

Exhibit 1



October 14, 2021

VIA E-MAIL

Freedom of Information Act Request
Office of General Counsel
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
E-mail: FOIA@ftc.gov

Re: Freedom of Information Act Request

Dear FOIA Officer:

I write on behalf of Americans for Prosperity Foundation (“AFPF”), a 501(c)(3) nonpartisan organization dedicated to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society.¹ In recent months, the Federal Trade Commission (“FTC”) has taken several actions to arrogate power to the Chair of the Commission and remove procedural and structural constraints on its power to make new rules and regulations, initiate investigations, and bring enforcement actions. Commissioners Christine Wilson and Noah Phillips describe these actions as “bulldozing procedural safeguards” and express concern “the reforms undercut the independence of those charged with conducting evidentiary hearings, limit valuable input from the public, and reverse decades of practice regarding agency transparency.”²

Pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, AFPF hereby requests the following records:³

1. Any policies or guidance that replace the 2015 Section 5 policy statement concerning unfair methods of competition;⁴

¹ See AMS. FOR PROSPERITY FOUND., www.americansforprosperityfoundation.org (last visited October 13, 2021).

² *Dissenting Statement of Comm’rs Christine Wilson and Noah Phillips Regarding the Commission Statement On the Adoption of Revised Section 18 Rulemaking Procedures* (July 9, 2021), available at https://www.ftc.gov/system/files/documents/public_statements/1591702/p210100_wilsonphillips_joint_statement_-_rules_of_practice.pdf.

³ For purposes of this request, the term “record” means any medium of information storage in the form and format maintained by the agency at the time of the request. If any portion of a “record,” so defined, is responsive to AFPF’s request, then the agency should process and disclose the record in its entirety. If the agency considers a medium of information storage to contain multiple records that it believes can be segmented on the basis of the subject-matter or scope of AFPF’s request, AFPF explicitly seeks access to those separate “records” as well. They should not be treated as “non-responsive.”

⁴ FTC, *Statement of the Commission On the Withdrawal of the Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act* (July 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591706/p210100commnstmtwithdrawalsec5enforcement.pdf.

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2. All communications, memoranda, or other documentation regarding:
 - a. the decision to replace the 2015 Section 5 policy statement concerning unfair methods of competition;⁵
 - b. the withdrawal of merger guidelines;⁶
 - c. any plans or policy to replace the merger guidelines;
 - d. adjustments to merger review announced on August 3, 2021;⁷
 - e. The pre-consummation warning letters announced in and attached to the FTC's August 3, 2021 blog post on merger review;⁸
 - f. the FTC's authority to send pre-consummation warning letters or take the actions described in the letters;
 - g. the FTC's plans to continue to seek monetary relief in response to the *AMG* decision,⁹ including communications with the Department of Justice and/or members of Congress or their staff regarding H.R. 2668.

The time period for this request is February 1, 2021, to the present.¹⁰

For the purposes of this request, please omit daily news clippings or other mass mailings unless there is commentary related to them. For all items of this request, if the agency uncovers responsive email records, AFPP's request specifically seeks the entirety of any email chain, any portion of which contains an individual email message responsive to this request, *i.e.*, the entire email chain is responsive to this request. If the agency identifies responsive records that it deems outside its legal control (*e.g.*, congressional records), AFPP requests the agency inform AFPP that such records exist.

Request for a Public Interest Fee Waiver

AFPP requests a waiver of any and all applicable fees. The FOIA and applicable regulations provide that the agency shall furnish requested records without or at reduced charge if “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”¹¹

⁵ *Id.*

⁶ FTC, *Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary* (September 15, 2021), <https://www.ftc.gov/news-events/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines>.

⁷ Holly Vedova, Bureau of Competition, FTC, *Adjusting merger review to deal with the surge in merger filings* (August 3, 2021), <https://www.ftc.gov/news-events/blogs/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings>.

⁸ *Id.*

⁹ *AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021).

¹⁰ For purposes of this request, the term “present” should be construed as the date on which the agency begins its search for responsive records. See *Pub. Citizen v. Dep't of State*, 276 F.3d 634 (D.C. Cir. 2002).

¹¹ 5 U.S.C. § 552(a)(4)(A)(iii); see also *Cause of Action v. Fed. Trade Comm'n*, 799 F.3d 1108, 1115–19 (D.C. Cir. 2015) (discussing proper application of public-interest fee waiver test).

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In this case, the requested records unquestionably shed light on the “operations or activities of the government” as they relate to FTC business and enforcement. The FTC has rescinded guidelines and policy statements regarding mergers and antitrust enforcement without replacing them. And according to two Commissioners, the FTC is “bulldozing procedural safeguards.” The public deserves to know what, if any, guidance or policies are guiding FTC rulemaking and enforcement and from where the agency derives the power to take the actions it proposes. In this way, responsive records will significantly contribute to public understanding.

AFPF intends to educate the public with the results of this FOIA request. It has the intent and ability to make those results available to a reasonably broad public audience through various media. Its staff has significant experience and relevant expertise; AFPF professionals will analyze responsive records, if any, use their editorial skills to turn raw materials into a distinct work, and share the resulting analysis with the public. AFPF is a non-profit organization as defined under Section 501(c)(3) of the Internal Revenue Code, and it has no commercial interest in making this request.

Request to Be Classified as a Representative of the News Media

In addition to a public interest fee waiver, AFPF requests that it be classified as a “representative of the news media” for fee purposes.¹² As the D.C. Circuit has explained, the “representative of the news media” test is properly focused on the requestor, not the specific FOIA request at issue.¹³ AFPF satisfies this test because it gathers information of potential interest to a segment of the public, uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience. Although not required, AFPF gathers the news it publishes from a variety of sources. It does not merely make raw information available to the public, but distributes distinct work product, including press releases, blog posts, reports, and other informative materials.¹⁴ These distinct works are distributed to the public through various online outlets, such as websites, Twitter, and Facebook. The statutory definition of a “representative of the news media” contemplates that organizations such as AFPF, which electronically disseminate information and publications via “alternative media[,] shall be considered to be news-media entities.”¹⁵

¹² 38 U.S.C. § 1.561(b)(7).

¹³ See *Cause of Action*, 799 F.3d at 1121.

¹⁴ See, e.g., *Permission to Care: How Certificate of Need Laws Harm Patients and Stifle Healthcare Innovation*, AMS. FOR PROSPERITY FOUND. (October 2020), available at <http://afpf.org/conreport>; *Records confirm VA's use of inaccurate wait time numbers*, AMS. FOR PROSPERITY FOUND. (Oct. 1, 2021), available at <https://bit.ly/3a9KGeL>; *Government documents reveal Export-Import Bank fails to protect taxpayers ... again*, AMS. FOR PROSPERITY FOUND. (Oct. 30, 2020), available at <https://bit.ly/3hD09Jn>; *Kansas Shut Down Businesses That Were Willing and Able to Comply with Safety Guidelines*, AMS. FOR PROSPERITY FOUND. (July 21, 2020), available at <https://bit.ly/3vbj7eC>; *Gone in an Instant: How Instant Messaging Threatens the Freedom of Information Act* (Mar. 16, 2020), AMS. FOR PROSPERITY FOUND., available at <https://bit.ly/2zQOEKI>.

¹⁵ 5 U.S.C. § 552(a)(4)(A)(ii)(II).

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Record Production and Contact Information

In an effort to facilitate document review, please provide the responsive documents in electronic form, preferably in their native format, in lieu of a paper production. If a certain portion of responsive records can be produced more readily, AFPF requests that those records be produced first, and the remaining records be produced on a rolling basis as circumstances permit.

If you have any questions about this request, please contact me by telephone at (202) 734-0239 or by e-mail at tkimbrell@afphq.org. Thank you for your attention to this matter.

Thomas Kimbrell

THOMAS KIMBRELL
POLICY ANALYST