November 30, 2018

Remington Gregg
Public Citizen
215 Pennsylvania Avenue, SE
Washington, DC 20003

Re: Freedom of Information Act (FOIA) Appeal (FOIA request No. 2018-00934)

Dear Mr. Gregg:

I am writing as the official designated to review FOIA appeals at the Commission. On behalf of Public Citizen, Inc., you filed an appeal from a determination issued by Assistant General Counsel Dione J. Stearns, in response to your above-captioned request for records under the FOIA, 5 U.S.C. § 552. In that request dated May 17, 2018, you sought access to the following records:

(1) Andrew Smith’s Executive Branch Personnel Public Financial Disclosure Report (OGE Form 278e), as well as any and all communications – including but not limited to letters, faxes, and emails, including all attachments to emails – related to his Form 278e.

(2) Any and all communications – including but not limited to letters, faxes, and emails, including all attachments to emails – related to Andrew Smith’s ethics agreement pursuant to 18 U.S.C. 208 and other conflicts of interest laws and regulations.

In response, the agency’s ethics office searched its records on June 7 and 16, 2018, and it forwarded approximately 495 pages of documents to the FTC FOIA Unit for a determination regarding releasability. Upon review, the FOIA Unit determined that some of these records were nonresponsive or duplicative and others responsive but exempt in full or in part from disclosure under the FOIA. On August 24, 2018, Ms. Stearns issued a determination letter wherein she granted you partial access to copies of relevant records. Though the determination letter cited only FOIA Exemption 5 as reason for withholding information, each redaction in the released records was superimposed with notations indicating the FTC’s reasons for withholding information, or the applicable FOIA exemptions (Exemptions 2, 4, 5, and 6, 5 U.S.C. § 552(b)(2), (4), (5), and (6)).

On October 31, 2018, you appealed Ms. Steans’ determination, contending that the “FTC
failed to conduct an adequate search; improperly withheld information under exemptions 2, 4, and 5; failed to perform a proper segregability review; and unlawfully withheld information for reasons not provided for by FOIA.” Appeal at 1. For the reasons detailed below, I am denying in part and granting in part your appeal.

As a threshold matter, you argue that the withholdings under FOIA Exemptions 2 and 4 are “improper” because they were not cited in the agency’s August 24, 2018 determination letter. Appeal 4-5. Though the Commission’s regulations specify that the agency’s response letter must generally include the reasons for its initial determination (see 16 C.F.R. § 4.11 (a)(1)(iii)(A); 5 U.S.C. § 552(a)(6)(A)(ii)), a failure to include all reasons for the determination in a letter does not, alone, warrant release of properly withheld material. This is especially true where, as here, the agency made its determination and “the reasons therefor” apparent in the produced material. In any event, nothing in the FOIA or the FTC’s regulations prevents the agency from amending or perfecting its initial determination. Courts have held that an agency’s failure to raise a FOIA exemption at any level of the administrative process does not preclude its right to later claim those exemptions. See, e.g., Young v. CIA, 972 F.2d 536, 538 (4th Cir. 1992). Accordingly, I find no legal basis for this argument.

On appeal, you challenge the adequacy of the agency’s search for responsive records. Appeal at 2. It is well established that an agency must “conduct a search reasonably calculated to uncover all relevant documents.” Truitt v. Dep’t of State, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations and internal quotation marks omitted). The key question is not “whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate.” Steinberg v. DOJ, 23 F.3d 548, 551 (D.C. Cir. 1994) (citation omitted). Here, searches were conducted by those within the agency who are most familiar with the subject matter of the request, in locations where documents would most likely be found. Specifically, staff in the FTC’s ethics office, who are chiefly responsible for reviewing employees’ financial disclosure reports and other OGE filings, searched their files for responsive records. Ethics staff conducted searches using a “date-of-search” cut-off, not a “time-of-request cut-off” (see Appeal at 2), as demonstrated by the presence of released records dated after the date of the request. See generally Pub. Citizen v. Dep’t of State, 276 F.3d 634, 644 (D.C. Cir. 2002) (favoring the “date-of-search” cut-off). “[T]he agency’s failure to turn up a particular document, or mere speculation that as yet uncovered documents might exist, does not undermine ... [an otherwise] adequate search.” Wilbur v. CIA, 355 F.3d 675, 678 (D.C. Cir. 2004). Accordingly, I conclude that the search was adequate under the FOIA.

You next challenge the agency’s application of FOIA Exemption 5 to withhold certain responsive records, arguing that some may not qualify as “intra-agency records” and that “it defies belief [that] the vast majority of communications related to Mr. Smith’s Form 278e and his ethics agreement would be predecisional deliberative materials.” Appeal at 3. I find these arguments unpersuasive. First, courts have long held that an agency can assert Exemption 5 to withhold materials received from, and authored by, a source outside of the agency. See Soucie v. David, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971). Because federal regulations require agencies to conduct an initial ethical conflicts analysis prior to onboarding, deliberations necessarily rely on communications with parties outside the agency, including the potential employee. See Defs.
of Wildlife v. U.S. Dep't of Interior, 314 F. Supp. 2d 1, 15 (D.D.C. 2004) (protecting information submitted to agency by former employer to inform ethics analysis). Moreover, I conclude that many communications related to Mr. Smith's ethics disclosure forms qualify as predecisional deliberative materials. Id. at 19 (though Office of Government Ethics "relies upon agencies to conduct inquiries into ethics violations and to report their findings, OGE is ultimately responsible for making a determination whether an agency official has complied with relevant ethics requirements.")

You next argue against the assertion of FOIA Exemption 4, which exempts from public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). In interpreting this exemption, courts distinguish between documents that are voluntarily and involuntarily submitted to the government. Here, the records at issue were submitted to ethics officials during the review and certification process of the nominee's financial disclosure report (Standard Form 278e). The agency has "no actual legal authority to compel" the production of information for that report. Defs. of Wildlife v. DOI, 314 F. Supp. 2d, at 17. "[I]f an agency has no authority to enforce an information request, submissions are not mandatory." Ctr. for Auto Safety v. NHTSA, 244 F.3d 144, 149 (D.C. Cir. 2001). If, as here, information was voluntarily submitted, it is confidential if the submitter would not "customarily" release it to the public. Critical Mass Energy Project v. NRC, 975 F.2d 871, 878-79 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1579 (1993). The records at issue reflect financial or proprietary information that is not customarily made public.1 I conclude that they were therefore properly withheld under Exemption 4.

Your argument against the application of FOIA Exemption 2 repeats the contention that the FTC's assertion of the Exemption in the documents themselves, as opposed to the cover letter, amounts to a material procedural error. I have addressed that argument above. Furthermore, I have reviewed the material withheld under that exemption and conclude that it relates to predominantly internal matters and "the formulation of policies, procedures, and relations with [or involving] employees." Milner v. Dep't of Navy, 562 U.S. 562, 569 (2011). Accordingly, I am denying that part of your appeal.

Next, you argue that the FTC failed to perform a proper segregability review. Upon review of this matter, I conclude that the agency possesses five pages of responsive material, and I am releasing them with this determination. Portions of the last page are protected by FOIA Exemption 5, 5 U.S.C. § 552(b)(5), which applies to inter-agency or intra-agency memoranda or letters "which would not be available to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). This material includes staff analyses and distillation of information that are "deliberative and pre-decisional and are an integral part of the agency's decision making process," NLRB v. Sears, Roebuck & Co., 412 U.S. 132 (1975).

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1 See, e.g., Defs. of Wildlife, 314 F. Supp. 2d at 17 (finding list of clients and severance information as to former employment "the kind of information that would not customarily be released to the public"); FlightSafety Servs. v. U.S. Dep't of Labor, 326 F.3d 607, 612 (5th Cir. 2003) (treating information reflecting compensation as confidential).
Finally, I agree that the FTC improperly withheld portions of certain documents as “non-responsive,” and I am remanding your request to the FOIA Unit and directing it to release all redacted portions that were deemed nonresponsive and remain non-exempt under the FOIA.

As required by the FOIA, you are hereby advised that judicial review of this decision may be obtained under 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:

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,

[Signature]
Heather Hippsley
Deputy General Counsel

Enclosures
FINANCIAL INTERESTS:

I hold financial interests in the below entities. Unless I receive a waiver of the conflict under 18 U.S.C. § 208(b)(1), I should not participate in FTC matters that will affect the willingness or ability of Covington & Burling, LLP to honor the terms of my fixed agreements with the firm.¹

<table>
<thead>
<tr>
<th>Entity</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Covington &amp; Burling, LLP</td>
<td>N/A</td>
</tr>
<tr>
<td>Family Trust</td>
<td>N/A</td>
</tr>
</tbody>
</table>

COVERED RELATIONSHIPS:

I have a “covered relationship” with the following entities. 5 CFR § 2635.502. Unless I am authorized to participate, I am disqualified from participating in any particular matter involving specific parties in which any of the following entities is a party or represents a party. For these purposes, the focus is not exclusively on named parties (such as defendants) but extends to actively involved third parties, including witnesses and complainants. Further, I generally must not otherwise officially meet or communicate with the following persons or entities about any FTC matter (including, a broad policy concern) unless the communication/meeting is open to all interested parties (i.e., the meeting/communication must involve five or more different stakeholders).²

My “covered relationship” with the following entities will expire on May 22, 2020:

- ACE Cash Express, Inc.
- Advanced Connectivity, LLC (affiliate of Toyota Motor Co.)
- Affirm, Inc.
- Altisource Solutions, Inc.
- Amazon.com, Inc.
- American Airlines, Inc.
American Express Co.
American Financial Services Association
Banc of America Merchant Services, LLC (operates as a subsidiary of Bank of America and First Data Corp.)
Banco Bilbao Vizcaya Argentaria, S.A.
Bank of America Corp.
Bioverativ (a Sanofi company)
Blue Global, LLC (doing business as Blue Global Media)
Blueessential Brands, Inc.
CAN Capital, Inc.
Cane Bay Partners VI LLLP
Capital One, N.A.
Cardinal Health, Inc.
Cash Advance Servicing, LLC
Cash America International, Inc. (acquired by FirstCash, Inc.)
CBC Companies, Inc.
Celtic Bank
Choate Rosemary Hall
Citigroup, Inc.
Citizens Financial Group, Inc.
Consumer Data Industry Association (CDIA)
Continental Finance Company, LLC/Celtic Bank
CoreLogic, Inc.
Cowboys Stadium, L.P.
Credit Karma, Inc.
CSAA Insurance Exchange
Deere & Co.
Dunn, Paul and Guido, Marco Christopher (individuals)
Early Warning Services, LLC
eBureau, LLC
Elevate Credit, Inc.
Empyrean Capital Partners, LP
Epsilon Data Management, LLC
Equifax, Inc.
Essent U.S. Holdings, Inc.
Eversi Holdings, Inc.
Exeter Finance Corp.
Expedia Group, Inc.
Experian Holdings, Inc.
Facebook, Inc.
Fair Isaac Corp. (FICO)
Fidelity National Information Services, Inc.
First Choice Loan Services, Inc. (a Berkshire Bank Company)

6 I represented these persons in their individual capacities. As best I can recall, they were both tied to a company called CADC, LLC (I do not Recall the scope of business of that entity).
7 First Choice Loan Services, Inc. is an affiliate of Berkshire Bank of Pittsfield, Massachusetts (it is not affiliated with Berkshire Hathaway).
(The) Foreign Policy Initiative
Gilead Sciences, Inc.
GlaxoSmithKline PLC
Goldman Sachs Bank USA
GoldMoney, Inc.
GreenSky, LLC
Gryphon Investors, Inc.
HealthEquity, Inc.
Huntington Bancshares Inc. (formerly, Huntington National Bank)
Industria Latinoamericana de Automedicacion Responsible A.C. [The Latin American Industry of Responsible Self-Medication (ILAR)]
Innovative Lending Platform Association
Intelligo Group
JPMorgan Chase & Co.
(The) Lead Group
Leonard Green & Partners, LP
LexisNexis Risk Solutions, Inc.
LifeLock, Inc. and its subsidiaries ID Analytics, LLC and Sagestream, LLC
LinkedIn Corp.
London Bay Capital, LLC
Martorella, Matt (individual; former owner of Liont, LLC)
MB Financial Bank, N.A.
McKesson Corp.
Microsoft Corp.
Midland Financial Co.
MoneyGram International, Inc.
MoneyKey
Mortgage Bankers Assoc.
Munich Re Automation Solutions Ltd.
National Automobile Dealers Association
National Bank of Commerce (wholly owned subsidiary of National Commerce Corporation)
(The) National Cooperative Bank, N.A.
National Football League, Inc.
NerdWallet, Inc.
Oculus VR, LLC
OnDeckCapital, Inc. (doing business as On Deck)
Online Lenders Alliance
Openpay Pty Ltd.
Oursman Chevrolet Co. Inc.
Parallon Business Performance Group
PayPal, Inc.
PetForward
Pharmaceutical Research and Manufacturers of America (PhRMA)
Plaid, Inc.
Plutopian Corp.
PNC Financial Services Group, Inc.
Portfolio Recovery Associates, LLC (also known as Anchor Receivables Management)
Redbubble Limited
Regions Financial Corp.
Republic Finance
Riot Games, Inc. (subsidiary of Tencent Holdings Ltd.)
S&P Global, Inc.
Santander Consumer USA Holdings, Inc.
ServiceLink
(The) Sherwin-Williams Co.
Shogun Enterprises, Inc.
SimCorp A/S
SmartFinance, LLC
Sotheby's, Inc.
Stearns Lending, LLC
Stella & Dot, LLC
Synchrony Financial Corp.
TeleCheck
Thomson Reuters Corp.
TransUnion, LLC
Twitter, Inc.
Uber Technologies, Inc.
United States Tennis Association
U.S. Bank, N.A.
Verizon Communications, Inc.
Visa, Inc.
(The) Walt Disney Co.
Wells Fargo & Company
ETHICS PLEDGE

As a condition, and in consideration, of my employment in the United States Government in an appointee position invested with the public trust, I commit myself to the following obligations, which I understand are binding on me and are enforceable under law:

1. I will not, within 5 years after the termination of my employment as an appointee in any executive agency in which I am appointed to serve, engage in lobbying activities with respect to that agency.

2. If, upon my departure from the Government, I am covered by the post-employment restrictions on communicating with employees of my former executive agency set forth in section 207(c) of title 18, United States Code, I agree that I will abide by those restrictions.

3. In addition to abiding by the limitations of paragraphs 1 and 2, I also agree, upon leaving Government service, not to engage in lobbying activities with respect to any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration.

4. I will not, at any time after the termination of my employment in the United States Government, engage in any activity on behalf of any foreign government or foreign political party which, were it undertaken on January 20, 2017, would require me to register under the Foreign Agents Registration Act of 1938, as amended.

5. I will not accept gifts from registered lobbyists or lobbying organizations for the duration of my service as an appointee.

6. I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.

7. If I was a registered lobbyist within the 2 years before the date of my appointment, in addition to abiding by the limitations of paragraph 6, I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

8. I agree that any hiring or other employment decisions I make will be based on the candidate’s qualifications, competence, and experience.

9. I acknowledge that the Executive Order entitled “Ethics Commitments by Executive Branch Appointees,” issued by the President on January 28, 2017, which I have read before signing this document, defines certain terms applicable to the foregoing obligations and sets forth the methods for enforcing them. I expressly accept the provisions of that Executive Order as a part of this agreement and as binding on me. I understand that the obligations of this pledge are in addition to any statutory or other legal restrictions applicable to me by virtue of Government service.

[Signature]

May 21, 2018

[Print or type your full name (last, first, middle)]