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Description of document: **Consultant report on US Federal Trade Commission FOIA operations, June 2002**

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Source of document: Freedom of Information Act Request
Office of General Counsel
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

AUG 21 2006

Re: FOIA-2006-00772
FOIA Program Report by Outside
Consultant

This is in response to your 07/06/2006 correspondence requesting access, under the Freedom of Information Act ("FOIA"), to a copy of the FOIA program report by an outside consultant. In accordance with the FOIA and agency policy, we have searched our records, as of 07/10/2006, the date we received your request in our FOIA office.

We have located four pages of responsive records. You are therefore granted full access to the responsive records, which are enclosed.

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 have any questions about the way we handled your request, or about our FOIA regulations or procedures, please contact Lauren Marasco at 202-326-2183.

Sincerely,

A handwritten signature in black ink, appearing to read "Joan E. Fina".

Joan E. Fina
Attorney

University of Cincinnati



RECEIVED

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June 12, 2002

Hon. Timothy Muris
Chairman
Federal Trade Commission
Washington D.C. 20580

Re: Freedom of Information Act Operations

Dear Mr. Chairman:

I appreciate the opportunity to review the Commission's operations under the Freedom of Information Act (FOIA) and to offer several suggestions. Overall, the staff has performed very well and their efforts have served the Commission and its constituencies with distinction. The level of understanding, commitment to service and effectiveness seem exemplary relative to a peer group of agencies.

The current FTC system is significantly more "interactive" with requesters than other federal agencies' FOIA operations. Compared to a peer group of agencies, the FTC staff is remarkable in its effort to call each requester (with very limited exceptions) to learn of the specific interest that underlies the written request. Your staff of capable and pleasant FOI specialists make it their routine practice to call the requester, learn what is wanted, describe what is actually available, offer 100 pages free of charge, and describe the search and copying costs that could be incurred if the full content of the written request is pursued by staff member searches of the FTC's records. Many requesters then narrow their request and accept what is available; the staff notes that oral modification in the file; and the responsive documents are found and transmitted. The FTC FOIA staff conversations with requesters sometimes lead to expansion of the search and inclusion of additional data into the FOIA search or a new FOIA request, once the requester understands what could have been specified in the initial letter.

A note about FOIA history is relevant here. When sponsors shaped the original FOIA they placed the onus entirely on the requester to frame a sufficiently specific description of the requested records. The experience of federal agencies with litigation over FOIA has shifted in recent years, as the statute has matured, from disputes over exemption status for documents withheld, to disputes over the adequacy of an agency's unsuccessful search for responsive documents.

The benefits of the current FTC staff telephone contact system include a service oriented and friendlier relationship toward requesters, few disputes over search adequacy, and a savings in search time by the narrowing of many over-broad FOIA requests. Clarification usually reduces the scope of the search. The offer of "100 pages free" when combined with a description of search and copying charges (charges that the novice requester did not anticipate) usually leads to the requester's acceptance of a narrowing of what the terms of the written request might have covered. For those searches that are narrowed, attorney and management time expended for searching will be reduced and (where complaint files are sought) fewer copies will be made and mailed to the requesters. Presumably, most requesters will be satisfied that the FTC was responsive to their needs for information, though no survey data exists.

One downside of calling each requester is that staff time is devoted to phoning and leaving messages, repeatedly in some cases, explaining the scope of available data to the requester, and learning what the requester actually seeks. The other downside is that in some cases the requester, during or as a result of the communication from staff regarding what would be available, then asks for a broader search of more data that he or she initially had requested. This becomes complicated where the search has already been undertaken and a second expanded search is then undertaken in the same offices.

These benefits and costs do not routinely occur in other federal agencies, for the other agencies do not call requesters, or do so only in rare instances. The written request is interpreted by agency staff, the documents reasonably believed to be included are mailed, and the requester gets a bill for search and copying costs (unless costs are de minimis and billing would be waived). The practical choices by SEC, FDA, HHS, DOT, SBA and the DoJ Antitrust Division are to simply read and respond to the words of the request letter, except in rare cases. Their policy works for those agencies as a reasonable allocation of resources.

You asked what alternative actions might be suggested, from my perspective of 30 years dealing with and teaching and writing about the FOIA.

1. Bifurcate the Calling Policy

I recommend that the General Counsel, who heads the Commission's FOI operations, be asked to bifurcate the incoming requests into two classes. FOIA requests that come from an individual consumer, local group, small business, state or local government, etc. should continue to trigger a phone call from the FOIA staff to clarify and where possible narrow the scope of the inquiry, offering the 100 pages free as permitted under FTC Rules, 16 C.F.R. 4.8(b)(3). If the person called states that they wish to expand the scope of the request, then the FOIA staff should tell the requester to mail a second written request and suggest the initial request be withdrawn, or at a minimum, be held in the FOI office to avoid duplication of search efforts. If the requester declines to withdraw, then the

initial request should be processed without expansion, and the later second request should be handled separately. (Of course, no change is made in the status of exempt records that would be withheld under either response pattern; this goes only to the pre-decisional processing of the search for records.)

A second, smaller set of requests are from professionals and entities that are typically familiar with what they seek and need no FTC interaction to hone their skilled search requests. Those requests which the designated FOIA staff member believes are from groups or organizations that are more sophisticated in making FOIA requests, such as law firms, news media, think tanks, corporations and trade associations, would be answered as they are in other agencies, by proceeding with the search and then billing for the response.

The distinction between the two sets should be left to the judgment of the remarkably skilled FOIA staff. Being called is an agency convenience, and requesters have no statutory right to a call and no expectation that calls would be made to facilitate their work. FOIA itself is silent about what an agency could choose to do by telephone, and the proposed class of those who would not receive calls are likely to be well aware of what they are seeking, and able to pay search costs or to justify waiver under the fee waiver norms of 16 C.F.R. 4.8.

2. Reduce Costs, Adhere to Document Retention Schedules

The Chairman as head of the agency for purposes of 44 U.S.C. 3303(3) can direct the staff to adhere to records retention schedules that include a routine disposal date for records which "apparently will not after the lapse of the period specified have sufficient administrative, legal, research, or other value to warrant their further preservation by the Government." This authority under 36 C.F.R. 1228.10 is apparently managed by the FTC Information & Technology Management group, which listed records management in its annual report of activities. Adhering to existing records schedules saves file space, clears office clutter and complies with the best practices of other federal agencies. Assume a record of a certain action is made by the staff; an ITM records retention schedule calls for this type of record to be preserved for three years; and 5 years after the record's creation, an FOIA request is received. The FOIA answer would normally be that no record exists. But if the over-aged record is still in the files, and was not culled according to FTC records management policy, it will need to be extracted, copied, evaluated for exemption, discussed with FOIA staff, excised of exempt material, and then mailed. This suggestion does not call for destruction of records based on content, but for FTC staff to be instructed to regularly follow document retention policies that already apply and are not always followed. Old files lacking historic value should be routinely dealt with, and failure to do so adds bulk to both records storage and the FOIA search costs of the Commission.

3. Reconsider Closed Investigation Files' Release Timing

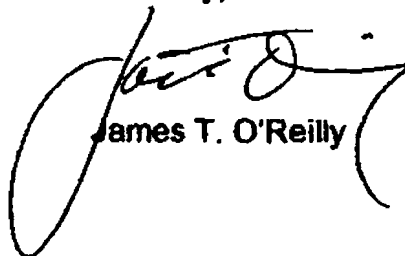
Internal agency documents collected in an investigation may be withheld from required disclosure under FOIA exemptions 5 U.S.C. 552(b)(5) and (7). FOIA does not state an expiration date for exempt status, and FTC rules (§4.10) do not state an expiration date. But the staff follows an internal policy that presumes the closed file will be disclosed after three years. Investigation files are treated differently when the request is for a file closed more than 3 years compared to those closed less than 3 years ("Steps in Responding to a FOIA Request", Feb. 28, 2002 at p. 2 ¶8) To overcome the presumption that a discretionary release will be made, each FTC office holding the documents must justify in detail why it would be harmful to release the records from this closed investigation. The FOI staff noted that the disclosure of the internal papers from one closed investigation, while parallel inquiries proceed against other firms or the same respondent on related grounds, makes for some difficulty in dealing internally with teams pursuing a current case. The disclosure of a 3 year old closed file may provide great defensive insights for private respondents' counsel fighting the staff on a second or third similar case. The FTC should consider whether the internal norms that presume in favor of disclosure after 3 years should be altered, perhaps to a period of 5 years after closure. To do so would facilitate the FOIA pre-release screening processes, and make it much more likely that any contents of a closed file will be of only historical value, rather than of current usefulness against the active FTC enforcement effort in related cases.

4. Continue Moving Releasable Data onto the Web Site.

The most satisfied customer of records disclosure is one who never has to make an FOI request at all because the record is available on the FTC website. Great progress has been made in diversion of what would have been FOIA requests onto the web site, where there needs to be no request and no cost to the requester. The status of FTC compliance with the Electronic FOIA Amendments appears good, but more can be done to place onto the web site items and groups of data that routinely are the subject of FOI requests.

I would be pleased to discuss these further at your convenience or to meet further with the staff. Thank you.

Cordially,



James T. O'Reilly