

Exhibit J



1700 G Street NW, Washington, D.C. 20552

August 11, 2022

VIA Electronic Mail

Mr. Ephriam Wernick
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RE: Final Appellate Determination Denying in Part, Granting in Part, and Remanding FOIA Request No. 2022-0115-F

Dear Mr. Wernick,

This letter constitutes the final determination of the Consumer Financial Protection Bureau (“Bureau” or “CFPB”) regarding your appeal of the Bureau’s response to Freedom of Information Act (“FOIA”) Request No. 2022-0115-F (“the Request”). For the reasons set forth below, the appeal is denied in part, granted in part, and remanded to the Bureau’s FOIA Office for further processing consistent with this decision.¹

I. Background

On January 21, 2022 you submitted a FOIA request (“the Request”) seeking communications between the CFPB that occurred on or after January 1, 2018 and concerned MoneyGram International, Inc., and involved any of the following entities or individuals: the Federal Trade Commission (“FTC”); the New York State Department of Financial Services (“NYDFS”); the New York State Office of the Attorney General (“NY AG”); Public Citizen, Inc.; Rohit Chopra; Jen Howard; and/or Rebecca Smullin.

The Request defined “Communications” as any information that is transmitted from one person or entity to another in any form, including any of the following: any letter, memorandum,

¹ The Bureau’s FOIA regulations are codified at 12 C.F.R. § 1070.10 *et seq.* Pursuant to these regulations, the authority to determine FOIA appeals rests with the Bureau’s General Counsel or her delegate. *See* 12 C.F.R. § 1070.21(e). The General Counsel has delegated to me the authority to determine the appeal of the Bureau’s response to the Request. This letter therefore constitutes the Bureau’s final response to the Request.

electronic mail message, note, text message, ephemeral message (e.g., WhatsApp, Signal, Telegram), telephone call, conversation, or meeting, whether by chance or prearranged, formal or informal.

Following discussions with the Bureau's FOIA Office, the parties agreed that searches would be conducted in the first instance for email records, using the following search parameters:

Part	Email address	Date Range	Keyword(s)
1. Federal Trade Commission (" FTC ")	between @cfpb.gov & @ftc.gov	01/01/2018 – 09/30/2021	Moneygram OR "Money gram" OR MGI OR MG
2. The New York State Department of Financial Services (" NYDFS ");	Between @cfpb.gov & @dfs.ny.gov	01/01/2018 – 09/30/2021	Moneygram OR "Money gram" OR MGI OR MG
3. The New York State Office of the Attorney General (" NY AG ");	Between @cfpb.gov & @ag.ny.gov	01/01/2018 – 09/30/2021	Moneygram OR "Money gram" OR MGI OR MG
4. Public Citizen	Between @cfpb.gov & @citizen.org	01/01/2018 – 10/31/2021	Moneygram OR "Money gram" OR MGI OR MG
5. Consumer Financial Protection Bureau (" CFPB ")	To/from/cc/bcc @cfpb.gov	01/01/2018 – 09/30/2021	(Moneygram OR "Money gram" OR MGI OR MG) AND (Rohit OR Chopra OR Jennifer OR Howard OR Rebecca OR Smullin)

On March 7, 2022, the FOIA Office sent an interim response stating that the searches for Part 4, Part 5, and a subset of Part 1 had been completed, and that no responsive records were located.

On April 20, 2022, the FOIA Office sent a second interim response indicating that the search had been completed for the remainder of Part 1 and no responsive records were located.

On June 1, 2022, you indicated to the FOIA Office that you no longer agreed to narrow your request pursuant to the agreed upon search terms, and were reinstating your request for *all* responsive communications.

On June 29, 2022, the FOIA Office provided a final response pertaining "to the remaining parts of your request in its totality." That response indicated that the FOIA Office had conducted a reasonable search within the Offices of Enforcement and Supervision and determined that "any records that would be responsive to your request are withheld in full pursuant to Title 5 U.S.C. § 552 (b)(5), (b)(7)(A), and (b)(8)."

On July 12, 2022, you submitted a timely appeal of the Bureau's determinations ("the Appeal"). The Appeal identified the following bases for appeal:

- (1) The search was inadequate as the CFPB has not explained its search methods in any detail nor explained why those methods were appropriate. The Appeal also states that "it is difficult to believe" the CFPB searched for all communications as defined in your request.
- (2) The CFPB failed to provide a reasonable estimate of the volume of the information withheld.
- (3) That even if some information is exempt from disclosure, the CFPB failed to segregate and release nonexempt information.
- (4) The appeal requests that the Bureau consider discretionary release of responsive records as a matter of public interest.

II. Appellate Determination

I have reviewed the administrative record and determined that a reasonable search for responsive records was conducted. However, the FOIA Office failed to either provide a reasonable estimate of the volume of information withheld or articulate a reason for withholding such an estimate. In addition, the record does not make clear whether appropriate efforts were made to reasonably segregate and produce nonexempt information.

As discussed below, the Appeal is denied in part, granted in part, and remanded for further processing consistent with the decision below.

A. Adequacy of Search

FOIA search is adequate if it is "reasonably calculated to uncover all relevant documents." *Ancient Coin Collector's Guild v. Dep't of State*, 641 F.3d 504,514 (D.C. Cir. 2011) (citations omitted). That is, search adequacy is "measured by a standard of reasonableness, and is dependent upon the circumstances of the case." *Heffernan v. Azar*, 317 F. Supp. 3d 94,104 (D.D.C. 2018) (quoting *Truitt v. Dep't of State*, 897 F.2d 540,542 (D.C. Cir. 1990)).

The administrative record reflects extensive efforts by the FOIA Office to locate materials responsive to your Request. The record indicates that e-discovery searches of email records were conducted using the initially agreed upon search parameters for all 5 parts of the Request. Following your request to reinstate the initial Request for all communications, the record indicates that a reasonable search for such records was conducted within the Offices of Enforcement and Supervision.

Mere speculation that additional responsive materials may exist does not undermine the legal sufficiency of the Bureau's search for responsive documents. *Safecard Services, Inc. v. S.E.C.*, 926 F.2d 1197, 1201 (D.C. Cir. 1991) ("Mere speculation that as yet uncovered documents may exist does not undermine the finding that the agency conducted a reasonable search for them."); *see also Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003) ("[T]he

adequacy of a FOIA search is generally determined not by the fruits of the search, but by the appropriateness of the methods used to carry out the search.”). It is well established that a FOIA search is not inadequate simply because the agency did not search all locations specified by a requester. *See Tunchez v. U.S. Dep’t of Justice*, 715 F. Supp. 2d 49, 54 (D.D.C. 2010) (“[A] FOIA requestor is not entitled to a search of files specified by the requestor, but rather to a search of files that are likely to turn up the information requested.”); *see also Mobley v. CIA*, 806 F.3d 568, 581 (D.C. Cir. 2015) (the reasonableness standard “would be undermined” if “a requester [were] allowed to dictate, through search instructions, the scope of an agency’s search”). Nonetheless, the FOIA Office may on remand choose to review its search methodology to determine whether it was reasonably calculated to uncover all relevant documents.

Lastly, your request that the FOIA Office “explain[] its search methods in ... detail” and “explain[] why its search methods were appropriate” is denied. FOIA does not “require an agency to answer questions disguised as a FOIA request, or to create documents or opinions in response to an individual’s request for information.” *Hudgins v. IRS*, 620 F. Supp. 19, 21 (D.D.C. 1985). Further, it is well established that requesters are not entitled to information akin to what would be found in a Vaughn index at the administrative stage. *See, e.g., Bangoura v. U.S. Dep’t of the Army*, 607 F. Supp. 2d 134, 143 n.8 (D.D.C. 2009) (noting that agency not required to provide Vaughn Index prior to filing of lawsuit); *Schwarz v. U.S. Dep’t of Treasury*, 131 F. Supp. 2d 142, 147 (D.D.C. 2000) (“[T]here is no requirement that an agency provide a . . . ‘Vaughn’ index on an initial request for documents.”), *summary affirmance granted*, No. 00-5453, 2001 WL 674636 (D.C. Cir. May 10, 2001).

B. Volume of Records Withheld

Agencies are required to “make a reasonable effort to estimate the volume” of any information withheld and should inform the requester of that estimate, unless doing so would harm an interest protected by an applied exemption. 5 U.S.C. § 552(a)(6)(F).

Here, in its final determination, the FOIA Office indicated only that “any records that would be responsive to your request are withheld in full pursuant to” Exemptions 5, 7(A) and 8. Because the determination provided no estimate of the volume of records withheld, nor in the alternative did it explain whether providing such an estimate would harm an interest protected by those exemptions, the request is remanded. In reprocessing the request, the FOIA Office should make a reasonable attempt to estimate the volume of records withheld, or adequately articulate the protected interests that would be harmed by disclosure of such an estimate.

C. Segregability

The Appeal argues that the CFPB has failed to demonstrate that it made a reasonable effort to segregate and produce nonexempt information. FOIA requires that “any reasonably segregable portion” of the record must be released after the deletion of the exempt material. 5 U.S.C. § 552(b). If the non-exempt portions of a record are inextricably intertwined with the exempt portions, however, then the entire record may be withheld. *Wilderness Soc’y v. U.S. Dep’t of Interior*, 344 F. Supp. 2d 1, 18 (D.D.C. 2004). In determining whether the non-exempt portions

of a document are reasonably segregable, an agency may consider the proportion of non-exempt information that is likely to be disclosed in relation to the overall amount of information that must be reviewed and the burden associated with such review. See, e.g., *Solar Sources, Inc. v. United States*, 142 F.3d 1033, 1039 (7th Cir. 1998); *Lead Indus. Ass'n v. OSHA*, 610 F.2d 70, 86 (2d Cir. 1979) (“[I]f the proportion of nonexempt factual material is relatively small and is so interspersed with exempt material that separation by the agency and policing of this by the courts would impose an inordinate burden, the material is still protected because, although not exempt, it is not ‘reasonably segregable.’”). An agency “need not expend substantial time and resources to ‘yield a product with little, if any, informational value.’” *Brown v. DOJ*, 734 F. Supp. 2d 99, 110-11 (D.D.C. 2010) (quoting *Assassination Archives & Research Ctr. v. CIA*, 177 F. Supp. 2d 1, 9 (D.D.C. 2001)).

It is not clear from the administrative record whether the FOIA Office completed an adequate analysis with respect to any material identified as responsive in order to release all non-exempt material that is reasonably segregable. Accordingly, the Request is remanded to the FOIA Office for further evaluation of whether any reasonably segregable, non-exempt information can be produced.

D. Discretionary disclosure

The Appeal also requests that the Bureau exercise its discretion to release exempt information responsive to your request as a matter of public interest. Agencies may make “discretionary disclosures” of exempt information, as a matter of their administrative discretion, where they are not otherwise prohibited by law from doing so. See *Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979) (reasoning that application of agency FOIA policies may require “some balancing and accommodation,” and noting that “Congress did not design the FOIA exemptions to be mandatory bars to disclosure”); *Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 282 (D.C. Cir. 1997) (“FOIA’s exemptions simply permit, but do not require, an agency to withhold exempted information”).

After reviewing the administrative record, I do not find that disclosure of information withheld under Exemption 5 is likely to promote the public interest identified in the Appeal. However, when reprocessing the remanded portions of this Request, the FOIA Office may consider whether discretionary disclosure of any exempt material is appropriate.

* * * * *

If you are dissatisfied with the Bureau’s final appellate determination, you may contact the Office of Government Information Services (OGIS), which offers mediation services to resolve disputes between FOIA requesters and Federal agencies pursuant to 5 U.S.C. § 552(h)(3). Using OGIS services does not affect your right to judicial review. You may seek judicial review of this

determination in the U.S. District Court for the district where you have your primary place of business, where the documents you seek are located, or in the District of Columbia.

Sincerely,

Laura M. Hussain Digitally signed by Laura M.
Hussain
Date: 2022.08.11 11:15:31 -04'00'

Laura M. Hussain
Assistant General Counsel for Litigation and Oversight