

Exhibit E



United States of America
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

David C. Shonka
Principal Deputy General Counsel

February 19, 2015

Philip R. Reitingger
P.O. Box 7324
Falls Church, VA 20580

Re: Freedom of Information Act Appeal (FOIA Request No. 2014-01310)

Dear Mr. Reitingger:

I write in response to your appeal letter dated January 22, 2015 in which you seek review of Sarah Mackey's resolution of your November 13, 2014 request for access to documents under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. You requested all documents concerning the FTC's "standards, guidelines, or criteria" for determining (1) what "conduct or omission" is an unfair or deceptive practice in the areas of cybersecurity and data security; and (2) whether to bring a law enforcement action against such practices under Section 5 of the FTC Act, 15 U.S.C. § 45. On December 23, 2014, you spoke with FTC FOIA attorney Alice Bartek, and clarified that you were only seeking information about the FTC's general policies for cybersecurity and data security enforcement, not material specific to each investigation.

On December 24, 2014, Ms. Mackey denied your request, explaining that the responsive records contained staff analyses, opinions, and recommendations protected by the deliberative process privilege and FOIA Exemption 5, 5 U.S.C. § 552(b)(5). Your appeal letter contends that the agency failed to release "reasonably segregable-non exempt portions of the records" and that "disclosure would further the public interest." For the reasons outlined below, I am denying your appeal.

Exemption 5

Exemption 5 shields from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). Exemption 5 incorporates civil discovery privileges, including the deliberative process privilege, which protects "documents reflecting advisory opinions, recommendations and deliberations comprising part of the process by which governmental decisions and policies are formulated." *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (quotation marks omitted). To qualify for the deliberative process privilege, a document must be both predecisional and deliberative. "A document is predecisional if it was prepared in order to assist an agency decisionmaker in arriving at his decision, rather

than to support a decision already made. Material is deliberative if it reflects the give-and-take of the consultative process.” *Petroleum Info Corp. v. Dep’t of Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992) (citations and quotation marks omitted).

After careful review of the documents responsive to your request, I conclude that they consist entirely of material protected by the deliberative process privilege. The documents are predecisional because they assisted FTC staff in deciding whether to recommend opening investigations and commencing litigation. Moreover, the documents do not contain an “authoritative statement” of the Commission’s law enforcement policies relating to cybersecurity and data security, but rather “merely examine[] policy options available” to the agency. *Elec. Frontier Found. v. DOJ*, 739 F.3d 1, 10 (D.C. Cir. 2014). See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975) (deliberative process privilege “calls for disclosure of all opinions and interpretations which embody the agency’s effective law and policy, and the withholding of all papers which reflect the agency’s group thinking in the process of working out its policy and determining what its law shall be”) (citations and quotation marks omitted).

The documents are also deliberative, since they reflect staff’s draft analyses, recommendations, questions, and internal deliberations regarding whether certain data security and cybersecurity practices should lead to an FTC investigation or enforcement action. See *Judicial Watch, Inc. v. Dep’t of Homeland Sec.*, 926 F. Supp. 2d 121, 134 (D.D.C. 2013) (deliberative process privilege applies to agency’s “consultative process” concerning “the adoption of final guidance regarding which [immigration] removal cases satisfy the criteria for potential dismissal”). I conclude that releasing these documents would not serve the public interest, because this would chill internal agency deliberations on these important subjects. See *Klamath*, 532 U.S. at 8-9 (explaining that the deliberative process privilege aims to “enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the government”) (citations and quotation marks omitted).

Additionally, I have found that the responsive documents contain no releasable information “reasonably segregable” from the privileged material. 5 U.S.C. § 552(b); see *Army Times Publ’g Co. v. Dep’t of Air Force*, 998 F.2d 1067, 1071 (D.C. Cir. 1993) (“Exemption 5 applies only to the deliberative portion of a document and not to any purely factual, non-exempt information the document contains.”). After reviewing the documents, I have found that they contain no purely factual information about data security practices, investigations, or cases that can be separated from the deliberative content. Accordingly, I conclude that the documents should be withheld in full.

Exemption 7(E)

Moreover, I have determined that the documents you seek are also exempt from disclosure under FOIA Exemption 7(E), which allows agencies to protect records “compiled for law enforcement purposes” when their release “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). The documents you requested are law enforcement guidelines that suggest law enforcement priorities and the potential allocation of

agency resources for such investigations. *See Allard K. Lowenstein Int'l Human Rights Project v. Dep't of Homeland Sec.*, 626 F.3d 678, 682 (2d Cir. 2010) ("For example, if a law enforcement agency concerned with tax evasion directs its staff to bring charges only against those who evade more than \$100,000 in taxes, that direction constitutes a 'guideline.'"). Exemption 7(E) does not require that "guidelines" be formal, or final, for protection under the FOIA. *See Am. Immigration Council v. Dep't of Homeland Sec.*, 30 F. Supp. 3d 67, 76 (D.D.C. 2014) (Exemption 7(E) applies to internal agency deliberations about potential responses to hypothetical situations).

I have concluded that disclosing the documents you requested could reasonably be expected to risk circumvention of the law. To withhold material under Exemption 7(E), an agency need only demonstrate that "release of a document might increase the risk that a law will be violated or that past violators will escape legal consequences." *Pub. Emps. for Envtl. Responsibility v. United States Section, Int'l Boundary & Water Comm'n, U.S.-Mexico*, 740 F.3d 195, 204-05 (D.C. Cir. 2014) (citations and quotation marks omitted). Courts have recognized that this sets a "relatively low bar" for agencies to clear. *Id.*; *Blackwell v. FBI*, 646 F.3d 37, 42 (D.C. Cir. 2011). Here, disclosure of the documents you requested might increase the risk that a person or business will violate the law by engaging in certain types of unfair or deceptive data security practices that the FTC is less likely to investigate.

As required by FOIA, you are hereby advised that judicial review of this decision may be obtained under 5 U.S.C. § 552(a)(4)(B), in a United States District Court in the district where you reside or have your principal place of business, or in which the records are situated, or in the District of Columbia. Also, as required by FOIA, you are hereby advised that I am the designated official responsible for partially denying your appeal. Finally, I note that the 2007 FOIA amendments created the Office of Governmental Information Services ("OGIS") to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. *See* <https://ogis.archives.gov>. Using OGIS services does not affect your right to pursue litigation. OGIS's contact information is as follows:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road – OGIS
College Park, MD 20740-6001
ogis@nara.gov
phone: 202-741-5770, or toll-free 1-877-684-6448
fax: 202-741-5769.

Sincerely,



David C. Shonka
Principal Deputy General Counsel