

Exhibit 4

From: [Benjenk, Randy](#)
To: CFPB_FOIA@cfpb.gov
Subject: Freedom of Information Act Appeal (#CFPB-2015-118-F)
Date: Wednesday, May 06, 2015 2:52:25 PM
Attachments: [Freedom of Information Act Appeal.pdf](#)
[image001.png](#)

Consumer Financial Protection Bureau
Attn: General Counsel (c/o Chief FOIA Officer)
Freedom of Information Act Appeal
1700 G Street, NW
Washington, DC 20552

Dear General Counsel:

Attached is an administrative appeal of the CFPB's April 16, 2015 partial denial (#CFPB-2015-118-F) of my Freedom of Information Act request dated March 2, 2015.

If you have any questions about processing this appeal, you may contact me during at (202) 662-5041 or rbenjenk@cov.com.

Sincerely,
Randy Benjenk

Randy Benjenk

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Via E-mail

May 6, 2015

Consumer Financial Protection Bureau
Attn: General Counsel (c/o Chief FOIA Officer)
Freedom of Information Act Appeal
1700 G Street, NW
Washington, DC 20552

Re: Freedom of Information Act Appeal

Dear General Counsel:

This letter is in response to the Consumer Financial Protection Bureau's (CFPB) April 16, 2015 response #CFPB-2015-118-F partially denying my Freedom of Information Act (FOIA) request dated March 2, 2015. My request, and the CFPB's response, are attached to this letter. My request sought all documents and records relating to, or relied upon to prepare, the CFPB's report entitled "Consumer Voices on Credit Reports and Scores" (February 2015) (the "Report"). In response to this request, the CFPB released 187 pages in full and 111 pages in part, but withheld 1,196 pages under FOIA Exemptions 4, 5, and 6. I write to appeal the partial denial of my FOIA request with respect to the following records:

1. Records of the process of, and parameters for, selecting focus group participants and focus group locations;
2. Focus group participants' responses; and
3. Demographic data of focus group participants.

At the outset, the CFPB's denial letter does not satisfy the requirements of *Vaughn v. Rosen*.¹ Without a meaningful description of the withheld documents and an explanation of how the claimed exemptions apply to each of the 1,196 withheld documents (or portions of each document), the CFPB has failed to carry its burden of demonstrating that the withheld information falls within the claimed exemptions. Nonetheless, even in the absence of the showing required by FOIA, it is evident, for the reasons discussed below, that none of the FOIA Exemptions cited by the CFPB in response to my initial request justify withholding the requested records.²

¹ 484 F.2d 820 (D.C. Cir. 1973).

² Although FOIA contains exemptions from disclosure, the exemptions must be "narrowly construed." *FBI v. Abramson*, 456 U.S. 615, 630 (1982).

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Exemption 4. Exemption 4 protects “trade secrets and commercial or financial information obtained from a person and privileged or confidential.”³ The terms “commercial or financial” generally refer to records in which the submitter has a “commercial interest,”⁴ though “[t]he mere fact that an event occurs in connection with a commercial operation does not automatically transform documents regarding that event into commercial information.”⁵ Where submission to a government agency is mandatory, commercial or financial information is considered confidential if disclosure is likely: “(1) to impair the Government’s ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.”⁶ Where submission is voluntary, such information is considered confidential if it would not “customarily” be publicly disclosed.⁷

None of the information requested implicates trade secrets or commercial or financial information obtained from a person that is privileged or confidential:

- The information requested does not contain trade secrets, which are generally considered to be secret, commercially valuable plans, formulas, processes or devices used in commercial manufacturing processes.⁸
- The focus group transcripts and participant selection and demographic information also are not of commercial or financial interest. This data was created by the government, not a commercial enterprise, and there is no evidence that the focus group participants considered their responses to consist of sensitive commercial or financial information.⁹ In any event, as described below, the CFPB could easily mask the personal identifying

³ 5 U.S.C. § 552(b)(4).

⁴ Pub. Citizen Health Research Grp. v. FDA, 704 F.2d 1280, 1290 (D.C. Cir. 1983).

⁵ Chi. Tribune Co. v. FAA, No. 97 C 2363, 1998 WL 242611, at *2 (N.D. Ill. May 7, 1998).

⁶ Nat’l Parks and Conservation Ass’n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).

⁷ Critical Mass Energy Project v. Nuclear Regulatory Comm’n, 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc).

⁸ See Pub. Citizen Health Research Grp., 704 F.2d at 1288 (defining trade secret narrowly as “a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.”).

⁹ See Nat’l Ass’n of Home Builders v. Norton, 309 F.3d 26, 39 (D.C. Cir. 2002) (finding that the requested “owl-sighting data itself is commercial neither by its nature (having been created by the government rather than in connection with a commercial enterprise) nor in its function (as there is no evidence that the parties who supplied the owl-sighting information have a commercial interest at stake in its disclosure”).

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information of focus group participants, and I note that, under the CFPB's confidentiality rules, such information is not protected from disclosure.¹⁰

- Rather, this is purely factual information—raw data and information about the focus group's composition, as well as the methodology and results of the focus group testing—which courts have found not subject to Exemption 4.¹¹
- Further, the information requested is not confidential or privileged. Release of this information will cause no competitive harm; it will neither dissuade consumers from participating in studies nor consultants from contracting with the government.

Exemption 5. The deliberative process privilege does not permit withholding of the requested information. This privilege protects inter- or intra-agency records that are both predecisional and deliberative (meaning the document is “a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters”).¹² As with Exemption 4, the deliberative process privilege does not typically apply to purely factual matters.¹³ Rather, this privilege protects advisory opinions, recommendations, and similar records.¹⁴ No such documents are requested here. The documents sought consist of “raw research data” and related methodology information not within the Exemption's purview.¹⁵ By their nature, the requested documents do not consist of CFPB recommendations, have not been modified in any way that reflects on agency process, and have no other similar characteristics that would subject the documents to the deliberative process privilege.¹⁶

¹⁰ See 12 C.F.R. § 1070.41(c) (“Nothing in this subpart shall limit the discretion of the CFPB to disclose materials that it derives from or creates using confidential information to the extent that such materials do not identify, either directly or indirectly, any particular person to whom the confidential information pertains.”).

¹¹ See *Chi. Tribune Co.*, 1998 WL 242611, at *3 (purely factual information, such as data on “the nature and frequency of in-flight medical emergencies,” is not commercial information).

¹² *Jordan v. Dep't of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978) (en banc), *overruled on other grounds by Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (D.C. Cir. 1981) (en banc); *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975).

¹³ See *Sw. Ctr. for Biological Diversity v. USDA*, 170 F. Supp. 2d 931, 941 (D. Ariz. 2000) (“raw research data” is not covered by deliberative process privilege); *Pub. Citizen v. Dep't of State*, No. 91-746(CRR), 1991 WL 179116, at *4 (D.D.C. Aug. 27, 1991) (generally, release of “purely factual matters . . . would not threaten agency deliberations”), *aff'd on other grounds by* 11 F.3d 198 (D.C. Cir. 1993).

¹⁴ See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975); *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 337 F. Supp. 2d 146, 173-74 (D.D.C. 2004).

¹⁵ *Sw. Ctr. for Biological Diversity*, 170 F. Supp. 2d at 941.

¹⁶ See *Vaughn*, 523 F.2d at 1145 (survey results are not protected by the deliberative process privilege where they “provide the raw data upon which decisions can be made [and] are not themselves a part of the decisional process”); *Playboy Enters., Inc. v. Dep't of Justice*, 677 F.2d (continued...)

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Exemption 6. Exemption 6 exempts from disclosure under FOIA “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy,”¹⁷ but does not protect from disclosure the documents requested here. The CFPB has indicated that the records it withheld contain mobile telephone numbers, email addresses and other private information. However, the information requested consists of demographic information, participant selection criteria, and focus group transcripts, not personal information pertaining to the participants or others involved. As such, the information requested does not even meet the threshold requirement for invoking Exemption 6—that the records consist of “personnel and medical files and similar files.”¹⁸

To the extent you determine that the requested records still contain personally identifying information such as mobile telephone numbers, email addresses and other private information, the CFPB may redact such information and return the records.¹⁹

Finally, even if personal information is contained in the requested documents and is not redacted, disclosure of the requested information is warranted because of the strong public interest in disclosure.²⁰ The focus group findings may play a role in future CFPB financial literacy initiatives.²¹ Dodd-Frank mandates that the CFPB develop initiatives for consumer financial education,²² and the CFPB explicitly referenced this mandate in introducing the Report and concluded that the focus group findings “will allow us . . . to develop targeted messages,

931, 935 (D.C. Cir. 1982) (“a report does not become part of the deliberative process merely because it contains only those facts which the person making the report thinks material”); *Sw. Ctr. for Biological Diversity*, 170 F. Supp. 2d at 941 (“raw research data” that does not consist of recommendations and is not “selective” is not subject to deliberative process privilege).

¹⁷ 5 U.S.C. § 552(b)(6).

¹⁸ *Id.*

¹⁹ *See Oblesby v. U.S. Dep’t of the Army*, 79 F.3d 1172, 1176 (D.C. Cir. 1996) (even if an exemption applies to some information in a document, the CFPB “must still release ‘any reasonably segregable portion’ after deletion of the nondisclosable portions”) (citing 5 U.S.C. § 552(b)).

²⁰ *See Dep’t of the Air Force v. Rose*, 425 U.S. 352, 372 (1976).

²¹ *See, e.g., Advocates for Highway and Auto Safety v. Federal Highway Admin.*, 818 F. Supp. 2d 122, 126-27 (D.D.C. 2011) (finding strong public interest existed in videotapes of truck drivers that recorded driver’s face and the road for a study of driver fatigue that was informative in Department of Transportation rulemakings); *see also Alliance for the Wild Rockies v. Dep’t of the Interior*, 53 F. Supp. 2d 32, 36-37 (D.D.C. 1999) (noting that a strong public interest exists in information relied upon by an agency in making a rule).

²² 12 U.S.C. § 5493(d)(1).

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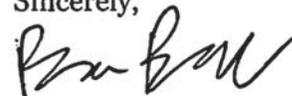
information, and other approaches designed to encourage consumers to understand and take action to improve credit reports and scores.”²³

Moreover, the information requested is necessary for the public to verify the quality of the study’s methodology. Without transcripts, it is impossible to know whether the CFPB’s questions were unambiguous and unbiased; whether all or only a few of the consumers involved actively participated; and whether the Report is a true reflection of consumers’ responses. Without demographic data, it is impossible to determine whether the CFPB’s Report is representative of consumers generally, or to verify the Report’s claim that study was “demographically diverse.”²⁴ Participant selection information is similarly informative of the study’s methodology.

Furthermore, the public is entitled to evaluate whether the CFPB’s conclusions about these important public policy matters are fairly supported by the results of the focus group testing, or whether other valid conclusions might be drawn from the survey results.

Accordingly, I respectfully request review of the CFPB’s partial denial of records. Please let me know if you have any questions. You can contact me at (202) 662-5041 or rbenjenk@cov.com.

Sincerely,



Randy Benjenk

Attachments

²³ Report at 21.

²⁴ Report at 8.