

FREEDOM OF INFORMATION ACT APPEAL

September 9, 2011

VIA FEDERAL EXPRESS

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

Re: Appeal of Denial of Freedom of Information Request No. FOIA-2011-01045

Dear Sir or Madam:

This firm represents Bloomberg L.P. (“Bloomberg”) and its reporter Jeff Bliss in connection with their above-referenced Freedom of Information Act (“FOIA”) request to the Federal Trade Commission (the “FTC”). I am writing to appeal the FTC’s response to Mr. Bliss’s request.

I. The Request

On June 6, 2011, Bloomberg reporter Jeff Bliss submitted a FOIA request to the FTC seeking copies of or access to (1) any communications between Andrew McLaughlin, then-deputy chief technology officer in the White House Office of Science and Technology Policy (“OSTP”), or his staff, and the FTC from May 2009 to January 31, 2011; and (2) any communications between Congress and the FTC regarding Google Inc. or Apple Inc. from January 2009 to the date of the final response (the “Request”).

On August 12, 2011, the FTC responded to the Request, stating that it had located 32 pages of responsive records. The FTC produced 28 of the 32 pages, which consist entirely of communications responsive to the second request (communications between Congress and the FTC regarding Google Inc. and/or Apple Inc). The FTC did not produce any communications responsive to the first request (communications between Mr. McLaughlin or the OSTP and the FTC during the relevant time period). The FTC also withheld four pages of responsive records pursuant to Exemption 5 of the FOIA because they “contain staff analyses, opinions, and recommendations . . . [that] are deliberative and pre-decisional and are an integral part of the agency’s decision-making process” (the “Denial”). *See* 5 U.S.C. § 552(b)(5). The FTC did not explain to which request these pages are responsive, to which deliberative process the four withheld pages relate, or what harm may result from disclosure of the pages. It is also unclear whether the FTC conducted the segregability analysis required by the FOIA.

See 5 U.S.C. § 552(b). As a result, the FTC has failed to meet its burden under the FOIA and should produce documents responsive to the first request, if any, and the four withheld pages without delay.

II. Argument

A. The FTC Has Not Satisfied Its Burden Of Demonstrating That The Four Withheld Pages Are Exempt From Disclosure Under Exemption 5.

Exemption 5 of the FOIA exempts from disclosure “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). The privileges that are incorporated into Exemption 5 include, *inter alia*, the deliberative process privilege, the attorney work-product privilege, and the attorney-client communications privilege. *DOI v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8-9 (2001). Here, the FTC contends that the withheld documents are “deliberative and pre-decisional.”

To qualify for FOIA’s deliberative process privilege, an agency must *demonstrate* that the withheld documents are both “pre-decisional” and “deliberative”; it does not suffice to simply declare that they are. *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006). A document will be deemed “pre-decisional” if it was “generated before the adoption of an agency policy” and “deliberative” if it reflects the “give-and-take of the consultative process.” *Id.* (internal quotations omitted). The deliberative process privilege does not protect “an agency’s final opinions, statements or policy and interpretations definitively adopted by the agency, and any documents having ‘the force and effect of law.’” *Nat’l Wildlife Fed’n v. U.S. Forest Serv.*, 861 F.2d 1114, 1122 (9th Cir. 1988) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975)). The privilege also does not protect material that is “purely factual.” *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997).

The Denial fails to demonstrate that the four withheld pages are protected from discovery pursuant to the deliberative process privilege. Although the FTC need not point to a specific final agency decision in order to invoke Exemption 5, the FTC must establish “what deliberative process is involved, and the role played by the documents in issue in the course of that process.” *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980). It has not done so. Instead, the Denial simply states that the four withheld pages “contain staff analyses, opinions, and recommendations” and are “deliberative and pre-decisional and are an integral part of the agency’s decision making process.” It does not specify any deliberative process pursuant to which the documents are being withheld, or what role, if any the withheld documents played in that process. Indeed, the Denial does not even indicate whether the four withheld pages are responsive to the first or the second request. The Denial also fails to state that harm will result from disclosure of the documents, even though an agency invoking Exemption 5 is required to “show, by specific and detailed proof, that disclosure would defeat, rather than further, the purposes of FOIA.” *Mead Data Cent., Inc. v. U.S. Dep’t of Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977) (citations omitted). Thus, the FTC has failed to provide the “detailed justification” required under the FOIA. *Id.* at 258.

B. The FTC Is Required To Produce Any “Reasonably Segregable” Portions Of The Four Withheld Pages Of Responsive Records.

The fact that the FTC withheld four responsive pages in their entirety strongly suggests that the FTC failed to conduct the segregability analysis required by the FOIA. See 5 U.S.C. § 552(b) (“[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.”); see also *Ctr. for Int’l Env’t Law v. Office of the U.S. Trade Representative*, 505 F. Supp. 2d 150, 158 (D.D.C. 2007) (holding that even if a FOIA exemption applies, a government agency “may not automatically withhold the full document as categorically exempt without disclosing any segregable portions”). Even if some portion of the four withheld pages “contain staff analyses, opinions, and recommendations,” the FTC is required to produce any portion of those pages that is not both “pre-decisional” and “deliberative.” See, e.g., *Public Citizen, Inc. v. OMB*, 598 F.3d 865, 876 (D.C. Cir. 2010) (ordering the OMB to produce all portions of withheld documents that were not both pre-decisional and deliberative). Here, given that the Request seeks communications between the FTC and Congress or the OSTP, it is likely that any responsive documents — including the four pages being withheld — would include purely factual information, such as the names of the sender(s) and recipient(s) of the communication, as well as the title and date of the communication. The FTC is required to disclose any such “purely factual” information. *Id.* (“agencies must disclose portions of predecisional and deliberative documents that contain factual information that does not inevitably reveal the government’s deliberations.”) (internal quotations omitted). Therefore, to the extent that portions of the four withheld pages contain information that is both “pre-decisional” and “deliberative,” this information should be redacted and the remainder of the text produced.

C. The FTC’s Failure To Respond To The First Request Within The Time Period Required By The FOIA Constitutes A Constructive Denial Of The Request.

As stated above, it is unclear from the Denial whether the four withheld pages are responsive to the first request (communications between Mr. McLaughlin or the OSTP and the FTC during the relevant time period) or the second request (communications between Congress and the FTC regarding Google Inc. and/or Apple Inc). If the four withheld pages are responsive to the second request, then the FTC has failed to respond to the first request within the time period required by the FOIA.

The FTC was required to respond to the first request, at the latest, within 30 business days of its receipt of the request. 5 U.S.C. § 552(a)(6)(A). The FTC’s response was therefore due on or about July 19, 2011. To date, the FTC has produced no documents responsive to the first request, nor has the FTC articulated any basis for withholding the requested documents,¹ nor has it represented that it has searched for and been unable to locate responsive documents. These failures constitute a constructive denial of the first request and Bloomberg is deemed to have exhausted its administrative remedies. 5 U.S.C. § 552(a)(6)(C)(i) (“Any person making a request to an agency for records shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit of this paragraph.”).

¹ While it is possible that the four withheld pages are responsive to the first request, the FTC has given no indication as to whether they are responsive to the first or the second request.

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For the reasons set forth above, Bloomberg respectfully requests that the FTC produce the documents responsive to the Request forthwith and respond to this appeal within 20 days. *See* 5 U.S.C. § 552(b)(6)(A)(ii). If you have any questions or concerns regarding this appeal, please contact me directly at (212) 728-8530.

Sincerely,



Deirdre N. Hykal

Enclosures

cc: Charles Glasser (via e-mail)
Global Media Counsel, Bloomberg News

Jeff Bliss (via e-mail)
Reporter, Bloomberg News