

# Exhibit 1

FOIA-2022-01204

SUBMITTED ELECTRONICALLY VIA FTC PUBLIC ACCESS LINK ON 6/23/2022

**Leah Anne Nysten**

Reporter

Bloomberg

1101 New York Ave NW

Suite 800

Washington, DC 20005

lnysten2@bloomberg.net

Requester Default Category: News Media

RE: Pre-consummation warning letters

Pursuant to the Freedom of Information Act, 5 U.S.C. Section 552 et seq. ("FOIA") and on behalf of Bloomberg News, I request access to and copies of: all pre-consummation warning letters issued by the agency since July 2021 as disclosed in this Aug. 3, 2021 blog post: <https://www.ftc.gov/enforcement/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings> (Date Range for Record Search: From 7/1/2021 To 6/23/2022)

I am making this request as a reporter for Bloomberg News, an accredited and recognized news-gathering organization. I request the Records to inform the public about matters of public concern.



UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

## Exhibit 2

June 28, 2022

Leah Nylén  
Bloomberg  
1101 New York Ave NW, Suite 800  
Washington, DC 20005

Re: FOIA-2022-01204

Dear Ms. Nylén:

This is in response to your request dated June 23, 2022 under the Freedom of Information Act seeking access to a copy of all pre-consummation warning letters the FTC has issued as discussed in this blog post from August 2021: <https://www.ftc.gov/news-events/blogs/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings>. In accordance with the FOIA and agency policy, we have searched our records on June 27, 2022.

We are denying your request. The responsive records are exempt from disclosure under FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A), because disclosure of that material could reasonably be expected to interfere with the conduct of the Commission's law enforcement activities. *See Robbins Tire & Rubber Co. v. NLRB*, 437 U.S. 214 (1978).

If you have any questions about the way we are handling your request or about the FOIA regulations or procedures, please contact Anthony Ellis at [rellis@ftc.gov](mailto:rellis@ftc.gov).

If you are not satisfied with this response to your request, you may appeal by writing to Freedom of Information Act Appeal, Office of the General Counsel, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580, or via email at [FOIAAppeal@ftc.gov](mailto:FOIAAppeal@ftc.gov), within 90 days of the date of this letter. Please enclose a copy of your original request and a copy of this response.

You also may seek dispute resolution services from the FTC FOIA Public Liaison Richard Gold via telephone at 202-326-3355 or via e-mail at [rgold@ftc.gov](mailto:rgold@ftc.gov); or from the Office of Government Information Services via email at [ogis@nara.gov](mailto:ogis@nara.gov), via fax at 202-741-5769, or via mail at Office of Government Information Services (OGIS), National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740.

Please note that the FOIA Public Liaison's role relates to comments, questions or concerns that a FOIA Requester may have with or about the FOIA Response.

Sincerely,

 / LR

Dione J. Stearns  
Assistant General Counsel

-----  
1909 K Street, NW  
12th Floor  
Washington, DC 20006-1157  
TEL 202.661.2200  
FAX 202.661.2299  
www.ballardspahr.com

Chad R. Bowman  
Tel: 202.508.1120  
Fax: 202.661.2299  
bowmanchad@ballardspahr.com

July 15, 2022

*Via E-mail (FOIAAppeal@ftc.gov)*

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

Re: Administrative Appeal from Denial of FOIA Request, FOIA-2022-01204

FOIA Appeal Officer:

We represent Bloomberg News and its Reporter Leah Nysten (collectively, “Bloomberg”). We write to appeal the Federal Trade Commission’s (“FTC”) denial of Bloomberg’s June 23, 2022 Freedom of Information Act (“FOIA”) request for copies of “all pre-consummation warning letters issued by the agency since July 21” as discussed in the FTC’s August 2021 blog post (the “Request”).<sup>1</sup> In response to the Request, the FTC asserted that “responsive records are exempt from disclosure under FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A), because disclosure of that material could reasonably be expected to interfere with the conduct of the Commission’s law enforcement activities.”<sup>2</sup> Exemption 7(A), however, does not justify withholding the records sought. As such, we respectfully request that the FTC be directed to disclose responsive records consistent with its obligations under FOIA.

### **BACKGROUND**

In August of 2021, the FTC explained that, because it had “been hit by a tidal wave of merger filings that [was] straining [its] capacity to rigorously investigate deals ahead of the statutory deadlines,” it had “begun to send form letters alerting companies that the FTC’s investigation remains open and remind companies that the agency may subsequently determine that [a] deal was unlawful” and that companies that “chose to proceed with

---

<sup>1</sup> The Request is attached to this appeal as Exhibit A. The blog post referenced in the request is at <https://www.ftc.gov/enforcement/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings>.

<sup>2</sup> The FTC’s Denial Letter is attached to this appeal as Exhibit B.

Freedom of Information Act Appeal  
July 15, 2022  
Page 2

transactions that ha[d] not been fully investigated,” therefore, were “doing so at their own risk.” The FTC clarified that its issuance of a form letter “should not be construed as a determination that [a] deal is unlawful, just as the fact that we have not issued such a letter . . . should not be construed as a determination that a deal is lawful.”<sup>3</sup>

On June 23, 2022, Bloomberg submitted its FOIA Request seeking access to a copy of all such pre-consummation letters. On June 28, 2022, the FTC denied the Request citing FOIA Exemption 7(A). As explained below, this denial is inconsistent with FOIA’s requirements and germane case law. Bloomberg, therefore, requests that responsive records be promptly disclosed.

### **ARGUMENT**

The “basic policy” of FOIA is “disclosure, not secrecy.” *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8 (2001). Congress intended FOIA “to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.” *Dep’t of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (citation omitted). FOIA creates a “strong presumption in favor of disclosure” and squarely “places the burden on the agency to justify the withholding of any requested documents.” *Dep’t of State v. Ray*, 502 U.S. 164, 163 (1991). FOIA’s limited exemptions, on the other hand, “must be narrowly construed.” *Multi AG Media LLC v. Dep’t of Agriculture*, 515 F.3d 1224, 1227 (D.C. Cir. 2008) (citation omitted).

Consistent with these well-established principles, the amendments to FOIA enacted in the FOIA Improvement Act of 2016 require agencies to administer FOIA with a clear presumption of openness and permit withholding of information only in situations where disclosure would result in *reasonably foreseeable harm* or where disclosure is prohibited by law. *See* 5 U.S.C. § 552(a)(8)(A)(i).

#### **Exemption 7(A) does not Justify Withholding the Pre-Consummation Letters**

Exemption 7 protects certain “records or information compiled for law enforcement purposes,” including, as relevant here, when disclosure “could reasonably be expected to interfere with enforcement proceedings.” 5 U.S.C. § 552(b)(7)(A). The purpose of Exemption 7(A) is to “prevent harm to the government’s case in court by not allowing litigants earlier or greater access to agency investigatory files than they would otherwise have.” *Mapother v. Dep’t of Justice*, 3 F.3d 1533, 1540 (D.C. Cir. 1993) (citation and marks omitted). In order to withhold information pursuant to this exemption, agencies must show

---

<sup>3</sup> *See* <https://www.ftc.gov/enforcement/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings>.

Freedom of Information Act Appeal  
July 15, 2022  
Page 3

that disclosure of the records “(1) could reasonably be expected to interfere with (2) enforcement proceedings that are (3) pending or *reasonably anticipated*.” *Id.* at 1540.

**Enforcement proceedings.** To begin with the second and third elements, records are “compiled for law enforcement purposes” if they “were compiled for adjudicative or enforcement purposes” related to the enforcement of criminal and civil laws. *Stern v. F.B.I.*, 737 F.2d 84, 88-9 (D.C. Cir. 1984). An agency must “establish a rational nexus between [its] activity in compiling the documents and its law enforcement duties.” *New York Times Co. v. Dep’t of Justice*, 390 F. Supp. 3d 499, 513 (S.D.N.Y. 2019). That the FTC *may* perform law enforcement functions does not, by itself, justify withholding these requested records. *See Roth v. Dep’t of Justice*, 642 F.3d 1161, 1173 (D.C. Cir. 2011) (“FBI records are not law enforcement records under FOIA imply by virtue of the function that the FBI serves.”) (citation and marks omitted).

Here, the FTC has indicated that its form letters, sent out as a matter of course, should not be read to indicate that a “deal is unlawful.” Indeed, the fact the FTC has *not* “issued such a letter . . . should not be construed as a determination that a deal is lawful.” By its own terms, then, the FTC has fallen short of its burden to show that the records at issue—form letters from which legal inferences should not be drawn irrespective of whether they are transmitted to private companies—were compiled for a pending or “reasonably anticipated” enforcement proceeding.

**Reasonable expectation of interference.** In addition, the agency “must show by more than a conclusory statement, how the particular kinds of investigatory records requested would interfere with a pending enforcement proceeding.” *Dillon v. Dep’t of Justice*, 102 F. Supp. 3d 272, 290 (D.D.C. 2015) (citation and marks omitted). Exemption 7(A) “does not authorize automatic or wholesale withholdings of records simply because the material is related to an enforcement proceeding.” *Id.* (citation omitted). That is, the agency must provide “a predictive judgment of the harm that will result from disclosure of information.” *Ctr. for Nat’l Sec. Studies v. Dep’t of Justice*, 331 F.3d 918, 928 (D.C. Cir. 2003).

While courts “give deference to an agency’s predictive judgment of the harm that will result from disclosure of information, it is not sufficient for the agency to simply assert that disclosure will interfere with enforcement proceedings; it must rather demonstrate how disclosure will do so.” *Stein v. United States SEC*, 266 F. Supp. 3d 326, 344 (D.D.C. 2017) (citation omitted); *accord Citizens for Responsibility & Ethics in Wash. v. Dep’t of Justice*, 746 F.3d 1082, 1098 (D.C. Cir. 2014). “Ultimately, the government must allow the court to trace a rational link between the nature of the document and the alleged likely interference.” *New York Times Co.*, 390 F. Supp. 3d at 515 (citation and marks omitted).

In response to Bloomberg’s Request, the FTC did not give *any* predictive judgment as to the harm that will result from disclosure. Rather, it asserted in conclusory fashion that the records “could reasonably be expected to interfere with the conduct of the Commission’s law


Freedom of Information Act Appeal  
July 15, 2022  
Page 4

enforcement activities.” Ex. B. This bare recitation of Exemption 7(A)’s function is plainly insufficient to satisfy the FTC’s burden to justify its withholding. *See Citizens for Responsibility and Ethics in Wash.*, 746 F.3d at 1098 (stressing that “although we give deference to an agency’s predictive judgment of the harm that will result from disclosure of information . . . it is not sufficient for the agency to simply assert that disclosure will interfere.”); *see also Cuban v. SEC*, 744 F. Supp. 2d 60 (D.D.C. 2010) (denying summary judgment for SEC when agency failed to substantiate its exemptions with sufficient details for the court to conclude that the exemption was applicable.).

In short, the FTC’s response to Bloomberg fails to meet the requirements imposed by Exemption 7(A). More importantly, the FTC’s own characterization of its form letters—sent out *irrespective* of whether the agency anticipates any legal action whatsoever—places these records beyond the scope of Exemption 7(A)’s applicability. We respectfully request that you direct the FTC to release, without further delay, the records responsive to Bloomberg’s Request.

We look forward to your prompt response to this appeal within 20 working days and, in any event, no later than the close of business on August 12, 2022. *See* 5 U.S.C. 552(a)(6)(A)(ii). If you would like to discuss this matter, my contact information is at the top of this letter. Thank you for your assistance.

Very truly yours,

A handwritten signature in blue ink that reads "Chad R. Bowman". The signature is written in a cursive, flowing style.

Chad R. Bowman

CB

# Exhibit A



FOIA-2022-01204

SUBMITTED ELECTRONICALLY VIA FTC PUBLIC ACCESS LINK ON 6/23/2022

**Leah Anne Nylan**

Reporter

Bloomberg

1101 New York Ave NW

Suite 800

Washington, DC 20005

lnylan2@bloomberg.net






Requester Default Category: News Media

RE: Pre-consummation warning letters

Pursuant to the Freedom of Information Act, 5 U.S.C. Section 552 et seq. ("FOIA") and on behalf of Bloomberg News, I request access to and copies of: all pre-consummation warning letters issued by the agency since July 2021 as disclosed in this Aug. 3, 2021 blog post: <https://www.ftc.gov/enforcement/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings> (Date Range for Record Search: From 7/1/2021 To 6/23/2022)

I am making this request as a reporter for Bloomberg News, an accredited and recognized news-gathering organization. I request the Records to inform the public about matters of public concern.

Request - FOIA-2022-01204

 **Inbox (0)**
 **Compose Message**
 **Sent**  
**Messages**
 **Withdraw Request**
 **Back**  
**(RequestStatus.aspx)**

**Requester Details**

To modify request details please update your requester profile or contact the our office for assistance.

**Leah Anne Nysten**

Reporter  
 Bloomberg  
 1101 New York Ave NW  
 Suite 800  
 Washington, DC 20005  
 lnysten2@bloomberg.net

Requester Default Category: News Media

**Request Details**

Date Requested	06/23/2022
Status	Closed

**General Information**

**FOIA/PA** - The Freedom of Information Act (FOIA) allows any person to make a request for any agency records so long as one of the nine FOIA exemptions do not apply to the record(s) or portions of the record(s). See 5 U.S.C. § 552. However, if you are seeking records about yourself or a specific person, see [Make a Privacy Act Request](#).

**Privacy Act Requests** - The Privacy Act of 1974 requires additional identification verification to obtain agency records about yourself or a specific individual. 5 U.S.C. § 552a(b). If you are requesting records about yourself, we are required to verify your identity before releasing any records. If you are a third-party requesting records about a specific individual, that individual is required to authorize the release of those records. If submitting a Privacy Act you must complete and attached the Certification of Identity and Consent Form ([https://www.ftc.gov/system/files/attachments/make-privacy-act-request/privacy\\_act\\_request\\_form.pdf](https://www.ftc.gov/system/files/attachments/make-privacy-act-request/privacy_act_request_form.pdf)) to your request in the area provided below.

Request Type  ▼

Select a suitable description of yourself for the purpose of determining the appropriate fee category. (See Fee Regulations (<https://www.ftc.gov/about-ftc/foia/fee-regulations>) for Requester Category Information)

Requester Category  ▼

Delivery Mode  ▼

**Mailing Address**

Street1

Street2

City

State  ▼

State (Other)

Country  ▼

Zip Code

**Subject Matter of Request**

In 8 words or less, please describe the subject matter of your request. (e.g., "Do-Not-Call complaints submitted in May 2018" or "Records the FTC may have about me.")

Subject Matter of Request

**Description of Records**

- Please provide a detailed description of the information you seek.
- Requesters must reasonably describe the records sought and provide sufficient details to enable personnel to locate those records with a reasonable amount of effort. Include descriptive information such as when and by whom the record(s) was created. **Do not include sensitive personally identifiable information** such as a date of birth or social security number.
- Try to keep your request simple and to the point. Highly complex requests or requests for voluminous records may be delayed. Also, please note that the FOIA does not require agencies to do research for you, answer written questions, or in any other way create records (such as lists or statistics) in order to respond to a request.

**Enter detailed description in the field below and if necessary add attachment.**

Detailed Records Description

Pursuant to the Freedom of Information Act, 5 U.S.C. Section 552 et seq. ("FOIA") and on behalf of Bloomberg News, I request access to and copies of: all pre-

Date Range for Record Search:  
From(mm/dd/yyyy)

07/01/2021


To  
(mm/dd/yyyy)

06/23/2022

Description Document

 Add Attachment

**Consent** - only required in very limited circumstances.

Consent Attachment  Add Attachment

**Proof of Identity** - To ensure Privacy Act protected information is not released improperly, access to records regarding you or your minor child must be accompanied by verification(s) of identity. Complete the Certification of Identity and Consent Form ([https://www.ftc.gov/system/files/attachments/make-privacy-act-request/privacy\\_act\\_request\\_form.pdf](https://www.ftc.gov/system/files/attachments/make-privacy-act-request/privacy_act_request_form.pdf)) and attach below.

Proof of Identity Attachment  Add Attachment

**Fee Information**

The FOIA allows agencies to charge fees for processing FOIA requests (See Fee Regulations (<https://www.ftc.gov/about-ftc/foia/fee-regulations>) for Requester Category Information)

**Fee Agreement** (enter the maximum amount of fees you are willing to pay)

Amount Willing to Pay (\$)

100.00

**Fee Waiver Requests** - A request for a waiver or a reduction of fees will be considered 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.

Check to Request a Fee Waiver   Add Attachment

Fee Waiver Granted TBD


Reason for Waiver Request

I am making this request as a reporter for Bloomberg News, an accredited and recognized news-gathering organization. I request the Records to inform the public

**Expedite Information**

A request may be processed on an expedited basis if the requester demonstrates a compelling need for expedited treatment. A requester may show a “compelling need” in one of two ways: (1) by establishing that failure to obtain the records quickly “could reasonably be expected to pose an imminent threat to the life or physical safety of an individual,” or (2) by showing that the requester is a “person primarily engaged in disseminating information” and that an “urgency to inform the public concerning actual or alleged Federal Government activity” exists. 5 U.S.C. § 552(a)(6)(E)(v); accord 16 C.F.R. § 4.11 (a)(1)(i)(G).

**If you believe your request warrants expedited treatment, please select and describe in detail your specific justification for such treatment, which you must certify as true and correct. Simply stating that the request should be expedited or reciting the statutory language, without more, is insufficient to obtain expedited treatment.**

Check to   Add Attachment  
 Request Expedite

Select Justification

- An imminent threat to the life or physical safety of an individual exists.
- An urgency to inform the public concerning actual or alleged federal government activity exists (option available c

Detailed Justification

**Payment Information**

Invoice No.	Invoice Date	Invoice Amount	Transaction Number	Paid Amount	Balance	Method of Payment	Transaction Date	Invoice Action

# Exhibit B



UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

June 28, 2022

Leah Nylén  
Bloomberg  
1101 New York Ave NW, Suite 800  
Washington, DC 20005

Re: FOIA-2022-01204

Dear Ms. Nylén:

This is in response to your request dated June 23, 2022 under the Freedom of Information Act seeking access to a copy of all pre-consummation warning letters the FTC has issued as discussed in this blog post from August 2021: <https://www.ftc.gov/news-events/blogs/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings>. In accordance with the FOIA and agency policy, we have searched our records on June 27, 2022.

We are denying your request. The responsive records are exempt from disclosure under FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A), because disclosure of that material could reasonably be expected to interfere with the conduct of the Commission's law enforcement activities. *See Robbins Tire & Rubber Co. v. NLRB*, 437 U.S. 214 (1978).

If you have any questions about the way we are handling your request or about the FOIA regulations or procedures, please contact Anthony Ellis at [rellis@ftc.gov](mailto:rellis@ftc.gov).

If you are not satisfied with this response to your request, you may appeal by writing to Freedom of Information Act Appeal, Office of the General Counsel, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580, or via email at [FOIAAppeal@ftc.gov](mailto:FOIAAppeal@ftc.gov), within 90 days of the date of this letter. Please enclose a copy of your original request and a copy of this response.

You also may seek dispute resolution services from the FTC FOIA Public Liaison Richard Gold via telephone at 202-326-3355 or via e-mail at [rgold@ftc.gov](mailto:rgold@ftc.gov); or from the Office of Government Information Services via email at [ogis@nara.gov](mailto:ogis@nara.gov), via fax at 202-741-5769, or via mail at Office of Government Information Services (OGIS), National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740.

Please note that the FOIA Public Liaison's role relates to comments, questions or concerns that a FOIA Requester may have with or about the FOIA Response.

Sincerely,

 / LR

Dione J. Stearns  
Assistant General Counsel



# Exhibit 4



UNITED STATES OF AMERICA  
Federal Trade Commission  
WASHINGTON, D.C. 20580

Office of the General Counsel

~

Elizabeth Tucci  
Deputy General Counsel for Legal Counsel

August 15, 2022

Chad R. Bowman, Esq.  
Ballard Spahr LLP  
1909 K Street, NW  
12<sup>th</sup> Floor  
Washington, DC 20006

Re: Freedom of Information Act (“FOIA”) Appeal | FOIA Request No. 2022-01204

Dear Mr. Bowman:

I am writing as the official designated to review FOIA<sup>1</sup> appeals for the Federal Trade Commission (“FTC”).

On June 23, 2022, Ms. Nylen submitted a FOIA request seeking “pre-consummation warning letters issued by the agency since July 2021 as disclosed in [the FTC’s August] 3, 2021 blog post: <https://www.ftc.gov/enforcement/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings>.”<sup>2</sup> On June 28, 2022, Assistant General Counsel Dione Stearns fully denied Ms. Nylen’s request for copies of the pre-consummation warning letters issued to companies in this time period and determined that the records were protected under FOIA Exemption 7(A).<sup>3</sup> On July 15, 2022, you submitted a timely appeal arguing that FOIA Exemption 7(A) does not apply to any responsive records.<sup>4</sup> You argue that the withheld records were not compiled for law enforcement purposes and state that “the FTC’s own characterization of its form letters—sent out *irrespective* of whether the agency anticipates any legal action whatsoever—places these records beyond the scope of FOIA Exemption 7(A)’s applicability.”<sup>5</sup> You also claim that the FTC failed to indicate the harm that would result in releasing the records and instead “asserted, in conclusory fashion, that the records ‘could

---

<sup>1</sup> 5 U.S.C. § 552.

<sup>2</sup> Initial Request re: 2022-01204 dated June 23, 2022.

<sup>3</sup> Final Response re: 2022-01204 dated June 28, 2022 (hereinafter “Final Response”).

<sup>4</sup> Appeal re: 2022-01204 dated July 15, 2022 (hereinafter “Appeal”).

<sup>5</sup> *Id.* at 4.

reasonably be expected to interfere with the conduct of the Commission’s law enforcement activities.”<sup>6</sup>

FOIA Exemption 7(A) protects “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings.”<sup>7</sup> To determine whether FOIA Exemption 7(A) requires a two-prong analysis,<sup>8</sup> first, the agency must show “a law enforcement proceeding or investigation is pending or prospective.”<sup>9</sup> Second, the agency must show “release of the information could reasonably be expected to cause some articulable harm” to that proceeding.<sup>10</sup>

Here, you are correct “that [the FTC’s] form letters, sent out as a matter of course, should not be read to indicate that a ‘deal is unlawful.’”<sup>11</sup> However, that statement does not guarantee that proceedings will not “become necessary as the investigation progresses.”<sup>12</sup> Additionally, it does not prove that the information within the requested records was not compiled for law enforcement purposes. Additionally, under the “articulable harm” standard, an agency may withhold responsive records only if “disclosure is reasonably expected to interfere” with the investigation in a “palpable, particular way.”<sup>13</sup> For this request, “if the documents [in question] were released, they could ‘reveal the scope, direction, and nature of [prospective] investigation[s],’”<sup>14</sup> Additionally, in the *Ctr. for Nat’l Sec. Studies v. Dep’t of Justice*, cited in your appeal, the court reviews the harm articulated in litigation-related affidavits, not final FOIA request determinations at the agency-level.<sup>15</sup> In fact, the same case held that the agency had satisfied its burden of demonstrating potential harm under FOIA Exemption 7(A).<sup>16</sup> The court rejected “any attempt to artificially limit the long-recognized deference to the executive.”<sup>17</sup> Accordingly, FOIA Exemption 7(A) was correctly applied to all responsive records.

Conversely, in addition to FOIA Exemption 7(A), the FOIA Unit should have applied FOIA Exemption 3 to all responsive records. FOIA Exemption 3 permits an agency to withhold records that are exempt from disclosure by another statute.<sup>18</sup> The HSR Act, 15 U.S.C. § 18a(h), states that “[a]ny information or documentary material filed with the . . . Federal Trade Commission pursuant to this section shall be exempt from disclosure under section 552 of Title 5.”<sup>19</sup> Therefore, any record that was obtained by the FTC pursuant to the HSR Act may not be disclosed before, during, or after the

<sup>6</sup> *Id.* at 3-4 (quoting Final Response).

<sup>7</sup> 5 U.S.C. § 552(b)(7)(A).

<sup>8</sup> *E.g.*, *Carter, Fullerton & Hayes v. FTC*, 637 F. Supp. 2d 1, 9 (D.D.C. 2009); *see also Juarez v. Dep’t of Justice*, 518 F.3d 4, 58-59 (D.C. Cir. 2008); *Sussman v. U.S. Marshal Serv.*, 494 F.3d 1106, 1113-14 (D.C. Cir. 2007).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Appeal at 4 (quoting Fed’l Trade Comm’n, *Adjusting merger review to deal with the surge in merger filings*, <https://www.ftc.gov/enforcement/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings> (Last Visited Aug. 2, 2022)).

<sup>12</sup> *Jud. Watch, Inc. v. FBI*, No. 00-745 (TFH), 2001 WL 35612541, at \*5 (D.D.C. Apr. 20, 2001).

<sup>13</sup> *North v. Walsh*, 881 F.2d 1088, 1100 (D.C. Cir. 1989).

<sup>14</sup> *Id.* at \*5 (quoting *Kay v. F.C.C.*, 976 F. Supp. 23, 38 (D.D.C. 1997), *aff’d*, 172 F.3d 919 (D.C. Cir. 1998)).

<sup>15</sup> Appeal at 3 (quoting *Ctr. for Nat. Sec. Stud. v. U.S. Dep’t of Just.*, 331 F.3d 918, 928 (D.C. Cir. 2003)).

<sup>16</sup> *Ctr. for Nat. Sec. Studies* 331 F.3d at 928.

<sup>17</sup> *Id.*

<sup>18</sup> 5 U.S.C. § 552(b)(3).

<sup>19</sup> 15 U.S.C. § 18a(h).

completion of a relevant transaction, and records that would reveal the fact of an HSR filing are also protected from disclosure.<sup>20</sup>

Here, the withheld documents at issue are letters sent to companies who filed a letter of intent to merge (“LOI”) with the agency. The information in these letters were obtained through those LOI submissions. LOIs are only provided by companies to begin the HSR filing process. Therefore, information such as the company name, address, and details related to the proposed merger are considered “information or documentary material filed with the... [FTC].”<sup>21</sup> Accordingly, FOIA Exemption 3 in tandem with 15 U.S.C. § 18a(h) protects all responsive records for this request and should have been cited in the original final determination letter.

For the foregoing reasons, I am denying your appeal pursuant to FOIA Exemption 7(A) and, additionally, pursuant to FOIA Exemption 3 in tandem with 15 U.S.C. § 18a(h).

If you are dissatisfied with my action on your appeal, FOIA permits you to file a lawsuit in accord with 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 the District of Columbia.

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

Sincerely,

**ELIZABETH TUCCI** Digitally signed by ELIZABETH  
TUCCI  
Date: 2022.08.14 17:20:27 -04'00'  
Elizabeth Tucci  
Deputy General Counsel for Legal Counsel

---

<sup>20</sup> See, e.g., *Lieberman v. FTC*, 771 F.2d 32, 34 (2d Cir. 1985) (affirming Commission’s determination that § 18a(h) prohibits disclosure of HSR “material filed with it before merger,” even after merger was consummated).

<sup>21</sup> 15 U.S.C. § 18a(h).