

EXHIBIT M



CARTER HAYES LLC
ATTORNEYS AT LAW

August 3, 2017

Freedom of Information Act Appeal

Office of General Counsel
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
foia@ftc.gov

Re: FOIA-2017-00444

To the General Counsel:

This letter is an appeal pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. The appeal is submitted to the Federal Trade Commission (FTC) on behalf of Carter Hayes, LLC ("CH"). CH appeals the retention by the FTC of \$2,500.00 of undocumented fees associated with processing the FOIA-2017-00444 search. For the reasons stated below, CH demands a refund from the FTC of \$2,500.00. Further, the firm requests, pursuant to this administrative appeal, that the FOIA unit be directed, at no cost to CH, to complete the processing of records requested and thereafter deliver those responsive records to CH.

By a letter dated January 25, 2017, CH requested records from the FTC. Subsequently and in a telephone conversation, the undersigned spoke with Ms. Shelley O'Hara of the FTC FOIA Unit and voluntarily agreed to reduced the scope of the FOIA request and voluntarily granted the FTC additional time to respond to the request. These agreements were documented by a letter from CH to the FTC dated February 8, 2017. By letter dated March 9, 2017, the FOIA Unit advised CH that it had "located and processed approximately 21 pages to date." The March 9th letter stated that: "[t]o date, we have received notice from approximately 15 Offices or Divisions within the agency that may have responsive records. The collective search time is expected to exceed \$2,500." CH was not provide any further information regarding the total, or estimated, cost to complete the FOIA search. Wanting the FOIA disclosure process to proceed, CH forwarded a check in the amount of \$2,500. Thereafter, CH has not received an invoice or other information from the FTC accounting for the \$2,500.00.

On May 5, 2017, the FTC FOIA Unit sent a final letter to CH advising that it had located approximately 368 pages of responsive records and was granting partial access to approximately 39 pages of those documents. The May 5th letter included an invoice for \$500 relating to the 365 pages of documents subdivided by search time (\$65), review/excising (\$360) and coordination/approval/denial (\$75).

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CH's FOIA-2017-00444 resulted in the disclosure of 90 pages of documents, most of which are generic responses to the public, and in excess of 400 responsive documents were withheld. In similar FOIA searches submitted by CH, the Commission has asserted that responsive records were in the 3,000 to 5,000 range.

During the primary search for records (FOIA-2017-00444), CH also submitted a series of smaller and related requests. CH learned that FOIA-2017-00444 was the most expensive commercial search processed by the FTC during calendar year 2016 through January 26, 2017. In addition, the FTC asserted that the "key words" used by the Commission to perform the search, which could have been used by CH to narrow the scope of future requests, were non-discoverable as attorney work product. Other documents were withheld by the FTC on grounds that the documents were prepared by the FTC in anticipation of litigation. Throughout the pendency of the search, the FTC FOIA public liaison was copied on correspondences from this law firm. The FOIA Public Liaison's office has not provided any response to CH.

The FTC FOIA Unit Has Engaged in Deceptive
Bill Practices Designed to Thwart the FOIA Process

The FTC FOIA Unit has employed a number of legal maneuvers to improperly deny CH public access to Commission records. For the following reasons, CH should be reimbursed by the FTC in the amount of \$2,500 and the FOIA Unit should be further directed, at no cost to CH, to complete its processing of records requested pursuant to and thereafter deliver those records to CH.

1. *Improper Billing Procedures.* The FOIA Unit received from this law firm \$3,000.00 to process FOIA- 2017-00444 and yet only produced one invoice in the amount of \$500.00 attributable to most of the services provided. It would be improper for the Commission, as part of its response to this appeal, to retroactively create an after-the-fact invoice. In addition, the invoice for the \$500 contains no details or explanation of - who performed the work, the different times when work was performed, time spent by each individual providing services, and the individual(s) who performed the generically identified tasks. These are basic concepts of billing practices that should be provided by the FTC as they are generally acceptable commercial practices.
2. *Use of Excessive Fees to Thwart the FOIA Process.* The FTC Unit is authorized to collect reasonable fees to process commercial FOIA Requests. The collection of excessive fees by the FOIA Unit is not allowed under the statute. No articulable

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reason exist as to why CH, FOIA-2017-00444 was the most expensive commercial FOIA request processed by the FTC FOIA Unit during calendar year 2016 through January 25, 2017. The source of this financial information was derived from FOIA 2017- 2017-00670 and FOIA 2017-00753 which identified the 10 largest invoices for the applicable time period:

	Total Invoice	Search Fee Portion	FTC Payment Instructions	Number of Pages
2015-01231	\$ 998.80	\$ 460.00	Pay the invoice	45 Produced
2016-00151	\$ 1088.12	\$ 165.12	Pay the invoice	764 Produced
2016-000389	\$ 931.80	\$ 901.60	Bill will be submitted in future. Second delivery-please pay invoice	3,754 Identified 3,268 Produced
2016-00407	\$ 960.00	No search fee	Please pay invoice	1,570 Produced
2016-00415	\$ 1483.00	\$ 80.00	Pay invoice to be provided with final response. Agreement to pay \$1500 exhausted.	1,131 Identified 595 Produced
2016-00440	1000.00	\$ 200.00	Pay invoice	5,177 Produced
2016-00484	995.00	No Search fee	Pay invoice	1,043 Produced
2016-00759	\$2,223.76	\$ 1,900.76	Pay invoice	44 Produced
2016-01025	\$2,043.00	No Search Fee	Pay invoice	2,631+ Produced
2016-00382	\$ 1520.00	\$160.00	Invoice will be sent	486 +

Excessive, undocumented fees were charged to CH to thwart the disclosure of public records.

3. *Exclusive Use of High Dollar Employees to Process FOIA 2017-00444.* From the limited billing documentation provided to CH (the \$500 invoice), it appears the FTC Unit assigned its highest cost employees to process CH's FOIA request. This only worked to artificially drive up the cost of processing CH's request. A review of the names of email recipients at the FTC who were asked by the FOIA Unit to look for documents responsive to FOIA-2017-00444 contradict the attorney/economist titles assigned to FTC employees listed on the lone \$500 invoice. The email recipient list identifies FTC employees who are not attorneys/economists and as such should have been billed at a lesser rate, if an appropriate bill had been generated.
4. *FOIA Key Words.* In a separate FOIA request, the FTC FOIA Unit refused to identify, on attorney work product grounds, the "key words" also known as "search terms" it utilized to process FOIA 2017-00444. The reason CH requested identification of the search terms was to help CH with the on-going process of

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narrowing its present and future search requests. The FTC Unit consistently requests the narrowing of FOIA requests on grounds it will reduce response times. Conceptually this makes sense but in application it merely provides the FOIA Unit with grounds for possibly excluding otherwise responsive documents. It basically puts the burden upon the requestor to guess the breadth of responsive documents possessed by the FTC. If the requestor guesses incorrectly, large categories of documents can be excluded from production. To make the FOIA process more transparent and efficient, the FOIA Unit should readily share proposed "key words" or "search terms" with requestors. This act alone would greatly enhance the efficiency of the FOIA process. As part of this appeal, CH requests that FOIA Unit policies be re-examined and the FOIA Unit be directed to share information on how it conducts its searches with the public.

In response to this appeal, please direct the FOIA Unit to refund \$2,500.00 to CH. Additionally, please direct the FOIA Unit, at no cost to CH, to complete its processing of records requested pursuant to FOIA 2017-00444.

Respectfully submitted,

Carter Hayes, LLC

By: 
John L. Carter