IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAUSE OF ACTION INSTITUTE
Plaintiff,
v.
FEDERAL TRADE COMMISSION
Defendant.

Civil Action No. 17-1649

EXHIBIT 1 TO COMPLAINT
VIA E-MAIL

Ms. Claudia Simons
Legislative Counsel
Office of Congressional Relations
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
E-mail: FOIA@ftc.gov

Re:  Freedom of Information Act Request

Dear Ms. Simons:

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), Cause of Action hereby requests access to all documents (including, but not limited to, communications via e-mail, text, or facsimile): (1) regarding Margaret (or Maggie) Lassack or Alain Sheer; and (2) reflecting communications (including, but not limited to, via e-mail, text, or facsimile) with the United States House of Representatives Committee on Oversight and Government Reform regarding the matter captioned In re: LabMD, Inc., FTC Docket No. 9357.

The time period for this request is August 28, 2013 to the present.

Request for News Media Status

For fee purposes, Cause of Action qualifies as a “representative of the news media” under 5 U.S.C. § 552(a)(4)(A)(ii)(II). Specifically, Cause of Action gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.

Cause of Action gathers news that it regularly publishes from a variety of sources, including FOIA requests, whistleblowers/insiders, and scholarly works. Cause of Action does not merely make raw information available to the public, but rather distributes distinct work products, including articles, blog posts, investigative reports, and newsletters.¹ These distinct

works are distributed to the public through various media, including Cause of Action's website, which has been viewed just under 120,000 times in the past year alone. Cause of Action also disseminates news to the public via Twitter and Facebook, and it provides news updates to subscribers via e-mail.

The statutory definition of a “representative of the news media” unequivocally contemplates that organizations such as Cause of Action, which electronically disseminate information and publications via “alternative media[,] shall be considered to be news-media entities.” 5 U.S.C. § 552(a)(4)(A)(ii)(II). In light of the foregoing, federal agencies have appropriately recognized Cause of Action’s news media status in connection with its FOIA requests.3

Record Production and Contact Information

In the event that Cause of Action’s request for news media status is denied, Cause of Action, without waiving its right to appeal, would be willing to pay applicable fees up to $1,500. However, if you expect the fees to exceed $1,500, please contact us before proceeding.

In an effort to facilitate record production, please provide the responsive records in electronic format (e.g., PDFs). If a certain set of responsive records can be produced more readily, Cause of Action respectfully requests that those records be produced first and that the remaining records be produced on a rolling basis as circumstances permit.

If you have any questions about this request, please contact Patrick Massari by e-mail at patrick.massari@causeofaction.org, or by telephone at (202) 499-4232. Thank you for your attention to this matter.

Cause of Action

By:

Prashant K. Khetan, Esq.
Patrick J. Massari, Esq.


IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAUSE OF ACTION INSTITUTE

Plaintiff,

v. Civil Action No. 17-1649

FEDERAL TRADE COMMISSION

Defendant.

EXHIBIT 2 TO COMPLAINT
October 30, 2014

Patrick Massari
Cause of Action
1919 Pennsylvania Ave NW, Suite 650
Washington, DC 20006


Dear Mr. Massari:

This letter acknowledges the receipt of the four Freedom of Information Act (FOIA) requests you sent dated October 30, 2014. You sent these four requests to four different individuals: Mr. Jon Nuechterlein, General Counsel of the Federal Trade Commission ("the FTC"); Ms. Kelly Tshibaka, Acting Inspector General of the FTC; Mr. Christian White, Chief Ethics Officer of the FTC; and Ms. Claudia Simons, Legislative Counsel at the FTC. The requests are not exactly the same, but all of them request access to various records pertaining to the In re LabMD Inc. matter from August 28, 2013 to the present. Also, these are the only FOIA requests that we know you have recently sent to agency personnel. If there are others, please so advise us immediately so we can begin processing them.

As you are aware and previously have done so, a FOIA request for FTC records should be sent to the following address:

Freedom of Information Act Request
Office of General Counsel
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

In the future, if you do not properly address your FOIA request and send it to the FOIA Office, our response may be delayed and we may treat it as an improper FOIA request.

1 16 C.F.R. § 4.11 (a) Freedom of Information Act—(1) Initial requests—(i) Form and contents; time of receipt. (A) A request under the provisions of the Freedom of Information Act, 5 U.S.C. 552, as amended, for access to Commission records shall be in writing and transmitted by one of the following means: by mail to the following address: Freedom of Information Act Request, Office of the General Counsel, Federal Trade Commission, 600 Pennsylvania Avenue NW., Washington, DC 20580; by facsimile transmission to (202) 326-2477; by email message to the FOIA email account at foia@ftc.gov; or by the form located at the FTC's FOIA Web site, https://www.ftc.gov/foia.htm.
Please note that we designated three different FOIA request numbers to your submitted requests. FOIA Request No. 2015-00108 is assigned to your request addressed to Mr. Nuechterlein concerning all documents regarding the withdrawal of Margaret (or Maggie) Lassack as Complainant Counsel in connection with the matter captioned In re: LabMD, Inc., FTC Docket No. 9357. Request No. 2015-00109 is assigned to your requests addressed to Ms. Tshibaka and Mr. White pertaining to all documents regarding the matter captioned In re: LabMD, Inc., FTC Docket No. 9357. Request No. 2015-00110 is assigned to your request to Ms. Simons seeking all documents regarding 1) Margaret Lassack or Alain Sheer and 2) communications with the United States House of Representatives Committee on Oversight and Government Reform regarding the matter captioned In re: LabMD, Inc., FTC Docket No. 9357.

You may check the status of your FOIA request by visiting http://www.ftc.gov/about-ftc/foia/foia-reading-rooms/track-your-foia-request. The status of your FOIA requests is updated at the end of each month. If you should have any questions regarding your request, please contact me at 202-326-2735. In any telephone calls or future written correspondence concerning your requests, please refer to the following FOIA Request numbers FOIA-2015-00108, FOIA-2015-00109, and FOIA-2015-00110.

Sincerely,

Dione Stearns
Assistant General Counsel
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAUSE OF ACTION INSTITUTE
Plaintiff,
v.
FEDERAL TRADE COMMISSION
Defendant.

Civil Action No. 17-1649

EXHIBIT 3 TO COMPLAINT
Patrick Massari  
Cause of Action  
1919 Pennsylvania Ave NW, Suite 650  
Washington, DC 20006

Re: FOIA-2015-00110  
OCR communications

Dear Mr. Massari:

On October 30, 2014 we received under the Freedom of Information Act for access to communications to or from staff in the Office of Congressional Relations (1) regarding Margaret Lassack or Alain Sheer; or (2) reflecting communications with the House Committee on Oversight and Government Reform regarding the matter In re: LabMD, Inc, from August 28, 2013 to present. In that request, you asked that we grant Cause of Action news media status.

We are denying your request for news media status because we have determined that Cause of Action is a “commercial use” requester under the Commission’s Rules of Practice. See 16 C.F.R. § 4(b)(1). As such, Cause of Action is responsible for all search, review, and duplication costs associated with this request. We will continue processing your request in accordance with your $1500 fee agreement.

If you are not satisfied with our denial of your request for a fee waiver, 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, within 30 days of the date of this letter. Please enclose a copy of your original request and a copy of this response.

If you have any questions about the way we are handling your request or about the FOIA regulations or procedures, please contact Andrea Kelly at (202) 326-2836.

Sincerely,

Sarah Mackey
Associate General Counsel
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAUSE OF ACTION INSTITUTE

Plaintiff,

v. Civil Action No. 17-1649

FEDERAL TRADE COMMISSION

Defendant.

EXHIBIT 4 TO COMPLAINT
Dear Mr. Massari:

This is in partial response to your request dated October 30, 2014, under the Freedom of Information Act seeking access to communications to or from staff in the Office of Congressional Relations (1) regarding Margaret Lassack or Alain Sheer; or (2) reflecting communications with the House Committee on Oversight and Government Reform regarding the matter In re: LabMD, Inc, from August 28, 2013 to present. In accordance with the FOIA and agency policy, we have searched our records as of October 30, 2014, the date we received your request in our FOIA office.

We have reviewed 33 pages of records responsive to part two of your request. We are continuing to review responsive records, and hope to have an additional response to you shortly. Our final response will also contain an invoice for any fees incurred by this request, up to your $1500 fee agreement. I am granting partial access to the accessible records. Portions of these pages fall within the exemptions to the FOIA’s disclosure requirements, as explained below.

Portions of the responsive records are protected from disclosure under Article I, § 6, cl.1 of the Constitution, otherwise known as the Speech and Debate Clauses. This clause protects information that would directly interfere with the legislative process by interfering with an ongoing activity by Congress. See Paisley v. CIA, 712 F.2d 686, 696 (D.C. Cir. 1983), citing Eastland v. United States Servicemen’s Fund, 421 U.S. 491, 510 n. 16 (1975). This information is awarded additional protection under FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A), which exempts from disclosure material could reasonably be expected to interfere with ongoing law enforcement activities. See Robbins Tire & Rubber Co. v. NLRB, 437 U.S. 214 (1978).

Additionally, some of the records contain personal identifying information compiled for law enforcement purposes. This information is exempt for release under FOIA Exemptions 6, 5 U.S.C. § 552(b)(6), and 7(C), 5 U.S.C. § 552(b)(7)(C), because individuals’ right to privacy outweighs the general public’s interest in seeing personal identifying information.

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, within 30 days of the date of this letter. Please enclose a copy of your original request and a copy of this response. If you believe
that we should choose to disclose additional materials beyond what the FOIA requires, please explain why this would be in the public interest.

If you have any questions about the way we handled your request or about the FOIA regulations or procedures, please contact Andrea Kelly at (202) 326-2836.

Sincerely,

Sarah Mackey
Associate General Counsel
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAUSE OF ACTION INSTITUTE

Plaintiff,

v.

FEDERAL TRADE COMMISSION

Defendant.

Civil Action No. 17-1649

EXHIBIT 5 TO COMPLAINT
Brandon, Meghan, and Tim,

As I neglected to copy you, below please see my email correspondence from last week regarding the status of the FTC’s production in response to Chairman Issa’s September 22 document request. Please let me know if you have questions.

Jeanne

From: Bumpus, Jeanne
Sent: Thursday, October 23, 2014 4:56 PM
To: ‘Barblan, Jennifer’; Grimm, Tyler
Cc: Vandecar, Kim
Subject: RE: (b)(7)(A); Speech or Debate Clause

Jen and Tyler,

Regarding documents, we believe we have completed the production in response to requests 1 and 3. With respect to request 2, we provided some documents, but are still in the process of reviewing other materials that we have collected to see what is responsive. We will be in touch next week regarding the status.

Jeanne

From: Barblan, Jennifer [mailto:Jennifer.Barblan@mail.house.gov]
Sent: Thursday, October 23, 2014 3:48 PM
To: Bumpus, Jeanne; Grimm, Tyler
Cc: Vandecar, Kim
Subject: RE: (b)(7)(A); Speech or Debate Clause

Jeanne,

Please also confirm that the FTC has completed its response to the Chairman’s September 22 document request. If not, when do you anticipate making the next production?

Thanks,
Jen
Jen and Tyler,

Jeanne

Jeanne Bumpus
Office of Congressional Relations
Federal Trade Commission
326-2946
Hi Jeanne,

Attached please find a letter from Chairman Issa requesting documents related to our investigation of Tiversa, Inc. Please let me know if you have any questions.

Thank you.

Tyler Grimm
House Committee on Oversight and Government Reform
Rep. Darrell Issa, Chairman
(202) 225-5074
Brandon,

Attached please find the letter from the Department of Justice. It was shared Friday with Complaint and Respondent's Counsel.

Jeanne

Jeanne Bumpus
Office of Congressional Relations
Federal Trade Commission
326-2946
U.S. Department of Justice
Criminal Division

Assistant Attorney General

Washington, D.C., 20530

November 14, 2014

The Honorable David C. Shonka
Principal Deputy General Counsel
Office of the General Counsel
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Attention: Lisa M. Harrison
Bradley D. Grossman

Re: In re LabMD, Inc.

Dear Mr. Shonka:

Pursuant to the authority vested in me by 18 U.S.C. § 6004 and 28 C.F.R. § 0.175(a), I hereby approve your request for authority to issue an order requiring Richard Edward Wallace, pursuant to 18 U.S.C. § 6004, to give testimony or provide other information in the above matter and in any further proceedings resulting therefrom or ancillary thereto.

Sincerely,

Leslie R. Caldwell
Assistant Attorney General

[Signature]

PAUL M. O'BRIEN
DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION
Jen and Tyler,

Attached please find the letter from the Department of Justice. It was shared Friday with Complaint and Respondent's Counsel.

Jeanne

Jeanne Bumpus
Office of Congressional Relations
Federal Trade Commission
326-2946
The Honorable David C. Shonka  
Principal Deputy General Counsel  
Office of the General Counsel  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

Attention: Lisa M. Harrison  
Bradley D. Grossman

Re: In re LabMD, Inc.

Dear Mr. Shonka:

Pursuant to the authority vested in me by 18 U.S.C. § 6004 and 28 C.F.R. § 0.175(a), I hereby approve your request for authority to issue an order requiring Richard Edward Wallace, pursuant to 18 U.S.C. § 6004, to give testimony or provide other information in the above matter and in any further proceedings resulting therefrom or ancillary thereto.

Sincerely,

Leslie R. Caldwell  
Assistant Attorney General

[Signature]

PAUL L. O'BRIEN  
DEPUTY ASSISTANT ATTORNEY GENERAL  
CRIMINAL DIVISION
Kelly, Andrea

From: Bumpus, Jeanne
Sent: Wednesday, August 20, 2014 5:23 PM
To: ‘Marin, Mark’
Cc: Barblan, Jennifer; Grimm, Tyler; Berroya, Meghan; Reavis, Brandon; Lessley, Lucinda; Vandecar, Kim; 'ashley.callen@mail.house.gov'
Subject: Meeting with FTC staff week of Sept 8?

Mark,

I wanted to follow up on meeting with senior FTC staff. Would the week of September 8 work for you? Thank you,

Jeanne Bumpus
Office of Congressional Relations
Federal Trade Commission
326-2946
Thanks Jeanne. I appreciate it.

Best,
Brandon

From: Bumpus, Jeanne [mailto:Bumpus@ftc.gov]
Sent: Monday, November 17, 2014 9:26 AM
To: Reavis, Brandon
Cc: Vandecar, Kim
Subject: Letter from DoJ

Brandon,

Attached please find the letter from the Department of Justice. It was shared Friday with Complaint and Respondent’s Counsel.

Jeanne

Jeanne Bumpus
Office of Congressional Relations
Federal Trade Commission
326-2946
Kelly, Andrea

From: Barblan, Jennifer <Jennifer.Barblan@mail.house.gov>
Sent: Monday, November 17, 2014 11:11 AM
To: Bumpus, Jeanne
Subject: Re: Letter from DoJ

Thanks Jeanne

From: Bumpus, Jeanne [mailto:Bumpus@ftc.gov]
Sent: Monday, November 17, 2014 10:25 AM
To: Barblan, Jennifer; Grimm, Tyler
Cc: Vandecar, Kim <KVANDECAR@ftc.gov>
Subject: Letter from DoJ

Jen and Tyler,

Attached please find the letter from the Department of Justice. It was shared Friday with Complaint and Respondent’s Counsel.

Jeanne

Jeanne Bumpus
Office of Congressional Relations
Federal Trade Commission
326-2946
Kelly, Andrea

From: Bumpus, Jeanne  
Sent: Friday, August 22, 2014 9:38 AM  
To: 'Marin, Mark'  
Cc: Barblan, Jennifer; Grimm, Tyler; Berroya, Meghan; Reavis, Brandon; Lessley, Lucinda; Vandecar, Kim; Callen, Ashley  
Subject: RE: Meeting with FTC staff week of Sept 8?

Thanks Mark,

Unfortunately we have folks out the prior week, but Monday September 8 should be good. I will confirm with our people and get back to you.

Jeanne

From: Marin, Mark [mailto:Mark.Marin@mail.house.gov]  
Sent: Friday, August 22, 2014 9:16 AM  
To: Bumpus, Jeanne  
Cc: Barblan, Jennifer; Grimm, Tyler; Berroya, Meghan; Reavis, Brandon; Lessley, Lucinda; Vandecar, Kim; Callen, Ashley  
Subject: RE: Meeting with FTC staff week of Sept 8?

Thanks for reaching out, Jeanne, and sorry for the delay in responding. Would it be possible to meet during the prior week? Perhaps on September 2, 3, or 4? If not, Monday, September 8 should work also. Thanks -- Mark

From: Bumpus, Jeanne [mailto:Jbumpus@ftc.gov]  
Sent: Wednesday, August 20, 2014 5:23 PM  
To: Marin, Mark  
Cc: Barblan, Jennifer; Grimm, Tyler; Berroya, Meghan; Reavis, Brandon; Lessley, Lucinda; Vandecar, Kim; Callen, Ashley  
Subject: Meeting with FTC staff week of Sept 8?

Mark,

I wanted to follow up on meeting with senior FTC staff. Would the week of September 8 work for you? Thank you,

Jeanne Bumpus  
Office of Congressional Relations  
Federal Trade Commission  
326-2946
Kelly, Andrea

From: Bumpus, Jeanne
Sent: Friday, August 22, 2014 3:53 PM
To: 'Mark.Marin@mail.house.gov'
Cc: 'Jennifer.Barbian@mail.house.gov'; 'Tyler.Grimm@mail.house.gov';
'Meghan.Berroya@mail.house.gov'; 'brandon.reavis@mail.house.gov';
'luicinda.lessley@mail.house.gov'; Vandecar, Kim; 'Ashley.Callen@mail.house.gov'
Subject: Re: Meeting with FTC staff week of Sept 8?

Thanks. We'll plan to see you then.
Jeanne

From: Marin, Mark [mailto:Mark.Marin@mail.house.gov]
Sent: Friday, August 22, 2014 03:48 PM
To: Bumpus, Jeanne
Cc: Barbian, Jennifer <Jennifer.Barbian@mail.house.gov>; Grimm, Tyler <Tyler.Grimm@mail.house.gov>; Berroya, Meghan <Meghan.Berroya@mail.house.gov>; Reavis, Brandon <Brandon.Reavis@mail.house.gov>; Lessley, Lucinda <Lucinda.Lessley@mail.house.gov>; Vandecar, Kim; Callen, Ashley <Ashley.Callen@mail.house.gov>
Subject: Re: Meeting with FTC staff week of Sept 8?

Thanks Jeanne. Let's do 3:30pm in 2157 Rayburn. -Mark

On Aug 22, 2014, at 11:23 AM, "Bumpus, Jeanne" <JBumpus@ftc.gov> wrote:

Mark,

We are available to come up in the late afternoon of September 8, any time after 3:30. Please let me know if this works on your end, and where we should meet you. Thank you,

Jeanne

From: Marin, Mark [mailto:Mark.Marin@mail.house.gov]
Sent: Friday, August 22, 2014 9:16 AM
To: Bumpus, Jeanne
Cc: Barbian, Jennifer; Grimm, Tyler; Berroya, Meghan; Reavis, Brandon; Lessley, Lucinda; Vandecar, Kim; Callen, Ashley
Subject: RE: Meeting with FTC staff week of Sept 8?

Thanks for reaching out, Jeanne, and sorry for the delay in responding. Would it be possible to meet during the prior week? Perhaps on September 2, 3, or 4? If not, Monday, September 8 should work also. Thanks -- Mark

From: Bumpus, Jeanne [mailto:JBumpus@ftc.gov]
Sent: Wednesday, August 20, 2014 5:23 PM
To: Marin, Mark
Cc: Barbian, Jennifer; Grimm, Tyler; Berroya, Meghan; Reavis, Brandon; Lessley, Lucinda; Vandecar, Kim; Callen, Ashley
Subject: Meeting with FTC staff week of Sept 8?

Mark,
I wanted to follow up on meeting with senior FTC staff. Would the week of September 8 work for you? Thank you,

Jeanne Bumpus  
Office of Congressional Relations  
Federal Trade Commission  
326-2946
Kelly, Andrea

From: Lessley, Lucinda <Lucinda.Lessley@mail.house.gov>
Sent: Friday, September 26, 2014 2:05 PM
To: Bumpus, Jeanne
Cc: Vandecar, Kim
Subject: Re: Response to Letter from Chairman Issa

Oh - no problem - thanks!

Lucinda Lessley
Committee on Oversight & Government Reform
Office of Congressman Elijah E. Cummings
202-225-4741

Sent from my little BlackBerry

From: Bumpus, Jeanne [mailto:JBumpus@ftc.gov]
Sent: Friday, September 26, 2014 2:01 PM
To: Lessley, Lucinda
Cc: Vandecar, Kim <KVANDECAR@ftc.gov>
Subject: FW: Response to Letter from Chairman Issa

Sorry Lucinda,

I corrected my misspelling of your name.

Jeanne

From: Bumpus, Jeanne
Sent: Friday, September 26, 2014 1:48 PM
To: 'Grimm, Tyler'
Cc: Vandecar, Kim; Barblan, Jennifer; Gorman, Elizabeth; Callen, Ashley; 'meghan.berroya@mail.house.gov'; 'brandon.reavis@mail.house.gov'; 'lucinda.leslie@mail.house.gov'
Subject: Response to Letter from Chairman Issa

Tyler,

I am responding to Chairman Issa’s letter to Chairwoman Edith Ramirez, dated September 22, 2014. We are working to comply with your latest request and would like to discuss the timing and scope of the document search you wish us to undertake. We can begin document production on October 6, 2014, but the amount of time it takes to complete the production will depend on the breadth of the search.

Sincerely,

Jeanne Bumpus
Director
Office of Congressional Relations
Federal Trade Commission
Hi Jeanne,

Attached please find a letter from Chairman Issa requesting documents [redacted] related to our investigation of Tiversa, Inc. Please let me know if you have any questions.

Thank you.

Tyler Grimm
House Committee on Oversight and Government Reform
Rep. Darrell Issa, Chairman
(202) 225-5074
Kelly, Andrea

From: Bumpus, Jeanne
Sent: Monday, September 29, 2014 12:14 PM
To: ‘Grimm, Tyler’
Cc: Barblan, Jennifer; Vandecar, Kim
Subject: RE: Response to Letter from Chairman Issa

Tyler,

That’s good, thanks. Yes, please call 326-2946.

Jeanne

From: Grimm, Tyler [mailto:Tyler.Grimm@mail.house.gov]
Sent: Monday, September 29, 2014 12:13 PM
To: Bumpus, Jeanne
Cc: Barblan, Jennifer; Vandecar, Kim
Subject: RE: Response to Letter from Chairman Issa

Thanks. How about 3:45? Is there a good number to call you at?

From: Bumpus, Jeanne [mailto:Bumpus@ftc.gov]
Sent: Monday, September 29, 2014 12:07 PM
To: Grimm, Tyler
Cc: Barblan, Jennifer; Vandecar, Kim
Subject: RE: Response to Letter from Chairman Issa

Tyler,

Yes, Kim and I are free until 2:00, then again after 3:30.

Jeanne

From: Grimm, Tyler [mailto:Tyler.Grimm@mail.house.gov]
Sent: Monday, September 29, 2014 11:28 AM
To: Bumpus, Jeanne
Cc: Barblan, Jennifer
Subject: RE: Response to Letter from Chairman Issa

Jeanne – Do you have time for a call later this afternoon?

Thank you.

Tyler

From: Bumpus, Jeanne [mailto:Bumpus@ftc.gov]
Sent: Friday, September 26, 2014 1:48 PM
To: Grimm, Tyler
Cc: Vandecar, Kim; Barblan, Jennifer; Gorman, Elizabeth; Callen, Ashley; Berroya, Meghan; Reavis, Brandon;
Tyler,

I am responding to Chairman Issa’s letter to Chairwoman Edith Ramirez, dated September 22, 2014. We are working to comply with your latest request and would like to discuss the timing and scope of the document search you wish us to undertake. We can begin document production on October 6, 2014, but the amount of time it takes to complete the production will depend on the breadth of the search.

Sincerely,

Jeanne Bumpus
Director
Office of Congressional Relations
Federal Trade Commission
(202) 326-2946

From: Grimm, Tyler [mailto:Tyler.Grimm@mail.house.gov]
Sent: Monday, September 22, 2014 3:49 PM
To: Bumpus, Jeanne
Cc: Vandecar, Kim; Barblan, Jennifer; Gorman, Elizabeth; Callen, Ashley
Subject: Letter from Chairman Issa
Importance: High

Hi Jeanne,

Attached please find a letter from Chairman Issa requesting documents related to our investigation of Tiversa, Inc. Please let me know if you have any questions.

Thank you.

Tyler Grimm
House Committee on Oversight and Government Reform
Rep. Darrell Issa, Chairman
(202) 225-5074
Hi Jeanne,

Tyler is out today, but I'm available at 2:30. You can reach me at 226-5818.

Thanks,
Jen

---

From: Bumpus, Jeanne [mailto:Bumpus@ftc.gov]
Sent: Friday, October 31, 2014 10:39 AM
To: Barblan, Jennifer; Grimm, Tyler
Cc: Vandecar, Kim
Subject: Talk at 2:30?

Jen and Tyler,

Are you available at 2:30 today to talk about the document production?

Jeanne

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From: Bumpus, Jeanne
Sent: Thursday, October 30, 2014 4:51 PM
To: 'Barblan, Jennifer'; Grimm, Tyler
Cc: Vandecar, Kim
Subject: RE: No need to talk

Jen,

No problem, thank you. We should be able to talk tomorrow afternoon about the document production.

Jeanne

---

From: Barblan, Jennifer [mailto:Jennifer.Barblan@mail.house.gov]
Sent: Thursday, October 30, 2014 4:31 PM
To: Bumpus, Jeanne; Grimm, Tyler
Cc: Vandecar, Kim
Subject: RE: No need to talk

Jeanne,

Sorry for the delay in getting back to you – both Tyler and I were tied up in meetings today. Can we talk tomorrow or Monday about the timing of the remaining documents to be produced?

Thanks,
Jen

From: Bumpus, Jeanne [mailto:Bumpus@ftc.gov]
Sent: Thursday, October 30, 2014 1:11 PM
To: Barblan, Jennifer; Grimm, Tyler
Cc: Vandecar, Kim
Subject: No need to talk

Jen and Tyler,

We just spoke to the Minority re: our question and they were able to answer it, so please disregard my earlier request to talk later today. Thank you,

Jeanne

From: Bumpus, Jeanne
Sent: Thursday, October 30, 2014 12:13 PM
To: 'Barblan, Jennifer'; Grimm, Tyler
Cc: Vandecar, Kim
Subject: Talking today?

Jen and Tyler,

Kim and I hoped to talk to you today if you’re able. Do you have any time this afternoon when we can call you? If so, what is the best number to use? Thank you,

Jeanne

Jeanne Bumpus
Office of Congressional Relations
Federal Trade Commission
326-2946
Kelly, Andrea

From: Bumpus, Jeanne
Sent: Tuesday, September 30, 2014 11:14 AM
To: 'Barblan, Jennifer'; Grimm, Tyler
Cc: Vandecar, Kim
Subject: RE: Time to talk at 11:15?

Thanks,

Understood. Yes, we’re available this afternoon as well.

Jeanne

From: Barblan, Jennifer [mailto:Jennifer.Barblan@mail.house.gov]
Sent: Tuesday, September 30, 2014 11:11 AM
To: Bumpus, Jeanne; Grimm, Tyler
Cc: Vandecar, Kim
Subject: RE: Time to talk at 11:15?

Hi Jeanne,

Much of our staff is tied up this morning with the Secret Service hearing. Can we talk later this afternoon? I will be in touch as soon as I have a better idea as to time.

Thanks,

Jen

From: Bumpus, Jeanne [mailto:Bumpus@ftc.gov]
Sent: Tuesday, September 30, 2014 10:58 AM
To: Barblan, Jennifer; Grimm, Tyler
Cc: Vandecar, Kim
Subject: Time to talk at 11:15?

Jen and Tyler,

Were you able to get any clarification re: the scope of the document request[1] If so, are you available to talk at 11:15 this morning?

Thank you,

Jeanne Bumpus
Office of Congressional Relations
Federal Trade Commission
326-2946
Thank you. We’ll get back to you re: schedule.

Jeanne

From: Grimm, Tyler [mailto:Tyler.Grimm@mail.house.gov]
Sent: Tuesday, September 30, 2014 4:12 PM
To: Bumpus, Jeanne; Vandecar, Kim; Barblan, Jennifer
Subject: RE: Time to talk at 11:15?

Yes – meant to include that in the e-mail, thanks for reminding me.

From: Bumpus, Jeanne [mailto:Bumpus@ftc.gov]
Sent: Tuesday, September 30, 2014 4:11 PM
To: Grimm, Tyler; Vandecar, Kim; Barblan, Jennifer
Subject: RE: Time to talk at 11:15?

Tyler,

Appreciate the quick response. Let us take this back to our folks and we’ll be in touch.

Jeanne.

From: Grimm, Tyler [mailto:Tyler.Grimm@mail.house.gov]
Sent: Tuesday, September 30, 2014 3:56 PM
To: Vandecar, Kim; Barblan, Jennifer; Bumpus, Jeanne
Subject: RE: Time to talk at 11:15?

Kim and Jeanne,

With respect to the document production, we are still discussing internally the issues you raised yesterday. We will get you an answer soon, but in the mean time, we are willing to accept a rolling production of documents as soon as they are available. Hopefully this addresses some of the issues but if you would still like to talk at 4:30, we can be available.

Thank you.
From: Vandecar, Kim [mailto:KVANDECAR@ftc.gov]
Sent: Tuesday, September 30, 2014 3:51 PM
To: Barblan, Jennifer; Bumpus, Jeanne; Grimm, Tyler
Subject: RE: Time to talk at 11:15?

Thanks Jen. Any chance we could talk before 4:30?

From: Barblan, Jennifer [mailto:Jennifer.Barblan@mail.house.gov]
Sent: Tuesday, September 30, 2014 11:11 AM
To: Bumpus, Jeanne; Grimm, Tyler
Cc: Vandecar, Kim
Subject: RE: Time to talk at 11:15?

Hi Jeanne,

Much of our staff is tied up this morning with the Secret Service hearing. Can we talk later this afternoon? I will be in touch as soon as I have a better idea as to time.

Thanks,
Jen

From: Bumpus, Jeanne [mailto:Bumpus@ftc.gov]
Sent: Tuesday, September 30, 2014 10:58 AM
To: Barblan, Jennifer; Grimm, Tyler
Cc: Vandecar, Kim
Subject: Time to talk at 11:15?

Jen and Tyler,

Were you able to get any clarification re: the scope of the document request? If so, are you available to talk at 11:15 this morning?

Thank you,

Jeanne Bumpus
Office of Congressional Relations
Federal Trade Commission
326-2946
Brandon,

Thank you. We’ll call you at 1:00.

Jeanne.

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Hi Jean,

I would be available at any time before 3:30 this afternoon.

Thanks,

Brandon

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Brandon, Meghan, and Tim,

Kim and I hoped to talk to you today if you’re available. Do you have any time for a call this afternoon? Thank you,

Jeanne

Jeanne Bumpus
Office of Congressional Relations
Federal Trade Commission
326-2946
Thank you.

Jeanne

Jeanne and Kim –

Thanks,

Jen

Jennifer Barblan
Senior Counsel
Committee on Oversight and Government Reform
Rep. Darrell E. Issa, Chairman
(202) 225-5074
Jennifer.Barblan@mail.house.gov
From: Reavis, Brandon <Brandon.Reavis@mail.house.gov>
Sent: Monday, October 27, 2014 10:58 AM
To: Bumpus, Jeanne
Subject: RE: [b](7)(A). Speech or Debate Clause

Thanks Jeanne.

From: Bumpus, Jeanne [mailto:Bumpus@ftc.gov]
Sent: Monday, October 27, 2014 10:58 AM
To: Reavis, Brandon; Berroya, Meghan; Lynch, Tim
Cc: Vandecar, Kim
Subject: RE: [b](7)(A). Speech or Debate Clause

Thanks Brandon,

Yes, we have sent you all of the documents we’ve provided to the majority staff.

Jeanne

From: Reavis, Brandon [mailto:Brandon.Reavis@mail.house.gov]
Sent: Monday, October 27, 2014 9:19 AM
To: Bumpus, Jeanne; Berroya, Meghan; Lynch, Tim
Subject: RE: [b](7)(A). Speech or Debate Clause

Thanks Jeanne. Can you please confirm that the minority staff has received all documents produced to the majority staff at this point? Thanks again.

From: Bumpus, Jeanne [mailto:Bumpus@ftc.gov]
Sent: Monday, October 27, 2014 9:14 AM
To: Reavis, Brandon; Berroya, Meghan; Lynch, Tim
Subject: FW: [b](7)(A). Speech or Debate Clause

Brandon, Meghan, and Tim,

As I neglected to copy you, below please see my email correspondence from last week regarding the status of the FTC’s production in response to Chairman Issa’s September 22 document request. Please let me know if you have questions.

Jeanne

From: Bumpus, Jeanne
Sent: Thursday, October 23, 2014 4:56 PM
To: 'Barblan, Jennifer'; Grimm, Tyler
Cc: Vandecar, Kim
Subject: RE: [b](7)(A). Speech or Debate Clause

Jen and Tyler,
Regarding documents, we believe we have completed the production in response to requests 1 and 3. With respect to request 2, we provided some documents, but are still in the process of reviewing other materials that we have collected to see what is responsive. We will be in touch next week regarding the status.

Jeanne

From: Barblan, Jennifer [mailto:Jennifer.Barblan@mail.house.gov]
Sent: Thursday, October 23, 2014 3:48 PM
To: Bumpus, Jeanne; Grimm, Tyler
Cc: Vandecar, Kim
Subject: RE: (b)(7)(A). Speech or Debate Clause

Jeanne,

(b)(7)(A). Speech or Debate Clause

Please also confirm that the FTC has completed its response to the Chairman’s September 22 document request. If not, when do you anticipate making the next production?

Thanks,
Jen

From: Bumpus, Jeanne [mailto: JBumpus@ftc.gov]
Sent: Thursday, October 23, 2014 12:59 PM
To: Barblan, Jennifer; Grimm, Tyler
Cc: Vandecar, Kim
Subject: (b)(7)(A). Speech or Debate Clause

Jen and Tyler,

(b)(6). (b)(7)(A). (b)(7)(C). Speech or Debate Clause

Jeanne

Jeanne Bumpus
Office of Congressional Relations
Federal Trade Commission
326-2946
Kelly, Andrea

From: Bumpus, Jeanne
Sent: Monday, September 29, 2014 5:48 PM
To: 'Grimm, Tyler'; Barblan, Jennifer
Cc: Vandecar, Kim
Subject: Scheduling

Tyler and Jen,

[Highlighted text]

Jeanne Bumpus
Office of Congressional Relations
Federal Trade Commission
326-2946
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAUSE OF ACTION INSTITUTE
Plaintiff,
v.

FEDERAL TRADE COMMISSION
Defendant.

Civil Action No. 17-1649

EXHIBIT 6 TO COMPLAINT
December 19, 2014

VIA E-MAIL

Ms. Sarah Mackey
Associate General Counsel
Office of the General Counsel
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
E-mail: FOIA@ftc.gov

Re: Freedom of Information Act Appeal: FOIA No. 2015–00110

Dear Ms. Mackey:

This is a timely administrative appeal of the Federal Trade Commission’s (“FTC”) November 20, 2014 letter in response to Cause of Action’s (“CoA”) Freedom of Information Act (“FOIA”) request for all documents regarding Margaret (or Maggie) Lassack or Alain Sheer; and reflecting communications with the United States House of Representatives Committee on Oversight and Government Reform regarding the matter captioned In re: LabMD, Inc., FTC Docket No. 9357. CoA is appealing FTC’s denial of CoA’s request for news media status.

Procedural Background

On October 30, 2014, CoA submitted a FOIA request requesting “access to all documents (including, but not limited to, communications via e-mail, text, or facsimile): (1) regarding Margaret (or Maggie) Lassack or Alain Sheer; and (2) reflecting communications (including, but not limited to, via e-mail, text, or facsimile) with the United States House of Representatives Committee on Oversight and Government Reform regarding the matter captioned In re: LabMD, Inc., FTC Docket No. 9357.”¹ For fee purposes, CoA established it qualifies as a “representative of the news media.” FTC responded, “denying . . . [CoA’s] request for news media status because we have determined that Cause of Action is a ‘commercial use’ requester” under 16 C.F.R. § 4(b)(1).²

Discussion

I. Cause of Action is a Representative of the News Media.

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FOIA defines "a representative of the news media" as "[(1)] any person or entity that
gathers information of potential interest to a segment of the public, [(2)] uses its editorial skills to
turn the raw materials into a distinct work, and [(3)] distributes that work to an audience." The
statute further defines "news" as "information that is about current events or that would be of
current interest to the public." The statutory definition of a news media requester unequivocally
contemplates that organizations such as CoA, which electronically disseminate information and
publications via "alternative media[, shall be considered to be news-media entities." For these
reasons, numerous federal agencies have appropriately recognized CoA’s news media status in
connection with its FOIA requests. As detailed below, CoA is a representative of the news
media because it satisfies each of the three statutory criteria. Indeed, FTC’s failure to explain
why CoA does not meet the standard — instead providing only a conclusory statement — is itself
reason to revisit the determination. Moreover, FTC’s determination that CoA is not a

A. CoA gathers information of potential interest to the public.

CoA gathers the information that it regularly publishes from a wide variety of sources and
methods, including whistleblowers, government agencies, universities, scholarly works, and
FOIA requests. This information pertains to current events, other issues of interest to the public,
and topics considered valuable in contemporary political and cultural discourse. Notably, the
FTC has failed to explain why the information CoA seeks is not of potential interest to the
public. Yet, the public has a substantial interest in understanding the FTC’s policies, practices,
and procedures, to the extent any exist, as applied in connection with a pending enforcement
action by the FTC.

B. CoA uses its editorial skill to create distinct works.

CoA uses the information it obtains through its investigative efforts to create reports,
newsletters, memoranda, press releases, original website content, and other news materials. Over

4 Id.
5 Id.
6 See, e.g., FOIA Request F-2015-106, Fed. Communications Comm’n, (Dec. 12, 2014); FOIA Request F-2014-
21360, Dep’t of State (Dec. 3, 2014); FOIA Request LR-2015-0115, Nat’l Labor Relations Bd. (Dec. 1, 2014);
FOIA Request 201500009F, Exp.-Imp. Bank (Nov. 21, 2014); FOIA Request 2015-OSEC-00771-F, U.S. Dep’t of
Agric. (OCIO) (Nov. 21, 2014); FOIA Request OS-2015-00068, U.S. Dep’t of Interior (Office of Sec’y) (Nov. 20,
2014); FOIA Request CFPB-2015-049-F, Consumer Fin. Prot. Bureau (Nov. 19, 2014); FOIA Request CFPB-2014-
14, 2014); FOIA Request LR-20140441, Nat’l Labor Relations Bd. (June 4, 2014); FOIA Request 14-01095, Sec. &
Exch. Comm’n (May 7, 2014); FOIA Request 2014-4QFO-00236, Dep’t of Homeland Sec. (Jan. 8, 2014); FOIA
Request DOC-OS-2014-000304, Dep’t of Commerce (Dec. 30, 2013); FOIA Request 14F-036, Health Res. & Serv.
Admin. (Dec. 6, 2013); FOIA Request CFPB-2014-010-F, Consumer Fin. Prot. Bureau (Oct. 7, 2013); FOIA
Request 2013-01234-F, Dep’t of Energy (July 1, 2013); FOIA Request 2013-073, Dep’t of Homeland Sec.
(Apr. 5, 2013); FOIA Request 2012-RMA-02563F, Dep’t of Agric. (Mar. 3, 2012); FOIA Request 2012-00270,
Dep’t of Interior (Feb. 17, 2012); FOIA Request 12-00455-F, Dep’t of Educ. (Jan. 20, 2012).
7 Cf. Stewart v. Dep’t of Interior, 554 F.3d 1236 (10th Cir. 2009) (conclusory fee category denials likely would be
overturned on de novo judicial review because such review is restricted to the administrative record).
the past seventeen months, for example, CoA has published nine reports that incorporated information obtained from diverse sources. During that same period, CoA produced fifteen blog posts related to its investigative reporting efforts vis-à-vis the FOIA, which editorialized on responsive documents or the failure of agencies to reply satisfactorily. All of these activities


required the extensive research and editorial skills of CoA’s analysts, lawyers, and communications experts. CoA does not simply maintain a database or library of responsive documents that is accessible and searchable by the public. Instead, it is engaged in reporting on the operations and activities of the government.

While CoA’s investigative reports, blog posts, and online outreach may not always be published in traditional print form, Congress intended the phrase “representative of the news media” to be construed “broadly.” “[A]ny person or organization which regularly publishes or disseminates information to the public ... should qualify for waivers as a ‘representative of the news media.’”

Congress passed FOIA to facilitate government accountability and “unambiguously envisioned” that public interest organizations like CoA would constitute a “representative of the news media.” As one district court has stated, “arguably anyone with a website” is entitled to news media status, at least in demanding free search services, and it rests with Congress to remedy agency dissatisfaction with this liberality. Here, CoA is engaged in more than the mere maintenance of a website: it creates original editorial content and distributes that content to a wider audience, which is the hallmark of a news media requester.

C. Cause of Action distributes its original work to an audience.

In its original request, CoA demonstrated how it is able to actively disseminate information to the public rather than passively make it available on a website. CoA is actively involved in creating original editorial work product using material it has gleaned from various sources; this content includes reports, blog posts, newsletters, memoranda, press releases, and other news materials. Like every “traditional news” media organization, CoA maintains a regularly-updated website, a Facebook page, and a Twitter account. Unlike an “information vendor[], data broker[], or other second-hand disseminator[] of documents,” CoA distributes its original content through its own outlets. And by distributing such information to other media organizations that enjoy larger and more diverse readerships, CoA reaches an even wider


10 Nat’l Sec. Archive v. Dep’t of Defense, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (“[O]rganizations seeking to establish private repositories of public records shall not qualify for a waiver. These groups purport to act as an intermediary between the Government and requesters in seeking records that requesters could only seek directly from the Government.”) (citing comments of Sen. Orrin Hatch, 132 Cong. Rec. S14040 (Sept. 27, 1986)).

11 Id. at 1386 (citing 132 Cong. Rec. S14298 (Sept. 30, 1986)).

12 Id.

13 Nat’l Sec. Archive, 880 F.2d at 1385.


15 See supra note 1, Ex. 1.

16 Nat’l Sec. Archive, 880 F.2d at 1387 (“[I]information vendors, data brokers, and other second-hand disseminators of documents who do so at a price as the means of their economic self-sufficiency, should not qualify ... under any reasonable construction of the term ‘media.’”) (citing comments of Sen. Orrin Hatch, 132 Cong. Rec. S16505 (Oct. 15, 1986)).
audience." Thus, CoA is capable of disseminating original work concerning the requested records "to a reasonably broad audience of persons interested in the subject," and in such a manner as to constitute "news."  

CoA intends to make the results of its analysis of the requested information available to the public in various ways, including its website and electronic newsletters. These formats have "consistently [been] found ... sufficiently broad to demonstrate that the disclosure of requested information will contribute to a greater understanding on the part of the public at large." A requester need not disseminate information to a "broad cross-section of the public in order to benefit the public at large." It is sufficient, rather, that CoA's original content is distributed to, or accessed by, prominent universities, think-tanks, media organizations, corporations and federal government entities.

Accordingly, FTC should revisit this issue and determine that CoA is a representative of the news media.

II. CoA is Not a "Commercial Use" Requester.

With no explanation or meaningful citations, FTC summarily determined that CoA is a "commercial use" requester. As set forth below, this determination is wrong and violates 5 U.S.C. § 706(2)(A).

FTC's FOIA regulations define a commercial use requester as "a requester who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made." As opposed to other fee categories, inclusion in the commercial use category is determined not by the identity of the

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18 Carney v. Dep't of Justice, 19 F.3d 807, 815 (2d Cir. 1994); see also Federal CURE v. Lappin, 602 F. Supp. 2d 197, 202-06 (D.D.C. 2009) (finding a nonprofit public interest organization to be capable of disseminating records to a sufficiently broad audience, and to increase the limited information concerning the subject of its FOIA request, through its website, newsletter, and chat room).


20 In Def. of Animals v. Nat'l Insts. of Health, 543 F. Supp. 2d 83, 110 (D.D.C 2008) (citation omitted); see also, e.g., Forest Guardians v. Dep't of Interior, 416 F.3d 1173, 1180 (10th Cir. 2005); Carney, 19 F.3d at 807.

21 See Carney, 19 F.3d at 814.

22 Google Analytics for http://www.causeofaction.org (on file with Cause of Action).

requester, but the use to which the requester will put the information obtained. Thus, it is possible for a commercial enterprise to make a request that is not for a commercial use, or for a non-profit organization to make a request for a commercial use. Here, the distinction is simple. CoA is not a "commercial use" requester because CoA submitted its FOIA request on its own behalf and not its client's – it has no commercial interest in making the requests in question.

As a non-profit, nonpartisan government accountability organization, CoA advocates for the protection of economic opportunity whenever federal regulations, spending, and cronyism threaten it. CoA reports on governmental activities to educate the public, and any legal representation is provided free of charge. CoA does not engage in commerce, trade, or profit-making. Thus, any information that CoA obtains from its FOIA request will be disseminated to the general public for the public's benefit, and not be used by CoA for commercial gain.

In deciding whether a request is primarily motivated by commercial interest, FTC should consider three factors: (1) whether a requester has provided sufficient explanatory material regarding the commercial interest consideration; (2) whether the public interest outweighs any extant commercial interest; and, (3) whether a presumption based on the requester's status, e.g., as a representative of the news media or a corporation might apply.

As previously indicated, there is no commercial interest in making the requests in question. Rather, any information obtained would benefit the public interest in that it would educate the public on the internal workings of the FTC, an agency that brings enforcement actions against businesses. Other commercial benefits that may arise (such as charitable contributions) would be incidental, and would not vitiate CoA's primary educational and advocacy goals. In the alternative, even if CoA were to possess a limited commercial interest, this interest would be outweighed by the benefit to public interest and understanding of FTC's activities relating to its efforts to bring enforcement actions. Additionally, media or scholars can have a profit motive, as long as the dissemination of the requested information is made in their professional capacity and, again, would further the public interest. Finally, given that CoA should qualify as a representative of the news media (as set forth above), there should be a presumption here that there is no commercial interest. Accordingly, FTC should determine that CoA is not a "commercial use" requester.

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25 Id.
27 43 C.F.R. § 2.48(b)(1)-(3) (Dept't of the Interior regulations).
28 Ctr. for Medicare Advocacy, Inc. v. U.S. Dep't of Health & Human Servs., 577 F. Supp. 2d 221, 242 (D.D.C. 2008) (finding that a non-profit organization that educated and advocated on behalf of Medicare beneficiaries was still entitled to a public interest fee waiver).
Ms. Sarah Mackey  
December 19, 2014  
Page 7

Please do not hesitate to contact me at (202)499-4232 or patrick.massari@causeofaction.org if you have any questions.

Sincerely,

Patrick J. Massari, Esq.
Exhibit 1
VIA E-MAIL

Ms. Claudia Simons
Legislative Counsel
Office of Congressional Relations
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
E-mail: FOIA@ftc.gov

Re: Freedom of Information Act Request

Dear Ms. Simons:

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), Cause of Action hereby requests access to all documents (including, but not limited to, communications via e-mail, text, or facsimile): (1) regarding Margaret (or Maggie) Lassack or Alain Sheer; and (2) reflecting communications (including, but not limited to, via e-mail, text, or facsimile) with the United States House of Representatives Committee on Oversight and Government Reform regarding the matter captioned In re: LabMD, Inc., FTC Docket No. 9357.

The time period for this request is August 28, 2013 to the present.

Request for News Media Status

For fee purposes, Cause of Action qualifies as a “representative of the news media” under 5 U.S.C. § 552(a)(4)(A)(ii)(II). Specifically, Cause of Action gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.

Cause of Action gathers news that it regularly publishes from a variety of sources, including FOIA requests, whistleblowers/insiders, and scholarly works. Cause of Action does not merely make raw information available to the public, but rather distributes distinct work products, including articles, blog posts, investigative reports, and newsletters. These distinct

works are distributed to the public through various media, including Cause of Action's website, which has been viewed just under 120,000 times in the past year alone. Cause of Action also disseminates news to the public via Twitter and Facebook, and it provides news updates to subscribers via e-mail.

The statutory definition of a “representative of the news media” unequivocally contemplates that organizations such as Cause of Action, which electronically disseminate information and publications via “alternative media[,] shall be considered to be news-media entities.” 5 U.S.C. § 552(a)(4)(A)(ii)(II). In light of the foregoing, federal agencies have appropriately recognized Cause of Action’s news media status in connection with its FOIA requests.

**Record Production and Contact Information**

In the event that Cause of Action’s request for news media status is denied, Cause of Action, without waiving its right to appeal, would be willing to pay applicable fees up to $1,500. However, if you expect the fees to exceed $1,500, please contact us before proceeding.

In an effort to facilitate record production, please provide the responsive records in electronic format (e.g., PDFs). If a certain set of responsive records can be produced more readily, Cause of Action respectfully requests that those records be produced first and that the remaining records be produced on a rolling basis as circumstances permit.

If you have any questions about this request, please contact Patrick Massari by e-mail at patrick.massari@causeofaction.org, or by telephone at (202) 499-4232. Thank you for your attention to this matter.

Cause of Action

By:  

[Signature]

Prashant K. Khetan, Esq.

Patrick J. Massari, Esq.

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Exhibit 2
Patrick Massari  
Cause of Action  
1919 Pennsylvania Ave NW, Suite 650  
Washington, DC 20006

Dear Mr. Massari:

On October 30, 2014 we received under the Freedom of Information Act for access to communications to or from staff in the Office of Congressional Relations (1) regarding Margaret Lassack or Alain Sheer; or (2) reflecting communications with the House Committee on Oversight and Government Reform regarding the matter In re: LabMD, Inc, from August 28, 2013 to present. In that request, you asked that we grant Cause of Action news media status.

We are denying your request for news media status because we have determined that Cause of Action is a “commercial use” requester under the Commission’s Rules of Practice. See 16 C.F.R. § 4(b)(1). As such, Cause of Action is responsible for all search, review, and duplication costs associated with this request. We will continue processing your request in accordance with your $1500 fee agreement.

If you are not satisfied with our denial of your request for a fee waiver, 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, within 30 days of the date of this letter. Please enclose a copy of your original request and a copy of this response.

If you have any questions about the way we are handling your request or about the FOIA regulations or procedures, please contact Andrea Kelly at (202) 326-2836.

Sincerely,

Sarah Mackey  
Associate General Counsel
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAUSE OF ACTION INSTITUTE
Plaintiff,

v.

FEDERAL TRADE COMMISSION
Defendant.

Civil Action No. 17-1649

EXHIBIT 7 TO COMPLAINT
VIA E-MAIL

Mr. Jonathan E. Nuechterlein
Office of the General Counsel
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
E-mail: FOIA@ftc.gov

Re: Freedom of Information Act Appeal: FOIA No. 2015–00110

Dear Mr. Nuechterlein:


Procedural Background

On October 30, 2014, CoA submitted a FOIA request requesting “access to all documents (including, but not limited to, communications via e-mail, text, or facsimile): (1) regarding Margaret (or Maggie) Lassack or Alain Sheer; and (2) reflecting communications (including, but not limited to, via e-mail, text, or facsimile) with the United States House of Representatives Committee on Oversight and Government Reform regarding the matter captioned In re: LabMD, Inc., FTC Docket No. 9357.”\(^1\) On November 20, 2014, FTC denied “[CoA’s] request for news media status because we have determined that Cause of Action is a ‘commercial use’ requester” under 16 C.F.R. § 4(b)(1).\(^2\) On December 19, 2014, CoA filed a timely appeal of FTC’s denial of news media requester status and determination of CoA as a “commercial use” requester.\(^3\) On December 16, 2014, FTC issued an interim determination letter, making a partial production of

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3 Letter from Cause of Action to Sarah Mackey (Dec. 19, 2014) (on file with CoA).
documents (33 pages), which contained redactions purportedly based on Exemptions 6, 7(a) and 7(c), and the Speech or Debate Clause (U.S. Const. Art. I, § 6, cl. 1) (the “Clause”).

Discussion

FTC redacts various parts of documents based on Exemptions 6 and 7(c). However, FTC has failed to establish cognizable substantial privacy interests. Moreover, even assuming such privacy interests exist, FTC has failed to demonstrate that they outweigh the strong public interest in disclosure. See Multi AG Media LLC v. Dep’t of Agric., 515 F.3d 1224, 1230 (D.C. Cir. 2008). Here, CoA seeks the requested records for the purposes of government accountability, a recognized purpose served by the FOIA. See, e.g., Balt. Sun v. U.S. Marshals Serv., 131 F. Supp. 2d 725, 729 (D. Md. 2001).

In addition, FTC’s use of the Speech or Debate Clause to redact documents is erroneous as a matter of law. See Paisley v. CIA, 712 F.2d 686, 696 (D.C. Cir. 1983), vacated (in part), 724 F.2d 201 (D.C. Cir. 1984). FTC does not have standing to assert the Clause because its privileges belong exclusively to Members of Congress. Paisley, 712 F.2d at 687 & 697; Eastland v. United States Servicemen’s Fund, 421 U.S. 491, 502 (1975) (citations omitted); Hutchinson v. Proxmire, 443 U.S. 111, 127 (1979); United States v. Brewster, 408 U.S. 501, 507 (1972). FTC has not shown that any individual legislator or their aide(s) will be subject to civil or criminal litigation as a result of FTC’s production of documents, nor has FTC indicated that Congress asked FTC to invoke the Clause on its behalf. See Paisley, 724 F.2d at 204.

FTC suggests that disclosure would interfere with an ongoing activity by Congress, see Ex. 2, at 1, but FTC does not show “ongoing activity” by Congress or any evidence of an ongoing investigation, and the documents at issue do not reflect any possibility that such legislative activity or action will result in a lawsuit against any individual member of Congress, or that any congressional member will be questioned “in any other place.” Similarly, FTC has not met its burden to invoke Exemption 7(a), including that it makes no effort to show a specific pending or contemplated law enforcement proceeding. See, e.g., NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 224 (1978).

Conclusion

For all of these reasons, FTC’s redactions are contrary to law, ultra vires, and violate 5 U.S.C. § 706(2)(A). It should produce all documents in unredacted form within 20 days.

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4 Letter from Sarah Mackey to Cause of Action (Dec. 16, 2014) (attached as Ex. 2). CoA reserves all of its rights to raise such other and further issues on administrative appeal within 30 days of FTC making its final determination. See 16 C.F.R. § 4.11(a)(2) (2015) (“If an initial request is denied in part, the time for appeal will not expire until 30 days after the date of the letter notifying the requester that all records to which access has been granted have been made available.”).

5 Although FTC cites to Paisley in its December 16, 2014 determination letter, FTC ignores that Paisley refutes, rather than supports, FTC’s position.
Please do not hesitate to contact me at (202) 499-4232, or patrick.massari@causeofaction.org if you have any questions. Thank you for your consideration of this matter.

Cause of Action

By: [Signature]

Patrick J. Massari, Counsel
EXHIBIT 1
VIA E-MAIL

Ms. Claudia Simons
Legislative Counsel
Office of Congressional Relations
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
E-mail: FOIA@ftc.gov

Re:  Freedom of Information Act Request

Dear Ms. Simons:

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), Cause of Action hereby requests access to all documents (including, but not limited to, communications via e-mail, text, or facsimile): (1) regarding Margaret (or Maggie) Lassack or Alain Sheer; and (2) reflecting communications (including, but not limited to, via e-mail, text, or facsimile) with the United States House of Representatives Committee on Oversight and Government Reform regarding the matter captioned In re: LabMD, Inc., FTC Docket No. 9357.

The time period for this request is August 28, 2013 to the present.

Request for News Media Status

For fee purposes, Cause of Action qualifies as a “representative of the news media” under 5 U.S.C. § 552(a)(4)(A)(ii)(II). Specifically, Cause of Action gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.

Cause of Action gathers news that it regularly publishes from a variety of sources, including FOIA requests, whistleblowers/insiders, and scholarly works. Cause of Action does not merely make raw information available to the public, but rather distributes distinct work products, including articles, blog posts, investigative reports, and newsletters.¹ These distinct

works are distributed to the public through various media, including Cause of Action’s website, which has been viewed just under 120,000 times in the past year alone. Cause of Action also disseminates news to the public via Twitter and Facebook, and it provides news updates to subscribers via e-mail.

The statutory definition of a “representative of the news media” unequivocally contemplates that organizations such as Cause of Action, which electronically disseminate information and publications via “alternative media[,] shall be considered to be news-media entities.” 5 U.S.C. § 552(a)(4)(A)(ii)(II). In light of the foregoing, federal agencies have appropriately recognized Cause of Action’s news media status in connection with its FOIA requests.3

Record Production and Contact Information

In the event that Cause of Action’s request for news media status is denied, Cause of Action, without waiving its right to appeal, would be willing to pay applicable fees up to $1,500. However, if you expect the fees to exceed $1,500, please contact us before proceeding.

In an effort to facilitate record production, please provide the responsive records in electronic format (e.g., PDFs). If a certain set of responsive records can be produced more readily, Cause of Action respectfully requests that those records be produced first and that the remaining records be produced on a rolling basis as circumstances permit.

If you have any questions about this request, please contact Patrick Massari by e-mail at patrick.massari@causeofaction.org, or by telephone at (202) 499-4232. Thank you for your attention to this matter.

Cause of Action

By:

Prashant K. Khuton, Esq.
Patrick J. Massari, Esq.

---


EXHIBIT 2
Dear Mr. Massari:

This is in partial response to your request dated October 30, 2014, under the Freedom of Information Act seeking access to communications to or from staff in the Office of Congressional Relations (1) regarding Margaret Lassack or Alain Sheer; or (2) reflecting communications with the House Committee on Oversight and Government Reform regarding the matter In re: LabMD, Inc, from August 28, 2013 to present. In accordance with the FOIA and agency policy, we have searched our records as of October 30, 2014, the date we received your request in our FOIA office.

We have reviewed 33 pages of records responsive to part two of your request. We are continuing to review responsive records, and hope to have an additional response to you shortly. Our final response will also contain an invoice for any fees incurred by this request, up to your $1500 fee agreement. I am granting partial access to the accessible records. Portions of these pages fall within the exemptions to the FOIA’s disclosure requirements, as explained below.

Portions of the responsive records are protected from disclosure under Article I, § 6, cl.1 of the Constitution, otherwise known as the Speech and Debate Clause. This clause protects information that would directly interfere with the legislative process by interfering with an ongoing activity by Congress. See Paisley v. CIA, 712 F.2d 686, 696 (D.C. Cir. 1983), citing Eastland v. United States Servicemen’s Fund, 421 U.S. 491, 510 n. 16 (1975). This information is awarded additional protection under FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A), which exempts from disclosure material could reasonably be expected to interfere with ongoing law enforcement activities. See Robbins Tire & Rubber Co. v. NLRB, 437 U.S. 214 (1978).

Additionally, some of the records contain personal identifying information compiled for law enforcement purposes. This information is exempt for release under FOIA Exemptions 6, 5 U.S.C. § 552(b)(6), and 7(C), 5 U.S.C. § 552(b)(7)(C), because individuals’ right to privacy outweighs the general public’s interest in seeing personal identifying information.

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, within 30 days of the date of this letter. Please enclose a copy of your original request and a copy of this response. If you believe
that we should choose to disclose additional materials beyond what the FOIA requires, please explain why this would be in the public interest.

If you have any questions about the way we handled your request or about the FOIA regulations or procedures, please contact Andrea Kelly at (202) 326-2836.

Sincerely,

Sarah Mackey
Associate General Counsel
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

______________________________
CAUSE OF ACTION INSTITUTE
Plaintiff,
v.
FEDERAL TRADE COMMISSION
Defendant.

Civil Action No. 17-1649

______________________________
EXHIBIT 8 TO COMPLAINT
January 21, 2015

Patrick Massari
Cause of Action
1919 Pennsylvania Ave NW, Suite 650
Washington, DC 20006

Re: Freedom of Information Act (FOIA) Request-2015-00110

Dear Mr. Massari:

This letter responds to your appeal, received in this office on December 19, 2014, of our November 20, 2014 denial of news media requester status for your FOIA request.\(^1\) In your original FOIA request, received October 30, 2014, you sought access to all documents (including, but not limited to, communications via e-mail, text, or facsimile): (1) regarding Margaret (or Maggie) Lassack or Alain Sheer; and (2) reflecting communications with the House Committee on Oversight and Government Reform regarding the matter In re: LabMD, Inc, from August 28, 2013 to present.

As you are likely aware, Cause of Action (COA) is currently appealing the summary judgment granted in Cause of Action v. FTC, 961 F. Supp. 2d 142 (D.D.C. 2013), a decision that affirmed this agency’s denial of your organization’s request for news media requester status. That case aside, however, an agency’s determination of an individual requester’s fee status category is dependent on the intended use of the information sought. Here, I find that COA has an obvious commercial purpose in requesting communications referencing the staff attorneys assigned to the LabMD matter, and with the House Committee on Oversight and Government Reform for the same matter. Although in your appeal letter you failed to mention your organization’s role as opposing counsel in the Commission’s pending litigation against LabMD, your organization’s website prominently advertises that fact.\(^2\) Further, I do not find credible the claim in your appeal letter that you made the request on your own behalf and not your client’s. We could not distinguish your organization’s website maintenance activities from its activities as counsel to LabMD, especially where we were unable to find a single mention of the case on your website that does not also mention COA’s ongoing role as LabMD’s counsel.

---

\(^1\) A reply to your appeal dated January 15, 2015 regarding the same matter is forthcoming.

A FOIA request is in the commercial interest of the requester if it directly relates to its pending litigation against the agency. See Rozet v. HUD, 59 F. Supp. 2d 55, 57 (D.D.C. 1999) (finding commercial interest where requester sought documents to defend his corporations in civil fraud action, and discounting plaintiff's assertion that information was not of commercial interest where timing and content of requests in connection with other non-FOIA litigation conclusively demonstrated otherwise). In addition, although the news media status litigation is pending on appeal, the District Court expressly noted that one of the three requests at issue in that case was motivated by litigation rather than public good: “Even if the Court were to consider the commercial interest prong of the test, however, it would likely find COA’s second request fails that as well, because of its nexus with the lawsuit plaintiff filed against the agency.” Cause of Action v. FTC, 961 F. Supp. 2d at 159 n.4. Here, I find that your organization’s intent to inform the public with the information released under this request is, at most, secondary to the commercial use of the information as counsel to LabMD. Therefore, I am denying your appeal.

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, have your principal place of business, or in the United States District Court for the District of Columbia. You are also advised that I am the designated official responsible for this decision. 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 requestors 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]

David C. Shonka  
Principal Deputy General Counsel
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAUSE OF ACTION INSTITUTE
Plaintiff,
v.
FEDERAL TRADE COMMISSION
Defendant.

Civil Action No. 17-1649

EXHIBIT 9 TO COMPLAINT
Dear Mr. Massari:

This letter serves as our second and final response to your request dated October 30, 2014, under the Freedom of Information Act seeking access to communications to or from staff in the Office of Congressional Relations (1) regarding Margaret Lassak or Alain Sheer; or (2) reflecting communications with the House Committee on Oversight and Government Reform regarding the matter In re: LabMD, Inc, from August 28, 2013 to present. In accordance with the FOIA and agency policy, we have searched our records as of October 30, 2014, the date we received your request in our FOIA office.

We have located an additional 1.5GB of responsive records. I am granting partial access to the accessible records. Portions of these pages fall within the exemptions to the FOIA's disclosure requirements, as explained below.

Portions of the responsive records are protected from disclosure under Article I, § 6, cl.1 of the Constitution, otherwise known as the Speech and Debate Clause. This clause protects information that would directly interfere with the legislative process by interfering with an ongoing activity by Congress. See Paisley v. CIA, 712 F.2d 686, 696 (D.C. Cir. 1983), citing Eastland v. United States Servicemen’s Fund, 421 U.S. 491, 510 n. 16 (1975). This information is awarded additional protection under FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A), which exempts from disclosure material could reasonably be expected to interfere with ongoing law enforcement activities. See Robbins Tire & Rubber Co. v. NLRB, 437 U.S. 214 (1978).

Some responsive records are exempt from disclosure under FOIA Exemption 3, 5 U.S.C. § 552(b)(3), because they are exempt from disclosure by another statute. Specifically, Section 21(f) of the FTC Act provides that information obtained by the Commission in a law enforcement investigation, whether through compulsory process, or voluntarily in lieu of such process, is exempt from disclosure under the FOIA. 15 U.S.C.§ 57b-2(f), see Kathleen McDermott v. FTC, 1981-1 Trade Cas. (CCH) ¶ 63964 (D.D.C. April 13, 1981).

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).
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).

Some of the records contain personal identifying information compiled for law enforcement purposes. This information is exempt for release under FOIA Exemptions 6, 5 U.S.C. § 552(b)(6), and 7(C), 5 U.S.C. § 552(b)(7)(C), because individuals’ right to privacy outweighs the general public’s interest in seeing personal identifying information.

Some information is exempt from disclosure under FOIA Exemption 7(E), 5 U.S.C. § 552(b)(7)(E). Exemption 7(E) protects 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. See Foster v. DOJ, 933 F. Supp. 687 (E.D. Mich. 1996).

Based on the fee provisions of the FOIA, 5 U.S.C. § 552(a)(4)(A), and the Commission’s Rules of Practice, 16 CFR § 4.8 et seq., as amended, I am also enclosing an invoice for the charges we incurred throughout the processing of your request. Failure to pay this bill promptly will result in our refusal to provide copies of accessible documents in response to future requests. If not paid within 30 days, this bill will accrue interest penalties as provided by Federal Claims Collection Standards, 31 C.F.R. § 900-904, as amended.

Please make checks payable to U.S. Treasury and send payment to:

Financial Management Office, H-790
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

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, within 30 days of the date of this letter. Please enclose a copy of your original request and a copy of this response. If you believe that we should choose to disclose additional materials beyond what the FOIA requires, please explain why this would be in the public interest.

If you have any questions about the way we handled your request or about the FOIA regulations or procedures, please contact Andrea Kelly at (202) 326-2836.

Sincerely,

Sarah Mackey
Associate General Counsel
**Invoice Summary**

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

**Report Date:** 02/10/2015  
**Time:** 4:54:07 PM

**Requester Details**
Mr. Patrick J. Massari  
Counsel  
Cause of Action  
1919 Pennsylvania Ave NW  
Suite 650  
Washington, DC 20006

**Requester Invoice**
- Request No: FOIA-2015-00110  
- Invoice No: 00000003634  
- Invoice Date: 11/19/2014  
- Requester Name: Massari, Patrick  
- Requester Organization: Cause of Action

**Fee Items**

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**Request Description**
OCR communications

**Sub Requests**
Default

**Memo**
Federal Trade Commission
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAUSE OF ACTION INSTITUTE
Plaintiff,
v. 
FEDERAL TRADE COMMISSION
Defendant.

Civil Action No. 17-1649

EXHIBIT 10 TO COMPLAINT
Thanks for the update!

Kelly Tshibaka
Acting Inspector General
Federal Trade Commission
202-326-3527.

Hello Kelly,

I've asked BCP paralegal Matthew Smith to send you a live link to an additional document we sent OGR last week.

Jeanne
I'll stop by in about 15 minutes -- after I finish reviewing a draft memo.

-----Original Message-----
From: Bumpus, Jeanne
Sent: Friday, October 31, 2014 11:32 AM
To: Shonka, David C.; Vandecar, Kim
Cc: Oxford, Clinton P.
Subject: RE: INC000000128353

Thanks Dave. I've suggested to Chairman Issa's staff that we talk at 2:30 and I'll scheduler once I hear back from them. Please come on by before 1:30 or I'm happy to come up if that's easiest.

-----Original Message-----
From: Shonka, David C.
Sent: Friday, October 31, 2014 11:28 AM
To: Vandecar, Kim
Cc: Bumpus, Jeanne; Oxford, Clinton P.
Subject: RE: INC000000128353

I am free to discuss between now and 1:30. Let me know if you would like me to drop by. Thanks.

-----Original Message-----
From: Vandecar, Kim
Sent: Friday, October 31, 2014 10:14 AM
To: Shonka, David C.
Cc: Bumpus, Jeanne; Oxford, Clinton P.
Subject: Re: INC000000128353

----- Original Message ----- 
From: Shonka, David C.
Sent: Friday, October 31, 2014 09:57 AM
To: Vandecar, Kim
Cc: Bumpus, Jeanne; Oxford, Clinton P.
Subject: RE: INC0000000128353
-----Original Message-----

From: Vandecar, Kim
Sent: Thursday, October 30, 2014 12:11 PM
To: Shonka, David C.
Cc: Bumpus, Jeanne; Oxford, Clinton P.
Subject: FW: INC000000128353

Hi Dave,

Kim

From: Smith, Matthew
Sent: Thursday, August 28, 2014 5:01 PM
To: Shonka, David C.
Cc: Vandecar, Kim; Schoshinski, Robert; Havens, Kevin
Subject: FW: INC000000128353

Good afternoon Dave,
Checking in to ensure you have access to the folder noted below. Please let me know if you do not.

Best,

Matt

Folder:

Matthew Smith  
Division of Privacy and Identity Protection  
Federal Trade Commission  
400 7th Street SW  
Washington, DC 20001  
Mail Stop – CC 8232  
Direct: (202)326-2693  
Fax: (202)326-3062  
Email: msmith4@ftc.gov  

This email message and any attachments are confidential and may be privileged. If you are not the intended recipient, please delete the email and notify the sender.

-----Original Message-----  
From: Havens, Kevin  
Sent: Tuesday, July 29, 2014 12:37 PM  
To: Shonka, David C.; Smith, Matthew  
Subject: FW: INC000000128353
Let me know if there are any access issues. You will need to log off and back on the pc.

-----Original Message-----

From: FTCRemedy [mailto:FTCRemedy@ftc.gov]

Sent: Friday, July 25, 2014 1:48 PM

To: Havens, Kevin

Subject: INC000000128353

Kevin,

Per request INC000000128353 I have taken the following actions.

The customer will need to log out of and back into Windows 7 to access the folder.

If you have any questions, please contact the Enterprise Service Desk.

Edward Chism, (CTR)
FTC Enterprise Service Desk
202-326-3500
helpdesk@ftc.gov

(URS Federal Services)

"Please send all inquiries and replies regarding this matter to Helpdesk@ftc.gov mailbox, which is monitored continuously."
Email Attachment:
Kelly, Andrea

From: Shonka, David C.
Sent: Friday, October 31, 2014 11:03 AM
To: Vandecar, Kim
Cc: Bumpus, Jeanne; Oxford, Clinton P.
Subject: RE: INC000000128353

(5)(b)(7)(A), Speech or Debate Clause

Duplicate; Speech or Debate Clause
Kelly, Andrea

From: Bumpus, Jeanne
Sent: Friday, September 26, 2014 10:17 AM
To: Shonka, David C.; Vandecar, Kim
Subject: RE: Issa response 140926.doc
Attachments: Issaresponse926.doc

Thanks Dave,

Here are possible edits.

From: Shonka, David C.
Sent: Friday, September 26, 2014 8:41 AM
To: Bumpus, Jeanne; Vandecar, Kim
Subject: Issa response 140926.doc

I've now added a new sentence to end of the first paragraph.
Case 1:17-cv-01649   Document 1-10   Filed 08/15/17   Page 10 of 21

Kelly, Andrea

From: Bumpus, Jeanne
Sent: Friday, August 22, 2014 1:05 PM
To: Schoshinski, Robert
Cc: Mithal, Maneesha
Subject: RE: 6x(7/1A).Speech or Debate Clause

Bob,

Of course. Please include anyone you think is appropriate.

Jeanne

---

From: Schoshinski, Robert
Sent: Friday, August 22, 2014 12:56 PM
To: Bumpus, Jeanne
Cc: Mithal, Maneesha
Subject: RE: 6x(7/1A).Speech or Debate Clause

Jeanne:

6(5).6(7/1A)

Thanks,

Bob Schoshinski

---

From: Bumpus, Jeanne
Sent: Friday, August 22, 2014 10:27 AM
To: Mithal, Maneesha; Schoshinski, Robert; Sheer, Alain; Kaufman, Daniel; Vandecar, Kim; Shonka, David C.; Rich, Jessica L.
Subject: 6(7/1A).Speech or Debate Clause

Hello,

6(9).6(7/1A).6(7/C).Speech or Debate Clause

Jeanne
Kelly, Andrea

From: Bumpus, Jeanne
Sent: Friday, August 22, 2014 10:38 AM
To: Shonka, David C.
Subject: RE: [b](7)(A), Speech or Debate Clause

Thanks Dave.

-----Original Message-----
From: Shonka, David C.
Sent: Friday, August 22, 2014 10:36 AM
To: Bumpus, Jeanne; Mithal, Maneesha; Schoshinski, Robert; Sheer, Alain; Kaufman, Daniel; Vandecar, Kim; Rich, Jessica L.
Subject: RE: [b](7)(A), Speech or Debate Clause

So you know, I will not be here on the 29th or the 2nd.
Kelly, Andrea

From: Shonka, David C.
Sent: Monday, October 20, 2014 2:23 PM
To: Sheer, Alain; Bumpus, Jeanne; Vandecar, Kim; Kaye, Robert S.
Subject: RE: §(7)(A), Speech or Debate Clause

-----Original Message-----
From: Sheer, Alain
Sent: Monday, October 20, 2014 2:05 PM
To: Bumpus, Jeanne; Shonka, David C.; Vandecar, Kim; Kaye, Robert S.
Subject: RE: §(7)(A), Speech or Debate Clause

Ok with me. Alain

From: Bumpus, Jeanne
Sent: Monday, October 20, 2014 1:54 PM
To: Shonka, David C.; Vandecar, Kim; Sheer, Alain; Kaye, Robert S.
Subject: RE: §(7)(A), Speech or Debate Clause

Dave,

Jeanne

From: Shonka, David C.
Sent: Monday, October 20, 2014 1:22 PM
To: Bumpus, Jeanne; Vandecar, Kim; Sheer, Alain; Kaye, Robert S.
Subject: (d)/(A), Speech or Debate Clause

(d)/(A), Speech or Debate Clause

Please advise. Thanks.
Kelly, Andrea

From: Kaye, Robert S.
Sent: Monday, October 20, 2014 1:47 PM
To: Shonka, David C.; Bumpus, Jeanne; Vandecar, Kim; Sheer, Alain
Subject: Re: (b)(7)(A). Speech or Debate Clause

Duplicate: Speech or Debate Clause
Kelly, Andrea

From: Bumpus, Jeanne  
Sent: Friday, September 26, 2014 12:43 PM  
To: Shonka, David C.; Kaufman, Daniel; Mithal, Maneesha; Vandecar, Kim; Schoshinski, Robert; VanDruff, Laura Riposo; Sheer, Alain; Cohen, Kristin; Rich, Jessica L.  
Subject: Revised draft email to Chairman Issa

Sincerely,

Jeanne Bumpus  
Director  
Office of Congressional Relations  
Federal Trade Commission  
(202) 326-2946

From: Bumpus, Jeanne  
Sent: Thursday, September 25, 2014 3:22 PM  
To: Shonka, David C.; Kaufman, Daniel; Mithal, Maneesha; Vandecar, Kim; Schoshinski, Robert; VanDruff, Laura Riposo; Sheer, Alain; Cohen, Kristin  
Subject: Draft reply to Chairman Issa

Jeanne Bumpus  
Director  
Office of Congressional Relations  
Federal Trade Commission  
(202) 326-2946
Dear Committee Staff,

Below you will find a link to download additional documents Chairman Issa requested in a letter to the FTC on July 18, 2014. As discussed with Commission staff, the information contained in these documents is highly sensitive. The link to download these documents will be active for a period of 48 hours or about 2 days. Should you have any questions, please do not hesitate to contact Kim Vandecar at (202) 326-2658.

Kind Regards,

Matt Smith

Matthew Smith
Division of Privacy and Identity Protection
Federal Trade Commission
400 7th Street, SW
Washington, D.C. 20024
Mail Stop CC-8232
Direct: (202)326-2693
Fax: (202)326-3062
Email: msmith4@ftc.gov

This email message and any attachments are confidential and may be privileged. If you are not the intended recipient, please delete the email and notify the sender.

Secure File Downloads:
Available until: 07 September 2014

Click link to download:

2014.09.03_Nonpublic Info and Documents Re Tiversa To Chairman Issa.zip
1,781.53 KB

You have received attachment link(s) within this email sent via the FTC Secure Mail system. To retrieve the attachment(s), please click on the link(s).
Kelly, Andrea

From: Smith, Matthew
Sent: Wednesday, October 08, 2014 4:28 PM
To: jennifer.barblan@mail.house.gov, kathleen.teleky@mail.house.gov; Mark.Marin@mail.house.gov; meghan.berroya@mail.house.gov; lucinda.lessley@mail.house.gov; brandon.reavis@mail.house.gov; tyler.grimm@mail.house.gov
Cc: Bumpus, Jeanne; Vandecar, Kim
Subject: Document from the Federal Trade Commission

You have received 1 secure file from msmith4@ftc.gov.
Use the secure link below to download.

Dear Committee Staff,

Attached please find the signed version of the certification document the FTC sent you on October 6, 2014. If you have any questions please contact Kim Vandecar at 202-326-2858.

Kind Regards,

Matt Smith

Matthew Smith
Division of Privacy and Identity Protection
Federal Trade Commission
400 7th Street, SW
Washington, D.C. 20024
Mail Stop CC-8232
Direct: (202)326-2693
Fax: (202)326-3062
Email: msmith4@ftc.gov

Secure File Downloads:
Available until: 12 October 2014

Click link to download:

Tiversa Certification of Records of Regularly Conducted Activity.pdf
670.42 KB

You have received attachment link(s) within this email sent via the FTC Secure Mail system. To retrieve the attachment(s), please click on the link(s).
You have received 1 secure file from smith4@ftc.gov.
Use the secure link below to download.

Dear Committee Staff,

Below you will find a link to download an additional document Chairman Issa requested in a letter to the FTC on September 22, 2014. The link to download this document will be active for a period of 48 hours or about 2 days. Should you have any questions, please do not hesitate to contact Kim Vandecar at (202) 326-2858.

Kind Regards,

Matt Smith
Matthew Smith
Division of Privacy and Identity Protection
Federal Trade Commission
400 7th Street, SW
Washington, D.C. 20024
Mail Stop CC-8232
Direct: (202)326-2693
Fax: (202)326-3062
Email: smith4@ftc.gov

Secure File Downloads:
Available until: 19 October 2014

Click link to download:

SKMBT_42313082116011.pdf
156.18 KB

You have received attachment link(s) within this email sent via the FTC Secure Mail system. To retrieve the attachment(s), please click on the link(s).
Case 1:17-cv-01649   Document 1-10   Filed 08/15/17   Page 19 of 21

Kelly, Andrea

From: Smith, Matthew
Sent: Monday, October 06, 2014 5:33 PM
To: jennifer.barblan@mail.house.gov; kathleen.teleky@mail.house.gov;
Mark.Marin@mail.house.gov; meghan.berroya@mail.house.gov;
lucinda.lessley@mail.house.gov; brandon.reavis@mail.house.gov;
tyler.grimm@mail.house.gov
Cc: Bumpus, Jeanne; Vandecar, Kim
Subject: Documents from the Federal Trade Commission

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Dear Committee Staff,

Below you will find a link to download some of the documents Chairman Issa requested in a letter to the FTC on September 22, 2014. As discussed with Commission staff, the information contained in these documents is highly sensitive. The link to download these documents will be active for a period of 48 hours or about 2 days. Should you have any questions, please do not hesitate to contact Kim Vandecar at (202) 326-2858.

Kind Regards,

Matt Smith

Matthew Smith
Division of Privacy and Identity Protection
Federal Trade Commission
400 7th Street, SW
Washington, D.C. 20024
Mail Stop CC-8232
Direct: (202)326-2693
Fax: (202)326-3062
Email: msmith4@ftc.gov

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Ms. Barblan,

Below you will find a link to download documents Chairman Issa requested in a letter to the FTC on September 22, 2014, as well as additional documents regarding verification, which we discussed with Majority staff on Friday. Please note that the information contained in these documents is highly sensitive. The link to download these documents will be active for a period of 48 hours or about 2 days. Should you have any questions, please do not hesitate to contact Kim Vandecar at (202) 326-2858.

Regards,

Matt Smith

Matthew Smith
Division of Privacy and Identity Protection
Federal Trade Commission
400 7th Street SW
Washington, DC 20001
Mail Stop – CC 3232
Direct: (202)326-2693
Fax: (202)326-3062
Email: msmith4@ftc.gov

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Kelly, Andrea

From: King, Donald
Sent: Monday, November 03, 2014 4.28 PM
To: jennifer.barblan@mail.house.gov; kathleen.teleky@mail.house.gov; meghan.berroya@mail.house.gov; lucinda.lessley@mail.house.gov; brandon.reavis@mail.house.gov; tyler.grimm@mail.house.gov; tim.lynch@mail.house.gov; Ashley.callen@mail.house.gov
Cc: Bumpus, Jeanne; Vandecar, Kim
Subject: FTC Document Request

You have received 1 secure file from dking1@ftc.gov.
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Below you will find a link to download documents Chairman Issa requested in a letter to the FTC on September 22, 2014, as well as additional documents regarding verification, which we discussed with Majority staff on Friday. Please note that the information contained in these documents is highly sensitive. The link to download these documents will be active for a period of 48 hours or about 2 days. Should you have any questions, please do not hesitate to contact Kim Vandecar at (202) 326-2858.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAUSE OF ACTION INSTITUTE
Plaintiff,
v.
FEDERAL TRADE COMMISSION
Defendant.

Civil Action No. 17-1649

EXHIBIT 11 TO COMPLAINT
February 17, 2015

Patrick Massari  
Cause of Action  
1919 Pennsylvania Ave NW, Suite 650  
Washington, DC 20006

Re: Freedom of Information Act (FOIA) Request-2015-00110

Dear Mr. Massari:

I write in response to your appeal letter (received in this office on January 16, 2015) of the interim determination letter and redaction of documents responsive to the above-captioned FOIA request. In that request, you sought access to all documents (including, but not limited to, communications via e-mail, text, or facsimile): (1) regarding Margaret (or Maggie) Lassack or Alain Sheer; and (2) reflecting communications with the House Committee on Oversight and Government Reform ("Committee") regarding the matter In re: LabMD, Inc. from August 28, 2013 to present. On December 16, 2014, Ms. Sarah Mackey, Associate General Counsel for Project Management, granted your request in part and released documents responsive to the second part of your request, with certain material redacted pursuant to FOIA Exemptions 6, 7(A), and 7(C). The redacted text contained identifying information of persons who have assisted in the Committee's investigation of Tiversa, Inc. Ms. Mackey also indicated that portions of the responsive records are protected by the Speech or Debate Clause. U.S. Const. art. 1 § 6. Your appeal letter challenges these redactions. For the reasons outlined below, I am denying your appeal.

At the outset, I note that the Committee itself has asserted, and continues to assert, the Speech or Debate Clause protection with respect to portions of these documents. Accordingly, I affirm Ms. Mackey's decision to withhold those documents and need not address your argument that the FTC lacks "standing to assert the Clause because its privileges belong exclusively to Members of Congress."

As to the FOIA Exemptions, FOIA Exemption 6, protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Courts have interpreted "similar files" to include most information that "applies to a particular individual," and "not just files, but also bits of personal
information, such as names and addresses, the release of which would ‘create[ a] palpable threat to privacy.’” Carter, Fullerton & Hayes LLC v. FTC, 520 F. Supp. 2d 134, 144-45 (D.D.C. 2007) (quoting Judicial Watch, Inc. v. FDA, 449 F.3d 141, 148 (D.C. Cir. 2006)). I have concluded that the material redacted from the responsive records meets this criterion.

Once it is determined that the record in question is a personnel, medical, or similar file, the focus turns to whether disclosing the record would constitute a “clearly unwarranted invasion of personal privacy.” This requires a determination that the privacy interest at issue is greater than de minimis and clearly outweighs the public interest in disclosure. See Multi Ag Media LLC v. USDA, 515 F.3d 1224, 1228 (D.C. Cir. 2008). Any public interest in disclosing such information, however, must be related to the “core purpose” of FOIA, “shed[ding] light on an agency’s performance of its statutory duties.” DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989).

I conclude that the FOIA Unit properly redacted information under Exemption 6, including withholding personally identifying information. Additionally, you have not established any countervailing public interest in the disclosure by explaining how this information would “shed[] light on an agency’s performance of its statutory duties.” Reporters Comm. 489 U.S. at 773. “This inquiry, moreover, should focus not on the general public interest in the subject matter of the FOIA request, but rather on the incremental value of the specific information being withheld.” Schrecker v. United States, 349 F.3d 657, 661 (D.C. Cir. 2003).

Moreover, FOIA Exemption 7(C) allows the agency to redact the identifying information of personnel targeted by or aiding the Committee’s investigation. Under this exemption, an agency may withhold material “compiled for law enforcement purposes” that “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(7)(C). Government employees have a privacy interest in avoiding disclosure of the fact that they were subject to investigation, since this revelation could cause them to suffer harassment, embarrassment, and reputational harm in their official duties and their private lives. See Nix v. United States, 572 F.2d 998, 1006 (4th Cir. 1978); Providence Journal Co. v. U.S. Dep’t of Army, 981 F.2d 552, 568 (1st Cir. 1992); New England Apple Council v. Donovan, 725 F.2d 139, 142 (1st Cir. 1984). Additionally, there is no public interest in revealing the identity of the specific employees who were subject to the investigations at issue, since the allegations here concern isolated instances of misconduct by relatively low-ranking personnel. See Providence Journal, 981 F.2d at 568; McMichael v. U.S. Dep’t of Def., 910 F. Supp. 2d 47, 53-54 (D.D.C. 2012). Exemption 7(C) also permits the agency to redact the identity others who cooperated with any investigation. See Nat’l Whistleblower Ctr. v. HHS, 849 F. Supp. 2d 13, 28 (D.D.C. 2012) ("Individuals involved in law-enforcement investigations — including targets, witnesses, complainants, and investigators — have a privacy interest in non-disclosure of their names and identifying information.").

Finally, Exemption 7(A) applies where a law enforcement proceeding or investigation is pending or prospective, and where release of the information could reasonably be expected to cause some articulable harm. See Carter, Fullerton & Hayes, 637 F. Supp. 2d at 12. The FTC need not demonstrate interference on a document-by-document basis to invoke FOIA Exemption
7(A). Instead, it is sufficient for the agency to make a generalized showing that release of these particular kinds of documents would generally interfere with enforcement proceedings. See National Labor Relations Board v. Robbins Tire & Rubber Co., 437 U.S. 214, 236 (1978). Releasing the requested material to COA would reveal facts about the nature and scope of the investigation that could reasonably be expected to cause harm. Other potential harms could include a “chilling effect” on potential witnesses or third parties, interference with free flow of information between Congress and the agency, or a diminished ability to shape and control investigation. See, e.g., J.P. Stevens & Co. v Perry, 710 F.2d 136, 143 (4th Cir. 1983). For this reason and those discussed above, I am denying your appeal.

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, have your principal place of business, or in the United States District Court for the District of Columbia. You are also advised that I am the designated official responsible for this decision. 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 requestors 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]

David C. Shonka
Principal Deputy General Counsel
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAUSE OF ACTION INSTITUTE

Plaintiff,

v.

FEDERAL TRADE COMMISSION

Defendant

Civil Action No. 17-1649

EXHIBIT 12 TO COMPLAINT
March 12, 2015

VIA E-MAIL

Mr. Jonathan E. Nuechterlein
General Counsel
Office of the General Counsel
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
E-mail: FOIA@ftc.gov

Re: Freedom of Information Act Appeal: FOIA No. 2015–00110

Dear Mr. Nuechterlein:

This is a timely administrative appeal of the Federal Trade Commission’s (“FTC”) February 10, 2015 “second and final” determination letter and redaction of documents in response to Cause of Action’s October 30, 2014 Freedom of Information Act (“FOIA”) request for documents in connection with the matter captioned In re: LabMD, Inc., FTC Docket No. 9357. Cause of Action is appealing those redactions.1

Procedural Background

On October 30, 2014, Cause of Action submitted a FOIA request requesting “access to all documents (including, but not limited to, communications via e-mail, text, or facsimile): (1) regarding Margaret (or Maggie) Lassack or Alain Sheer; and (2) reflecting communications (including, but not limited to, via e-mail, text, or facsimile) with the United States House of Representatives Committee on Oversight and Government Reform regarding the matter captioned In re: LabMD, Inc., FTC Docket No. 9357.”2 On November 20, 2014, FTC denied “[Cause of Action’s] request for news media status because we have determined that Cause of Action is a ‘commercial use’ requester” under 16 C.F.R. § 4(b)(1).3 On December 19, 2014, Cause of Action filed a timely appeal of FTC’s denial of news media requester status and determination of Cause of

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1 See 16 C.F.R. § 4.11(a)(2) (2015) (“If an initial request is denied in part, the time for appeal will not expire until 30 days after the date of the letter notifying the requester that all records to which access has been granted have been made available.”).
Action as a “commercial use” requester. On December 16, 2014, FTC issued an interim determination letter, making a partial production of documents (33 pages), which contained redactions purportedly based on Exemptions 6, 7(A) and 7(C), and the Speech or Debate Clause (U.S. Const. Art. I, § 6, cl. 1) (the “Clause”). On January 15, 2015, Cause of Action filed a timely appeal of all such redactions. On February 10, 2015, FTC issued a “second and final” determination letter, “granting partial access to the accessible records” in a production of documents (20 pages), which contained redactions purportedly based on Exemptions 3 in conjunction with Section 21(f) of the FTC Act (15 U.S.C. § 57b-2(f)), 5 under Deliberative Process, 6, 7(A), 7(C), 7(E) and the Clause.

Discussion

FTC’s February 10, 2015 letter indicates “[s]ome responsive records” are exempt under Exemption 3 in conjunction with Section 21(f) of the FTC Act, yet the 20 page productions does not indicate any redactions under that provision, presumably because several pages of the “1.5GB of responsive records” were withheld in full under the exemption and other exemptions. FTC fails to meet its burden of proof to establish this exemption because FTC’s letter merely states a formulaic recitation of the law, which lacks any particularized explanation of how the purportedly exempted documents fall within the scope of Section 21(f), and are therefore exempt from disclosure under Exemption 3. See Campbell v. U.S. Dep’t of Justice, 164 F.3d 20, 30 (D.C. Cir. 1998). Moreover, there is no basis asserted upon which to conclude that the documents sought would involve Exemption 3.

Similarly, FTC’s redaction of documents under the deliberative process privilege (Exemption 5) is flawed. The D.C. Circuit has held that before an agency may invoke the deliberative process privilege, two necessary prerequisites must be met: first, the communication must be predecisional, i.e., “antecedent to the adoption of an agency policy” (Jordan v. United States Dep’t of Justice, 591 F.2d 753, 774 (D.C. Cir. 1978) (en banc)); second, the communication must be deliberative, i.e., “a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.” Vaughn v. Rosen, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975). FTC has the burden to show that the records in question satisfy both of these requirements. Coastal States Gas Corp. v. Dep’t of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

Here, the second item of Cause of Action’s FOIA request sought only those records in the possession of OCR that related to FTC communications with the House Oversight and Government Reform Committee regarding the FTC’s current adjudication in LabMD. To claim Exemption 5 for any communications regarding LabMD, whether internal to the FTC or with an outside entity, would only be appropriate if the communications were predecisional to the

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5 Letter from Sarah Mackey to Cause of Action (Dec. 16, 2014) (attached as Ex. 2).
7 Letter from Sarah Mackey to Cause of Action (Feb. 10, 2015) (attached as Ex. 4).
adoption of agency policy in LabMD - in other words, a Commission issuance of a final order; and deliberative, that is, part of a legal recommendation concerning the Commission’s or a commissioner’s penultimate decision-making. Problematically, in order for Cause of Action to determine the validity of the privilege being invoked, the FTC must disclose the identity of the person for whose communication the privilege is being invoked, or, in the alternative, confirm that the privilege has been applied to a document issued by the person with “authority to speak finally and officially for the agency.” *Pfeiffer v. CIA*, 721 F. Supp. 337, 340 (D.D.C. 1989).

When a commissioner or the Commission communicates on a matter relating to an adjudication, that document is not considered predecisional because the Commission and its members have final decision making authority on all agency adjudications before the FTC. *Brinton v. Dep’t of State*, 636 F.2d 600, 605 (D.C. Cir. 1980). Here, FTC’s conclusory description of “[s]ome responsive records contain[ing] staff analyses, opinions, and recommendations” misses the mark because it does not explain why or how the documents are predecisional or deliberative. Moreover, the scope of Cause of Action’s FOIA request does not implicate deliberative process considerations per se.

FTC also redacts various parts of documents based on Exemptions 6 and 7(C). However, FTC has failed to establish cognizable substantial privacy interests. Moreover, even assuming such privacy interests exist, FTC has failed to demonstrate that they outweigh the strong public interest in disclosure. See *Multi AG Media LLC v. Dep’t of Agric.*, 515 F.3d 1224, 1230 (D.C. Cir. 2008). Here, Cause of Action seeks the requested records for the purposes of government accountability, a recognized purpose served by the FOIA. See, e.g., *Balt. Sun v. U.S. Marshals Serv.*, 131 F. Supp. 2d 725, 729 (D. Md. 2001).

In addition, FTC’s use of the Speech or Debate Clause to redact documents is erroneous as a matter of law. See *Paisley v. CIA*, 712 F.2d 686, 696 (D.C. Cir. 1983), vacated (in part), 724 F.2d 201 (D.C. Cir. 1984). FTC does not have standing to assert the Clause because its privileges belong exclusively to Members of Congress. See *Paisley*, 712 F.2d at 687 & 697; *Eastland v. United States Servicemen’s Fund*, 421 U.S. 491, 502 (1975) (citations omitted); *Hutchinson v. Proxmire*, 443 U.S. 111, 127 (1979); *United States v. Brewster*, 408 U.S. 501, 507 (1972). FTC has not shown that any individual legislator or their aide(s) will be subject to civil or criminal litigation as a result of FTC’s production of documents, nor has FTC indicated that Congress asked FTC to invoke the Clause on its behalf. See *Paisley*, 724 F.2d at 204. Alternatively, if Congress has asked FTC to invoke the Clause, then FTC should produce evidence of that fact and/or identify all FTC employees involved in communications for which Congress is claiming the Clause.

FTC suggests that disclosure would interfere with an ongoing activity by Congress, see Ex. 4, at 1-2, but FTC does not show “ongoing activity” by Congress or any evidence of an ongoing investigation, and the documents at issue do not reflect any possibility that such legislative activity or action will result in a lawsuit against any individual member of Congress, or that any congressional member will be questioned “in any other place.” Similarly, FTC has

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8 Although FTC cites to *Paisley* in its December 16, 2014 and February 10, 2015 determination letters, FTC ignores that *Paisley* refutes, rather than supports, FTC’s position.
not met its burden to invoke Exemption 7(A), including that it makes no effort to show a specific pending or contemplated law enforcement proceeding. *See, e.g., NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978).

Lastly, FTC claims that some information is exempted from disclosure under Exemption 7(E) 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 expect to risk circumvention of the law.” 5 U.S.C. § 552(b)(7)(E). However, this claimed exemption must fail, particularly since it is being invoked by FTC’s Office of Congressional Relations, a non-investigatory arm of the FTC that is not likely in possession of information that would fall under the exemption within the scope of Cause of Action’s FOIA request. Regardless, FTC has failed to describe with any specificity what technique, procedure, or guideline it is using as a basis for the exemption as required by law. *See Judicial Watch, Inc. v. U.S. Dep’t of Commerce*, 337 F. Supp. 2d 146, 181 (D.D.C. 2004) (citations omitted).

**Conclusion**

FTC’s redactions are contrary to law, ultra vires, in retaliation for the exercise of protected rights, and violate 5 U.S.C. § 706(2)(A). The FTC should produce all documents in unredacted form within 20 days.

Please do not hesitate to contact me at (202) 499-4232, or prashant.khetan@causeofaction.org if you have any questions. Thank you for your consideration of this matter.
Exhibit 1
VIA E-MAIL

Ms. Claudia Simons
Legislative Counsel
Office of Congressional Relations
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
E-mail: FOIA@ftc.gov

Re: Freedom of Information Act Request

Dear Ms. Simons:

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), Cause of Action hereby requests access to all documents (including, but not limited to, communications via e-mail, text, or facsimile): (1) regarding Margaret (or Maggie) Lassack or Alain Sheer; and (2) reflecting communications (including, but not limited to, via e-mail, text, or facsimile) with the United States House of Representatives Committee on Oversight and Government Reform regarding the matter captioned In re: LabMD, Inc., FTC Docket No. 9357.

The time period for this request is August 28, 2013 to the present.

Request for News Media Status

For fee purposes, Cause of Action qualifies as a "representative of the news media" under 5 U.S.C. § 552(a)(4)(A)(ii)(II). Specifically, Cause of Action gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.

Cause of Action gathers news that it regularly publishes from a variety of sources, including FOIA requests, whistleblowers/insiders, and scholarly works. Cause of Action does not merely make raw information available to the public, but rather distributes distinct work products, including articles, blog posts, investigative reports, and newsletters.¹ These distinct

works are distributed to the public through various media, including Cause of Action’s website, which has been viewed just under 120,000 times in the past year alone. Cause of Action also disseminates news to the public via Twitter and Facebook, and it provides news updates to subscribers via e-mail.

The statutory definition of a “representative of the news media” unequivocally contemplates that organizations such as Cause of Action, which electronically disseminate information and publications via “alternative media[,] shall be considered to be news-media entities.” 5 U.S.C. § 552(a)(4)(A)(ii)(II). In light of the foregoing, federal agencies have appropriately recognized Cause of Action’s news media status in connection with its FOIA requests.

**Record Production and Contact Information**

In the event that Cause of Action’s request for news media status is denied, Cause of Action, without waiving its right to appeal, would be willing to pay applicable fees up to $1,500. However, if you expect the fees to exceed $1,500, please contact us before proceeding.

In an effort to facilitate record production, please provide the responsive records in electronic format (e.g., PDFs). If a certain set of responsive records can be produced more readily, Cause of Action respectfully requests that those records be produced first and that the remaining records be produced on a rolling basis as circumstances permit.

If you have any questions about this request, please contact Patrick Massari by e-mail at patrick.massari@causeofaction.org, or by telephone at (202) 499-4232. Thank you for your attention to this matter.

**Cause of Action**

By: [Signature]

Prashant K. Khemani, Esq.
Patrick J. Massari, Esq.

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Exhibit 2
Dear Mr. Massari:

This is in partial response to your request dated October 30, 2014, under the Freedom of Information Act seeking access to communications to or from staff in the Office of Congressional Relations (1) regarding Margaret Lassack or Alain Sheer; or (2) reflecting communications with the House Committee on Oversight and Government Reform regarding the matter In re: LabMD, Inc, from August 28, 2013 to present. In accordance with the FOIA and agency policy, we have searched our records as of October 30, 2014, the date we received your request in our FOIA office.

We have reviewed 33 pages of records responsive to part two of your request. We are continuing to review responsive records, and hope to have an additional response to you shortly. Our final response will also contain an invoice for any fees incurred by this request, up to your $1500 fee agreement. I am granting partial access to the accessible records. Portions of these pages fall within the exemptions to the FOIA’s disclosure requirements, as explained below.

Portions of the responsive records are protected from disclosure under Article I, § 6, cl.1 of the Constitution, otherwise known as the Speech and Debate Clause. This clause protects information that would directly interfere with the legislative process by interfering with an ongoing activity by Congress. See Paisley v. CIA, 712 F.2d 686, 696 (D.C. Cir. 1983), citing Eastland v. United States Servicemen’s Fund, 421 U.S. 491, 510 n. 16 (1975). This information is awarded additional protection under FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A), which exempts from disclosure material could reasonably be expected to interfere with ongoing law enforcement activities. See Robbins Tire & Rubber Co. v. NLRB, 437 U.S. 214 (1978).

Additionally, some of the records contain personal identifying information compiled for law enforcement purposes. This information is exempt for release under FOIA Exemptions 6, 5 U.S.C. § 552(b)(6), and 7(C), 5 U.S.C. § 552(b)(7)(C), because individuals’ right to privacy outweighs the general public’s interest in seeing personal identifying information.

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, within 30 days of the date of this letter. Please enclose a copy of your original request and a copy of this response. If you believe
that we should choose to disclose additional materials beyond what the FOIA requires, please explain why this would be in the public interest.

If you have any questions about the way we handled your request or about the FOIA regulations or procedures, please contact Andrea Kelly at (202) 326-2836.

Sincerely,

Sarah Mackey
Associate General Counsel
Exhibit 3
VIA E-MAIL

Mr. Jonathan E. Nuechterlein  
Office of the General Counsel  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580  
E-mail: FOIA@ftc.gov

Re: Freedom of Information Act Appeal: FOIA No. 2015–00110

Dear Mr. Nuechterlein:


Procedural Background

On October 30, 2014, CoA submitted a FOIA request requesting “access to all documents (including, but not limited to, communications via e-mail, text, or facsimile): (1) regarding Margaret (or Maggie) Lassack or Alain Sheer; and (2) reflecting communications (including, but not limited to, via e-mail, text, or facsimile) with the United States House of Representatives Committee on Oversight and Government Reform regarding the matter captioned In re: LABMD, Inc., FTC Docket No. 9357.” On November 20, 2014, FTC denied “[CoA’s] request for news media status because we have determined that Cause of Action is a ‘commercial use’ requester” under 16 C.F.R. § 4(b)(1). On December 19, 2014, CoA filed a timely appeal of FTC’s denial of news media requester status and determination of CoA as a “commercial use” requester. On December 16, 2014, FTC issued an interim determination letter, making a partial production of

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3 Letter from Cause of Action to Sarah Mackey (Dec. 19, 2014) (on file with CoA).
documents (33 pages), which contained redactions purportedly based on Exemptions 6, 7(a) and 7(c), and the Speech or Debate Clause (U.S. Const. Art. I, § 6, cl. 1) (the "Clause").

**Discussion**

FTC redacts various parts of documents based on Exemptions 6 and 7(c). However, FTC has failed to establish cognizable substantial privacy interests. Moreover, even assuming such privacy interests exist, FTC has failed to demonstrate that they outweigh the strong public interest in disclosure. *See Multi AG Media LLC v. Dep’t of Agric.*, 515 F.3d 1224, 1230 (D.C. Cir. 2008). Here, CoA seeks the requested records for the purposes of government accountability, a recognized purpose served by the FOIA. *See, e.g., Balt. Sun v. U.S. Marshals Serv.*, 131 F. Supp. 2d 725, 729 (D. Md. 2001).

In addition, FTC’s use of the Speech or Debate Clause to redact documents is erroneous as a matter of law. *See Paisley v. CIA*, 712 F.2d 686, 696 (D.C. Cir. 1983), *vacated (in part)*, 724 F.2d 201 (D.C. Cir. 1984). FTC does not have standing to assert the Clause because its privileges belong exclusively to Members of Congress. *Paisley*, 712 F.2d at 687 & 697; *Eastland v. United States Servicemen’s Fund*, 421 U.S. 491, 502 (1975) (citations omitted); *Hutchinson v. Proxmire*, 443 U.S. 111, 127 (1979); *United States v. Brewster*, 408 U.S. 501, 507 (1972). FTC has not shown that any individual legislator or their aide(s) will be subject to civil or criminal litigation as a result of FTC’s production of documents, nor has FTC indicated that Congress asked FTC to invoke the Clause on its behalf. *See Paisley*, 724 F.2d at 204.

FTC suggests that disclosure would interfere with an ongoing activity by Congress, see Ex. 2, at 1, but FTC does not show “ongoing activity” by Congress or any evidence of an ongoing investigation, and the documents at issue do not reflect any possibility that such legislative activity or action will result in a lawsuit against any individual member of Congress, or that any congressional member will be questioned “in any other place.” Similarly, FTC has not met its burden to invoke Exemption 7(a), including that it makes no effort to show a specific pending or contemplated law enforcement proceeding. *See, e.g., NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978).

**Conclusion**

For all of these reasons, FTC’s redactions are contrary to law, ultra vires, and violate 5 U.S.C. § 706(2)(A). It should produce all documents in unredacted form within 20 days.

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4 Letter from Sarah Mackey to Cause of Action (Dec. 16, 2014) (attached as Ex. 2). CoA reserves all of its rights to raise such other and further issues on administrative appeal within 30 days of FTC making its final determination. *See 16 C.F.R. § 4.11(a)(2) (2015)* ("If an initial request is denied in part, the time for appeal will not expire until 30 days after the date of the letter notifying the requester that all records to which access has been granted have been made available.").

5 Although FTC cites to *Paisley* in its December 16, 2014 determination letter, FTC ignores that *Paisley* refutes, rather than supports, FTC’s position.
Please do not hesitate to contact me at (202) 499-4232, or patrick.massari@causeofaction.org if you have any questions. Thank you for your consideration of this matter.

Cause of Action

By:

Patrick J. Massari, Counsel
EXHIBIT 1
VIA E-MAIL

Ms. Claudia Simons  
Legislative Counsel  
Office of Congressional Relations  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580  
E-mail: FOIA@ftc.gov

Re: Freedom of Information Act Request

Dear Ms. Simons:

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), Cause of Action hereby requests access to all documents (including, but not limited to, communications via e-mail, text, or facsimile): (1) regarding Margaret (or Maggie) Lassack or Alain Sheer; and (2) reflecting communications (including, but not limited to, via e-mail, text, or facsimile) with the United States House of Representatives Committee on Oversight and Government Reform regarding the matter captioned In re: LabMD, Inc., FTC Docket No. 9357.

The time period for this request is August 28, 2013 to the present.

Request for News Media Status

For fee purposes, Cause of Action qualifies as a “representative of the news media” under 5 U.S.C. § 552(a)(4)(A)(ii)(II). Specifically, Cause of Action gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.

Cause of Action gathers news that it regularly publishes from a variety of sources, including FOIA requests, whistleblowers/insiders, and scholarly works. Cause of Action does not merely make raw information available to the public, but rather distributes distinct work products, including articles, blog posts, investigative reports, and newsletters.¹ These distinct

works are distributed to the public through various media, including Cause of Action’s website, which has been viewed just under 120,000 times in the past year alone.\(^2\) Cause of Action also disseminates news to the public via Twitter and Facebook, and it provides news updates to subscribers via e-mail.

The statutory definition of a “representative of the news media” unequivocally contemplates that organizations such as Cause of Action, which electronically disseminate information and publications via “alternative media[,] shall be considered to be news-media entities.” 5 U.S.C. § 552(a)(4)(A)(ii)(II). In light of the foregoing, federal agencies have appropriately recognized Cause of Action’s news media status in connection with its FOIA requests.\(^3\)

**Record Production and Contact Information**

In the event that Cause of Action’s request for news media status is denied, Cause of Action, without waiving its right to appeal, would be willing to pay applicable fees up to $1,500. However, if you expect the fees to exceed $1,500, please contact us before proceeding.

In an effort to facilitate record production, please provide the responsive records in electronic format (e.g., PDFs). If a certain set of responsive records can be produced more readily, Cause of Action respectfully requests that those records be produced first and that the remaining records be produced on a rolling basis as circumstances permit.

If you have any questions about this request, please contact Patrick Massari by e-mail at patrick.massari@causeofaction.org, or by telephone at (202) 499-4232. Thank you for your attention to this matter.

Cause of Action

By:

Prashant K. Khutani, Esq.
Patrick J. Massari, Esq.

\(^2\)Google Analytics for http://www.causeofaction.org (on file with Cause of Action).

EXHIBIT 2
Dear Mr. Massari:

This is in partial response to your request dated October 30, 2014, under the Freedom of Information Act seeking access to communications to or from staff in the Office of Congressional Relations (1) regarding Margaret Lassack or Alain Sheer; or (2) reflecting communications with the House Committee on Oversight and Government Reform regarding the matter In re: LabMD, Inc, from August 28, 2013 to present. In accordance with the FOIA and agency policy, we have searched our records as of October 30, 2014, the date we received your request in our FOIA office.

We have reviewed 33 pages of records responsive to part two of your request. We are continuing to review responsive records, and hope to have an additional response to you shortly. Our final response will also contain an invoice for any fees incurred by this request, up to your $1500 fee agreement. I am granting partial access to the accessible records. Portions of these pages fall within the exemptions to the FOIA's disclosure requirements, as explained below.

Portions of the responsive records are protected from disclosure under Article I, § 6, cl.1 of the Constitution, otherwise known as the Speech and Debate Clause. This clause protects information that would directly interfere with the legislative process by interfering with an ongoing activity by Congress. See Paisley v. CIA, 712 F.2d 686, 696 (D.C. Cir. 1983), citing Eastland v. United States Servicemen’s Fund, 421 U.S. 491, 510 n. 16 (1975). This information is awarded additional protection under FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A), which exempts from disclosure material could reasonably be expected to interfere with ongoing law enforcement activities. See Robbins Tire & Rubber Co. v. NLRB, 437 U.S. 214 (1978).

Additionally, some of the records contain personal identifying information compiled for law enforcement purposes. This information is exempt for release under FOIA Exemptions 6, 5 U.S.C. § 552(b)(6), and 7(C), 5 U.S.C. § 552(b)(7)(C), because individuals’ right to privacy outweighs the general public’s interest in seeing personal identifying information.

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, within 30 days of the date of this letter. Please enclose a copy of your original request and a copy of this response. If you believe
that we should choose to disclose additional materials beyond what the FOIA requires, please explain why this would be in the public interest.

If you have any questions about the way we handled your request or about the FOIA regulations or procedures, please contact Andrea Kelly at (202) 326-2836.

Sincerely,

Sarah Mackey
Associate General Counsel
Exhibit 4
Dear Mr. Massari:

This letter serves as our second and final response to your request dated October 30, 2014, under the Freedom of Information Act seeking access to communications to or from staff in the Office of Congressional Relations (1) regarding Margaret Lassack or Alain Sheer; or (2) reflecting communications with the House Committee on Oversight and Government Reform regarding the matter In re: LabMD, Inc, from August 28, 2013 to present. In accordance with the FOIA and agency policy, we have searched our records as of October 30, 2014, the date we received your request in our FOIA office.

We have located an additional 1.5GB of responsive records. I am granting partial access to the accessible records. Portions of these pages fall within the exemptions to the FOIA’s disclosure requirements, as explained below.

Portions of the responsive records are protected from disclosure under Article I, § 6, cl.1 of the Constitution, otherwise known as the Speech and Debate Clause. This clause protects information that would directly interfere with the legislative process by interfering with an ongoing activity by Congress. See Paisley v. CIA, 712 F.2d 686, 696 (D.C. Cir. 1983), citing Eastland v. United States Servicemen’s Fund, 421 U.S. 491, 510 n. 16 (1975). This information is awarded additional protection under FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A), which exempts from disclosure material could reasonably be expected to interfere with ongoing law enforcement activities. See Robbins Tire & Rubber Co. v. NLRB, 437 U.S. 214 (1978).

Some responsive records are exempt from disclosure under FOIA Exemption 3, 5 U.S.C. § 552(b)(3), because they are exempt from disclosure by another statute. Specifically, Section 21(f) of the FTC Act provides that information obtained by the Commission in a law enforcement investigation, whether through compulsory process, or voluntarily in lieu of such process, is exempt from disclosure under the FOIA. 15 U.S.C.§ 57b-2(f), see Kathleen McDermott v. FTC, 1981-1 Trade Cas. (CCH) ¶ 63964 (D.D.C. April 13, 1981).

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).
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).

Some of the records contain personal identifying information compiled for law enforcement purposes. This information is exempt for release under FOIA Exemptions 6, 5 U.S.C. § 552(b)(6), and 7(C), 5 U.S.C. § 552(b)(7)(C), because individuals' right to privacy outweighs the general public's interest in seeing personal identifying information.

Some information is exempt from disclosure under FOIA Exemption 7(E), 5 U.S.C. § 552(b)(7)(E). Exemption 7(E) protects 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. See Foster v. DOJ, 933 F. Supp. 687 (E.D. Mich. 1996).

Based on the fee provisions of the FOIA, 5 U.S.C. § 552(a)(4)(A), and the Commission's Rules of Practice, 16 CFR § 4.8 et seq., as amended, I am also enclosing an invoice for the charges we incurred throughout the processing of your request. Failure to pay this bill promptly will result in our refusal to provide copies of accessible documents in response to future requests. If not paid within 30 days, this bill will accrue interest penalties as provided by Federal Claims Collection Standards, 31 C.F.R. § 900-904, as amended.

Please make checks payable to U.S. Treasury and send payment to:

Financial Management Office, H-790
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

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, within 30 days of the date of this letter. Please enclose a copy of your original request and a copy of this response. If you believe that we should choose to disclose additional materials beyond what the FOIA requires, please explain why this would be in the public interest.

If you have any questions about the way we handled your request or about the FOIA regulations or procedures, please contact Andrea Kelly at (202) 326-2836.

Sincerely,

Sarah Mackey
Associate General Counsel
# Invoice Summary

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

Report Date: 02/10/2015
Time: 4:54:07 PM

## Requester Details
Mr. Patrick J. Massari
Counsel
Cause of Action
1919 Pennsylvania Ave NW
Suite 650
Washington, DC 20006

## Requester Invoice
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Total Amount ($) : 324.14
Amount Paid ($) : 0.00
Balance Due ($) : 324.14

## Request Description
OCR communications
Sub Requests
Default

## Memo
Federal Trade Commission

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAUSE OF ACTION INSTITUTE
Plaintiff,
v.
FEDERAL TRADE COMMISSION
Defendant.

EXHIBIT 13 TO COMPLAINT
April 9, 2015

Preshant Khetan
Cause of Action
1919 Pennsylvania Avenue NW
Suite 650
Washington, DC 20006

Re: Freedom of Information Act (FOIA) Request-2015-00110

Dear Mr. Khetan:

I write in response to your appeal letter (received in this office on March 13, 2015) of the second and final determination letter and redaction of documents responsive to the above-captioned FOIA request. In that request, you sought access to all documents (including, but not limited to, communications via e-mail, text, or facsimile): (1) regarding Margaret (or Maggie) Lassack or Alain Sheer; and (2) reflecting communications with the House Committee on Oversight and Government Reform (“Committee”) regarding the matter In re: LabMD, Inc. from August 28, 2013 to present. On February 10, 2015, Ms. Sarah Mackey, Associate General Counsel for Project Management, granted your request in part and released documents responsive to the second part of your request, and withheld other material under FOIA Exemptions 3 (pursuant to 15 U.S.C. § 57b-2(f), 5, 6, 7(A), 7(C), and 7(E), 5 U.S.C. § 552(b)(3), (b)(5), (b)(6), (b)(7)(A), (b)(7)(C), and (b)(7)(E)). Ms. Mackey also indicated that portions of the responsive records are protected by the Speech or Debate Clause. U.S. CONST. art. 1 § 6, cl. 1. Your appeal letter challenges these redactions. For the reasons outlined below, I am denying your appeal.

At the outset, I note that the Committee itself has asserted, and continues to assert, the Speech or Debate Clause protection with respect to portions of these documents. Accordingly, I affirm Ms. Mackey’s decision to withhold those documents and need not address your argument that the FTC lacks “standing to assert the Clause because its privileges belong exclusively to Members of Congress.”

As to the FOIA Exemptions, Exemption 3 applies to matters that are “specifically exempted from disclosure by [another] statute . . . , provided that such statute (A) requires that matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.” 5 U.S.C. § 552(b)(3). Ms. Mackey’s letter claims that section 21(f) of the FTC Act,
15 U.S.C. § 57b-2(f), specifically exempt documents from disclosure under the FOIA.

Section 21(f)(1) of the FTC Act provides that “[a]ny material which is received by the Commission in any investigation, a purpose of which is to determine whether any person may have violated any provision of the laws administered by the Commission, and which is provided pursuant to any compulsory process under this Act or which is provided voluntarily in place of such compulsory process shall not be required to be disclosed under section 552 of Title 5.” 15 U.S.C. § 57b-2(f)(1). The exempted records include materials that the FTC asked for and received voluntarily in lieu of and pursuant to compulsory process, and which are thus exempt from disclosure. A. Michael’s Piano, Inc. v. FTC, 18 F.3d 138, 145-46 (2d Cir. 1994).

Exemption 5. FOIA Exemption 5 applies to “inter-agency or intra-agency memorandums 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). I find that the FOIA Unit properly withheld material under this exemption because it contained “staff analyses, opinions, and recommendations” 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), and protected attorney work product prepared by FTC staff in contemplation of potential litigation. See FTC v. Grolier, Inc., 462 U.S. 19, 28 (1983).

Exemption 7(A). FOIA Exemption 7(A) applies where a law enforcement proceeding or investigation is pending or prospective, and where release of the information could reasonably be expected to cause some articulable harm. 5 U.S.C. § 552(b)(7)(A); see Carter, Fullerton & Hayes, LLC v. FTC, 601 F. Supp. 2d 728, 740 (E.D. Va. 2009). The FTC need not demonstrate interference on a document-by-document basis to invoke FOIA Exemption 7(A). Instead, it is sufficient for the agency to make a generalized showing that release of these particular kinds of documents would generally interfere with enforcement proceedings. See NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 236 (1978). Releasing the requested material to Cause of Action would reveal facts about the nature and scope of the investigation that could reasonably be expected to cause harm. Other potential harms include a “chilling effect” on potential witnesses or third parties, interference with free flow of information between Commission employees and supervisors or other government agencies, or a diminished ability to shape and control investigation. These potential harms could also occur when the FOIA is used to prematurely obtain materials not otherwise obtainable through discovery in litigation. See, e.g., J.P. Stevers & Co. v Perry, 710 F.2d 136, 143 (4th Cir. 1983); Robbins Tire, 437 U.S. at 241-43.

Exemption 7(E). FOIA Exemption 7(E) affords protection to 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.” 5 U.S.C. § 552(b)(7)(E). I find that the FOIA Unit properly withheld material under this exemption.

For the reasons discussed above, I am denying your appeal. 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, have your principal place of business, or in the United States District Court for the District of Columbia.
You are also advised that I am the designated official responsible for this decision. 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 requestors 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]

David C. Shonka  
Principal Deputy General Counsel