. at 10). In other words, “the consultant corollary simply recognizes that on some occasions, outsiders may stand in the shoes of fellow agency employees, when they have been specifically asked to provide input from a neutral perspective.” *Am. Oversight v. U.S. Dep’t of Health & Hum. Servs.*, 380 F. Supp. 3d 45, 55 (D.D.C. 2019); *see also Klamath*, 532 U.S. at 10–11 (what “is constant in the typical cases is that the consultant does not represent an interest of its own, or the interest of any other client, when it advises the agency that hires it”).

We are aware of no judicial decision applying this doctrine to a foreign governmental entity. To the contrary, the typical beneficiaries are clear-cut consultants performing a discrete task to assist the agency—individuals such as a property appraiser, an English barrister, an auditor, outside “experts on Chinese history,” and the like. *See, e.g., Hoover v. DOI*, 611 F.2d 1132, 1138 (5th Cir. 1980) (protecting appraiser’s report); *Gov’t Land Bank v. GSA*, 671 F.2d 663, 665 (1st Cir. 1982) (same); *Lead Indus. Ass’n v. OSHA*, 610 F.2d 70, 83 (2d Cir. 1979) (protecting lead-exposure consultant’s report); *Miller v. DOJ*, 562 F. Supp. 2d 83, 113 (D.D.C. 2008) (protecting legal opinion prepared by English barrister for U.S. agency); *CREW v. DHS*, 514 F. Supp. 2d 36, 44 (D.D.C. 2007) (protecting documents prepared by FEMA contractors); *Sakamoto v. EPA*, 443 F. Supp. 2d 1182, 1191 (N.D. Cal. 2006) (protecting documents prepared by audit contractor); *Wu v. Nat’l Endowment for the Humanities*, 460 F.2d 1030, 1031-32 (5th Cir. 1972) (protecting recommendations of Chinese historian-consultants).

Unlike hired consultants or helpful historians, foreign jurisdictions necessarily “advocate for [their] own interests” rather than provide “independent advice to the United States.” *Ctr. for Int’l Env’t Law*, 237 F. Supp. 2d at 27. These jurisdictions are not engaging with the Commission

to provide their “unbiased expert opinion.” *Hoover*, 611 F.2d at 1138. Just as the Commission is presumably working to advance U.S. interests when it communicates with foreign jurisdictions, those foreign jurisdictions are communicating with the Commission to advance their distinct national interests. They are quite obviously not treating the Commission “just as an employee would be expected to do.” *Klamath*, 532 U.S. at 10–11. Their communications are thus not “inter-agency” or “intra-agency” ones. They must accordingly be produced in full.

3. Relatedly, the records the Chamber requested must be turned over to the extent they concern a foreign jurisdiction’s decisions rather than the Commission’s decisions. Records about the decisions of a foreign government are not “pre-decisional” under 5 U.S.C. § 552(b)(5), *even if* they could otherwise qualify as “inter-agency.” The Commission bears the burden of establishing that every document it is withholding is both (1) pre-decisional, and (2) deliberative. *U.S. Fish & Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777, 785–86 (2021). On this front, too, it has failed to do so.

Communications with a foreign jurisdiction about *that* jurisdiction’s decision to investigate or pursue the Illumina-Grail transaction are pre-decisional as to the *foreign* jurisdiction, but FOIA only protects deliberations preceding an *agency* decision. That statute offers no protection for documents that were “prepared to assist” with decisions made outside the agency “rather than agency deliberations.” *Electronic Privacy Information Center v. Transportation Security Administration*, 928 F. Supp. 2d 156, 164–65 (D.D.C. 2013); *cf. Rockwell International Corp. v. U.S. Department of Justice*, 235 F.3d 598, 605 (D.C. Cir. 2001) (Communications with Congress can qualify as “intra-agency” *only* “if they were ‘part and parcel of the agency’s deliberative process,’”—but *not* if they were “created specifically to assist” Congress “with its deliberations.” (emphasis altered and citation omitted)). Such documents must therefore be produced in full.

4. To the degree that any of the withheld documents actually qualify as pre-decisional intra-agency communications, the Commission has an obligation to segregate and produce all non-privileged 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). As one court has explained, “any documents produced by or exchanged with [a foreign government] are not protected by Exemption 5 because they are not inter-agency or intra-agency records ... [so] any factual portions of documents describing or summarizing such communications to or from [that foreign government] likewise are not protected.” *Ctr. for Int’l Env’t Law*, 237 F. Supp. 2d at 27. That requirement applies here.

The letter from Assistant General Counsel Stearns also contains just two sentences of conclusory explanation and two citations—a facially deficient justification for the substantial amount of material the FTC has withheld. The Commission has an “obligation to carry its evidentiary burden and fully explain its decisions on segregability.” *Am. Immigr. Council v. U.S. Dep’t of Homeland Sec.*, 950 F. Supp. 2d 221, 248 (D.D.C. 2013). Indeed, it “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. DOJ*, 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 paltry analysis the Commission has offered thus far falls far short. For that reason, too, you should direct a complete production and a detailed explanation for any materials the Commission continues to withhold.

5. Finally, the Commission’s attempt to impose \$1,736 in fees on the Chamber for producing irrelevant material flies in the face of the governing regulations and should also be reversed. As our original request explained, a fee waiver is entirely justified here. 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 Federal government.” 16 C.F.R. § 4.8(e)(2)(i)(A)-(B). The Chamber is a non-profit organization organized under Section 501(c)(6) of the Internal Revenue Code and “does not have a commercial interest that would be furthered by the requested disclosure,” *id.* § 4.8(e)(2)(ii)(A), because the Chamber seeks to use this information to educate itself and the public about the FTC’s ongoing activities. 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 the requested 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. Disclosure will thus contribute to “public understanding, as opposed to the understanding of the individual requester or a narrow segment of interested persons” and that “likely contribution to public understanding will be significant.” *Id.* § 4.8(e)(2)(i)(C)-(D).

Not only that, but the Commission’s imposition of substantial fees is particularly egregious here, where the Chamber clarified in an exchange with the Commission that we are seeking *communications with* foreign jurisdictions concerning a particular transaction and *communications about* such foreign outreach—not whatever grab-bag of materials related to this transaction that the Commission happens to possess. But despite seeking and obtaining that clarification, the Commission seems to have ignored it. Rather than produce the requested communications—as it must—the Commission produced a ream of documents that are, at most, barely responsive. The FTC’s attempt to charge the Chamber nearly \$2,000 for this so-far-pointless exercise should be reversed as well.

* * *

For all these reasons, the FTC's denial of the Chamber's request as to more than half the documents in its possession and its attempt to charge the Chamber for the privilege of receiving that denial are baseless and should be reversed. The public has a right to know what the Commission has been saying to foreign jurisdictions, the public interest in this particular transaction is intense, *see* Brent Kendall and Daniel Michaels, *Illumina Battles U.S., European Antitrust Enforcers on Grail Deal*, The Wall Street Journal (May 28, 2021), and the Commission cannot withhold its communications with European regulators by claiming that the European Union moonlights as one of its consultants. We ask that you promptly reverse the decision of Assistant General Counsel Stearns to the extent it withholds any requested material and direct that material's immediate production. The law requires nothing less.

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
202-463-5368 (phone)
202-463-5346 (fax)
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

May 16, 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. 2022-00588

Dear Mr. Joseffer:

I am writing as the official designated to review FOIA appeals for the Federal Trade Commission (“FTC”). On February 4, 2022, you submitted a request to the FTC FOIA Unit seeking the following information:

All records related to communications between the FTC and the European Commission or other foreign jurisdictions regarding the Illumina-Grail transaction. This request includes, but is not limited to, all such communications between or among the FTC and the European Commission or other non-U.S. agencies or authorities; communications between the FTC and members of the Biden transition team; and any press statements or drafts of press statements. The timeframe for the Chamber’s 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 any other electronic or hard copy records stored on official or personal devices or in official or personal accounts.¹

On March 11, 2022, you amended the request to the following information:

- Communications between FTC personnel about outreach to any foreign jurisdiction, non-U.S. agency, or non-U.S. authority regarding the Illumina-Grail transaction;
- Communications between FTC personnel and any foreign jurisdiction, non-U.S. agency, or non-U.S. authority regarding the Illumina-Grail transaction;

¹ Initial Request re: 2022-00588 dated Feb. 4, 2022.

- Scheduled meetings or phone conversations with any foreign jurisdiction, non-U.S. agency, or non-U.S. authority regarding the Illumina-Grail transaction;
- Communications between the FTC and members of the Biden transition team about outreach to any foreign jurisdiction, non-U.S. agency, or non-U.S. authority regarding the Illumina-Grail transaction;
- Any draft press statements concerning any foreign jurisdiction, non-U.S. agency, or non-U.S. authority and the Illumina-Grail transaction the Illumina-Grail transaction.²

On April 14, 2022, Assistant General Counsel Dione J. Stearns provided 1,009 pages of responsive records and stated that the remained of responsive records are exempt from disclosure under FOIA Exemption 5.³

On April 19, 2022, you submitted a timely appeal, contesting the FTC's withholding of the responsive records under FOIA Exemption 5.⁴ On appeal you argue that FOIA Exemption 5 does not apply to communications between agencies and foreign jurisdictions even under the consultant corollary doctrine and that even if the agency concluded that Exemption 5 applied to parts of the records, segregable portions should be produced.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

² Amended Request re: 2022-00588 dated Mar. 11, 2022.

³ Final Determination Letter re: 2022-00588 dated Apr. 14, 2022.

⁴ Daryl Joseffer Appeal re: 2022-00588 dated Apr. 19, 2022.

⁵ *Id.*

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”).

Deliberative and pre-decisional email communication exchanged between an agency and a non-agency individual or entity are not protected under the FOIA Exemption 5 unless the consultant corollary doctrine applies.¹¹ This doctrine permits an agency to withhold communication records between agency personnel and non-agency parties, if: “(1) the agency solicited the records from the non-agency party or there exists some indicia of a consultant relationship between the outsider and the agency, and (2) the records were created for the purpose of aiding the agency’s deliberative process.”¹²

I find that a consultant relationship exists between the FTC and foreign jurisdictions in the responsive records. The FTC relied on these communications, as it would an outside consultant, in its deliberative process, with regard to formulating agency positions on the Illumina-Grail transaction. I therefore conclude that the FOIA Unit properly applied Exemption 5 to the remaining 30 pages of responsive documents under the consultant corollary doctrine.

Next, I considered your argument that portions of any withheld documents could be disclosed. The FOIA requires that “any reasonably segregable portion of a record shall be provided to any person requesting such a record after deletion of the portions which are exempt.”¹³ 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.”¹⁴ Moreover, 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.”¹⁵ I find that the FOIA Unit properly applied Exemption 5 to the responsive records in their entirety because the protected information is inextricably intertwined that disclosure would necessarily reveal internal deliberations.

Last, your request for a public interest fee waiver is denied, and you are required to pay the billed amount for this request.

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

¹¹ See generally *Klamath*, 532 U.S. 1 (2001).

¹² *Am. Oversight v. U.S. Dep’t of the Treasury*, 474 F. Supp. 3d 251, 262 (D.D.C. 2020) (citations omitted); see also *Jud. Watch, Inc. v. U.S. Dep’t of State*, 306 F. Supp. 3d 97, 106-07 (D.D.C. 2018) (first quoting *Nat’l Inst. of Military Justice v. U.S. Dep’t of Def.*, 512 F.3d 677, 686-87 (D.C. Cir. 2008); then quoting *Pub. Citizen, Inc. v. U.S. Dep’t of Justice*, 111 F.3d 168, 170 (D.C. Cir. 1997) (quotations omitted)).

¹³ 5 U.S.C. § 552(b).

¹⁴ *In re Sealed Case*, 121 F.3d at 737; 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)).

¹⁵ *Wolfe v. Dep’t of Health and Human Servs.*, 839 F.2d 768, 774 (D.C. Cir. 1988) (protecting the fact that a proposal has been made as part of the deliberative process).

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:

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National Archives and Records Administration
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ogis@nara.gov
phone: 202-741-5770, or toll-free 1-877-684-6448
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Sincerely,

Elizabeth Tucci
Deputy General Counsel for Legal Counsel