



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

Office of the General Counsel

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Elizabeth Tucci  
Deputy General Counsel for Legal Counsel

July 1, 2022

Daryl Joseffer  
U.S. Chamber of Commerce  
1615 H Street, NW  
Washington, D.C. 20062

Re: Freedom of Information Act (“FOIA”) Appeal | FOIA Request No. 2022-00863

Dear Mr. Joseffer,

I am writing as the official designated to review FOIA<sup>1</sup> appeals for the Federal Trade Commission (“FTC”).

On December 2, 2021, the U.S. Chamber of Commerce submitted a request for full and complete copies of the:

- (a) Office of Secretary Procedures Manual (“OS Procedures Manual”) dated April 7, 1994, and any newer version, including updates, revisions, or successor or superseding documents; and
- (b) Documents containing the Policy with Respect to Counting Votes of Departing and Arriving Commissioners dated March 27, 1984, and any newer version, including updates or revisions, or successor or superseding documents.<sup>2</sup>

On January 3, 2022, Assistant General Counsel Dione Stearns sent a final letter to the U.S. Chamber of Commerce partially denying their request under FOIA Exemption 5.<sup>3</sup> The FOIA Unit released forty-nine (49) pages of the OS Procedures Manual with portions redacted under FOIA

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<sup>1</sup> 5 U.S.C. § 552.

<sup>2</sup> Fed. Trade Comm’n Freedom of Information Act Reading Room, Frequently Requested Records <https://www.ftc.gov/legal-library/browse/frequently-requested-foia-records/commission-voting-policy/office-secretary-procedures-manual> (last visited June 15, 2022).

<sup>3</sup> Final Response re: 2022-00322 dated Jan. 3, 2022.

Exemptions 2, 4, 6, and 7(E).<sup>4</sup> The final response letter also confirmed some responsive records were publicly available on the Federal Trade Commission (“FTC”) website.<sup>5</sup>

On January 6, 2022, you submitted a timely appeal of the final decision arguing that the agency has no basis to withhold the responsive records.<sup>6</sup> On February 22, 2022, I granted your appeal on the basis that the “FOIA Unit erred in applying Exemption 5 across the board to all non-public responsive records because at least some portion of the records do not appear to be pre-decisional or deliberative.”<sup>7</sup> I remanded the request to the FOIA Unit for further review.

On May 13, 2022, Assistant General Counsel Dione Stearns sent a final letter to the U.S. Chamber of Commerce partially denying their request under FOIA Exemptions 2, 5, 6, and 7(E).<sup>8</sup> On June 3, 2022, you submitted a timely appeal of the remanded final decision and argued:

- (1) FOIA Exemption 7(E) does not apply because there are no indications that:
  - a. The redacted portions of the Procedure Manual were compiled for law enforcement purposes,
  - b. The redacted portions of the Procedure Manual do not protect techniques, procedures, or guidelines used for law enforcement investigations or prosecutions, and
  - c. Releasing the redacted portions of the Procedures Manual risks circumvention of the law;
- (2) FOIA Exemption 2 only protects rules and practices dealing with employee relations or human resources, which is not at issue here;
- (3) FOIA Exemption 4 was erroneously applied because this exemption only protects third-party confidential information, which is not at issue here;
- (4) FOIA Exemption 5 does not apply because the redacted portions of the responsive records are not deliberative and pre-decisional.
- (5) All FOIA Exemptions should be removed since an unredacted copy of an older OS Procedures Manual already exists in the public domain; and
- (6) Even if exemptions apply, the FOIA Unit failed to segregate non-exempt information for protected portions of the responsive records.<sup>9</sup>

First, FOIA Exemption 7(E) protects law enforcement information that:

Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.<sup>10</sup>

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<sup>4</sup> Responsive Records re: 2022-00863 (hereinafter “Responsive Records”).

<sup>5</sup> *Id.*; see also Fed. Trade Comm’n Freedom of Information Act Reading Room, Frequently Requested Records <https://www.ftc.gov/legal-library/browse/frequently-requested-foia-records/commission-voting-policy/office-secretary-procedures-manual> (last visited June 15, 2022).

<sup>6</sup> 2022-00332 Initial Appeal dated Jan. 6, 2022.

<sup>7</sup> APP-2022-00016 Determination Letter dated Feb. 22, 2022.

<sup>8</sup> 2022-00863 Final Response dated May 13, 2022.

<sup>9</sup> Second Appeal re: 2022-00863 dated Jun. 3, 2022 (hereinafter “Second Appeal”).

<sup>10</sup> 5 U.S.C. § 552(b)(7)(E).

First, to qualify under FOIA Exemption 7, the records must have been compiled for law enforcement purposes.<sup>11</sup>

The OS Procedures Manual was created to summarize “the procedures the Office of the Secretary follows to execute its responsibilities for the Commission decision making process.”<sup>12</sup> After reviewing the records, I find that these records are not directly related to techniques, procedures, or guidelines for law enforcement. Accordingly, FOIA Exemption 7(E) was improperly applied.

Second, FOIA Exemption 2 protects records that are “related solely to the internal personnel rules and practices of an agency.”<sup>13</sup> I reviewed the records and find that none of the redacted portions of the responsive records relate to employee relations or human resources or contain information about specific FTC personnel.<sup>14</sup> Accordingly, FOIA Exemption 2 was incorrectly applied.

Third, FOIA Exemption 4 protects “trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.”<sup>15</sup> To satisfy FOIA Exemption 4 the responsive records must be: 1) commercial or financial, 2) obtained from a person, and 3) privileged or confidential.<sup>16</sup>

I reviewed the records and find that the redacted portions of the responsive records do not satisfy the three-prong test required to apply FOIA Exemption 4. Accordingly, FOIA Exemption 4 was improperly applied.

Fourth, on May 13, 2022, Assistant General Counsel Dione Stearns sent a final letter to the U.S. Chamber of Commerce partially denying their request under FOIA Exemption 5. I confirmed with the FOIA Unit that the reference to FOIA Exemption 5 was in error and should have read FOIA Exemption 4. Accordingly, further discussion on the application of this exemption is unnecessary at this time.

Fifth, the public domain doctrine prohibits an agency from applying any FOIA exemptions to records that already exist in the public domain.<sup>17</sup> However, for this doctrine to apply, the public records must be: 1) identical<sup>18</sup> and 2) acknowledged by the agency.<sup>19</sup> Under the first prong of this doctrine, the requester is responsible for “pointing to specific information in the public domain that appears to

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<sup>11</sup> See *Pub. Emps. for Env't Resp. v. U.S. Section, Int'l Boundary & Water Comm'n, U.S.-Mex.*, 740 F.3d 195, 202-03 (D.C. Cir. 2014) (holding that “[t]o fall within Exemption 7, documents must first meet a threshold requirement: that the records were ‘compiled for law enforcement purposes’”).

<sup>12</sup> Responsive Records at 1.

<sup>13</sup> 5 U.S.C. § 552.

<sup>14</sup> See *Milner v Dep't of the Navy*, 562 U.S. 562, 570-78 (2011).

<sup>15</sup> 5 U.S.C. § 552(b)(4).

<sup>16</sup> See *id.*

<sup>17</sup> See generally *Niagara Mohawk Power Corp. v. U.S. Dep't of Energy*, 169 F.3d 16, 19 (D.C. Cir. 1999) (discussing Exemption 4); *Davis v. U.S. Dep't of Justice*, 968 F.2d 1276, 1279 (D.C. Cir. 1992) (discussing Exemptions 3 and 7).

<sup>18</sup> See generally *id.* (explaining “if identical information is truly public, then enforcement of an exemption cannot fulfill its purposes”)(emphasis added).

<sup>19</sup> See generally *Afshar v. Dep't of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983).

duplicate [the records] being withheld.”<sup>20</sup> Under the second prong, “even if a [record] is the subject of widespread media and public speculation,” an agency must officially acknowledge the records as true in order for the doctrine to apply.<sup>21</sup>

Here, you shared that an older version of the OS Procedures Manual is in the public domain and any newer versions should be released.<sup>22</sup> You point to tweets from reporter Leah Nylen regarding the OS Procedures Manual and you acknowledge that this version “appears to be an older version or edition of the Procedures Manual than the redacted one given to the Chamber pursuant to its request.”<sup>23</sup> Ms. Nylen also states that the version she shared via Twitter was leaked to her, but does not name her source.<sup>24</sup> There seems to be no dispute that the records in question in this appeal are not identical to the records Ms. Nylen shared. There has also been no evidence provided to indicate Ms. Nylen’s records were officially acknowledged by the FTC. Accordingly, the public domain doctrine does not apply.

Finally, you argue that the FOIA Unit failed to segregate and release any segregable portions of the records.<sup>25</sup> The FOIA requires agencies to disclose information that is “reasonably segregable” from exempt information. However, a detailed analysis of the FOIA Unit’s segregation efforts is not ripe at this time because the records should be remanded for review on other grounds.

Based on these grounds, the FOIA Unit will reopen and notify you of its revised determination within a reasonable time. Please note, however, that other 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](mailto: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:

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Second Appeal at 6.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 2.

<sup>25</sup> *Id.* at 7.

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Sincerely,

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