UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR DIGITAL DEMOCRACY Plaintiff, v. **FEDERAL TRADE COMMISSION** Defendant.	)	Case No. 14-cv-2084 (APM)

PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff Center for Digital Democracy ("CDD") cross-moves for partial summary judgment with respect to defendant Federal Trade Commission's withholding of certain information requested by CDD under the Freedom of Information Act, 5 U.S.C. § 552. CDD respectfully refers the Court to the accompanying memorandum of points and authorities in support of this cross-motion.

Respectfully submitted,

/s/ David L. Sobel

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR DIGITAL DEMOCRACY	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 14-cv-2084 (APM)
	)	
FEDERAL TRADE COMMISSION	)	
	)	
Defendant.	)	
	)	

MEMORANDUM IN PARTIAL OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff Center for Digital Democracy ("CDD") initiated this action on December 11, 2014, to challenge the decision of defendant Federal Trade Commission ("FTC") to withhold certain information requested by CDD under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. The FTC filed its motion for summary judgment on March 23, 2015 (Dkt. No. 6), asserting that all of the disputed information has been properly withheld under FOIA Exemptions 3 and 4. While CDD concedes that *some* of the information responsive to its request may be withheld from disclosure, it strongly disputes the agency's exemption claims with respect to a substantial amount of the withheld material. As such, CDD partially opposes the FTC's motion and cross-moves for partial summary judgment and entry of an order requiring the disclosure of the information discussed herein.

Background

A. The Children's Online Privacy Protection Act and the FTC's Implementing Rules

Congress enacted the Children's Online Privacy Protection Act, 15 U.S.C. § 6501-6506 ("COPPA") in 1998. The statute imposes certain requirements on operators of websites or online services directed to children under 13 years of age, and on operators of other websites or online services that have actual knowledge that they are collecting personal information online from a child under 13 years of age. 15 U.S.C. § 6502(a).[1] COPPA directs the FTC to promulgate regulations implementing the statute, *id*. § 6502(b). The FTC's first iteration of the mandated regulations went into effect in April 2001, and were amended in January 2013. 16 C.F.R. § 312.1-312.13 (the "COPPA Rule").

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[1] Under COPPA, regulated operators must:

> (a) Provide notice on the website or online service of what information it collects from children, how it uses such information, and its disclosure practices for such information;
>
> (b) Obtain verifiable parental consent prior to any collection, use, and/or disclosure of personal information from children;
>
> (c) Provide a reasonable means for a parent to review the personal information collected from a child and to refuse to permit its further use or maintenance;
>
> (d) Not condition a child's participation in a game, the offering of a prize, or another activity on the child disclosing more personal information than is reasonably necessary to participate in such activity; and
>
> (e) Establish and maintain reasonable procedures to protect the confidentiality, security, and integrity of personal information collected from children.

16 C.F.R. § 312.3.

B. The COPPA Safe Harbor Program and the Reporting Requirement

Of particular relevance to this case, the statute provides that regulated operators may be deemed to comply with the Commission's COPPA Rule "by following a set of self-regulatory guidelines, issued by representatives of the marketing or online industries or by other persons." 15 U.S.C. § 6503(a); *see also* 16 C.F.R. § 312.11(g). Entities that issue and administer such self-regulatory guidelines are known as "safe harbor programs." *See* 16 C.F.R. § 312.11. The FTC may approve a safe harbor program after notice and public comment and a finding that the self-regulatory guidelines "meet the requirements" of the COPPA Rule. 15 U.S.C. § 6503(b)(2); *see also* 16 C.F.R. § 312.11(a). There are currently seven safe harbor programs approved by the FTC. Declaration of Kandi Parsons ("Parsons Decl.") (Dkt. No. 6-2) ¶ 5. In order to qualify for the Commission's approval, a safe harbor program must satisfy the FTC's "performance standards" by 1) "provid[ing] substantially the same or greater protections for children" as those required by the COPPA Rule; 2) implementing "[a]n effective, mandatory mechanism for the independent assessment" of operators' compliance with the self-regulatory guidelines, including a "comprehensive" annual review of each operator's policies, practices, and representations; and 3) imposing "[d]isciplinary actions" against operators who violate program guidelines, which may include public reporting or referral to the Commission for law enforcement. 16 C.F.R. § 312.11(b). Approval of a safe harbor program may be revoked by the FTC "if at any time it determines that the approved self-regulatory program guidelines or their implementation do not meet the requirements" of the COPPA Rule. 16 C.F.R. § 312.11(f).

The COPPA Rule, as amended, requires each safe harbor program approved by the FTC to submit an annual report by July 1, 2014, and each year thereafter, containing, "at a minimum," 1) an "aggregated summary of the results" of the programs' "independent assessments" of their

members' compliance with the self-regulatory program guidelines; 2) a "description" of "any disciplinary action" taken against a member; and 3) a "description" of "any approval of member operators' use of a parental consent mechanism" beyond those enumerated in the Rule. 16 C.F.R. § 312.11(d)(1).

CDD, and its predecessor the Center for Media Education, were instrumental in pushing Congress to enact COPPA in 1998 and have been actively engaged in the law's implementation by the FTC. Throughout COPPA's history, CDD has played an important role ensuring robust enforcement of the statute. CDD frequently investigates websites and mobile applications for COPPA violations on its own and may request that the FTC find that the operator has violated the law.[2] CDD has also played an important role in the oversight of COPPA safe harbor programs, which are tasked with ensuring their members comply with the COPPA Rule. CDD filed comments on all of the safe harbor applications submitted to the FTC dating back to the first, by PrivacyBot.com, in 2000.[3]

C. Plaintiff's FOIA Request and the FTC's Response

By letter dated July 2, 2014, CDD's counsel submitted a FOIA request on CDD's behalf to the FTC. The request sought access to the following records:

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[2] CDD has filed numerous requests for investigation over the past decade, most recently against Topps in December 2014. *Topps Company, Trading Card and Candy Company Charged with Violations of the Children's Online Privacy Protection Act (COPPA); Coalition of Groups Urge FTC to Investigate and Bring Action*, CDD Blog (Dec. 9, 2014), https://www.democraticmedia.org/content/topps-company-trading-card-and-candy-company-charged-violations-childrens-online-privacy.

[3] *Consumer advocate groups move to block PrivacyBot*, AdAge (Apr. 7, 2000), http://adage.com/article/news/consumer-advocate-groups-move-block-privacybot/9127. The most recent safe harbor applications commented upon by CDD were submitted by iKeepSafe and kidSAFE.

> All annual reports submitted by safe harbor programs as required by the Children's Online Privacy Protection Act Rule (COPPA Rule), 16 C.F.R. § 312.11(d)(1), including . . . reports of the following safe harbor programs:
>
> (1) kidSAFE Seal Program,
> (2) Aristotle International Inc.,
> (3) Children's Advertising Review Unit (CARU),
> (4) Entertainment Software Rating Board (ESRB),
> (5) Privacy Vaults Online, Inc. (PRIVO), and
> (6) TRUSTe.

Exhibit A, attached to Declaration of Dione Jackson Stearns ("Stearns Decl.") (Dkt. No. 6-1). Upon the failure of the agency to respond to its request within FOIA's statutory time limit, CDD initiated this action on December 11, 2014.

On February 12, 2015, the FTC produced to CDD, in heavily redacted form, the annual reports of kidSAFE, Aristotle, CARU, ESRB and TRUSTe. The agency released two pages in full, 33 pages in part, and withheld 50 pages in full. Stearns Decl. ¶ 13, and Exhibit G thereto. On February 25, 2015, the FTC produced, also in heavily redacted form, the three-page annual report of PRIVO. *Id*. ¶ 14, and Exhibit H.[4]

D. The FTC's Motion for Summary Judgment

On March 23, 2015, the FTC filed its motion for summary judgment, asserting that it has conducted an adequate search for responsive records and asking the Court to ratify all of the withholdings made by the agency under FOIA Exemptions 3 and 4. Memorandum in Support of Defendant's Motion for Summary Judgment ("Def. Mem.") (Dkt. No. 6). Specifically, the agency identified eight distinct categories of information it asserts are exempt from disclosure:

a. Nonpublic Interpretations and Analyses of the COPPA Rule;
b. Self-Regulatory Assessments Not Required by the COPPA Rule;

[4] In determining how it would respond to CDD's FOIA request, the FTC consulted with the safe harbor programs that had submitted the requested annual reports. The FTC's letters to the programs "attached proposed redactions to the safe harbor reports and sought comments on the proposed release." Stearns Decl. ¶ 8.

c. Business Development Plans;

d. Compliance Oversight Tools and Logistics;

e. Membership Statistics and Market Shares;

f. Member Correspondence Regarding Compliance Issues;

g. Remediation and Disciplinary Rates; and

h. Identity of Members Subject to Discipline

Id. at 19-30.

Upon review of the agency's submission, and in the interest of limiting the scope of the matters to be addressed by the Court, CDD is able to narrow its challenge to the FTC's handling of its FOIA request. As such, CDD does not challenge the adequacy of the agency's search for responsive records and does not challenge the agency's exemption claims with respect to five of the eight identified categories of information. However, as explained more fully below, CDD strongly disputes the FTC's entitlement to withhold three categories of information: 1) interpretations and analyses of the COPPA Rule; 2) membership statistics and market shares; and 3) remediation and disciplinary rates.[5] CDD does not seek information that would identify any particular safe harbor member, but rather seeks only the aggregated information safe harbor programs are required to submit to the FTC annually.

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[5] The FTC's withholdings are identified in the agency's *Vaughn* Index, FTC Exhibit K (Dkt. No. 6-2, pp. 42-49), as numerical categories within each of the six documents at issue. For cross-reference purposes, CDD does not challenge the following categories identified in the *Vaughn* Index: Doc 2, Category (3) (product development information); Doc 3, Categories (2) (description of compliance monitoring techniques and procedures, including proprietary software), (4) (interpretations of program requirements not related to COPPA), and (5) (communications with a Safe Harbor member); Doc 4, Categories (2) (description of technical and analytical abilities, including proprietary software), (3) (monitoring of membership unrelated to COPPA Rule), (4) (private communications with program members), and (6) (description of marketing and business plans); Doc 5, Categories (2) (business and product development plans), and (3) (description of proprietary compliance monitoring procedures and techniques).

Argument

I. FOIA Establishes a Presumption of Disclosure and Places the Burden on the FTC to Demonstrate that Any Withheld Information is Properly Exempt from Disclosure

The Freedom of Information Act safeguards American citizens' right to know "what their Government is up to." *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989). The central purpose of the statute is "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). "[D]isclosure, not secrecy, is the dominant objective of [FOIA]." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976). *See also Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002) ("[a]t all times, courts must bear in mind that FOIA mandates a 'strong presumption in favor of disclosure.'") quoting *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991).

The statute requires disclosure of agency records when requested by the public unless the records fall within one of nine exemptions. *See* 5 U.S.C. § 552(b)(1) - (9). If requested information does not fit squarely into one of these enumerated categories, the law requires federal agencies to disclose the information. *NLRB v. Robbins,* 437 U.S. at 221. FOIA's exemptions "have been consistently given a narrow compass," and requested agency records that "do not fall within one of the exemptions are improperly withheld[.]" *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989) (internal quotation marks omitted).

Disputes involving the propriety of agency withholdings are commonly resolved at the summary judgment stage in FOIA cases. *Harrison v. EOUSA*, 377 F. Supp. 2d 141, 145 (D.D.C. 2005). To be entitled to summary judgment, an agency must prove that "each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt

from the Act's inspection requirements." *Goland v. CIA*, 607 F.2d 339, 352 (D.C. Cir. 1978) (internal citation and quotation omitted). When claiming one of FOIA's exemptions, the agency bears the burden of providing a "'relatively detailed justification' for assertion of an exemption, and must demonstrate to a reviewing court that records are *clearly* exempt." *Birch v. United States Postal Service,* 803 F.2d 1206, 1209 (D.C. Cir. 1986) (emphasis added) (citing *Mead Data Cent., Inc. v. Dep't of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977)).

The Court reviews the government's withholding of agency records *de novo*, and the government bears the burden of proving that particular information falls within one of the nine narrow exemptions to FOIA's broad mandate of disclosure. 5 U.S.C. § 552(a)(4)(B); *Reporters Comm.*, 489 U.S. at 755. "Unlike the review of other agency action that must be upheld if supported by substantial evidence and not arbitrary or capricious, the FOIA expressly places the burden 'on the agency to sustain its action.'" *Id*. (quoting 5 U.S.C. § 552(a)(4)(B)).

As an initial matter, CDD notes that the FTC – perhaps in an effort to shore up its withholding determinations in this case – has incorrectly described the applicable standard of review. While the agency nowhere in its brief mentions the statutorily mandated *de novo* standard, it instead asserts that

> [t]he district court is required to accord substantial weight to declarations submitted by an agency in support of the claimed exemptions, 5 U.S.C. § 552(a)(4)(B), and such declarations are presumed to be submitted in good faith. *SafeCard Servs., Inc. v. Securities and Exchange Comm'n*, 926 F.2d 1197, 1200 (D.C. Cir. 1991).

Def. Mem. at 8. The portion of FOIA's judicial review provision (5 U.S.C. § 552(a)(4)(B)) the agency quotes does *not* address "claimed exemptions," as the agency asserts. Rather, the cited language deals with two distinct issues having nothing to do with "claimed exemptions" – "technical feasibility" and "reproducibility" under sections of the statute addressing the manner

in which information is to be provided to requesters. Likewise, the quoted language from *SafeCard* ("declarations are presumed to be submitted in good faith") discusses declarations submitted "[i]n order to establish the adequacy of a search," 926 F.2d at 1200, and not, as the agency asserts, declarations submitted "in support of the claimed exemptions." Despite the FTC's apparent confusion on the point, FOIA clearly and unequivocally mandates that "the court shall determine . . . *de novo*" whether requested "records [have been] improperly withheld." 5 U.S.C. § 552(a)(4)(B).[6] CDD submits that the FTC's withholding determinations at issue in this case cannot survive scrutiny under that standard of review.

II. The Disputed Information Is Not Properly Exempt From Disclosure Under FOIA Exemptions 3 and 4

The FTC seeks to withhold the three categories of disputed information under FOIA Exemptions 3 and 4. As the agency explains, its reliance upon Exemption 3 mirrors its reliance upon Exemption 4. Def. Mem. at 13 ("The legal standards for withholding documents under these provisions are 'coextensive' in scope.") (footnote and citation omitted).[7] The FTC's challenged exemption claims thus must rise or fall under the standards of Exemption 4, which permits the withholding of "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). *See United Techs. Corp. v. Dep't of Defense*, 601 F.3d 557, 563 (D.C. Cir. 2010). The FTC asserts that the information it redacted from the safe harbor programs' annual reports information was 1) "obtained from a person," Def. Mem. at 14; 2) "commercial," *id*. at 15; and 3) "confidential," *id*. at 17. CDD

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[6] Indeed, the juxtaposition of the "*de novo*" language and the "substantial weight" language in the judicial review provision underscores Congress' intent that the latter standard is *not* applicable to the Court's review of an agency's exemption claims.

[7] In its invocation of Exemption 3 (information "exempted from disclosure by statute"), the FTC relies upon Section 6(f) of the FTC Act and notes that Congress "intend[ed] that the standard for application of Exemption 4 apply" under Section 6(f). *Id*., n.5.

agrees that the withheld information was "obtained from a person" and is "commercial" within the meaning of Exemption 4, but strongly disputes the agency's contention that the information qualifies as "confidential."

In its caselaw, the D.C. Circuit has, for the purpose of determining whether information is "confidential" under Exemption 4, distinguished between information that was voluntarily provided to an agency and information that was submitted on a mandatory basis. When information is provided to the government voluntarily, it "is 'confidential' for the purpose of Exemption 4 if it is of a kind that would customarily not be released to the public by the person from whom it was obtained." *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992) (*en banc*). If, on the other hand, submission of the information was mandatory, it qualifies as "confidential" if disclosing it would either 1) "impair the Government's ability to obtain necessary information in the future"; or 2) "cause substantial harm to the competitive position of the person from whom the information was obtained." *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). Here, the three categories of withheld information CDD seeks to have disclosed were, according to the agency, provided under the mandate of the agency's reporting requirements, and the so-called *National Parks* test thus applies. Def. Mem. at 19-20 ("Nonpublic Interpretations and Analyses of the COPPA Rule"); 25-26 ("Membership Statistics and Market Shares"); and 28-30 ("Remediation and Disciplinary Rates").

As this Court recently noted, "[d]etermining whether a document is 'confidential' [under Exemption 4] . . . typically turns on a *fact-specific inquiry* regarding whether the release of such information would 'cause substantial harm to the competitive position of the person from whom the information was obtained.'" *Scudder v. CIA*, 25 F. Supp. 3d 19, 31 (D.D.C. 2014), quoting

Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1290-91 (D.C. Cir. 1983) (emphasis added). Indeed, as the D.C. Circuit held in *Public Citizen*, "[c]onclusory and generalized allegations of substantial competitive harms, of course, are unacceptable and cannot support an agency's decision to withhold requested documents." 704 F.2d at 1291; *see also Biles v. Dep't of Health & Human Servs.*, 931 F. Supp. 2d 211, 230 (D.D.C. 2013) (agency "has the burden of showing that *substantial* competitive *harm* is *likely*") (emphasis in original). Claims of "competitive harm" under Exemption 4 must also be "logical or plausible." *Falkenstein v. Dep't of Housing & Urban Development*, 952 F. Supp. 2d 288, 294 (D.D.C. 2013) (citation omitted). CDD submits that a "fact-specific inquiry" of the circumstances surrounding the three categories of withheld information demonstrates that the disputed material can in no way be legitimately characterized as "confidential" under Exemption 4.

A. <u>The FTC Has Not Met its Burden to Justify Withholding Safe Harbor Programs' Legal Interpretations of the COPPA Rule</u>

First, the FTC has failed to demonstrate that safe harbor programs' interpretations of COPPA are confidential. The agency has "redacted language reflecting the programs' unique, nonpublic analyses of how the COPPA Rule should be implemented in various settings." Def. Mem. at 19 (citing Parsons Decl. ¶ 19). "The programs' proprietary interpretation of the COPPA Rule and its protections form an important basis on which they compete." *Id*. at 20; FTC Exhibit L, Declaration of Dona J. Fraser ("Fraser Decl.") ¶¶ 4-7 (stating that ESRB has developed interpretations that "differ substantially from the more complex formulation available in the COPPA rule" and it treats them as confidential). The FTC attempts to justify withholding this information by arguing that "[i]f rivals gained access to these analyses, they could bolster their own oversight functions and compliance advice, thereby diverting business from the programs that prepared them." Def. Mem. at 20 (citations omitted).

The FTC's theory of competitive harm directly contradicts the agency's goals of ensuring COPPA compliance. The agency claims that if safe harbor programs knew their competitors'

interpretations of the COPPA Rule, they might "bolster their own oversight functions and compliance advice" to their members. *Id*. In short, the FTC asserts that the consequence of disclosing the withheld legal analyses would be safe harbor programs *more robustly* enforcing COPPA's child-protection requirements. Rather than harming the programs, public access to this information would actually improve their overall quality, serving the very purpose of COPPA's statutory and regulatory scheme.

Moreover, although safe harbor programs may compete in a number of ways, they all must enforce the same federal law. It makes no sense to encourage private entities enforcing a federal law to develop secret, proprietary law that applies to a subset of online operators subject to COPPA. It strains reason to believe that the FTC – the federal agency tasked with enforcing COPPA uniformly – would countenance such an outcome. Indeed, the FTC's position runs counter to the fundamental democratic notion that the public should not be subject to secret law. *See*, *e.g.*, *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980) ("[a] strong theme of our opinions has been that an agency will not be permitted to develop a body of 'secret law'"). Further, in passing COPPA, Congress intended that safe harbor providers enforce the law in public and that the process be open. Congress required safe harbor guidelines to undergo public notice and comment before the FTC can approve them. 15 U.S.C. § 6503(b)(2). The FTC requires any subsequent changes to approved guidelines to undergo notice-and-comment once again. 16 C.F.R. § 312.11(e). The statute and its implementing rules strongly indicate that COPPA enforcement should be transparent. Thus, if all safe harbor programs are enforcing the same law, they should interpret the COPPA Rule in the same manner, openly.

The public should be able to review safe harbors' COPPA interpretations to ensure that they are in fact consistent with the COPPA Rule. To the extent safe harborprograms are changing their interpretations of COPPA after gaining approval from the FTC, the reports are

vital in discovering that information. The FTC's citation of *Public Citizen Health Research Group v. FDA*, 185 F.3d 898, 905 (D.C. Cir. 1999), in support of the proposition that "competitive harm may exist when disclosure would allow competitors to 'eliminate much of the time and effort that would otherwise be required to bring to market a (competitive) product,'" Def. Mem. at 20, underscores the absurdity of its position here. The "competitive product" in that case was an antifungal drug and the records at issue were investigational new drug applications submitted to the FDA. That is precisely the type of "competitive" interest Exemption 4 is designed to protect. It simply defies logic to treat the information at issue here in a similar manner.

B. <u>The FTC's Withholding of Safe Harbor Programs' Membership Data is Unsupported and Illogical</u>

The FTC's claims that membership numbers for each safe harbor program must remain confidential are unsupported because much of that information is already public. The agency has withheld information from all six annual reports which details "the number of members of each safe harbor program, annual changes in membership, and market shares." Def. Mem. at 25. The agency offers three theories in support of its withholdings. First, the FTC asserts that disclosing the information "would likely cause substantial competitive harm because larger safe harbor programs could use the data to target members of smaller, potentially more vulnerable competitors for recruiting and marketing" and that "[t]he larger firms could claim (correctly or incorrectly) that their smaller counterparts are less effective or less credible because they have a smaller market share or are losing members." *Id*. at 26 (citations omitted). Second, the FTC argues that harm could result because "membership data could be combined with other data on compliance incidents in the [safe harbor programs'] reports to determine the percentage of program members who were subjected to discipline or remediation." *Id*. (citations omitted). Third, the agency appears to argue that disclosing both the membership numbers and disciplinary data would imperil the success of the safe harbor program because providers would not produce

the information in the future.[8] None of the arguments are supported by the record or the FTC's supporting declarations.

1. Membership numbers are publicly available or easily discoverable, undercutting claims that they are confidential.

Membership numbers of the safe harbor programs are not confidential because, rather than regarding such information as secret, several of the programs publicly disclose their membership totals. For example TRUSTe discloses the "Number of Properties Certified" in its annual reports.[9] KidSAFE lists all of its members by name and logo on its website.[10] Although CARU does not currently list its members now, it did so as recently as May 2014.[11] ESRB states on its website that it "supports over 2,000 member websites and apps."[12]

Moreover, as the agency itself acknowledges, individual safe harbor members prominently display their affiliation with a particular program through seals displayed on their

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[8] The FTC states that "[t]he confidentiality of [membership] data is vital to the success of the COPPA safe harbor program for the reasons described in subsection B.3.g., *infra*." Def. Mot. at 26. Among other things, subsection B.3.g. of the agency's motion argues that COPPA enforcement would be impaired by disclosure of membership data and disciplinary rates. Def. Mot. at 30 ("this is another reason why such [disciplinary] rates—and the number of total safe harbor program members, which could be used to calculate those rates—are confidential under Exemption 4"). Thus, CDD assumes that the FTC's impairment argument applies to both the membership data and the disciplinary rates.

[9] TRUSTe Transparency Report 2013, at 20 (Appendix C), *available at* http://www.truste.com/window.php?url=http://download.truste.com/TVarsTf=3L0AXBJ0-470. A copy of this report is filed herewith as Exhibit A.

[10] KidSAFE Seal Program, Certified Products, *available at* http://www.kidsafeseal.com/certifiedproducts.html. A copy of this list is filed herewith as Exhibit B.

[11] Screen shots showing CARU's COPPA safe harbor members is filed herewith as Exhibit C. In addition, in May 2014, PRIVO's website identified 22 websites as "some of our clients." A screenshot of PRIVO's website is filed herewith as Exhibit D.

[12] ESRB Privacy Certified Member Services, *available at* http://www.esrb.org/privacy/member_services.jsp. A screenshot of ESRB's website is filed herewith as Exhibit E.

websites.[13] As the FTC's declarant, Ms. Parsons, explains, safe harbor programs issue members a seal that can be placed on a member website to "generate[ ] goodwill among parents." Parsons Decl. ¶7. The very purpose of the seal is to let the public know that a website or online service has been certified by a specific safe harbor program. By simply conducting an online search, competing safe harbor programs could easily learn whether a particular website is affiliated with a different program and solicit them accordingly. Given these facts, the disputed information can in no way be characterized as "confidential."

2. Claims that membership totals, combined with other public data, would result in competitive harm are speculative and unsupported.

The FTC's second justification for withholding membership totals also fails because the claimed harm is speculative and unsupported. FTC Mot. 26. As discussed above, some safe harbor programs already publicly disclose their membership totals and one program can readily determine whether a prospective member is a member of a different program. *See* Exhibits A, B, C, D, E. Combining that information with other publicly available data would therefore not cause competitive harm because there is nothing confidential about any of the information. The FTC has failed to show how combining public information about a safe harbor program's membership totals with other public information would result in competitive harm.

3. The FTC's government impairment argument is illogical.

The FTC claims that the confidentiality of the membership data is "vital to the success of the safe harbor program." Def. Mem. at 26. The FTC argues that if it discloses pure numerical membership totals along with disciplinary rates, safe harbor providers will not provide the information in the future or withdraw from the safe harbor market. *Id*. The agency's argument is illogical because safe harbor programs *are required* to submit an aggregated annual summary of their assessments of their members' compliance with the COPPA Rule. 16 C.F.R. §

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[13] An example of these seals can be found on the Elf on a Shelf Website, which is a member of Privo's safe harbor program. http://www.elfontheshelf.com/content/terms-use-and-privacy-policy. A screenshot of the privacy policy, including the seal, is filed herewith as Exhibit F.

312.11(d)(1). The purpose of the reporting requirement is to ensure the safe harbors comply with that requirement and to determine how actively the programs are assessing their members' compliance and enforcing COPPA. Without providing numerical membership totals to put each safe harbor program's assessments into context, the reporting requirement would be meaningless because the aggregate totals would not provide useful information. For instance, if a safe harbor program determines that ten of its members do not comply with COPPA's restrictions on third parties collecting personal information from children, it is material whether that total is out of twenty members or 2,000. Thus, to meet the annual report requirement of the COPPA Rule, providers must disclose their membership totals.

Failure to meet the annual reporting requirement would violate the COPPA Rule and could result in further investigation by the FTC and possibly even decertification of a safe harbor program. 16 C.F.R. § 312.11(f) ("The Commission reserves the right to revoke any approval granted under this section if at any time it determines that the approved self-regulatory program guidelines or their implementation do not meet the requirements of [the COPPA Rule]"). Because eligibility for the safe harbor program depends upon compliance with the annual report requirement and other provisions of the COPPA Rule, providers are required to provide the information. There is thus no plausible risk that the agency will not obtain the information in the future, undercutting the suggestion that the safe harbor regime could, as a result of disclosure, lose its effectiveness.

Further, to the extent that the FTC may be concerned that it would not receive additional information outside of that which providers are required to submit in their annual reports, the agency can access that information under its current rules.[14] The COPPA Rule requires that safe harbor programs maintain certain records, including consumer complaints, and must submit them to the FTC upon request. 16 C.F.R. § 312.11(d)(3)(i). As such, even though the agency suggests

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[14] Indeed, Ms. Parsons acknowledges that the agency asked the safe harbor programs to submit additional information, such as details regarding consumer complaints and their resolution. Parsons Decl. ¶ 13.

that it may not be able to obtain consumer complaint information in the future, *see* Parsons Decl. ¶ 15,[15] the agency can compel the programs to produce the same information that the providers voluntarily produced in the annual reports.

C. The FTC Has Failed to Justify its Withholding of Safe Harbor Programs' Membership Discipline and Remediation Rates

The FTC has similarly failed to show how disclosing the number of members that particular programs disciplined – without identifying the members – would result in competitive harm. The agency has withheld the disciplinary rates provided by PRIVO and the aggregated number of disciplinary actions taken by CARU, ESRB, kidSAFE, and TRUSTe on the theory that the total numbers could be combined with other data to determine those programs' disciplinary rates. Def. Mem. at 28. The FTC offers three justifications for withholding the information. First, disclosing the programs' disciplinary rates would "impair the FTC's interest in receiving the information" by giving programs an incentive to omit the statistics in future reports. *Id*. Second, disclosure of the data would cause competitive harm because "[i]f safe harbor programs could learn their competitors' rates of remediation or discipline, this might inspire them to recruit members by asserting that their rivals require remedial action by too many, or too few, of their members." *Id*. at 29. Finally, if the records were disclosed it "could cripple the effectiveness of the COPPA safe harbor program" by encouraging providers to their enforcement actions "for reasons of public perception," or to gain new business. *Id*. at 29-30. We address these contentions in turn.

1. The FTC will not be impaired from receiving aggregate disciplinary data.

The FTC fails to demonstrate that disclosing aggregate disciplinary data would harm competition. The proffered declarations from the safe harbor programs all concern a scenario in

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[15] Ms. Parsons states, "[t]hrough my conversations with representatives of at least two safe harbor programs, I have learned that, although the programs would like to give the FTC additional information in their annual reports, they are concerned that this will reveal their confidential information to the public and subject them to a competitive disadvantage." Parsons Decl. ¶ 15.

which they would have to disclose identifying information regarding the members that they have disciplined. *See, e.g.*, FTC Exhibit M, Declaration of Timothy Sullivan (TRUSTe) ¶¶4-5. Thus, the providers argue, disclosure would cause them to not provide information on specific members the future or withdraw from the safe harbor provider market. *Id*.

As CDD has explained, it only seeks *aggregate* data disclosing how many COPPA operators the providers disciplined, not the *identities* of the members that were disciplined. The FTC can withhold the *identities* of the disciplined members while still disclosing the *number* of disciplinary actions, which would moot any potential concerns regarding competitive harm. The agency's stated justification is therefore misplaced and cannot be relied upon as a basis for continuing to withhold anonymized information revealing the number of disciplinary actions taken by the safe harbor programs.

To the extent the declarations provided by safe harbor programs claim potential competitive harm, their concerns stem from the potential disclosure of the *identities* of particular members, which, as noted, CDD is not seeking. *See, e.g.*, FTC Exhibit L, Declaration of Dona J. Fraser ¶8 (describing market harm if ESRB was forced to disclose the identities of members because other programs and consumer groups might target the provider); FTC Exhibit M, Declaration of Timothy Sullivan ¶5 (describing how disclosure of membership names may lead companies to not participate in TRUSTe's safe harbor program "because of the concern that any remedial activities recommended by TRUSTe would cause significant reputational damage due to disclosure via FOIA"); FTC Exhibit O, Declaration of Shai Samet ¶11 (stating that it would undermine COPPA Rule to publicly identify particular kidSAFE member discipline).

2. Releasing the disciplinary rates would not result in competitive harm.

The FTC has failed to show how disclosing the disciplinary rates — after the agency has already disclosed the number of operators that the safe harbor providers have disciplined — would result in competitive harm. At the start, the FTC admits that the actual number of members each safe harbor provider has disciplined is not confidential information and must be

disclosed. In a letter to PRIVO concerning CDD's FOIA request, the agency rejected a confidentiality claim made by the program regarding the number of members it subjected to remediation in the past year. FTC Exhibit F (letter to PRIVO dated Feb. 6, 2015). Instead, the FTC disclosed that PRIVO required five of its members to fix some aspect of their service and advised the program that "we have concluded that the number of members subject to remediation does not constitute . . . confidential commercial or financial information." *Id.*

The FTC released similar data for other safe harbor providers that disclosed how many operators they did or did not subject to discipline in the past year. For example, TRUSTe suspended four clients, with two curing their issues (in order to be reinstated in the program) and two that did not. *See* Def. Exhibit G. The reports also show that Aristotle and KidSAFE took no disciplinary action against their members. *Id*. And in PRIVO's case, its annual report states that "[o]ne certified member has been issued a formal schedule for remediation of a significant number of issues that were found during the assessment period." Def. Exhibit H.

Even though the FTC recognizes that the pure number of members that each safe harbor provider disciplined is not confidential, it argues that disclosing the percentage will result in competitive harm. The FTC also seeks to withhold the disciplinary rates on the theory that if safe harbor programs knew the discipline rates of other programs, they could target each other's members with claims that one program is too strict or lenient in enforcing COPPA. Def. Mem. at 29. Those claims, and the projected harm that the FTC claims would follow, already can be made based on what has been disclosed. For example, because the FTC has already disclosed that Aristotle and KidSAFE took no disciplinary actions against any of their members, competitors can already make claims regarding how robustly they enforce COPPA. In short, the disclosed records already indicate that Aristotle and KidSAFE's enforcement rate is zero, undercutting the FTC's justification for withholding the records.

Additionally, the FTC's justification for withholding the records is also contradictory. Ms. Parsons states that the pure number of disciplinary actions "is not an accurate reflection of the quality of the safe harbor program." Parsons Decl. ¶ 25. She goes on to explain that a higher

discipline rate simply may indicate that a program is working with entities unfamiliar with COPPA or new to COPPA compliance. *Id*. Conversely, low disciplinary rates may simply indicate that a program's membership contains entities that are much more familiar with COPPA's requirements and thus already compliant. *Id*. Yet earlier in her declaration, Ms. Parsons states that the data from the annual reports is valuable because it will "strengthen the FTC's continuing oversight of safe harbor programs." *Id*. ¶ 10.

The FTC, relying on Ms. Parsons, thus argues that the annual reporting data is both important and benign. This is illogical. Either the reported data does meaningfully gauge how safe harbor providers enforce COPPA or it is not meaningful and therefore cannot be considered confidential. The FTC's conflicting positions on this issue is insufficient to justify withholding the disciplinary data. If the release of this information facilitates a race to the bottom in terms of safe harbor programs no longer actively enforcing COPPA, then the FTC must intervene and prevent lax enforcement of the law. On the other hand, if disclosure leads to more robust enforcement of COPPA by providers, that is ultimately good, as children will be better protected online.

3. The FTC will continue to obtain disciplinary information from safe harbor programs.

The FTC's claim that it will not be able to obtain information regarding safe harbor programs' discipline of their members in the future must be rejected. Def. Mem. at 28. As explained above, the COPPA Rule requires the programs to disclose any discipline or remediation they have taken against members in the past year. 16 C.F.R. § 312.11(d)(1). Because the programs must disclose this information to the FTC if they wish to maintain their certification, the agency will have little trouble obtaining it in the future.

4. The FTC fails to show how disclosing discipline totals would impair the agency's oversight of safe harbor programs.

The FTC argues that public disclosure of disciplinary totals would harm its COPPA enforcement scheme because entities would have incentives to "impose or forsake discipline in

order to gain new business." Def. Mem. at 30. The FTC apparently believes that providers would rather violate COPPA — by forsaking discipline even though they are required to enforce the law — than make public how often they enforce the law. The Court should reject such reasoning. Moreover, there is a strong public interest in requiring safe harbor programs to disclose these records, as it will allow the public to ensure that COPPA is being enforced uniformly.

In its most recent revision of the COPPA Rule, the FTC created the annual reporting requirement to evaluate the effectiveness of the certified programs. As Ms. Parsons explains, the annual reports are necessary "to determine how the programs are implementing the COPPA Rule" and "to strengthen the FTC's continuing oversight of safe harbor programs." Parsons Decl. ¶¶ 9, 10. She further states that "COPPA safe harbor programs must act with integrity and impose discipline or remedial action based on their good-faith application of the self-regulatory guidelines to the facts before them." *Id.* ¶ 25. In addition, if a program fails to act in good faith or otherwise engages in unfair or deceptive acts or practices in violation of Section 5 of the FTC Act, "[t]he FTC may pursue law enforcement actions against [programs]." *Id.* ¶ 9.

The FTC therefore expects that the safe harbor programs will act in good faith and discipline their members accordingly to ensure that they comply with the COPPA Rule and maintain their certification. Further, should a program be found to be "gaming the system" or failing to discipline members in an effort to gain a market advantage, such conduct would be grounds for the FTC to investigate and pursue a Section 5 claim against the program.

The FTC presumably can determine from review of the annual reports whether safe harbor programs are acting in good faith and consistently enforcing COPPA. But by withholding information from the public on how the providers actually enforce COPPA, there can be no oversight of the FTC to ensure that it is holding the certified programs accountable. Moreover, if safe harbor programs are avoiding disciplining their members in an effort to gain new business, there is a strong public interest in disclosing such trends to ensure proper functioning of COPPA. Indeed, it makes no sense for the FTC to simultaneously require specific details from programs

to gauge their effectiveness and then claim that public disclosure of those details would undercut its oversight.

* * *

The FTC has failed to carry its burden of "showing that *substantial* competitive *harm* is *likely*" if the three categories of disputed information are disclosed. *Biles*, 931 F. Supp. 2d at 230 (emphasis in original). Instead, the agency has put forward "[c]onclusory and generalized allegations of substantial competitive harms," which "are unacceptable and cannot support [its] decision to withhold" the information. *Public Citizen*, 704 F.2d at 1291. As such, the FTC's actions cannot survive *de novo* review and the Court should find that the disputed information has been improperly withheld.[16]

Conclusion

For the foregoing reasons, the FTC's motion for summary judgment should be denied with respect to the following categories of information withheld from the responsive records: 1) interpretations and analyses of the COPPA Rule; 2) membership statistics and market shares; and 3) remediation and disciplinary rates. CDD's cross-motion for partial summary judgment with respect to that material should be granted.

[16] FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided . . . after deletion of the portions which are exempt." 5 U.S.C. § 552(b). A segregability analysis is so vital to FOIA's broad mandate of disclosure that a district court has an affirmative duty to consider segregability *sua sponte*. *Trans-Pac. Policing Agreement v. U.S. Customs Serv.*, 177 F.3d 1022, 1028 (D.C. Cir. 1999). Here, the agency's segregability claims are set forth in two sentences at the conclusion of Ms. Stearns' declaration. *See* Stearns Decl. ¶ 51. In light of the substantial amount of information withheld (including 50 pages withheld in their entirety), CDD submits that the agency has failed to show that it has complied with FOIA's segregability requirement. *See, e.g.*, *Beltranena v. Clinton*, 770 F. Supp. 2d 175, 186 (D.D.C. 2011) (agency did not meet its burden where its "*only* explanation as to how it met the segregability requirement is one blanket statement in the last paragraph of [its] declaration") (emphasis in original).

Respectfully submitted,

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