

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

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

META PLATFORMS, INC.,

Defendant.

Civil Action No. 20-3590 (JEB)

MEMORANDUM OPINION

Defendant Meta Platforms, Inc. made two acquisitions relevant to this antitrust action — Instagram in 2012 and WhatsApp in 2014. Plaintiff Federal Trade Commission reviewed both transactions at the time to assess whether either posed anticompetitive concerns and ultimately allowed both to proceed. In the course of the Commission’s review, attorneys from its Bureau of Competition and economists in its Bureau of Economics prepared “recommendation packages” and other notes to advise the FTC on each proposed acquisition.

As the discovery phase of this litigation proceeds, Meta now asks this Court to compel the FTC to produce these materials, arguing that they contain relevant factual information about the contemporaneous state of market competition that is unavailable anywhere else. For its part, the Commission asserts that these materials are protected by a variety of privileges, most notably the deliberative-process privilege. Meta rejoins that the privilege does not apply and that, in any event, the FTC waived any privilege when it disclosed these materials to the House Judiciary Committee in September 2019. As the Court agrees that the FTC has the better of this argument, it will deny the Motion.

I. Background

As this Court has recounted the factual and procedural background of this case in depth in its prior Opinions, see Fed. Trade Comm’n v. Facebook, Inc., 2022 WL 103308 (D.D.C. Jan. 11, 2022); Fed. Trade Comm’n v. Facebook, Inc., 560 F. Supp. 3d 1 (D.D.C. 2021), it will confine this brief background section to the facts surrounding the documents directly at issue in this Motion.

On April 9, 2012, Meta — then, Facebook, Inc. — announced an agreement to acquire Instagram. See ECF No. 155 (Def. Motion to Compel) at 4. In conjunction with this acquisition, Defendant filed a pre-merger notification with the FTC as required by the Hart-Scott-Rodino Act, 15 U.S.C. § 18a. Id. The Commission then reviewed this transaction over the next four months to assess whether it posed anticompetitive concerns, taking the rare step of “requir[ing] the submission [by the parties] of additional information or documentary material relevant to the proposed acquisition.” 15 U.S.C. 18a(e)(1)(A). During the course of the agency’s review, attorneys from the FTC’s Bureau of Competition and economists from its Bureau of Economics prepared two “recommendation packages” for the Commission’s review. See ECF No. 160 (Pl. Opp.) at 3. The FTC describes these recommendation packages as including memoranda from BC attorneys and BE economists that “reflect legal advice, contain confidential third-party information, and comprise part of the FTC’s internal deliberation and decision-making.” ECF No. 160-7, Exh. A (Declaration of Holly Vedova), ¶ 9. These packages are often generated as part of the Commission’s decisionmaking process on matters including: “(1) screening mergers to determine whether to seek additional information, (2) authorizing and issuing compulsory process, including civil investigative demands and subpoenas, (3) undertaking enforcement through filing complaints, or (4) declining to take further action.” Id.

The first of the two recommendation packages relates to the use of compulsory process to secure facts relevant to the potential acquisition. It includes cover memos from the BC Front Office and BC career staff, memos “to the Merger Screening Committee — later provided to the Commission as an attachment to the compulsory process memorandum” — and a draft resolution authorizing the use of compulsory process. See Pl. Opp. at 3–4; ECF No. 160-8 (FTC Priv. Log) at 1 (entries 1a–1e). The second package concerns BC and BE staff recommendations to close the investigation into the acquisition. See Pl. Opp. at 3–5; FTC Priv. Log at 2 (entries 2a, 2b, and 2e). After deliberating on these materials, the Commission voted 5–0 to allow the acquisition to proceed and issued a no-action letter informing Meta that its “investigation has been closed,” with the proviso that the decision “is not to be construed as a determination that a violation may not have occurred.” ECF No. 160-9 (FTC Letter).

On February 19, 2014, Meta announced a second acquisition, this time of WhatsApp. Like its previous purchase, this transaction was also subject to Hart-Scott-Rodino Act pre-merger review. See 18 U.S.C. § 18b. This time, however, the FTC’s review was more streamlined, and the Commission did not request the submission of additional information. It instead made a decision based solely on Meta’s HSR filings and interviews with third parties. See Pl. Opp. at 5. In connection with this review, BC staff created only two documents at issue here, both of which were staff notes related to the investigation. See id.; FTC Priv. Log at 4 (entries 3 and 4). Once again, after reviewing the transaction, the FTC chose not to challenge it.

Meta requested the documents and memoranda from the FTC that its staff generated while reviewing both the Instagram and WhatsApp acquisitions, arguing that they contain centrally relevant factual information about the state of market competition at the time of these deals. See Def. Mot. at 8. The FTC, however, resisted production, arguing that the materials are

protected by a variety of privileges, including the deliberative-process, work-product, attorney-client, and investigatory-file privileges. See Pl. Opp. at 1.

In now moving to compel, Meta contends that these documents contain segregable and purely factual information relevant to its case that can be disclosed and that, regardless, the FTC waived any applicable privileges when it shared these documents with the House Judiciary Committee. See Def. Mot. at 2–3. To assist in its analysis, the Court ordered Plaintiff to produce *in camera* redacted and unredacted copies of the disputed materials. See Minute Order of Aug. 9, 2022. Having now reviewed those records, the Court may consider the parties’ legal arguments.

II. Legal Standard

Federal Rule of Civil Procedure 37 entitles parties to “move for an order compelling an answer [or] production” if, among other things, “a party fails to produce documents . . . requested under Rule 34.” Document requests under Rule 34 “may relate to any matter that may be inquired into under Rule 26(b).” Fed. R. Civ. P. 33(a)(2); see Fed. R. Civ. P. 34(a) (“A party may serve on any other party a request within the scope of Rule 26(b)”). Rule 26(b)(1), in turn, sets the “scope of discovery . . . as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.” The main question here is whether material concerning the “matter” that Defendant has requested in discovery is privileged under the deliberative-process, work-product, attorney-client, or investigatory-file privileges. The party seeking to withhold a document — here, the FTC — bears the burden of showing that the privilege applies. See United States v. Legal Servs. for NYC, 249 F.3d 1077, 1081 (D.C. Cir. 2001).

III. Analysis

The primary disputes between the parties here are whether the deliberative-process privilege protects the documents that the FTC generated in reviewing the Instagram and WhatsApp acquisitions, and, if it does, whether the Commission waived that privilege when it shared these documents with the House Judiciary Committee. The Court looks at these two questions in turn. While the FTC further contends that some of these documents are also protected by other privileges, the Court need not address these because the deliberative-process privilege acts as a complete shield.

A. Deliberative-Process Privilege

In refusing production here, the FTC invokes deliberative process. The Court first considers Meta's position that invoking the privilege runs counter to FTC policy. It next addresses whether the privilege is applicable in the circumstances here, and it then examines Meta's final argument that its showing of manifest need defeats the privilege.

1. *Availability of Privilege*

Meta begins by suggesting — albeit halfheartedly — that the deliberative-process privilege is categorically unavailable for the documents at issue here as a matter of FTC policy. See Def. Mot. at 12–13; ECF No. 163 (Def. Reply) at 8. Defendant's only support for this assertion is a citation to the FTC's 2016 Open Government Plan, a nonbinding guidance document that states that, in the context of Freedom of Information Act Exemption 5, the "FTC has worked under the presumption that most information protected by the Deliberative Process Privilege . . . should be released if the file has been closed for more than ten years unless staff can articulate a compelling reason for withholding the information." *2016 Open Government Plan*, FED. TRADE COMM'N (Sept. 15, 2016), <https://www.ftc.gov/system/files/attachments/open->

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