

EXHIBIT E

HUSCH BLACKWELL

Gregg N. Sofer
Partner

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Austin, TX 78701
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February 26, 2024

VIA FEDEX AND EMAIL [foiaappeals@doc.gov]

Assistant General Counsel for Employment
Litigation and Information
U.S. Department of Commerce
Office of General Counsel, Room 5896
1401 Constitution Ave. NW
Washington, DC 20230

Re: Freedom of Information Act (“FOIA”) Requests, Numbers DOC-BIS-2023-010061 and DOC-BIS-2023-010062

To Whom It May Concern:

On September 27, 2023, I submitted two separate FOIA requests to the Department of Commerce, Bureau of Industry and Security (“BIS”) seeking the following documents:

1. A copy of the final proposal and any accompanying attachments, exhibits, or appendices that were submitted to the End-User Review Committee (“ERC”) in support of the decision to place Yangtze Memory Technologies Corporation (“YMTC”) on the BIS Entity List.
2. A copy of the final proposal and any accompanying attachments, exhibits, or appendices that were submitted to the ERC in support of the decision to place Yangtze Memory Technologies Corporation (Japan) (“YMTJ”) on the BIS Entity List.

BIS confirmed receipt of my requests and assigned the YMTC request No. DOC-BIS-2023-010061 and the YMTJ request No. DOC-BIS-2023-010062 (collectively, the “FOIA Requests”). True and correct copies of the FOIA Requests are enclosed with this letter as **Exhibit A**.

On January 26, 2024—nearly *four months* after the FOIA Requests were first submitted—BIS denied the FOIA Requests in their entirety. Although BIS identified 553 pages of responsive documents, BIS stated that “[a]ll of the records are being withheld in full under

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FOIA Exemptions (b)(1), (b)(3), (b)(5), and (b)(6).” The only explanation BIS provided for the withholding was a short summary of the exemptions it was claiming:

These exemptions are summarized as follows (for a more detailed description, please refer to the statute):

- FOIA Exemption (b)(1) exempts from disclosure classified national security information.
- FOIA Exemption (b)(3) exempts from disclosure information prohibited from disclosure by another statute. Such a statute is Section 1761(h) of the Export Control Reform Act of 2018 which protects information concerning export license applications.
- FOIA Exemption (b)(5) exempts from disclosure “inter-agency or intra-agency” government documents which are both pre-decisional and deliberative. In addition, the attorney work-product privilege and the attorney-client privilege have been incorporated into the exemption.
- FOIA Exemption (b)(6) exempts from disclosure personal private information.

BIS did not provide any other details in support of its conclusion that the listed exemptions applied. A true and correct copy of the BIS response letter is enclosed with this letter as **Exhibit B**.

This letter represents a formal appeal of the BIS’s January 26, 2024 response to the FOIA Requests. FOIA requires disclosure of all information unless specifically exempt under one of the nine statutorily defined exemptions. 5 U.S.C. § 552(d). The “burden is always on the agency to justify the withholding of requested information.” *Bloche v. Dep’t of Def.*, 370 F.Supp.3d 40, 59 (D.D.C. 2019) (emphasis added). Agencies “cannot justify . . . withholdings on the basis of summary statements that merely reiterate legal standards[.]” *Id.* at 50 (quoting *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep’t of J.*, 955 F.Supp.2d 4, 13 (D.D.C. 2013)). Additionally, to the extent a FOIA exemption does apply, an agency is entitled to withhold only those portions of the document that are exempt—and not the entire document. *See* 5 U.S.C. § 552(a)(8)(A)(ii) and (b).

BIS has only identified the the exemptions it seeks to apply. In doing so, BIS has failed to provide any support for *why* any of the claimed exemptions apply. Moreover, BIS fails to provide any basis as why the relied upon exemptions apply *to the entirety of the document* even though the burden squarely rests on BIS under FOIA. BIS therefore has failed to meet its burden and must produce the requested documents.

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Even if BIS provided justifications for its wholesale withholdings, the exemptions BIS claims are not applicable to some or even most of the documents sought in the FOIA Requests. First, BIS states it is withholding the requested documents under Exemption (b)(1) for classified national security information. However, Exemption (b)(1) expressly states that for the exemption to apply, it must be “specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy” and “are in fact properly classified pursuant to such Executive order.” 5 U.S.C. § 552(b)(1). BIS has made no showing whatsoever that these requirements have been met. The decision to place YMTC and YMTJ on the Entity List are public decisions. *See* 87 Fed. Reg. 77,508 (Dec. 19, 2022) (codified at Supp. No. 4 to 15 C.F.R. Part 744.) And the documents the ERC considered as part of the BIS proposal likely include publications and reports that are generally available to the public on the internet or from unclassified sources. To the extent the materials do include classified portions BIS has not offered any justification for why it cannot segregate and redact classified portions and produce the remainder of the proposals, especially those portions that originate from public sources or which were provided by YMTC itself.

Second, BIS states it is withholding the requested documents under Exemption (b)(3) for prohibitions included as part of Section 1761(h) of the Export Control Reform Act of 2018. This provision contains an exception to disclosure under FOIA for what is defined as “Information” under the statute:

[I]nformation submitted or obtained in connection with an application for a license or other authorization to export, reexport, or in-country transfer items or engage in other activities, a recordkeeping or reporting requirement, an enforcement activity, or other operations under this subchapter, including--

- (i) the license application, license, or other authorization itself;
- (ii) classification or advisory opinion requests, and the response thereto;
- (iii) license determinations, and information pertaining thereto;
- (iv) information or evidence obtained in the course of any investigation; and
- (v) information obtained or furnished in connection with any international agreement, treaty, or other obligation.

The proposals to the ERC and the decision to place YMTC and YTMJ on the BIS Entity List do not fall under any one of these enumerated categories. Placement on the Entity List does not relate to licensing applications, license determination, or licenses generally under paragraphs (i) or (iii). It does not involve classification or advisory opinion requests under paragraph (ii). It does not relate to any international agreement, treaty, or other obligation under paragraph (v). And it does not qualify as information or evidenced obtained in the course of an investigation

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under paragraph (iv) because neither YMTC nor YTMJ have been subject to any form of enforcement action taken against them. Once again, BIS has provided no explanation as to why this particular provision of the Export Control Reform Act of 2018 would apply to the requested proposals. Exemption (b)(3) has not been properly invoked by BIS.

Third, BIS states it is withholding the requested documents under Exemption (b)(5) for “inter-agency or intra-agency” government documents which are both pre-decisional and deliberative, which includes documents normally protected under the attorney work-product privilege and the attorney-client privilege. For this exemption to apply, BIS is correct that it must demonstrate that the document is both predecisional and deliberative—a showing that BIS has not made at all. *See Am. Immigr. Council v. U.S. Customs & Border Patrol*, 590 F. Supp. 3d 306, 324 (D.D.C. 2022). At any rate, the fact that BIS adopted the proposals in final agency action by adding YMTC and YMTJ to the BIS Entity List caused the proposals to lose any protection they might have been afforded under the exemption. *Id.* (“[A] draft that was predecisional and deliberative when prepared may ‘lose that status if it is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public.’”); *see also* 87 Fed. Reg. 77,508. As for the customary privileges encompassed in Exemption (b)(5), there is no indication that the proposals involved attorney-client communications or were developed in anticipation of future litigation. Exemption (b)(5) has not been properly invoked by BIS.

Lastly, BIS states it is withholding the requested documents under FOIA Exemption (b)(6) for personal private information. While it certainly could be the case that the proposals contain names, contact information, and other personal material of its authors, it is inconceivable that the personal private information is found in more than just a few, segregable lines. BIS has an obligation under FOIA to reasonably segregate any portion of the requested document that is not exempt and produce it. *See* 5 U.S.C. § 552(a)(8)(A)(ii) and (b). BIS cannot avoid complete disclosure of the proposals simply because they contain *some* personal private information that can be segregated and redacted. Exemption (b)(6) has not been properly invoked by BIS.

BIS’s January 26, 2024 response letter failed to provide any justification whatsoever for the exemptions it claims. And even if it had, none of these exemptions would apply to the each or all of the specific documents sought in the FOIA Requests. BIS’s decision to withhold the requested documents, or portions thereof, is improper under the clear mandate of FOIA. BIS must promptly produce all withheld documents, or portions thereof, that are responsive to the FOIA Requests. As required by 5 U.S.C. § 552(a)(6)(A)(ii), please respond within twenty (20) business days notifying us of your decision.

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Very truly yours,

HUSCH BLACKWELL LLP

A handwritten signature in blue ink, appearing to read "G. Sofer", is positioned above the name of the signatory.

Gregg N. Sofer

cc: Jennifer Kuo, jennifer.kuo@bis.doc.gov
Stephanie Boucher, stephanie.boucher@bis.doc.gov

EXHIBIT A

HUSCH BLACKWELL

Gregg N. Sofer
Partner

111 Congress Avenue, Suite 1400
Austin, TX 78701
Direct: 202.378.2383
Fax: 512.479.1101
gregg.sofer@huschblackwell.com

September 27, 2023

VIA E-MAIL AND FOIA.GOV

Grace Agyekum
Department of Commerce
Bureau of Industry and Security
Office of Administration
Mail Stop H6622
1401 Constitution Avenue, N.W.
Washington, DC 20230
E-Mail: grace.agyekum@bis.doc.gov

Re: Freedom of Information Act Request

Dear Ms. Agyekum:

Pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, we request a copy of the final proposal and any accompanying attachments, exhibits, or appendices that were submitted to the End-User Review Committee (“ERC”) in support of the decision to place Yangtze Memory Technologies Corporation (“YMTC”) on the BIS Entity List. We are seeking these records from BIS both in its capacity as Chair of the ERC and in its capacity as an individual member of the ERC.

FOIA requires this request to be acted upon within twenty (20) working days of receipt. Please furnish the responsive documents immediately as they become available. Please advise us as soon as possible if you determine that there is no document responsive to the request or if there will be a delay in responding.

If you determine that the record or portions of the record are exempt from disclosure, please provide a Vaughn index containing a detailed justification of the grounds for nondisclosure of each withheld portion of requested material is required. *See Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

We are willing to pay reasonable standard search and duplication costs necessary to respond to this request. Please advise me before incurring these costs if you expect them to exceed \$5,000.

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Grace Agyekum
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Thank you for your assistance in processing this request. If you are not the custodian of these records, please forward this request to the custodian. Please call me if you have any questions.

Very truly yours,

HUSCH BLACKWELL LLP



Gregg N. Sofer

cc: Opher Shweiki, oshweiki@doc.gov

HUSCH BLACKWELL

Gregg N. Sofer
Partner

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September 27, 2023

VIA E-MAIL AND FOIA.GOV

Grace Agyekum
Department of Commerce
Bureau of Industry and Security
Office of Administration
Mail Stop H6622
1401 Constitution Avenue, N.W.
Washington, DC 20230
E-Mail: grace.agyekum@bis.doc.gov

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FOIA requires this request to be acted upon within twenty (20) working days of receipt. Please furnish the responsive documents immediately as they become available. Please advise us as soon as possible if you determine that there is no document responsive to the request or if there will be a delay in responding.

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Grace Agyekum
September 27, 2023
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Thank you for your assistance in processing this request. If you are not the custodian of these records, please forward this request to the custodian. Please call me if you have any questions.

Very truly yours,

HUSCH BLACKWELL LLP



Gregg N. Sofer

cc: Opher Shweiki, oshweiki@doc.gov

EXHIBIT B



UNITED STATES DEPARTMENT OF COMMERCE
Bureau of Industry and Security
1401 Constitution Avenue, Suite 6622
Washington, DC 20230

Gregg N. Sofer
Husch Blackwell LLP
111 Congress Avenue, Suite 1400
Austin, TX 78701

Via E-mail: gregg.sofer@huschblackwell.com

BIS FOIA Tracking Number: DOC-BIS-2023-010061 and DOC-BIS-2023-010062

Dear Mr. Sofer:

This letter responds to your September 27, 2023, Freedom of Information Act (FOIA) request to the Department of Commerce, Bureau of Industry and Security (BIS) for a copy of the final proposal and any accompanying attachments, exhibits, or appendices that were submitted to the End-User Review Committee (“ERC”) in support of the decision to place Yangtze Memory Technologies Corporation (“YMTC”) and Yangtze Memory Technologies Corporation (Japan) (“YMTJ”) on the BIS Entity List. We are seeking these records from BIS both in its capacity as Chair of the ERC and in its capacity as an individual member of the ERC.

BIS has completed its review and located 553 pages of responsive documents pertinent to your request. All of the records are being withheld in full under FOIA Exemptions (b)(1), (b)(3), (b)(5), and (b)(6). These exemptions are summarized as follows (for a more detailed description, please refer to the statute):

- FOIA Exemption (b)(1) exempts from disclosure classified national security information.
- FOIA Exemption (b)(3) exempts from disclosure information prohibited from disclosure by another statute. Such a statute is Section 1761(h) of the Export Control Reform Act of 2018 which protects information concerning export license applications.
- FOIA Exemption (b)(5) exempts from disclosure “inter-agency or intra-agency” government documents which are both pre-decisional and deliberative. In addition, the attorney work-product privilege and the attorney-client privilege have been incorporated into the exemption.
- FOIA Exemption (b)(6) exempts from disclosure personal private information.

If you have any questions or concerns or would like to discuss any aspect of your request, you may contact the BIS FOIA Public Liaison, Ms. Jennifer Kuo, via email at jennifer.kuo@bis.doc.gov, during business hours. Please refer to your FOIA Tracking Number when contacting us.

In addition, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows:



Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, Maryland 20740-6001
E-mail at ogis@nara.gov
Telephone at 202-741-5770
toll free at 1-877-684-6448
facsimile at 202-741-5769

You have the right to appeal this full denial of your FOIA request. An appeal must be received within 90 calendar days of the date of this response letter. Address your appeal to the following office:

Assistant General Counsel for Employment
Litigation and Information
U.S. Department of Commerce
Office of the General Counsel, Room 5896
1401 Constitution Ave., NW
Washington, D.C. 20230

An appeal may also be sent by e-mail to FOIAAppeals@doc.gov. The appeal should include a copy of the original request and initial denial, if any. All appeals should include a statement of the reasons why the records requested should be made available and why the adverse determination was in error.

The appeal letter, the envelope, and the e-mail subject line should be clearly marked "Freedom of Information Act Appeal." The e-mail and office mail are monitored only on working days during normal business hours (8:30 a.m. to 5:00 p.m., Eastern Time, Monday through Friday). FOIA appeals posted to the e-mail box or the office after normal business hours will be deemed received on the next normal business day. If the 90th calendar day for submitting an appeal falls on a Saturday, Sunday or legal public holiday, an appeal received by 5:00 p.m., Eastern Time, the next business day will be deemed timely.

Sincerely,



Keven Valentin
Chief Financial Officer and
Director of Administration

Attachment(s)

