

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

_____)	
CAUSE OF ACTION INSTITUTE)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 17-1649
)	
FEDERAL TRADE COMMISSION)	
)	
Defendant.)	
_____)	

EXHIBIT 7 TO COMPLAINT



January 15, 2015

VIA E-MAIL

Mr. Jonathan E. Nuechterlein
Office of the General Counsel
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
E-mail: FOIA@ftc.gov

Re: Freedom of Information Act Appeal: FOIA No. 2015-00110

Dear Mr. Nuechterlein:

This is a timely administrative appeal of the Federal Trade Commission's ("FTC") December 16, 2014 interim determination letter and redaction of documents in response to Cause of Action's ("CoA") October 30, 2014 Freedom of Information Act ("FOIA") request for documents in connection with the matter captioned *In re: LabMD, Inc.*, FTC Docket No. 9357. CoA is appealing those redactions.

Procedural Background

On October 30, 2014, CoA submitted a FOIA request requesting "access to all documents (including, but not limited to, communications via e-mail, text, or facsimile): (1) regarding Margaret (or Maggie) Lassack or Alain Sheer; and (2) reflecting communications (including, but not limited to, via e-mail, text, or facsimile) with the United States House of Representatives Committee on Oversight and Government Reform regarding the matter captioned *In re: LabMD, Inc.*, FTC Docket No. 9357."¹ On November 20, 2014, FTC denied "[CoA's] request for news media status because we have determined that Cause of Action is a 'commercial use' requester" under 16 C.F.R. § 4(b)(1).² On December 19, 2014, CoA filed a timely appeal of FTC's denial of news media requester status and determination of CoA as a "commercial use" requester.³ On December 16, 2014, FTC issued an interim determination letter, making a partial production of

¹ Letter from Cause of Action to Claudia Simons, Legislative Counsel, Office of Congressional Relations, Fed. Trade Comm'n, at 1 (Oct. 30, 2014) (attached as Ex. 1).

² Letter from Sarah Mackey, Assoc. Gen. Counsel, Fed. Trade Comm'n, to Cause of Action (Nov. 20, 2014) (on file with CoA).

³ Letter from Cause of Action to Sarah Mackey (Dec. 19, 2014) (on file with CoA).

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documents (33 pages), which contained redactions purportedly based on Exemptions 6, 7(a) and 7(c), and the Speech or Debate Clause (U.S. Const. Art. I, § 6, cl. 1) (the “Clause”).⁴

Discussion

FTC redacts various parts of documents based on Exemptions 6 and 7(c). However, FTC has failed to establish cognizable substantial privacy interests. Moreover, even assuming such privacy interests exist, FTC has failed to demonstrate that they outweigh the strong public interest in disclosure. *See Multi AG Media LLC v. Dep’t of Agric.*, 515 F.3d 1224, 1230 (D.C. Cir. 2008). Here, CoA seeks the requested records for the purposes of government accountability, a recognized purpose served by the FOIA. *See, e.g., Balt. Sun v. U.S. Marshals Serv.*, 131 F. Supp. 2d 725, 729 (D. Md. 2001).

In addition, FTC’s use of the Speech or Debate Clause to redact documents is erroneous as a matter of law. *See Paisley v. CIA*, 712 F.2d 686, 696 (D.C. Cir. 1983), *vacated (in part)*, 724 F.2d 201 (D.C. Cir. 1984).⁵ FTC does not have standing to assert the Clause because its privileges belong exclusively to Members of Congress. *Paisley*, 712 F.2d at 687 & 697; *Eastland v. United States Servicemen’s Fund*, 421 U.S. 491, 502 (1975) (citations omitted); *Hutchinson v. Proxmire*, 443 U.S. 111, 127 (1979); *United States v. Brewster*, 408 U.S. 501, 507 (1972). FTC has not shown that any individual legislator or their aide(s) will be subject to civil or criminal litigation as a result of FTC’s production of documents, nor has FTC indicated that Congress asked FTC to invoke the Clause on its behalf. *See Paisley*, 724 F.2d at 204.

FTC suggests that disclosure would interfere with an ongoing activity by Congress, *see* Ex. 2, at 1, but FTC does not show “ongoing activity” by Congress or any evidence of an ongoing investigation, and the documents at issue do not reflect any possibility that such legislative activity or action will result in a lawsuit against any individual member of Congress, or that any congressional member will be questioned “in any other place.” Similarly, FTC has not met its burden to invoke Exemption 7(a), including that it makes no effort to show a specific pending or contemplated law enforcement proceeding. *See, e.g., NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978).

Conclusion

For all of these reasons, FTC’s redactions are contrary to law, ultra vires, and violate 5 U.S.C. § 706(2)(A). It should produce all documents in unredacted form within 20 days.

⁴ Letter from Sarah Mackey to Cause of Action (Dec. 16, 2014) (attached as Ex. 2). CoA reserves all of its rights to raise such other and further issues on administrative appeal within 30 days of FTC making its final determination. *See* 16 C.F.R. § 4.11(a)(2) (2015) (“If an initial request is denied in part, the time for appeal will not expire until 30 days after the date of the letter notifying the requester that all records to which access has been granted have been made available.”).

⁵ Although FTC cites to *Paisley* in its December 16, 2014 determination letter, FTC ignores that *Paisley* refutes, rather than supports, FTC’s position.

Jonathan E. Nuechterlein

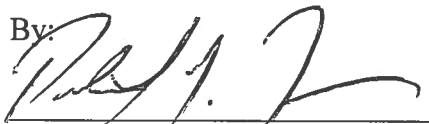
January 15, 2015

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Please do not hesitate to contact me at (202) 499-4232, or patrick.massari@causeofaction.org if you have any questions. Thank you for your consideration of this matter.

Cause of Action

By:

A handwritten signature in black ink, appearing to read "Patrick J. Massari", written over a horizontal line.

Patrick J. Massari, Counsel

EXHIBIT 1



October 30, 2014

VIA E-MAIL

Ms. Claudia Simons
Legislative Counsel
Office of Congressional Relations
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
E-mail: FOIA@ftc.gov

Re: Freedom of Information Act Request

Dear Ms. Simons:

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), Cause of Action hereby requests access to all documents (including, but not limited to, communications via e-mail, text, or facsimile): (1) regarding Margaret (or Maggie) Lassack or Alain Sheer; and (2) reflecting communications (including, but not limited to, via e-mail, text, or facsimile) with the United States House of Representatives Committee on Oversight and Government Reform regarding the matter captioned *In re: LabMD, Inc.*, FTC Docket No. 9357.

The time period for this request is August 28, 2013 to the present.

Request for News Media Status

For fee purposes, Cause of Action qualifies as a “representative of the news media” under 5 U.S.C. § 552(a)(4)(A)(ii)(II). Specifically, Cause of Action gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.

Cause of Action gathers news that it regularly publishes from a variety of sources, including FOIA requests, whistleblowers/insiders, and scholarly works. Cause of Action does not merely make raw information available to the public, but rather distributes distinct work products, including articles, blog posts, investigative reports, and newsletters.¹ These distinct

¹ See, e.g., CAUSE OF ACTION, GRADING THE GOVERNMENT: HOW THE WHITE HOUSE TARGETS DOCUMENT REQUESTERS (Mar. 18, 2014), available at <http://causeofaction.org/grading-government-white-house-targets-document-requesters/>; see also CAUSE OF ACTION, GREENTECH AUTOMOTIVE: A VENTURE CAPITALIZED BY CRONYISM (Sept. 23, 2013), available at <http://causeofaction.org/2013/09/23/greentech-automotive-a-venture-capitalized-by-cronyism-2/>; CAUSE OF ACTION, POLITICAL PROFITEERING: HOW FOREST CITY ENTERPRISES MAKES PRIVATE PROFITS AT THE EXPENSE OF AMERICAN TAXPAYERS PART I (Aug. 2,

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www.CauseOfAction.org

Ph: 202.499.4232

Claudia Simons
October 30, 2014
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works are distributed to the public through various media, including Cause of Action's website, which has been viewed just under 120,000 times in the past year alone.² Cause of Action also disseminates news to the public via Twitter and Facebook, and it provides news updates to subscribers via e-mail.

The statutory definition of a "representative of the news media" unequivocally contemplates that organizations such as Cause of Action, which electronically disseminate information and publications via "alternative media[,] shall be considered to be news-media entities." 5 U.S.C. § 552(a)(4)(A)(ii)(II). In light of the foregoing, federal agencies have appropriately recognized Cause of Action's news media status in connection with its FOIA requests.³

Record Production and Contact Information

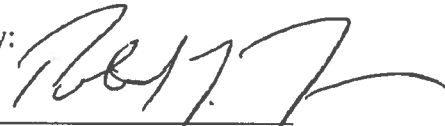
In the event that Cause of Action's request for news media status is denied, Cause of Action, without waiving its right to appeal, would be willing to pay applicable fees up to \$1,500. However, if you expect the fees to exceed \$1,500, please contact us before proceeding.

In an effort to facilitate record production, please provide the responsive records in electronic format (*e.g.*, PDFs). If a certain set of responsive records can be produced more readily, Cause of Action respectfully requests that those records be produced first and that the remaining records be produced on a rolling basis as circumstances permit.

If you have any questions about this request, please contact Patrick Massari by e-mail at patrick.massari@causeofaction.org, or by telephone at (202) 499-4232. Thank you for your attention to this matter.

Cause of Action

By:



Prashant K. Khetan, Esq.
Patrick J. Massari, Esq.

2013), available at <http://causeofaction.org/2013/08/02/political-rofitteering-how-forest-city-enterprises-makes-private-profits-at-the-expense-of-americas-taxpayers/>.

² *Google Analytics* for <http://www.causeofaction.org> (on file with Cause of Action).

³ See, e.g., FOIA Request CFPB-2014-303-F, Consumer Fin. Prot. Bureau (Sept. 15, 2014); FOIA Request GO-14-307, Dep't of Energy (Aug. 28, 2014); FOIA Request HQ-2014-01580-F, Dep't of Energy (Aug. 14, 2014); FOIA Request LR-20140441, Nat'l Labor Relations Bd. (June 4, 2014); FOIA Request 14-01095, Sec. & Exch. Comm'n (May 7, 2014); FOIA Request 2014-4QF0-00236, Dep't of Homeland Sec. (Jan. 8, 2014); FOIA Request DOC-OS-2014-000304, Dep't of Commerce (Dec. 30, 2013); FOIA Request 14F-036, Health Res. & Serv. Admin. (Dec. 6, 2013); FOIA Request CFPB-2014-010-F, Consumer Fin. Prot. Bureau (Oct. 7, 2013); FOIA Request 2013-01234-F, Dep't of Energy (July 1, 2013); FOIA Request 2013-073, Dep't of Homeland Sec. (Apr. 5, 2013); FOIA Request 2012-RMA-02563F, Dep't of Agric. (May 3, 2012); FOIA Request 2012-00270, Dep't of Interior (Feb. 17, 2012); FOIA Request 12-00455-F, Dep't of Educ. (Jan. 20, 2012).

EXHIBIT 2



United States of America
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Patrick Massari
Cause of Action
1919 Pennsylvania Ave NW, Suite 650
Washington, DC 20006

DEC 16 2014

Re: FOIA-2015-00110
OCR communications

Dear Mr. Massari:

This is in partial response to your request dated October 30, 2014, under the Freedom of Information Act seeking access to communications to or from staff in the Office of Congressional Relations (1) regarding Margaret Lassack or Alain Sheer; or (2) reflecting communications with the House Committee on Oversight and Government Reform regarding the matter *In re: LabMD, Inc*, from August 28, 2013 to present. In accordance with the FOIA and agency policy, we have searched our records as of October 30, 2014, the date we received your request in our FOIA office.

We have reviewed 33 pages of records responsive to part two of your request. We are continuing to review responsive records, and hope to have an additional response to you shortly. Our final response will also contain an invoice for any fees incurred by this request, up to your \$1500 fee agreement. I am granting partial access to the accessible records. Portions of these pages fall within the exemptions to the FOIA's disclosure requirements, as explained below.

Portions of the responsive records are protected from disclosure under Article I, § 6, cl. 1 of the Constitution, otherwise known as the Speech and Debate Clause. This clause protects information that would directly interfere with the legislative process by interfering with an ongoing activity by Congress. *See Paisley v. CIA*, 712 F.2d 686, 696 (D.C. Cir. 1983), *citing Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 510 n. 16 (1975). This information is awarded additional protection under FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A), which exempts from disclosure material could reasonably be expected to interfere with ongoing law enforcement activities. *See Robbins Tire & Rubber Co. v. NLRB*, 437 U.S. 214 (1978).

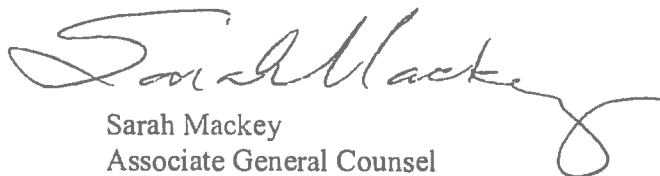
Additionally, some of the records contain personal identifying information compiled for law enforcement purposes. This information is exempt for release under FOIA Exemptions 6, 5 U.S.C. § 552(b)(6), and 7(C), 5 U.S.C. § 552(b)(7)(C), because individuals' right to privacy outweighs the general public's interest in seeing personal identifying information.

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, within 30 days of the date of this letter. Please enclose a copy of your original request and a copy of this response. If you believe

that we should choose to disclose additional materials beyond what the FOIA requires, please explain why this would be in the public interest.

If you have any questions about the way we handled your request or about the FOIA regulations or procedures, please contact Andrea Kelly at (202) 326-2836.

Sincerely,

A handwritten signature in cursive script, appearing to read "Sarah Mackey". The signature is written in black ink and is positioned above the printed name and title.

Sarah Mackey
Associate General Counsel