

PLAINTIFF  
EXHIBIT  
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CARTER FULLERTON & HAYES, LLC

ATTORNEYS AT LAW

December 19, 2013

Via e-mail and First Class U.S. Mail  
foia@ftc.gov

Consumer Response Center  
Dione Jackson Stearns, Esq.  
Mark Peterson, Esq.  
Federal Trade Commission  
Room 130  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

Re: FOIA – 2014-00237

Dear Ms. Stearns:

This is to acknowledge receipt of the FTC's letter dated December 4, 2013 regarding Carter Fullerton & Hayes, LLC's ("CFH") Freedom of Information Request ("FOIA") 2014-00237. In accordance with the letter, we have forwarding a check for \$1,500.00 to the Federal Trade Commission's ("FTC") Financial Management Office-H790 (see our attached letter of December 17, 2013). Once the check is received by the FTC, we request written confirmation of our payment.

We do not believe the FTC's December 4<sup>th</sup> letter accurately reflects our telephone conversation of December 2<sup>nd</sup>. It was CFH's position, and continues to be our position, that the firm remains committed to working with the Federal Trade Commission ("FTC") should the agency identify any specific areas of concern regarding the FOIA request (see our attached letter of December 2, 2013).

The December 4th letter seems to disregard the ongoing nature of CFH's FOIA searches. As the Commission is aware, CFH's May 20, 2011 submission to the FTC resulted in multi-year litigation before the U.S. District Court for the Eastern District of Virginia. While we agree that the FTC is required to use "best efforts to conduct a search that will be reasonable calculated to uncover all responsive records," we do not understand how the agency can claim our FOIA – 2014-00237 request is unreasonable.

As explained in the body of the FOIA request, CFH's most recent submission was prepared using information provided to the US District Court and CFH by the FTC. The definition in the letter of "FTC Offices Likely to Contain Responsive Documents" and the names of people likely to possess responsive documents were identified from: (i) the Declarations and the various *Vaughn*

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Indices submitted to the Court by the FTC and (ii) the prior documents released to CFH as being responsive documents (see the attached Stearns Declaration of August 2, 2012)<sup>1</sup>. CFH did not create the universe of FTC offices or designate the FTC personnel chosen by the agency to work on various projects involving the subject matters of FOIA Request 2014-2013. CFH only is trying to identify responsive records based upon the agency's own admissions and production.

We understand that the FTC does not agree with CFH's position that documents should be produced through the date of final production. Past experience suggests that by the time documents are produced by the FTC in response to a CFH request a substantial time has passed making the current FOIA request stale. For example, it took the FTC approximately two (2) years to fully respond to prior CFH FOIA Request 2011-00960. This delay ultimately defeats the open government purpose of the Freedom of Information Act. Providing documents through the date of final production would simplify subsequent production of documents. There appears to be a split of case authority as to whether an agency can unilaterally establish production cut off dates. This maybe an issue for the parties to resolve in a later appeal, but for the purposes of FOIA – 2014-00237 this requestor is seeking responsive records through the date of the final production.

Thank you again for your assistance in processing this request. We look forward to receiving any specific comments the FTC may have to enhance the processing of FOIA-2014-00237 and the receipt of requested documents in timely manner.

Very truly yours,

Carter Fullerton & Hayes, LLC

By:   
John L. Carter, Esq.

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<sup>1</sup> This declaration was one of eight (8) declarations and six (6) *Vaughn* Indices submitted by the agency to the U.S. District Court. The FTC ultimately produced more than 3,000 additional responsive records despite having asserted in a declaration that the agency already had conducted a search "reasonably calculated to uncover all responsive records." CFH has used in its request the information contained in the various declarations and *Vaughn* Indices to focus and narrow the FTC's efforts to search for responsive records.