

Exhibit 5



March 23, 2022

Sent via email at FOIAAppeal@ftc.gov

Freedom of Information Act Appeal
Office of the General Counsel
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Appeal of decision on request FOIA-2022-00436

The Functional Government Initiative (FGI) appeals the decision on its FOIA request for records relating to President Biden's request that the FTC investigate oil and gas companies for rising energy prices, submitted on January 3, 2022.

In its letter notifying us of the decision, the first correspondence received since submission, the FTC notes that 116 pages were found and that all pages were withheld under FOIA Exemption 5.

First, we question the completeness of the search of records cited as responsive to the request. Our request was worded broadly with six items requesting many types of records. Having only 116 pages seems very low given the topic of the request, a request to the FTC from the President of the United States to investigate a major industry. The request did not ask only for emails, for example. In our initial letter, we asked for a broad set of records to include memos, text messages, written notes, and more. We ask that the FTC review its records to ensure that only 116 pages are responsive that the reasonable attempts have been made to search for all types of records requested.

Second, our request asks for "all communications between Commissioners of the FTC or their staff and outside (non-governmental) organizations concerning or discussing the President's letter requesting an investigation into oil and gas companies or any topics or issues contained in the President's letter including the basis for opening the requested investigation." Communications with outside organizations are not protected as deliberative under FOIA Exemption 5. There is evidence from public information that there were communications with outside organizations. For example, in a press report, an email on this topic is cited:



“The FTC is concerned about this issue, and we are looking into it,” agency spokesperson Lindsay Kryzak said in an email.¹

Such an email would be a communication with an outside, non-governmental organization, would not be protected by Exemption 5, and therefore should be included as a responsive record. We ask that FTC resume the search and include this referenced email and other responsive records involving outside organizations.

Finally, the decision to withhold the documents in full runs counter to FOIA’s requirements. FOIA requires agencies to “take reasonable steps necessary to segregate and release nonexempt information.”² At a minimum, non-exempt information could include who sent messages, when meetings occurred, and more details that would not contain the material specifically exempt from disclosure. In our initial request, we requested specific information about exempt records that is not contained in the response. From the request, attached in the email that transmitted this letter, we request the following:

Should you decide to invoke a FOIA exemption, please include sufficient information for us to assess the basis for the exemption, including any interest(s) that would be harmed by release. Please include a detailed ledger which includes the following:

1. Basic factual material about each withheld record, including the originator, date, length, general subject matter, and location of each item; and
2. Complete explanations and justifications for the withholding, including the specific exemption(s) under which the record (or portion thereof) was withheld and a full explanation of how each exemption applies to the withheld material. Such statements will be helpful in deciding whether to appeal an adverse determination. Your written justification may help to avoid litigation.

On March 15, 2022, the Attorney General in his memo providing updated guidance for FOIA reminded federal agencies of the requirement to segregate records:

When an agency determines that it cannot make full disclosure of a requested record, FOIA requires that it “consider whether partial disclosure of information is possible” and “take reasonable steps necessary to segregate and release nonexempt information.” Id. § 552(a)(8)(A)(ii).³

¹ “Biden asks FTC to investigate oil, gas companies’ role in high prices at the pump” at <https://www.spglobal.com/commodity-insights/en/market-insights/latest-news/oil/111721-biden-asks-ftc-to-investigate-oil-gas-companies-role-in-high-prices-at-the-pump>

² 5 U.S.C. § (a)(8)(A)(ii).

³ <https://www.justice.gov/ag/page/file/1483516/download>



We ask that the FTC resume review of the responsive records, determine if more records exist, and release everything that is not specifically exempt.

Thank you for your prompt attention to this appeal. If you have any questions, please contact me.

Sincerely,

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