

Exhibit D



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

January 24, 2019

VIA EMAIL

Asher Hawkins
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Re: Final Appellate Determination Denying Appeal of FOIA Request No. 2018-0782-F

Dear Mr. Hawkins:

This letter constitutes the final determination of the Consumer Financial Protection Bureau (“Bureau”) regarding your appeal of the Bureau’s response to Freedom of Information Act (“FOIA”) Request No. 2018-0782-F (“the Request”). For the reasons set forth below, the appeal is denied.¹

I. Background

On September 19, 2018 you filed FOIA Request No. 2018-0782-F (“Request”) with the Bureau, seeking documents related to the matters *Consumer Fin. Prot. Bureau v. Nat’l Collegiate Master Student Loan Trust et al.*, No. 1:17-cv-01323-UNA (D. Del. 2017) (“NCSLT Action”) and *In re Transworld Sys., Inc.*, Admin. Proc. No. 2017-CFPB-0018 (Consumer Fin. Prot. Bureau 2017) (“Transworld Action”). In particular, your request sought copies of the documents in the Bureau’s possession “that pertain to the facts set forth in (1) the Complaint in the NCSLT Action (2) the Proposed Consent Judgment in the NCSLT Action (entered therein at Dkt. No. 3-1), and (3) the Consent Order in the Transworld Action (entered therein at Doc. 1).” The Request specified that such documents “include, but are not necessarily limited to, transcripts of any investigation-hearing testimony by” nine specific individuals. Following discussions with Senior FOIA Analyst

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.

Danielle Adams on November 29, 2018, you agreed to narrow the Request to seek only the transcripts of the investigational hearing testimony.

On December 3, 2018 the Bureau responded to the Request by letter and explained that the Bureau identified 557 pages of documents responsive to this request, but determined that all 557 pages should be withheld in full pursuant to FOIA Exemptions 4, 7(a), and 7(b). 5 U.S.C. §552 (b)(4), (b)(7)(A), and (b)(7)(E). You appealed this determination on December 21, 2018.

II. Appellate Determination

The records identified by the FOIA Office are exempt from disclosure under FOIA Exemption 7 and there are no reasonably segregable portions subject to disclosure. Your appeal is therefore denied. Given that the documents are properly withheld under Exemption 7, it is not necessary to address your arguments regarding the applicability of other exemptions.

Under Exemption 7, an agency can properly withhold “records or information compiled for law enforcement purposes” to the extent that their disclosure could have certain specified effects. 5 U.S.C. § 552(b)(7). Most relevant here, Exemption 7(E) permits withholding of such records to the extent that their production “would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.” 5 U.S.C. § 552(b)(7)(E). In addition, Exemption 7(A) authorizes the withholding of law enforcement records “to the extent that the production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings.” 5 U.S.C. § 552(b)(7)(A).

The documents that the Request seeks are exempt from disclosure under Exemptions 7 (E) and 7(A). The documents are plainly “records or information compiled for law enforcement purposes.” The Request seeks documents that the Bureau compiled and relied upon in identifying a particular unlawful practice cited in a consent order resolving a civil law enforcement action. In addition, producing the requested documents would have the effects covered by both Exemption 7(E) and Exemption 7(A).

A. Exemption 7(A)

The requested documents are exempt from disclosure under Exemption 7(A) because disclosing them “could reasonably be expected to interfere with enforcement proceedings,” 5 U.S.C. § 552(b)(7)(A). An agency properly withholds records from disclosure under Exemption 7(A) where the “disclosure (1) could reasonably be expected to interfere with (2) enforcement proceedings that are (3) pending or reasonably anticipated.” *Adionser v. U.S. Dep’t of Justice*, 811 F. Supp. 2d 284, 297 (D.D.C. 2011) (internal quotations and citation omitted). Your request relates to a matter (NCSLT) that is in active litigation. While it is true that a consent order was entered with regard to Transworld Systems, the information relating to that consent order arose out of the investigation and litigation involving NCLST, and therefore cannot be considered separately. Because these documents relate to a matter still under active litigation, their disclosure could reasonably be expected to interfere with those proceedings, and the documents are therefore properly withheld under Exemption 7(A).

Moreover, disclosure “causes such interference” under Exemption 7(A) where disclosure would make it “difficult in the future” for the agency “to obtain this kind of information.” *Timken Co. v. U.S. Customs Serv.*, 531 F. Supp. 194, 199 (D.D.C. 1981). Here, the witnesses provided testimony in response to civil investigative demands (CIDs) from the Bureau, without the Bureau’s having to obtain a court order requiring compliance with the CIDs. If the Bureau were to release the information that the company provided, other companies in the future would be less willing to comply with demands for information from the Bureau. The Bureau could still obtain the information by filing petitions in court to enforce its CIDs, but that process would take far more resources than obtaining CID recipients’ responses without a court order. “The government should not be forced to enlarge its enforcement staff . . . to obtain the information it needs.” *Id.* at 198.

B. Exemption 7(E)

The requested documents are also exempt from disclosure under Exemption 7(E), which allows an agency to withhold “records or information compiled for law enforcement purposes” to the extent that their disclosure “would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.” 5 U.S.C. § 552(b)(7)(E). Exemption 7(E) “affords categorical protection to material that would compromise law enforcement by revealing information about investigatory techniques that are not widely known to the general public.” *Pinson v. U.S. Dep’t of Justice*, --- F. Supp. 3d ---, 2016 WL 4074130, at *8 (D.D.C. July 29, 2016) (internal citations and quotation marks omitted). Disclosure of the transcripts would reveal which technique or combination of techniques the Bureau uses to discover specific facts for such investigations. The FOIA does not require the Bureau to make public its current approach to all investigations like this investigation including all its specific questions to witnesses. Keeping “confidential the procedures by which the agency conducted its investigation and by which it has obtained information” is “necessary for effective law enforcement.” *Frankel v. SEC*, 460 F.2d 813, 817 (2d Cir. 1972). *See also Frank LLP v. Consumer Financial Protection Bureau*, 1:16-cv-2015 (D.D.C., 2018) (upholding the CFPB’s nondisclosure of investigational hearing transcripts under Exemption 7(E))

C. Segregability

FOIA requires every federal agency to produce responsive documents that are not protected from disclosure by one of its nine exemptions. In addition, if a record contains both exempt and non-exempt material, then “any reasonably segregable portion” of the record must be released after the deletion of the exempt material. 5 U.S.C. § 552(b). However, if the non-exempt portions of a record are inextricably intertwined with the exempt portions, 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.’”); *Brown v. DOJ*, 734 F. Supp. 2d 99, 110-11 (D.D.C. 2010) (stating that an agency “need not expend substantial time and resources to ‘yield a product with little, if any, informational value.’” (quoting *Assassination Archives & Research Ctr. v. CIA*, 177 F. Supp. 2d 1, 9 (D.D.C.2001))). Based on review of these transcripts, the non-exempt factual portions of the document are relatively small and inextricably intertwined with the exempt portions.

For these reasons, the transcripts in question were subject to withholding in their entirety under Exemption 7. Because the documents in question are properly withheld on this basis alone, it is not necessary to consider the other exemptions noted in the Response and your Appeal. The appeal is therefore denied.

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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 pursue litigation. Under 5 U.S.C. § 552(a)(4)(B), you may also seek judicial review of this appeal denial in the U.S. District Court where you reside, in the district where the documents are located, or in the District of Columbia.

Sincerely,
**Steven Y.
Bressler**

 Digitally signed by Steven Y.
Bressler
Date: 2019.01.24 16:44:05
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Steven Y. Bressler
Assistant General Counsel for
Litigation and Oversight