

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

EMPOWER OVERSIGHT)
WHISTLEBLOWERS & RESEARCH,)
)
Plaintiff,)
)
v.)
)
U.S. SECURITIES AND EXCHANGE)
COMMISSION,)
)
Defendant.)

No. 1:21-cv-1370-RDA/TCB

**PLAINTIFF’S OPPOSITION TO DEFENDANT’S
MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

Empower Oversight brought this suit to compel the Securities and Exchange Commission to comply with the with the Freedom of Information Act. The SEC urges this Court to grant judgment in its favor, suggesting that it has fulfilled its statutory obligations. But the SEC distorts facts and misconstrues the law. This Court should reject its arguments for three reasons:

I. The SEC undisputedly failed to comply with FOIA's statutory deadlines after Empower Oversight submitted its request to the agency in August 2021. To comply with FOIA, the SEC had twenty days to make a determination as to that request, or it had to explain why unusual circumstances warranted more time. The SEC did neither one of those things. In fact, the agency conceded that it did not comply with the 20-day deadline and that it did not inform Empower Oversight that unusual circumstances existed.

Given the circumstances of this case, it is likely that the SEC's failure to make a timely determination also made it nearly impossible for the agency to conduct a reasonable search. Had the SEC properly issued its determination around the end of September or the beginning of October 2021—when it could have done so, but for its botched handling of the request—Empower Oversight could have worked with the agency to correct its misconstruction of the request (or even to mutually agree on limiting its scope) and thus potentially avoided litigation. It was not until after SEC issued its initial “no records” responses to the request that Empower Oversight challenged the agency's searches. And, as it turns out, the SEC discovered a typographical error, which caused its initial erroneous “no records” responses to two subcategories of the request. Yet the agency refused to reconsider any other aspect of its search.

II. The SEC incorrectly claims that it has conducted searches reasonably calculated to lead to responsive records. As proof, the SEC touts the fact that it has produced more than one thousand pages of documents. Yet this Court should not accept raw numbers as evidence that the SEC has complied with FOIA. The adequacy of an agency's search does not depend on the fruits of its search.

Here, the SEC ignored the plain meaning of a straightforward FOIA request. Empower Oversight seeks *all records* relating to communications between certain SEC officials and *any personnel* from certain outside entities, “including” emails between those officials and email addresses at specific domain names associated with those entities. But Empower Oversight did not limit the scope of its request only to those domain names. The ordinary meaning of the word “including” indicates that the list of items that follows the term is illustrative, not exclusive. Thus, it cannot be reasonable to interpret—as the SEC did—the list of items (i.e., calendar entries, notes, and emails with specific domains) as exclusive. Even so, the SEC *admits* that it failed to search for notes for five of the subcategories that Empower Oversight identified.

III. For the most part, Empower Oversight does not object to the SEC’s application of FOIA exemptions under 5 U.S.C. §§ 552(b)(4), (b)(5), and (b)(6). But the statute undoubtedly places the burden on the SEC to sustain any action to withhold information under these exemptions. The agency has not satisfied its burden.

STATUTORY BACKGROUND

Since the earliest days of this nation, our founders recognized that the public needs access to information to remain in control of their government. James Madison, for example, worried that “without popular information, or the means of acquiring it,” the people would be ruled by an unresponsive government. Letter from James Madison to W.T. Barry (Aug. 4, 1822), in 9 Writings of James Madison 103 (Gaillard Hunt, ed.1910). “Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.” *Id.*

Congress enacted FOIA in response to that persistent problem. *See In re Sealed Case*, 121 F. 3d 729, 749 (D.C. Cir. 1997). FOIA provides the people with the opportunity to acquire “adequate information to evaluate federal programs and formulate wise policies.” *Soucie v. David*, 448 F.2d 1067, 1080 (D.C. Cir. 1971). “Congress recognized that the public cannot make intelligent decisions without such information, and that governmental institutions become

unresponsive to public needs if knowledge of their activities is denied to the people and their representatives.” *Id.*

FOIA strongly favors openness. *DOJ v. Tax Analysts*, 492 U.S. 136, 142 (1989). Congress designed the statute to allow public access to “official information,” and Congress provided “a judicially enforceable public right to secure such information from possibly unwilling official hands.” *EPA v. Mink*, 410 U.S. 73, 80 (1973). No court should construe this right “as a convenient formalism” because it “defines a structural necessity in a real democracy.” *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004); accord *Ethyl Corp. v. EPA*, 25 F.3d 1241, 1245 (4th Cir. 1994). Disclosure, “not secrecy, is the dominant objective of the Act.” *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 361 (1976).

A. Agencies must comply with statutory deadlines.

FOIA requires each federal agency to publish guidance for the public to submit requests for information. After an agency receives a valid request for information, it must respond to that request within twenty days (exempting Saturdays, Sundays, and holidays) by notifying the requester of its “determination.” 5 U.S.C. § 552(a)(6)(A)(i)(I).

To comply with this statutory requirement, the determination “must be more than just an initial statement that the agency will generally comply with a FOIA request and will produce non-exempt documents and claim exemptions in the future.” *CREW v. FEC*, 711 F.3d 180, 188 (D.C. Cir. 2013). At a minimum, to make a “determination,” the agency instead must “(i) gather and review the documents; (ii) determine and communicate the scope of the documents it intends to produce and withhold, and the reasons for withholding any documents; and (iii) inform the requester that it can appeal whatever portion of the ‘determination’ is adverse.” *Id.*

In certain circumstances, an agency may provide notice to the requester that “unusual circumstances” merit additional time—up to an additional ten working days—to respond to the request. 5 U.S.C. § 552(a)(4)(viii)(II)(aa); *see also* 17 C.F.R. § 200.80(d)(5). If the agency provides notice to the requester of “unusual circumstances” and explains that it is not able to respond to the records request within the statutory deadline, the agency must provide the requester

“an opportunity to arrange with the agency an alternative time frame for processing the request.” 5 U.S.C. § 552(a)(6)(B)(ii); *see also* 17 C.F.R. § 200.80(d)(5).

“Congress adopted the time limit provision in the FOIA ‘in order to contribute to the fuller and faster release of information, which is the basic objective of the Act.’” *Oglesby v. Dep’t of the Army*, 920 F.2d 57, 64 n.8 (D.C. Cir. 1990) (quoting H.R. Rep. No. 876, 93rd Cong., 2d Sess. (1974)). FOIA does not require the agency to produce responsive records within the 20-day statutory time limit, but the agency must *respond* to a request within the deadline. No agency may ignore a valid request. If an agency fails to comply with the statutory deadlines, the requester “shall be deemed to have exhausted his administrative remedies.” 5 U.S.C. § 552(a)(6)(C)(i).

After an agency responds to a request, it must make records “promptly available” to the requester. 5 U.S.C. § 552(a)(3)(A). FOIA does not assign a particular timeframe for an agency to comply with the statutory requirement to make documents “promptly available.” Depending on the circumstances, this requirement “typically would mean within days or a few weeks of a ‘determination,’ not months or years.” *CREW*, 711 F.3d at 188.

B. Agencies must make reasonable efforts to search for records.

An agency responding to a valid request for records “shall make reasonable efforts to search for [such] records.” 5 U.S.C. § 552(a)(3)(C). Courts generally consider an agency’s search to be “adequate” if the agency “has conducted a search reasonably calculated to uncover all relevant documents.” *Weisberg v. DOJ*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). The agency need not “search every file where a document could possibly exist” because courts instead consider whether the search was reasonable “in light of the totality of the circumstances.” *Rein v. USPTO*, 553 F.3d 353, 364 (4th Cir. 2009).

In considering the adequacy and reasonableness of a search, no court should accept an agency’s “self-imposed limitation” on the scope of its search when that self-imposed limitation inaccurately depicts what the requester really seeks. *Miccosukee Tribe of Indians of Florida v. United States*, 516 F.3d 1235, 1253 (11th Cir. 2008). For example, an “agency ‘cannot limit its search’ to only one or more places if there are additional sources ‘that are likely to turn up the

information requested.” *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999) (quoting *Oglesby*, 920 F.2d at 68).

An agency initially may define the scope of its search, but that does not mean that the agency then “may ignore what it cannot help but know.” *Kowalczyk v. DOJ*, 73 F.3d 386, 389 (D.C. Cir. 1996). When a requester “clearly states” that it is seeking “all agency records on a subject” regardless of their location, the agency cannot in good faith ignore an apparent lead to other responsive records. *Id.* The agency is “obliged to pursue” that lead. *Halpern v. FBI*, 181 F.3d 279, 288 (2d Cir. 1999).

Similarly, if the requester explains to the agency that it has misinterpreted the scope of a request, the agency cannot simply refuse to perform a FOIA search based on the plain terms of the original request. *See, e.g., Rubman v. USCIS*, 800 F.3d 381, 391–92 (7th Cir. 2015). An agency, of course, may require requesters to “refile” their request “when they want to alter the parameters of their initial search request.” *Id.* at 392. But that applies only when the requester attempts to seek records “well outside the scope of the original request.” *Id.*

C. Agencies may withhold exempted information.

Public access to records “does not apply to matters” that fall within discrete categories of exemptions identified by the statute. *See* 5 U.S.C. § 552(b). For example, FOIA exempts “inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency,” except where such records were “created 25 years or more before the date on which the records were requested.” *Id.* § 552(b)(5). And FOIA exempts the disclosure of records that “would constitute a clearly unwarranted invasion of personal privacy,” such as “personnel and medical files.” *Id.* § 552(b)(6).

Under FOIA, “the burden is on the agency to sustain its action” to withhold information under any of the statutory exemptions. *Id.* § 552(a)(4)(B). A court may review records in camera to determine whether the agency has satisfied its burden. *See id.* Even if portions of responsive documents are covered by FOIA’s exemptions, however, the statute requires that agencies must provide the reasonably segregable portions of those records that are not subject to a FOIA

exemption. *Id.* § 552(a)(3)(B). “The burden is on the agency to show that no segregable materials exist.” *Carter, Fullerton & Hayes, LLC v. FTC*, 601 F. Supp. 2d 728, 744 (E.D. Va. 2009).

DISPUTED AND UNDISPUTED FACTS

I. Response to the SEC’s Statement

Empower Oversight’s request and the SEC’s search

1. Disputed in part. Empower Oversight disputes the agency’s characterization of the FOIA request that it submitted to the SEC on August 12, 2021. The request seeks:

1. All records relating to communications from May of 2017 through December of 2020 between William Hinman and any personnel from Simpson Thacher, including calendar entries, notes, or emails between Mr. Hinman and any email address from the domain “@stblaw.com”;
2. All records relating to communications from May of 2017 through December of 2020 between Mr. Hinman and any personnel from the Enterprise Ethereum Alliance, including calendar entries, notes or emails between Mr. Hinman and any email address from the domain “@entethalliance.org”;
3. All records relating to communications, including calendar entries, notes or emails between Mr. Hinman and any personnel in the SEC’s Office of the Ethics Counsel regarding Mr. Hinman’s continued payments from Simpson Thacher while employed at SEC, his potential recusals or conflicts related to his prior or future employment at Simpson Thacher, as well as his discussions and negotiations with Simpson Thacher regarding rejoining the firm;
4. All records relating to communications from May of 2017 through January of 2021 between Marc Berger and any personnel from Simpson Thacher, including calendar entries, notes or emails between Mr. Berger and any email address from the domain “@stblaw.com”;
5. All records relating to communications from May of 2017 through January of 2021 between Mr. Berger and any personnel from the Enterprise Ethereum Alliance, including calendar entries, notes or emails between Mr. Berger and any email address from the domain “@entethalliance.org”;
6. All records relating to communications, including calendar entries, notes, or emails between Mr. Berger and any personnel in the SEC’s Office of the Ethics Counsel, regarding Mr. Berger’s discussions and negotiations with Simpson Thacher, including all communications regarding potential recusals or conflicts related to his potential employment with Simpson Thacher;

7. All records relating to communication from May of 2017 through December of 2020 between Jay Clayton and personnel from One River Asset Management, including calendar entries, notes or emails between Mr. Clayton and any email address from the domain “@oneriveram.com”; and

8. All records of communications, including calendar entries, notes or emails between Mr. Clayton and personnel in the SEC’s Office of the Ethics Counsel regarding Mr. Clayton’s discussions and negotiations with One River Asset Management, including all communications regarding potential recusals or conflicts related to his potential employment with One River Asset Management.

See Ex. A at 2–3, Am. Compl. (Dkt. No. 25-1).

On August 13, 2021, the SEC sent eight separate letters corresponding to each of the eight items, acknowledging receipt of Empower Oversight’s request. The agency assigned tracking numbers to each item (21-02531-FOIA through 21-02538-FOIA). In each letter, the SEC did not identify any “unusual circumstances” that could allow for a 10-day extension of time under 5 U.S.C. § 552(a)(4)(viii)(II)(aa) for the statutory 20-working-day deadline. However, the SEC stated: “If you do not receive a response after thirty business days from when we received your request, you have the right to seek dispute resolution services from an SEC FOIA Public Liaison or the Office of Government Information Services (OGIS).” Am. Compl. ¶ 21.

Nearly four months later, Empower Oversight filed this action against the SEC on December 8, 2021, for failure to comply with FOIA’s statutory deadlines, in violation of 5 U.S.C. § 552(a)(6), and for unlawful withholding of agency records, in violation of Section 552(a)(3). *See* Compl. (Dkt. No. 1).

2. Disputed in part. Empower Oversight acknowledges that the SEC assigned tracking numbers to six subparts of its request. But Empower Oversight disputes that the agency made reasonable efforts to search for records responsive to its request. 5 U.S.C. § 552(a)(3)(C).

Request No. 21-02531-FOIA

3. Undisputed.

4. Disputed in part. Empower Oversight acknowledges that the SEC assigned a tracking number to the first subpart of its request. But Empower Oversight disputes that the agency made reasonable efforts to search for records responsive to this subpart. 5 U.S.C. § 552(a)(3)(C).

Empower Oversight did not limit its request only to email communications, or only to communications between the SEC and email addresses at the specified domain. Instead, it requested *all records* relating to communications “between William Hinman and any personnel from Simpson Thacher, *including* calendar entries, notes, or emails between Mr. Hinman and any email address from the domain ‘@stblaw.com.’” Ex. A at 2, Am. Compl. (Dkt. No. 25-1) (emphasis added); *see also id.* at 3 (providing a broad definition of the “communications” that it seeks). Empower Oversight disputes the reasonableness of scope of the agency’s search, limited by the terms that the SEC has described here.

5. Disputed in part. The SEC failed to explain that, on December 10, 2021, the agency issued a “no records” response to Request No. 21-02531-FOIA. In its letter to Empower Oversight, the SEC stated that it had “conducted a thorough search of the SEC’s various systems of records, but did not locate or identify any records responsive to your request.” Am. Compl. ¶ 27 (Dkt. No. 25). The SEC urged Empower Oversight to provide “additional information” if it still believed that the agency had responsive records. *Id.* “Otherwise,” the SEC concluded “that no responsive records exist and we consider this request to be closed.” *Id.*

On January 19, 2022, Empower Oversight appealed the SEC’s “no records” response to Request No. 21-02531-FOIA. *See* Ex. D, Am. Compl. (Dkt. No. 25-4). A month later, on February 22, 2022, Empower Oversight acknowledges that the SEC amended its response to Request No. 21-02531-FOIA, and that the agency sent 1,053 pages of responsive records that the SEC purported to redact in part. But Empower Oversight disputes that the SEC’s amended response involved any changes to the scope of the agency’s search after the agency previously issued a “no records” response to Request No. 21-02531-FOIA on December 10, 2021. Instead, the SEC amended its response after Empower Oversight alerted the agency that it had included a “self-imposed limitation” on the scope of its initial search, and that this limitation directly conflicted with the plain text of Empower Oversight’s request. *Micosukee Tribe of Indians of Florida*, 516 F.3d at 1253. The SEC indeed admitted that it used “an incorrect domain name for Simpson Thacher emails.” Verdi Decl. ¶ 8 (Dkt. No. 28-1).

Request No. 21-02532-FOIA

6. Undisputed. *See also* Ex. A at 3, Am. Compl. (Dkt. No. 25-1).

7. Disputed in part. Empower Oversight acknowledges that the SEC assigned a tracking number to the second subpart of its request. But Empower Oversight disputes that the agency made reasonable efforts to search for records responsive to this subpart. 5 U.S.C. § 552(a)(3)(C). The SEC admits that it “did not search for notes.” Verdi Decl. ¶ 19. Additionally, the SEC failed to note that, on December 10, 2021, the agency issued a “no records” response to Request No. 21-02532-FOIA. Am. Compl. ¶ 27 (Dkt. No. 25).

8. Undisputed.

Request No. 21-02533-FOIA

9. Undisputed. *See also* Ex. A at 3, Am. Compl. (Dkt. No. 25-1).

10. Disputed in part. Empower Oversight acknowledges that the SEC assigned a tracking number to the third subpart of its request. But Empower Oversight disputes that the agency made reasonable efforts to search for records responsive to this subpart.

12. Disputed in part. Empower Oversight does not dispute that, on March 25, 2022, the SEC produced 196 pages of emails and attachments between William Hinman and the Office of Ethics Counsel. Nor does Empower Oversight dispute that the SEC produced an additional 123 pages of responsive records on June 15, 2022.

Empower Oversight acknowledges that the SEC purported to rely on Exemption 5 to redact information from the produced documents and that the SEC withheld production of otherwise responsive documents under Exemption 5. But Empower Oversight disputes that the SEC has carried its burden to demonstrate that the agency complied with 5 U.S.C. § 552(b)(5). As to Exemption 6, Empower Oversight also acknowledges that the SEC purported to rely on this exemption to redact information, but Empower Oversight disputes that the SEC has carried its burden to demonstrate that the agency complied with 5 U.S.C. § 552(b)(6).

Request No. 21-02534-FOIA

12. Undisputed. *See also* Ex. A at 3, Am. Compl. (Dkt. No. 25-1).

13. Disputed in part. Empower Oversight acknowledges that the SEC assigned a tracking number to the fourth subpart of its request. But Empower Oversight disputes that the agency made reasonable efforts to search for records responsive to this subpart. 5 U.S.C. § 552(a)(3)(C). For example, the SEC admits that it “did not search for notes.” Verdi Decl. ¶ 33.

14. Disputed in part. Empower Oversight does not dispute that the SEC released “three sets of documents.” On February 16, 2022, the SEC produced 46 pages of records consisting of emails and attachments between Marc Berger, Simpson Thacher personnel, and others. On April 7, 2022, the SEC produced 1 page consisting of an email between Mr. Berger and Simpson Thacher personnel. And, on May 25, 2022, the SEC produced 4 pages of records consisting of an email and attachment between Mr. Berger, Simpson Thacher, and others.

Empower Oversight acknowledges that the SEC purported to rely on Exemption 6 to redact information from these documents. But Empower Oversight disputes that the SEC has carried its burden to demonstrate that the agency complied with 5 U.S.C. § 552(b)(6).

Request No. 21-02535-FOIA

15. Undisputed.

16. Disputed in part. Empower Oversight acknowledges that the SEC assigned a tracking number to the fifth subpart of its request. But Empower Oversight disputes that the agency made reasonable efforts to search for records responsive to this subpart. 5 U.S.C. § 552(a)(3)(C). For example, the SEC admits that it “did not search for notes.” Verdi Decl. ¶ 38. Additionally, the SEC failed to note that, on January 5, 2022, the agency issued a “no records” response to Request No. 21-02535-FOIA. Am. Compl. ¶ 29 (Dkt. No. 25).

17. Undisputed.

Request No. 21-02537-FOIA

18. Undisputed.

19. Disputed in part. Empower Oversight acknowledges that the SEC assigned a tracking number to the seventh subpart of its request. But Empower Oversight disputes that the agency made reasonable efforts to search for records responsive to this subpart. 5 U.S.C.

§ 552(a)(3)(C). For example, the SEC admits that it “did not search for notes.” Verdi Decl. ¶ 44. Additionally, the SEC failed to note that, on January 5, 2022, the agency issued a “no records” response to Request No. 21-02537-FOIA. Am. Compl. ¶ 29 (Dkt. No. 25).

20. Undisputed.

This Lawsuit

21. Disputed in part. As of December 8, 2021, when Empower Oversight filed this suit against the SEC, the agency omits the fact that it had not provided a “determination” for any of the six relevant FOIA tracking numbers. 5 U.S.C. § 552(a)(6)(A)(i)(I).

22. Disputed in part. Empower Oversight agrees that the SEC did not produce any records responsive to its request before this suit was filed. And, as noted above, the SEC subsequently issued “no records” responses to each relevant subpart of Empower Oversight’s request. On January 19, 2022, Empower Oversight appealed the SEC’s “no records” responses to Request Nos. 21-02531-FOIA, 21-02532-FOIA, 21-02535-FOIA, and 21-02537-FOIA. *See* Ex. D, Am. Compl. (Dkt. No. 25-4).

On August 30, 2022—one day before the deadline to move for summary judgment—the SEC provided a “supplemental release” of nearly 1,500 pages of previously produced responsive records to Empower Oversight, but with some unspecified redactions lifted. In an email, the SEC’s FOIA Office apologized to Empower Oversight “for any inconveniences this may have caused” (apparently referring to the eleventh-hour release of modified records). *See* Ex. A at 3 (attached). Empower Oversight asked follow-up questions about which redactions the SEC had removed, but the agency declined to answer those questions. In another email responding to Empower Oversight’s efforts to clarify what new information had been produced, the FOIA Office explained that the “newly unredacted information consists of certain email addresses and Simpson Thacher client names,” but that a “page to page comparison should be performed for an accurate analysis of these records.” *Id.* at 2.

23. Disputed in part. Empower Oversight acknowledges that its former counsel discussed this case with government lawyers from the DOJ and the SEC. Contrary to the SEC’s

characterization, *see, e.g.*, Verdi Decl. ¶ 51, the initial communications—including Empower Oversight’s provision of a list of names to the SEC as search terms—were never viewed as confidential “settlement discussions.” Empower Oversight instead viewed the list as an unnecessary clarification that it provided to the SEC to assist the agency in identifying additional responsive records. Empower Oversight provided the list of less than seventy-five names to the agency so that it might expedite the SEC’s search efforts after the agency sent “no records” responses to Empower Oversight.

On January 28, 2022, Empower Oversight participated in a conference call with representatives of the SEC and the DOJ. During the call, the SEC explained that the agency had reviewed its searches, identified an error, and—after correcting for the error—had located more than 1,000 pages of records responsive to Request No. 21-02531-FOIA. The SEC further explained that the agency was still working on its review of Request No. 21-02532-FOIA, and it claimed that the agency’s “no records” responses to Request Nos. 21-02535-FOIA and 21-02537-FOIA were accurate.

Empower Oversight asked about the search terms—i.e., the actual names of the Simpson Thatcher, Enterprise Ethereum Alliance, and One River Asset Management personnel—used to accomplish the SEC’s searches. The SEC advised Empower Oversight that the agency had not used names but instead had confined its searches only to emails ending with the domain names @stblaw.com, @entethalliance.org, or @oneriveram.com.

Consistent with the arguments raised in its administrative appeal filed on January 19, 2021, Ex. D, Am. Compl. (Dkt. No. 25-4), Empower Oversight pointed out that the scope of its request extended beyond email messages from only those three domain names (i.e., the request sought *all records* relating to *any* communication regardless of the address or domain) and beyond just email messages (i.e., the request also sought calendar entries and notes). One SEC representative disagreed with Empower Oversight’s interpretation of its own FOIA request. The representative seemed to misunderstand the plain meaning of the word “including” (i.e., comprising part of, but not being limited to, the whole) as used in Empower Oversight’s FOIA request. The agency

representative suggested that the SEC FOIA staff could not know the names of every individual associated with each of the entities in the request, so the SEC asked Empower Oversight to provide a specific list of names for the agency to search. Thus, the parties agreed that Empower Oversight would provide a list of names for the SEC to search, narrowing the scope of communications with “any personnel” in connection with Request Nos. 21-02531-FOIA, 21-02532-FOIA, 21-02534-FOIA, 21-02535-FOIA, and 21-02537-FOIA.

Empower Oversight—through its then-counsel—provided the list of names on February 18, 2022. The SEC notes that it received a PDF document with a label—“For Settlement Purposes Only.” But that label is not dispositive because “extrinsic evidence” demonstrates Empower Oversight’s intent *not* to shield this information from disclosure. *Coakley & Williams Const., Inc. v. Structural Concrete Equipment, Inc.*, 973 F.2d 349, 354 (4th Cir. 1992). Soon afterward, Empower Oversight issued an online press release with a link to the list of names, explaining to the public that it had provided the list “so that SEC can identify additional responsive records rather than limiting its searches to just certain email address domains.” Press Release, *SEC Releases E-mails to Empower Oversight in Crypto Conflicts Lawsuit, Still Searching for More* (Feb. 25, 2022); Ex. E, Am. Compl. (Dkt. No. 25-5) (PDF of the list).¹ Consistent with its mission, Empower Oversight posted the list of names online because it seeks to educate the public and to enhance independent oversight of government agencies through *transparency*, not *secrecy*.²

Empower Oversight never treated the list of names as confidential information, and it never tried to shield the names from disclosure. Nor has Empower Oversight ever claimed that the list of names should be confidential. Empower Oversight sent the list to the SEC in the context of a clarifying conversation with FOIA staff about the scope of its request—not “during compromise negotiations.” Fed. R. Evid. 408(a)(2).

¹ See <https://empowr.us/sec-releases-e-mails-to-empower-oversight-in-crypto-conflicts-lawsuit-still-searching-for-more/> (including a link to the list of names with no reference to “settlement”).

² See Mission Statement, <https://empowr.us/mission/>.

Even if this Court were to consider the application of Rule 408 in these circumstances, Empower Oversight has “waived any claim” to such protection by submitting the list names to the Court and making the list available online. *Eisenberg v. Univ. of New Mexico*, 936 F.2d 1131, 1134 (10th Cir. 1991). It “would be unfair” for the Court to allow the SEC “to block” any mention of the names simply because a former counsel no longer involved in the case had added a “settlement” label to the version of the document that he sent to the SEC with no consultation or approval from the client. *Bankcard America, Inc. v. Universal Bankcard Sys., Inc.*, 203 F.3d 477, 484 (7th Cir. 2000).³

24. Disputed in part. The SEC fails to note that, on April 7, 2022, this Court entered an order requiring the parties to file a joint statement as to discovery, summary judgment, and a proposed briefing schedule. Dkt. No. 12. The parties filed three reports. *See* Dkt. Nos. 13, 18, 19. In each report, the SEC explained that a subset of responsive records were subject to the agency’s confidential treatment procedure and that those documents had not yet been produced.

II. Empower Oversight’s Statement of Undisputed Facts

1. On January 28, 2022, Empower Oversight submitted to the SEC a separate FOIA request seeking three categories of records relating to the agency’s efforts to process four of the items at issue in this litigation. Empower Oversight generally sought:

- All processing notes relating to Request Nos. 21-02531-FOIA (records relating to communications between William Hinman and any personnel from Simpson Thacher), and 21-02532-FOIA (records relating to communications between Mr. Hinman and any personnel from the Enterprise Ethereum Alliance);
- All processing notes relating to Request No. 21-02535-FOIA (records relating to communications between Marc Berger and any personnel from the Enterprise Ethereum Alliance); and

³ For nearly forty years, the Department of Justice also has recognized that “information exchanged between adversaries during settlement negotiations” is not subject to “protection under the FOIA.” FOIA Update (Jan. 1, 1985), <https://www.justice.gov/oip/blog/foia-update-oip-guidance-protecting-settlement-negotiations>.

- All processing notes relating to Request No. 21-02537-FOIA (records relating to communications between Jay Clayton and personnel from One River Asset Management).

See generally Ex. B, Response Letter (attached). On May 20, 2022, the SEC partially responded to the request, providing 233 pages of responsive records to Empower Oversight. *Id.*

2. Among those records, the SEC included emails between contractors and SEC staff at the Office of Information Technology. In a series of emails sent on September 22 and September 23, 2021, a contractor informed the Office that she had “0 hits” for the search criteria used for Request Nos. 21-02531-FOIA, 21-02535-FOIA, and 21-02537-FOIA, and that she found “calendar entries only.” *See* Ex. C at 1, 8, 16 (emails) (attached).

3. SEC staff at the Office of Information Technology then traded emails discussing the contractor’s initial report. On September 28, 2021, one staff member asked, “Are you saying there are no hits at all?” *Id.* at 24. He received a response the next day, confirming “NO hits” – “That is correct.” *Id.* On November 3, 2021, another email was sent to “clarify” whether “emails, calendar entries or both” in fact were searched. *Id.* The SEC staff member received no response. That prompted several follow-up emails, including:

- November 9, 2021 – “Just checking on this one”
- November 17, 2021 – “Checking on this one”
- November 19, 2021 – “May I have the status of this request?”
- November 29, 2021 – “Following up on this one.”
- December 3, 2021 – “Any words from them” (referring to contractors)
- December 10, 2021 – “Can you check into this?”
- December 15, 2021 – “This one needs a status as well.”

See id. at 23–24.

LEGAL STANDARD

This Court may grant summary judgment only “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(A). A fact is “material” if a dispute over it “might affect the outcome of the

suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The Court must view the evidence in the light most favorable to Empower Oversight as the nonmovant, drawing all reasonable inferences in its favor. *Dennis v. Columbia Colleton Med. Ctr., Inc.*, 290 F.3d 639, 645 (4th Cir. 2002).

At summary judgment in a FOIA case, the “burden is on the agency to demonstrate that it made a ‘good faith effort to conduct a search . . . using methods which can be reasonably expected to produce the information requested.’” *DiBacco v. Army*, 795 F.3d 178, 188 (D.C. Cir. 2015) (quoting *Oglesby*, 920 F.2d at 68). Courts must deny summary judgment “if a review of the record raises substantial doubt, particularly in view of well defined requests and positive indications of overlooked materials.” *Id.* (quoting *Valencia-Lucena*, 180 F.3d at 326). Adequacy depends on the “appropriateness of the methods used” by the agency to conduct its search, not on the “fruits of the search.” *Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003).

FOIA also “places the burden on the government agency to sustain its action to withhold information under any of the FOIA Exemptions.” *Wickwire Gavin, P.C. v. U.S. Postal Serv.*, 356 F.3d 588, 591 (4th Cir. 2004) (citing 5 U.S.C. § 552(a)(4)(B)). This Court must determine as a matter of law whether the agency properly applied “FOIA’s prescribed exemptions.” *Id.* In doing so, the Court must construe the statutory exemptions narrowly “in favor of disclosure.” *JP Stevens & Co., Inc. v. Perry*, 710 F.2d 136, 139 (4th Cir. 1983) (citing *Rose*, 425 U.S. at 360–61).

ARGUMENT

I. The SEC failed to comply with statutory deadlines.

FOIA unambiguously requires all federal agencies—including the SEC—to issue a determination in response to a valid request for information “within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request.” 5 U.S.C. § 552(a)(6)(A)(i) (emphasis added). Yet the SEC did not comply with this requirement. The SEC did not make a determination that amounted to “more than just an initial statement that the agency will generally comply with [Empower Oversight’s] FOIA request” and that the SEC “will produce non-exempt documents and claim exemptions in the future.” *CREW*, 711 F.3d at 188. Nor did

the SEC explain to Empower Oversight how the agency (i) gathered and reviewed documents; (ii) determined the scope of the documents that it intends to produce and withhold, and the reasons for withholding any documents; or (iii) provided any information as to how Empower Oversight could appeal whatever portion of the determination is adverse. *See id.*

FOIA provides the agency additional time if necessary. *See* 5 U.S.C. § 552(a)(4)(viii)(II)(aa) (allowing “an additional 10 days” for “unusual circumstances”). But in this case, the SEC not only failed to issue a determination within the twenty-day period, but the SEC also failed to provide notice of any unusual circumstances meriting additional time.

The SEC has offered no meaningful explanation as to why the agency undisputedly failed to comply with the statutory deadlines. Perhaps, that is because the agency experienced an internal breakdown in communications that hindered progress for months. *See, e.g.*, Ex. C, at 23–25 (back-and-forth emails about “0 hits”) (attached). Either way, the SEC never has suggested that the agency in fact complied with the statutory deadlines. It plainly did not. The SEC itself acknowledged that the agency “*has not complied with the 20-day time period* for responding to [Empower Oversight’s] request (September 13, 2021)” and that “*it has not informed* [Empower Oversight] *that unusual circumstances exist* in processing [its] request.” Ex. C at 2, Am. Compl. (Dkt. No. 25-3). (emphasis added). No further analysis is required.

Now, however, the SEC insists that the statutory deadlines simply do not matter. The SEC suggests that “once all requested records are surrendered, federal courts have no further statutory function to perform.” Gov. Memo 12 (quoting *Perry v. Block*, 684 F.2d 121, 125 (D.C. Cir. 1982)). Yet the SEC misconstrues this precedent and misrepresents Empower Oversight’s position.

Empower Oversight does not agree that the SEC “has released all nonexempt materials” after the agency admittedly “failed to meet FOIA’s mandated standards of promptness.” *Tijerina v. Walters*, 821 F.2d 789, 799 (D.C. Cir. 1987). Accordingly, there is still “a live controversy” in this case. *Id.* And, unlike the circumstances in *Perry v. Block*, this Court still has a judicial function to perform because the SEC has not surrendered “all requested records.” 684 F.2d at 125. Empower Oversight still seeks a “response to its FOIA requests beyond what it already has

received.” *Cornucopia Inst. v. USDA*, 560 F.3d 673, 676 (7th Cir. 2009). This case is not moot because, as explained in greater detail below, the SEC failed to conduct searches reasonably calculated to locate responsive records.

The SEC wrongly suggests that “judicial relief in FOIA cases is limited to ordering the production of documents.” Gov. Memo. 10. Depending on the unique circumstances of each case, it is certainly true that an extended delay may cause the court “to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.” 5 U.S.C. § 552(a)(4)(B). Yet, from “the very beginning” of this case, Empower Oversight has sought “declaratory relief as well as an injunction.” *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 121 (1974); *see also* Compl. (Dkt. No. 1) (relief requested); Am. Compl. (Dkt. No. 25) (relief requested). This Court therefore may order the SEC to conduct further searches in line with the plain text of Empower Oversight’s request, as the Court also may declare that the SEC failed to comply with FOIA’s statutory deadlines. Granting such relief would not amount to an impermissible “advisory opinion.” *Payne Enters., Inc. v. United States*, 837 F.2d 486, 491 (D.C. Cir. 1988).

To be sure, “this case involves governmental action.” *Super Tire*, 416 U.S. at 122. And if the Court considers mootness, it also must consider the well-established exception for actions that are capable of repetition, yet evading review. *Id.* Put another way, even if the Court were to conclude that Empower Oversight “may have obtained relief as to a specific request under the FOIA,” that conclusion “will not moot a claim that an agency *policy or practice* will impair [Empower Oversight’s] lawful access to information in the future.” *Payne*, 837 F.2d at 491. “The fact that the practice at issue is *informal*, rather than articulated in regulations or an official statement of policy, is *irrelevant* to determining whether a challenge to that policy or practice is moot.” *Id.* (emphasis added). The SEC must carry its *heavy burden* to demonstrate that there is no reasonable expectation that the alleged violation—an inability to comply with FOIA’s statutory deadlines—will recur. *Id.* at 491–92. It cannot carry that burden here.

If this Court concludes that the SEC’s “refusal to supply information evidences a policy or practice of delayed disclosure or some other failure to abide by the terms of the FOIA, and not merely isolated mistakes by agency officials,” then, contrary to the SEC’s argument, Empower Oversight’s “challenge to the policy or practice cannot be mooted by the release of the specific documents that prompted the suit.” *Id.* at 491; *accord Hajro v. USCIS*, 811 F.3d 1086, 1103 (9th Cir. 2016) (holding that “a pattern or practice claim is not necessarily mooted by an agency’s production of documents”).

Empower Oversight was harmed by the SEC’s delay because it had to expend resources—including filing fees and attorney’s fees—to enforce its statutory right to information. *See Hajro*, 811 F.3d at 1103.⁴ There is also “a sufficient likelihood of future harm” to Empower Oversight because, as a nonprofit, nonpartisan organization devoted to government accountability, it will continue to bring FOIA suits in this district when necessary to enforce its rights, including future suits against the SEC. “Empower Oversight’s mission” will be “adversely affected by the SEC’s *continued failure* to render a timely final determination” for its FOIA requests. Am. Coml. ¶ 43 (emphasis added).

In sum, the SEC’s undisputed failure to comply with FOIA’s statutory deadlines remains a valid claim in this live controversy. This Court should declare that the SEC violated the statute.

II. The SEC failed to conduct searches reasonably calculated to locate responsive records.

Courts generally analyze the adequacy of a search by considering the reasonableness of the agency’s effort in the context of the specific FOIA request. *See, e.g., Larson v. Dep’t of State*, 565

⁴ A change in an agency’s position, such as the sudden attentiveness to a FOIA request after the requester files a lawsuit, also may justify the award of fees. *See e.g., EPIC v. DHS*, 218 F. Supp. 3d 27, 41 (D.D.C. 2016); *Judicial Watch, Inc. v. DOJ*, 878 F. Supp. 2d 225, 232 (D.D.C. 2012). “Congress did not enact the fee-shifting provision of FOIA to punish agencies for their slowness in processing FOIA requests, but to reward plaintiffs whose filing of lawsuits alters the government’s slowness and brings about disclosure.” *Terris, Pravlik & Millian, LLP v. Centers for Medicare & Medicaid Servs.*, 794 F. Supp. 2d 29, 38 (D.D.C. 2011). “In a given case, the absence of due diligence may justify the conclusion that the alteration of the government’s position and a sudden burst of alacrity in making the disclosure was caused by that lawsuit.” *Id.*

F.3d 857, 869 (D.C. Cir. 2009). An adequate search requires both an understanding of the nature and the scope of Empower Oversight's request as well as knowledge of where responsive information may be stored within the agency. The reasonableness of the SEC's search in this case turns on the plain language of Empower Oversight's request. Although the SEC's FOIA Office conveyed the request verbatim to the SEC's Office of Information Technology, the scope of the search changed as SEC employees worked with outside contractors, who pared down the request in such a way as to unreasonably limit its breadth.

Empower Oversight first learned of the agency's pared-down search more than five months after it had submitted its request. And in the aftermath of this revelation, the SEC steadfastly refused to address its error, or even to use the search terms that the agency itself requested from Empower Oversight after it had filed an administrative appeal challenging the agency's search. The SEC's position makes no sense. This Court should conclude, after reviewing the totality of the circumstances in this case, that the SEC has not "demonstrated that it has conducted a search reasonably calculated to uncover all relevant documents." *Ethyl Corp.*, 25 F.3d at 1246.

A. The SEC unreasonably narrowed the scope of Empower Oversight's request.

To fulfill its statutory obligations under FOIA, the SEC points out that the agency does not need to design the "perfect search" that will "uncover all relevant documents." Gov. Memo 12 (quoting *Rein*, 553 F.3d at 362). Empower Oversight never has suggested otherwise. Indeed, courts tend to afford agencies some leeway in crafting their search for responsive records. An agency, for example, "is not required to speculate about potential leads." *Kowalczyk*, 73 F.3d at 389. Nor is the agency "obliged to look beyond the four corners of the request for leads to the location of responsive documents." *Id.* But that does not mean that an agency "may ignore what it cannot help but know." *Id.*

Here, Empower Oversight fulfilled its responsibility to frame its request with sufficient particularity. *Light v. DOJ*, 968 F. Supp. 2d 11, 24 (D.D.C. 2013). This Court therefore must evaluate the SEC's search "in light of the request made." *Id.* When the agency sought clarification

as to the scope of the request—soliciting a list of names to define “any personnel” more specifically and to facilitate a more efficient search—Empower Oversight obliged. And the SEC now insists that the agency nevertheless “performed searches reasonably calculated to identify the relevant documents sought in each sub-part of Plaintiff’s FOIA request, often parroting the exact time frame, *domain names*, and *email inboxes* that Plaintiff explicitly referenced in its FOIA request.” Gov. Memo 13 (emphasis added); *see also, e.g.*, Verdi Decl. ¶¶ 9–10. But that is not what Empower Oversight sought, and the SEC knew as much. The agency failed to use the list of names that it solicited from Empower Oversight to conduct searches.

The SEC misunderstood the request. For each relevant subpart, Empower Oversight sought “[a]ll records *relating to* communications.” Ex. A at 2–3, Am. Compl. (Dkt. No. 25-1) (emphasis added). The ordinary meaning of these two words—*relating to*—is quite broad, meaning “to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with.” *Morales v. TWA, Inc.*, 504 U.S. 374, 383 (1992) (quoting Black’s Law Dictionary 1158 (5th ed. 1979)); *see also* Ex. A at 4, Am. Compl. (Dkt. No. 25-1) (defining the term). Properly understood, Empower Oversight thus sought *all records* with some relation to, pertaining to, or connected with *communications*—another term that Empower Oversight broadly defined in its request to include not only email messages but “every manner or method of disclosure, exchange of information, statement, or discussion between or among two or more persons.” *Id.* at 4. The same is true for all relevant requests that used the same language.

For example, consider Request No. 20-02531-FOIA: Empower Oversight sought all records *relating to communications* “between William Hinman and *any* personnel from Simpson Thacher, *including* calendar entries, notes, or emails between Mr. Hinman and any email address from the domain @stblaw.com.” Ex. A at 2–3, Am. Compl. (Dkt. No. 25-1). The term “any” has an expansive meaning, *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 635 (2012), which the SEC ignored. The agency also narrowly construed the term “including” to mean that Empower Oversight only sought “emails Mr. Hinman (using his SEC email) sent to or received from an

email address with the domain “@stblaw.com” from May 1, 2017 to December 31, 2020.” Verdi Decl. ¶ 9. That is, however, not what “including” means.

Neither this Court nor the SEC should read the word *including* “to introduce an exhaustive list, for it implies that the list is *only partial*.” Bryan A. Garner, *A Dictionary of Modern Legal Usage* 431 (1995) (emphasis added). Use of the word “including” does not convey a limitation. *See In re Zick*, 931 F.2d 1124, 1126 (6th Cir. 1991). “It is hornbook law that the use of the word ‘including’ indicates that the specified list of carriers that follows is *illustrative, not exclusive*.” *Puerto Rico Maritime Shipping Authority v. ICC*, 645 F.2d 1102, 1112 n.26 (D.C. Cir. 1981) (emphasis added). Empower Oversight properly explained what it meant by “including” in a supplement to its administrative appeal. *See Ex. D*, at 5–6 (attached).

Even if this Court were to accept the SEC’s incorrect reading of the term “including” to mean that Empower Oversight sought *only* “calendar entries, notes, or emails from specific domain names,” the SEC defeats its own argument. The agency admits that it did not search for *notes* for five of the numbered requests. *See Gov. Memo 14*; Verdi Decl. ¶¶ 13, 19, 33, 38, 44. However, for Request No. 21-02533-FOIA (concerning records related to Mr. Hinman’s communications with the SEC’s Office of the Ethics Counsel), the SEC at least *attempted* to search for notes. Agency “staff searched for notes by asking” other staff assigned to the Office of Ethics Counsel—who were “identified from responsive records from the email search”—to “search for any responsive notes.” Verdi Decl. ¶ 9. SEC staff also asked “current OEC staff to check departed OEC staff files for any responsive notes.” *Id.* But “SEC staff did not identify any responsive notes.” *Id.* The SEC provided no explanation as to why it did not take a similar approach in searching for responsive notes to the other subcategories of Empower Oversight’s request.

The SEC asserts that it may limit its searches “to the places most likely to contain responsive documents.” *Gov. Memo. 14* (quoting *Carter, Fullerton & Hayes, LLC*, 601 F. Supp. 2d at 735). Again, however, that does not mean that the agency simply may *ignore* locations. No agency may limit the scope of its search only to a certain location when it knows of other locations that may contain responsive records. *See, e.g., Morley v. CIA*, 508 F.3d 1108, 1119–20 (D.C. Cir.

2007). Here, the SEC never explained whether it contacted other staff identified from responsive records from its email searches to search for responsive notes beyond those associated with the Office of Ethics Counsel.

In these circumstances, the SEC cannot demonstrate that it conducted a good faith, reasonable search of all platforms likely to possess the requested records. *See Marino v. DOJ*, 993 F. Supp. 2d 1, 9 (D.D.C. 2013). The reasonableness of an agency’s search therefore depends on whether the agency properly determined *where* responsive records were likely to be found, and whether it properly searched those locations. To comply with FOIA, the agency must search records in the system most likely to store responsive records, and it must describe how it retrieved (or attempted to retrieve) records from that system. *See, e.g., Karantalis v. DOJ*, 635 F.3d 497, 500–501 (11th Cir. 2011). That is not what the SEC did here.

B. The SEC has failed to carry its burden of explaining why Empower Oversight’s request imposes an unreasonable burden on the agency.

As discussed above, the SEC initially issued a series of “no records” responses to Empower Oversight’s request. Not one of those responses included an explanation as to how the agency had interpreted the scope of Empower Oversight’s FOIA request, or how the SEC had designed its searches to implement its interpretation of the request. In support of its motion for summary judgment, the SEC now contends that it need not “comply with a request so broad that [it] would impose an unreasonable burden upon the agency.” Gov. Memo 14 (quoting *James Madison Project v. CIA.*, 2009 WL 2777961, at *3 (E.D. Va. Aug. 31, 2009)). But the SEC initially failed to explain to Empower Oversight in any meaningful way how the agency had interpreted the requests (i.e., what it searched for) and where it searched. The SEC thus provided Empower Oversight no opportunity to limit the scope of its request or to clarify any ambiguities. The closest the SEC came was in objecting to the scope of the term “any personnel” and asking Empower Oversight to provide the list of names, which it promptly provided and the SEC promptly ignored.

A requester, of course, “cannot dictate the search terms” that an agency uses. *Bigwood v. Dep’t of Defense*, 132 F. Supp. 3d, 124, 1440 (D.D.C. 2015). Yet, on August 20, 2021, the SEC

FOIA staff referred to their colleagues at the Office of Information Technology a *verbatim transcript* of the requests submitted by Empower Oversight to the agency:

- All records relating to communications from May of 2017 through December of 2020 between William Hinman and any personnel from Simpson Thacher, including calendar entries, notes, or emails between Mr. Hinman and any email address from the domain “@stblaw.com”
- All records relating to communications from May of 2017 through December of 2020 between William Hinman and any personnel from the Enterprise Ethereum Alliance, including calendar entries, notes or emails between Mr. Hinman and any email address from the domain “@entethalliance.org”
- [A]ll records relating to communications from May of 2017 through January of 2021 between Mr. Berger and any personnel from the Enterprise Ethereum Alliance, including calendar entries, notes or emails between Mr. Berger and any email address from the domain “@entethalliance.org”
- [A]ll records relating to communication from May of 2017 through December of 2020 between Jay Clayton and personnel from One River Asset Management, including calendar entries, notes or emails between Mr. Clayton and any email address from the domain “@oneriveram.com”

See Ex. E, at 1–5 (documents produced by the SEC regarding FOIA processing) (attached).

It appears that no one from the SEC’s FOIA Office instructed the Office of Information Technology to search for responsive records limited by *domain name* as opposed to searching for the names of persons affiliated with Simpson Thacher, Enterprise Ethereum Alliance, and One River Management.⁵ Moreover, on August 26, 2021, SEC’s Office of Information Technology forwarded to the agency’s contractor—eDiscovery Requests—the same *verbatim transcript* of the requests submitted by Empower Oversight without any limiting instructions as to the scope of any potential searches. See Ex. E, at 6–9.

Contractors at eDiscovery Requests eventually replied to the SEC’s Office of Information Technology, explaining that they had completed the following searches:

⁵ With respect to Simpson Thacher and One River Asset Management, the names of such persons easily can be accessed using open-source information available online. See, e.g., www.stblaw.com, and www.oneriveram.com.

- With respect to FOIA Request Number 21-02531-FOIA: all emails to/from HinmanW@sec.gov to/from the domain “@stblaw.com”⁶
- With respect to FOIA Request Numbers 21-02535-FOIA: all emails to/from BergerM@sec.com to/from the domain @entethalliance.org; and
- With respect to FOIA Request Numbers 21-02537-FOIA: all emails to/from ClaytonWJ@sec.gov to/from the domain @oneriver.com.⁷

See Ex. C, at 2–3, 10–11, 17–18 (listing contractor search parameters). As discussed above, the SEC provided 233 pages of documents to Empower Oversight in response to a separate FOIA request seeking records related to the agency’s efforts to process four of the items at issue in this litigation. Those records included no discussions or any information explaining *why* the contractor limited the scope of its searches to communications between government email addresses (i.e., those ending in “sec.com”) and the domain names for outside organizations (i.e., @stblaw.com, @entethalliance.org, and @oneriver.com). Rather, as described above in Empower Oversight’s Statement of Undisputed Facts, ¶¶ 1–3, staff from the SEC FOIA Office, staff from the Office of Information Technology, and the contractors spent nearly three months trying to figure out how the searches yielded “0 hits,” and whether the contractors had searched for responsive records in the correct locations.

C. Empower Oversight properly offered search terms to the SEC after it received “no records” responses.

The SEC issued a series of “no records” responses to Empower Oversight in December 2021 and January 2022. Empower Oversight then filed an administrative appeal, seeking review of those responses. “Because the SEC FOIA Research Specialists did not elaborate on the nature and scope of their searches,” Empower Oversight explained that it could not “discern whether they were reasonably calculated to uncover all relevant documents, and hence whether the SEC has demonstrated that it does not possess responsive records.” Ex. D at 1, Am. Compl. (Dkt. No. 25-

⁶ A contractor added a second “l” to Simpson Thacher’s email domain, which caused the SEC to issue a “no records” response on December 10, 2021, for Request No. 21-02531-FOIA.

⁷ The SEC did not produce eDiscovery Requests’ response concerning Request No. 21-02532-FOIA (communications between Hinman and personnel from the Enterprise Ethereum Alliance).

4). Empower Oversight requested that the SEC “review the nature and scope” of its searches, “apprise Empower Oversight of the same, and correct any deficiencies.” *Id.* at 2.

Nine days after it filed the administrative appeal, Empower Oversight participated in a conference call with representatives of the SEC and the Office of the United States Attorney for the Eastern District of Virginia. During that call, the SEC explained that it had located more than 1,000 ages of records responsive to Request No. 21-02531-FOIA after the agency discovered an error. A contractor mistakenly had added an additional letter “l” to the domain name for Simpson Thatcher. On the same call, the SEC told Empower Oversight that the agency had confined its searches to email messages to or from government accounts from only three domain names—@stblaw.com, @entethalliance.org, and @oneriveram.com.

Empower Oversight explained that the agency had misunderstood the scope of its request. To the extent that the request used the word “including,” Empower Oversight explained that the term, by definition, does not serve as a limitation. Instead, Empower Oversight told the SEC that it meant for “including” to be interpreted according to its commonly understood plain meaning—i.e., to inform the reader that it identifies certain illustrative examples that comprise part of, but not all of, the subject group. To facilitate the SEC’s compliance with the scope of its search responsibilities, Empower Oversight offered to limit the scope of its request to fewer than seventy-five named persons. *See* Ex. E, Am. Coml. (Dkt. No. 25-5). The SEC wrongly rejected that clarification.

Additionally, despite the plain language of Empower Oversight’s request (seeking “notes”), the SEC self-imposed a limitation on its search. The agency simply refused to search for notes. Empower Oversight clearly “specified” that it sought “notes” in its request, but the SEC “did not search notes” because it claimed to find “no limiting principle to where such notes would be located, and existing emails and calendar entries the SEC searched did not give any sense as to any notes that would have been taken and preserved.” Gov. Memo 14 (citing Verdi Decl. ¶¶ 9–11, 13). This Court should not accept such a nonsensical claim, especially when the SEC admits

that it was not unreasonably burdensome for the agency to search for notes in responsive to Request No. 21-02533-FOIA (Mr. Hinman’s communications with the Office of the Ethics Counsel).

Indeed, the SEC reasonably explained how agency staff searched for notes by asking their colleagues in the Office of Ethics Counsel—who were “identified from responsive records from the email search”—to “search for any responsive notes.” Verdi Decl. ¶ 9. The SEC even asked “current OEC staff to check departed OEC staff files for any responsive notes.” *Id.* It defies common sense to suggest that the agency could not have done the same thing for high-ranking agency officials like Messrs. Hinman, Berger, and Clayton. After all, they had agency staff assigned to assist them in organizing and filing materials that they generated—including notes, communications, as well as records from meetings—that qualify as “documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency,” which must be maintained by agencies, including the SEC. *See* 44 U.S.C. §§ 3101–07.

III. The SEC failed to carry its burden of demonstrating that it properly withheld information under FOIA exemptions.

On August 30, 2022, the day before the SEC moved for summary judgment, the agency provided Empower Oversight a “supplemental response” to Request Nos. 21-02531-FOIA, 21-02533-FOIA, and 21-02534-FOIA. The supplemental response included nearly 1,500 pages of records, which the agency previously had produced, but with changes to hundreds of earlier redactions. Based on a page-by-page review, Empower Oversight believes that nearly 200 pages include unmarked changes to the previously produced records—mostly removing redactions but in at least one instance adding a redaction.

Even so, the SEC has failed to satisfy its burden of demonstrating that it properly withheld information in certain records under the FOIA exemptions that it invoked. *See Wickwire Gavin*, 356 F.3d at 591. This Court should conclude, as a matter of law, that the SEC failed to comply with FOIA in redacting certain information.

A. The SEC improperly withheld information under 5 U.S.C. § 552(b)(4).

Exemption 4 applies to “trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.” 5 U.S.C. § 552(b)(4). This exemption generally protects the interests of government agencies as well as private parties. *See Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019).

For Request No. 21-02531-FOIA, the SEC worked with Simpson Thatcher to identify “certain information that should be exempt from disclosure under FOIA Exemption 4.” Gluckow Decl. ¶ 5 (Dkt. No. 28-9). The SEC stated: “Fifty-nine pages of documents contained information provided by Simpson Thacher that appeared to be Simpson Thacher’s commercial or financial information that might be exempt from disclosure pursuant to FOIA Exemption 4.” Verdi Decl. ¶ 12. “SEC staff ultimately determined to withhold certain information under Exemption 4,” but it did not explain *how* or *why* the agency decided to redact what it did, including why it redacted the names of some firm clients but not others. *Id.* The *Vaughn* index for Request No. 21-02531-FOIA likewise provides no explanation of the redactions purportedly made under Exemption 4. *See* Dkt. No. 28-2.

For Request No. 21-02534-FOIA, Simpson Thatcher similarly cooperated with the SEC. *See* Gluckow Decl. ¶¶ 6–7. SEC staff identified four pages of documents and “ultimately determined to withhold certain information under Exemption 4.” Verdi Decl. ¶ 32. Again, however, the agency failed to explain *how* or *why* the agency decided to redact what it did, or to explain whether it would have been possible for the SEC to provide reasonably segregable portions of those records. *See* 5 U.S.C. § 552(a)(8)(A)(ii). The *Vaughn* index for Request No. 21-02534-FOIA similarly provides no explanation of the redactions under Exemption 4. Dkt. No. 28-6.

“SEC staff reviewed the records to determine whether any portions” could be segregated for public disclosure. Verdi Decl. ¶ 56 (discussing information redacted under Exemption 4 for Request Nos. 21-02531-FOIA, 21-02533-FOIA, and 21-02534-FOIA). The SEC asserted that it released all portions of those records. *Id.* But it did not elaborate whether it could have taken any

other “reasonable steps” to segregate and to release nonexempt information. 5 U.S.C. § 552(a)(8)(A)(ii). The agency has not carried its burden in these circumstances.

B. The SEC improperly withheld information under 5 U.S.C. § 552(b)(5).

Courts generally have construed Exemption 5 as allowing an agency to withhold information from documents, or portions of documents, that normally would be “privileged in the civil discovery context.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). The “clear thrust” of Exemption 5 “is simply to ensure that FOIA does not deprive the government of the work-product and attorney-client protections otherwise available to it in litigation.” *Hunton & Williams v. DOJ*, 590 F.3d 272, 278 (4th Cir. 2010). To qualify for this exemption, a document must “satisfy two conditions: its source must be a Government agency, and it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it,” such as the attorney-client, deliberative process, or attorney work product privileges. *DOI v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8 (2001).

Here, the SEC relied on Exemption 5 to redact “portions of records” responsive to Request No. 21-02533-FOIA. Verdi Decl. ¶ 57; *see also Vaughn* index (Dkt. No. 28-4). The agency claimed that it “segregated and provided any portions that are not deliberative.” Verdi Decl. ¶ 58. Yet the SEC did not elaborate whether it could have taken any other “reasonable steps” to segregate and to release nonexempt information. 5 U.S.C. § 552(a)(8)(A)(ii). The agency has not carried its burden.

C. The SEC improperly withheld information under 5 U.S.C. § 552(b)(6).

Exemption 6 allows an agency to withhold “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). In balancing individual privacy interests and public disclosure interests, courts first must determine “whether disclosure of the files ‘would compromise a substantial, as opposed to de minimis, privacy interest.’” *MultiAg Media LLC v. USDA*, 515 F.3d 1224, 1229 (D.C. Cir. 2008) (quoting *Nat’l Ass’n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989)). If no significant privacy interest is implicated, “FOIA demands disclosure.” *Id.*

Under Exemption 6, the SEC explained that it withheld “certain names or personal information such as personal email addresses, telephone numbers, addresses, social security numbers, current SEC employee email addresses, non-public group work email addresses, work history, employment intentions and resumes, details of a partnership agreement with Simpson Thacher, identifying information of personnel of a Simpson Thacher client, personal financial information, and information relating to personal lives.” Verdi Decl. ¶ 60. In the supplemental response that the SEC sent to Empower Oversight on August 30, 2022, the agency *added* a redaction to black out the names “Annie, Bruce and Ollie” from an email. *See* Ex. F (two versions of the same record) (attached here).

The SEC purportedly relied on Exemption 6 to redact the names, but it is unclear how three first names—Annie, Bruce and Ollie—without a last name possibly could compromise a substantial, as opposed to de minimis, privacy interest. *See MultiAg Media*, 515 F.3d at 1229. FOIA accordingly requires disclosure.

CONCLUSION

This Court should deny the SEC’s motion for summary judgment.

Respectfully submitted,

/s/ Jeffrey S. Beelaert

Jeffrey S. Beelaert (VSB No. 81852)
STEIN MITCHELL BEATO & MISSNER LLP
901 15th Street NW, Suite 700
Washington, DC 20005
Tel: (202) 661-0923
Fax: (202) 296-8312
Email: jbeelaert@steinmitchell.com

*Attorney for Plaintiff Empower Oversight
Whistleblowers & Research*

October 3, 2022

Exhibit A

From: [Hansen, Joel](#)
To: [REDACTED] Jeffrey Beelaert; "Bryan Saddler"
Cc: [McInerney, Raymond](#); [Tallarico, Mark](#); [Katilius, Lizzette](#); [Verdi, Alexandra](#)
Subject: RE: Supplemental Release for FIOA Request Nos. 21-02533-FOIA and 21-02534-FOIA (Part 2)
Date: Tuesday, September 6, 2022 1:35:12 PM

Good Afternoon,

We believe we used reasonable steps to identify information that no longer needed to be redacted. Please let us know if you identify any places where you believe there is still redacted information that comes within the categories of information we unredacted. For other issues, please direct questions to counsel handling the litigation.

Regards,

Joel Hansen
Office of FOIA Services
U.S. Securities & Exchange Commission
100 F. Street, N.E., Suite 2803
Washington, DC 20549-2465
(202) 551-8377

From: [REDACTED]
Sent: Friday, September 2, 2022 4:24 PM
To: Hansen, Joel <HansenJo@SEC.GOV>; 'Jeffrey Beelaert' <JBeelaert@steinmitchell.com>; 'Bryan Saddler' <[REDACTED]>
Cc: McInerney, Raymond <McInerneyR@SEC.GOV>; Tallarico, Mark <tallaricom@SEC.GOV>; Katilius, Lizzette <KatiliusL@SEC.GOV>; Verdi, Alexandra <VerdiM@SEC.GOV>
Subject: RE: Supplemental Release for FIOA Request Nos. 21-02533-FOIA and 21-02534-FOIA (Part 2)

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Thank you for that clarification. However, it raises other questions:

1. Are you saying that you failed to mark the new information in any way as you lifted the redactions?
2. How did you internally track which redactions were being lifted?
3. Do you have versions of these documents internally that have the new information marked so that SEC staff and DOJ attorneys are not required to do a page-by-page comparison to review which redactions were lifted?
4. If the answer to #3 is yes, then why did you not produce those versions of the documents rather than versions that do not have then new information clearly marked?
5. If the answer to #3 is no, then how were SEC and/or DOJ staff possibly able make rational and consistent decisions about which redactions were going to be removed and

why if they could not readily ascertain which new information was being proposed for release?

Cordially,
Jason

[REDACTED]

From: Hansen, Joel <HansenJo@SEC.GOV>

Sent: Friday, September 2, 2022 1:37 PM

To: [REDACTED] Jeffrey Beelaert' <JBeelaert@steinmitchell.com>; 'Bryan Saddler' <[\[REDACTED\]](mailto:[REDACTED])>

Cc: McInerney, Raymond <McInerneyR@SEC.GOV>; Tallarico, Mark <tallaricom@SEC.GOV>; Katilius, Lizzette <KatiliusL@SEC.GOV>; Verdi, Alexandra <VerdiM@SEC.GOV>

Subject: RE: Supplemental Release for FIOA Request Nos. 21-02533-FOIA and 21-02534-FOIA (Part 2)

Good Afternoon,

The red outline shown was used in the initial possessing of the records as a guide of sorts for the person performing the redactions. As such, it is not meant to be an indicator of where the newly unredacted material is. Please note, not all unredacted material are marked with these red outlines. The newly unredacted information consists of certain email addresses and Simpson Thacher client names. A page to page comparison should be performed for an accurate analysis of these records.

Regards,

Joel Hansen
Office of FOIA Services
U.S. Securities & Exchange Commission
100 F. Street, N.E., Suite 2803
Washington, DC 20549-2465
(202) 551-8377

From: [REDACTED]

Sent: Friday, September 2, 2022 11:29 AM

To: Hansen, Joel <HansenJo@SEC.GOV>; 'Jeffrey Beelaert' <JBeelaert@steinmitchell.com>; 'Bryan Saddler' <[\[REDACTED\]](mailto:[REDACTED])>

Cc: McInerney, Raymond <McInerneyR@SEC.GOV>; Tallarico, Mark <tallaricom@SEC.GOV>; Katilius, Lizzette <KatiliusL@SEC.GOV>; Verdi, Alexandra <VerdiM@SEC.GOV>

Subject: RE: Supplemental Release for FIOA Request Nos. 21-02533-FOIA and 21-02534-FOIA (Part 2)

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Can you please confirm that for all of these supplemental releases the newly unredacted

material is always marked with a red outline? Your cover letter does not explain whether or how the new information is identified.

Cordially,

Jason

██████████

From: Hansen, Joel <HansenJo@SEC.GOV>

Sent: Wednesday, August 31, 2022 9:11 AM

To: ██████████

Cc: McInerney, Raymond <McInerneyR@SEC.GOV>; Tallarico, Mark <tallaricom@SEC.GOV>; Katilius, Lizzette <KatiliusL@SEC.GOV>; Verdi, Alexandra <VerdiM@SEC.GOV>

Subject: Supplemental Release for FIOA Request Nos. 21-02533-FOIA and 21-02534-FOIA (Part 2)

Mr. Foster,

This second email (part 2) which includes the response letter again, along with records for 21-02533-FOIA and 21-02534-FOIA. Once again apologies for any inconveniences this may have caused.

Regards,

Joel Hansen

Office of FOIA Services

U.S. Securities & Exchange Commission

100 F. Street, N.E., Suite 2803

Washington, DC 20549-2465

(202) 551-8377

Exhibit B



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
STATION PLACE
100 F STREET, NE
WASHINGTON, DC 20549-2465

Office of FOIA Services

May 20, 2022

Mr. Jason Foster
Empower Oversight



Re: Freedom of Information Act (FOIA), 5 U.S.C. § 552
Request Nos. **22-01118-FOIA, 22-01119-FOIA and
22-01120-FOIA**

Dear Mr. Foster:

This letter partially responds to your requests, dated January 28, 2022 and received in this office on January 31, 2022, for the three subjects shown below. Please note each subject was assigned a separate FOIA tracking number. Reference is also made to our letter dated February 1, 2022, in which we addressed your request for a fee waiver.

Request No.	Subject
22-01118-FOIA	All processing notes relating to Request Numbers 21-02531-FOIA and 21-02532-FOIA.
22-01119-FOIA	All processing notes relating to Request Number 21-02537-FOIA.
22-01120-FOIA	All processing notes relating to Request Number 21-02535-FOIA.

This letter partially responds to all three FOIA requests.¹

¹ Records responsive to each of these three FOIA requests are often duplicative. Therefore, FOIA request numbers 22-01119-FOIA and 22-01120-FOIA will be administratively closed and all records will be processed under FOIA request number 21-01118-FOIA.

Mr. Jason Foster
May 20, 2022
Page 2

22-01118-FOIA,
22-01119-FOIA and
22-01120-FOIA

Given the amount of time it takes to review the potentially responsive records, we will be issuing rolling responses as we complete our review of the records. Enclosed are 233 pages of records that are being provided to you, with the exception of certain information that is being withheld under 5 U.S.C. § 552(b)(5) and/or (b)(6), for the following reasons:

- Exemption 5 protects information that was prepared in anticipation of litigation, forms an integral part of the pre-decisional process, and/or contains advice given to the Commission or senior staff by the Commission's attorneys. This material is protected from release by the attorney work-product, deliberative process and/or attorney-client privileges embodied in Exemption 5. Under this exemption portions of email exchanges between SEC staff have been withheld.
- Exemption 6 protects from disclosure information that, if released, would constitute a clearly unwarranted invasion of personal privacy. Under this exemption email addresses and telephone numbers of SEC staff have been withheld.

Please be advised that we have considered the foreseeable harm standard in preparing this response.

I am the deciding official with regard to this adverse determination. You have the right to appeal my decision to the SEC's General Counsel under 5 U.S.C. § 552(a)(6), 17 CFR § 200.80(f)(1). The appeal must be received within ninety (90) calendar days of the date of this adverse decision. Your appeal must be in writing, clearly marked "Freedom of Information Act Appeal," and should identify the requested records. The appeal may include facts and authorities you consider appropriate.

You may file your appeal by completing the online Appeal form located at https://www.sec.gov/forms/request_appeal, or mail your appeal to the Office of FOIA Services of the Securities and Exchange Commission located at Station Place, 100 F Street NE, Mail Stop 2465, Washington, D.C. 20549, or deliver it to Room 1120 at that address.

Mr. Jason Foster
May 20, 2022
Page 3

22-01118-FOIA,
22-01119-FOIA and
22-01120-FOIA

This concludes this portion of our response. In the interim, if you have any questions, please contact Joel Hansen of my staff at hansenjo@sec.gov or (202) 551-8377. You may also contact me at foiapa@sec.gov or (202) 551-7900. You may also contact the SEC's FOIA Public Service Center at foiapa@sec.gov or (202) 551-7900. For more information about the FOIA Public Service Center and other options available to you please see the attached addendum.

Sincerely,

A handwritten signature in black ink, appearing to read "L. Katilius". The signature is written in a cursive, flowing style.

Lizzette Katilius
FOIA Branch Chief

Enclosures

ADDENDUM

For further assistance you can contact a SEC FOIA Public Liaison by calling (202) 551-7900 or visiting <https://www.sec.gov/oso/help/foia-contact.html>.

SEC FOIA Public Liaisons are supervisory staff within the Office of FOIA Services. They can assist FOIA requesters with general questions or concerns about the SEC's FOIA process or about the processing of their specific request.

In addition, you may also contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA dispute resolution services it offers. OGIS can be reached at 1-877-684-6448 or via e-mail at ogis@nara.gov. Information concerning services offered by OGIS can be found at their website at [Archives.gov](https://www.archives.gov). Note that contacting the FOIA Public Liaison or OGIS does not stop the 90-day appeal clock and is not a substitute for filing an administrative appeal.

Exhibit C

To: Kenner, Candace [(b)(6)]@sec.gov
Cc: Mitchell, Martha [(b)(6)]@SEC.GOV
From: Vollmers, Valerie (Contractor)
Sent: Wed 9/22/2021 1:17:22 PM
Subject: FOIA1179-Case#21-02531-FOIA NO HITS CALENDAR ONLY
Received: Wed 9/22/2021 1:17:23 PM
FOIA1179-Case#21-02531-FOIA NO HITS Calendar ONLY.xlsx

Hello Candace,

This request has been completed. I have attached a spreadsheet. There are 0 Hits with this search criteria. There are calendar entries only for this request.

[(b)(5)]

Thanks



Valerie Vollmers E-Discovery Services

[(b)(6)]

[(b)(6)]@sec.gov

	A	B	C	D
1	Search Performed Using Discovery Accelerator			
2	Search Performed By: Valerie Vollmers			
3	ID	Months Requested		Months Searched
4	Case#21-02531-FOIA	44		44
5	FOIA1179-Case#21-02531-FOIA			
6				
7	FOIA1179-Case#21-02531-FOIA TO SEC.pst			
8	Dates		5/1/2017 - 12/31/2020	
9	Custodian			TO
10	Search Hits		0	
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13	FOIA1179-Case#21-02531-FOIA FROM SEC.pst			
14	Dates		5/1/2017 - 12/31/2020	
15	Custodian			FROM
16	Search Hits		0	
17				TO
18	Calendar Requested		YES	
19	Time -	4 Hours		
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21	Key			
22	X = Mail Search			
23	NR = Month was not requested			
24	Corrupt = Month was there but the data was corrupt			
25	Missing = Month was there but the user's mailbox was not available			
26	No Database = Month was not available			
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5	Search for all emails TO the SEC custodian FROM EMAIL DOMAIN Addresses defined for the period specified		
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9	William Hinman	HinmanW@sec.gov	
10			
11	Simpson Thatcher LLC	stblaw.com	
12	Search for all emails FROM the SEC custodian FROM EMAIL DOMAIN Addresses for the period specified		
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15	William Hinman	HinmanW@sec.gov	
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17	Simpson Thatcher LLC	stblaw.com	
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To: Kenner, Candace (b)(6)@sec.gov
Cc: Mitchell, Martha (b)(6)@SEC.GOV
From: Vollmers, Valerie (Contractor)
Sent: Thur 9/23/2021 9:19:02 AM
Subject: FOIA1180-Case#21-02535-FOIA NO HITS CALENDAR ONLY
Received: Thur 9/23/2021 9:19:03 AM

Hello Candace,

This request has been completed. I have attached a spreadsheet. There are 0 Hits with this search criteria. There are calendar entries only for this request.

(b)(5)

Thanks



Valerie Vollmers E-Discovery Services

(b)(6)

(b)(6)@sec.gov

To: Kenner, Candace [(b)(6)]@sec.gov
Cc: Mitchell, Martha [(b)(6)]@SEC.GOV
From: Vollmers, Valerie (Contractor)
Sent: Thur 9/23/2021 4:04:59 PM
Subject: Attached Spreadsheet: FOIA1180-Case#21-02535-FOIA NO HITS CALENDAR ONLY
Received: Thur 9/23/2021 4:04:59 PM
FOIA1180-Case#21-02535-FOIA NO HITS Calendar ONLY.xlsx

Here is the spreadsheet.

From: Vollmers, Valerie (Contractor)
Sent: Thursday, September 23, 2021 9:19 AM
To: Kenner, Candace [(b)(6)]@sec.gov
Cc: Mitchell, Martha [(b)(6)]@SEC.GOV
Subject: FOIA1180-Case#21-02535-FOIA NO HITS CALENDAR ONLY
Importance: High

Hello Candace,

This request has been completed. I have attached a spreadsheet. There are 0 Hits with this search criteria. There are calendar entries only for this request.

[(b)(5)]

Thanks



Valerie Vollmers E-Discovery Services

[(b)(6)]

[(b)(6)]@sec.gov

	A	B	C	D
1	Search Performed Using Discovery Accelerator			
2	Search Performed By: Valerie Vollmers			
3	ID	Months Requested		Months Searched
4	Case#21-02535-FOIA	45		45
5	FOIA1180-Case#21-02535-FOIA			
6				
7	FOIA1180-Case#21-02535-FOIA TO SEC.pst			
8	Dates		5/1/2017- 1/31/2021	
9	Custodian			TO
10	Search Hits		0	FROM
11				
12				
13	FOIA1180-Case#21-02535-FOIA FROM SEC.pst			
14	Dates		5/1/2017- 1/31/2021	
15	Custodian			FROM
16	Search Hits		0	TO
17				
18	Calendar Requested		YES	
19	Time -	4 Hours		
20				
21	Key			
22	X = Mail Search			
23	NR = Month was not requested			
24	Corrupt = Month was there but the data was corrupt			
25	Missing = Month was there but the user's mailbox was not available			
26	No Database = Month was not available			
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6	Search for all emails TO the SEC custodian FROM EMAIL DOMAIN Addresses defined for the period specified		
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9	Marc Berger	BergerM@sec.gov	
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11	Enterprise Ethereum Alliance	entethalliance.org	
12	Search for all emails FROM the SEC custodian FROM EMAIL DOMAIN Addresses for the period specified		
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To: Kenner, Candace [(b)(6)]@sec.gov
Cc: Mitchell, Martha [(b)(6)]@SEC.GOV
From: Vollmers, Valerie (Contractor)
Sent: Thur 9/23/2021 4:27:36 PM
Subject: FOIA1181-Case#21-02537-FOIA NO HITS CALENDAR ONLY
Received: Thur 9/23/2021 4:27:36 PM
FOIA1181-Case#21-02537-FOIA NO HITS Calendar ONLY.xlsx

Hello Candace,

This request has been completed. I have attached a spreadsheet. There are 0 Hits with this search criteria. There are calendar entries only for this request.

[(b)(5)]

Thanks



Valerie Vollmers E-Discovery Services

[(b)(6)]

[(b)(6)]@sec.gov

	A	B	C	D
1	Search Performed Using Discovery Accelerator			
2	Search Performed By: Valerie Vollmers			
3	ID	Months Requested		Months Searched
4	Case#21-02537-FOIA	44		44
5	FOIA1181-Case#21-02537-FOIA			
6				
7	FOIA1181-Case#21-02537-FOIA TO SEC.pst			
8	Dates		5/1/2017 - 12/31/2020	
9	Custodian			TO
10	Search Hits		0	
11				FROM
12				
13	FOIA1181-Case#21-02537-FOIA FROM SEC.pst			
14	Dates		5/1/2017 - 12/31/2020	
15	Custodian			FROM
16	Search Hits		0	
17				TO
18	Calendar Requested		YES	
19	Time -	4 Hours		
20				
21	Key			
22	X = Mail Search			
23	NR = Month was not requested			
24	Corrupt = Month was there but the data was corrupt			
25	Missing = Month was there but the user's mailbox was not available			
26	No Database = Month was not available			
27				2017
28				Jan
29				Feb
30				Mar
31				Apr
32				May
33				Jun
34				Jul
35				Aug
36				Sep
37				Oct
38				Nov
39				Dec
40				2018
41				Jan
42				Feb
43				Mar
44				Apr
45				May
46				Jun
47				Jul
48				Aug
49				Sep
50				Oct
51				Nov
52				Dec
53				2019
54				Jan
55				Feb
56				Mar
57				Apr
58				May
59				Jun
60				Jul
61				Aug
62				Sep
63				Oct
64				Nov
65				Dec
66				2020
67				Jan

	E	F	G
1			
2			
3	Months Found	Months Missing	In Progress
4	44		0
5			
6	Search for all emails TO the SEC custodian FROM EMAIL DOMAIN Addresses defined for the period specified		
7			
8			
9	Jay Clayton	ClaytonWJ@sec.gov	
10			
11	One River Asset Management	oneriveram.com	
12	Search for all emails FROM the SEC custodian FROM EMAIL DOMAIN Addresses for the period specified		
13			
14			
15	Jay Clayton	ClaytonWJ@sec.gov	
16			
17	One River Asset Management	oneriveram.com	
18			
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22			
23			
24			
25			
26			
27			
28	NR		
29	NR		
30	NR		
31	NR		
32	X		
33	X		
34	X		
35	X		
36	X		
37	X		
38	X		
39	X		
40			
41	X		
42	X		
43	X		
44	X		
45	X		
46	X		
47	X		
48	X		
49	X		
50	X		
51	X		
52	X		
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54	X		
55	X		
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57	X		
58	X		
59	X		
60	X		
61	X		
62	X		
63	X		
64	X		
65	X		
66			
67	X		

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3	Remainig	Percent Complete
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68				Feb
69				Mar
70				Apr
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72				Jun
73				Jul
74				Aug
75				Sep
76				Oct
77				Nov
78				Dec

	E	F	G
68	X		
69	X		
70	X		
71	X		
72	X		
73	X		
74	X		
75	X		
76	X		
77	X		
78	X		

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68	.	
69	.	
70	.	
71	.	
72	.	
73	.	
74	.	
75	.	
76	.	
77	.	
78	.	

To: Mitchell, Martha (b)(6) @SEC.GOV; (b)(6) @SEC.GOV
From: Kenner, Candace
Sent: Wed 12/15/2021 7:02:52 AM
Subject: FW: Attached Spreadsheet: FOIA1180-Case#21-02535-FOIA NO HITS CALENDAR ONLY and 21-02537-FOIA
Received: Wed 12/15/2021 7:02:52 AM

This one needs a status as well.

Candace Kenner
Office of Information and Technology
U.S Securities and Exchange Commission

(b)(6)

(b)(6) @sec.gov

From: Mandic, Frank <MandicF@SEC.GOV>
Sent: Friday, December 10, 2021 12:30 PM
To: Kenner, Candace (b)(6) @sec.gov>
Cc: Katilius, Lizzette <KatiliusL@SEC.GOV>
Subject: FW: Attached Spreadsheet: FOIA1180-Case#21-02535-FOIA NO HITS CALENDAR ONLY and 21-02537-FOIA

Hi Candace
Can you check into this?
Thanks
Frank

From: Mandic, Frank
Sent: Friday, December 3, 2021 9:07 AM
To: Kenner, Candace (b)(6) @sec.gov>
Cc: Katilius, Lizzette <KatiliusL@SEC.GOV>
Subject: RE: Attached Spreadsheet: FOIA1180-Case#21-02535-FOIA NO HITS CALENDAR ONLY and 21-02537-FOIA

GM Candace
Any words from them?
Thanks
Frank

From: Kenner, Candace (b)(6) @sec.gov>
Sent: Monday, November 29, 2021 1:22 PM
To: Mitchell, Martha (b)(6) @SEC.GOV>; (b)(6) @SEC.GOV>
Cc: Mandic, Frank <MandicF@SEC.GOV>
Subject: RE: Attached Spreadsheet: FOIA1180-Case#21-02535-FOIA NO HITS CALENDAR ONLY and 21-02537-FOIA

Good Afternoon,
Following up on this one.
Did OIT search for emails, calendar entries or both? Please clarify.
Thanks

Candace Kenner
Office of Information and Technology
U.S Securities and Exchange Commission

(b)(6)

(b)(6) @sec.gov

From: Kenner, Candace
Sent: Friday, November 19, 2021 7:39 AM
To: Mitchell, Martha (b)(6) @SEC.GOV>; (b)(6) @SEC.GOV>
Cc: 'Mandic, Frank (MandicF@sec.gov)' <MandicF@sec.gov>
Subject: FW: Attached Spreadsheet: FOIA1180-Case#21-02535-FOIA NO HITS CALENDAR ONLY and 21-02537-FOIA

Good Morning,
May I have the status of this request?
Thank you
Candace Kenner

Office of Information and Technology
U.S Securities and Exchange Commission

(b)(6)

(b)(6) @sec.gov

From: Mandic, Frank <MandicF@SEC.GOV>

Sent: Wednesday, November 17, 2021 9:59 AM

To: Kenner, Candace (b)(6)@sec.gov

Subject: FW: Attached Spreadsheet: FOIA1180-Case#21-02535-FOIA NO HITS CALENDAR ONLY and 21-02537-FOIA GM

Checking on this one.

From: Mandic, Frank

Sent: Tuesday, November 9, 2021 6:22 AM

To: Kenner, Candace (b)(6)@sec.gov

Subject: FW: Attached Spreadsheet: FOIA1180-Case#21-02535-FOIA NO HITS CALENDAR ONLY and 21-02537-FOIA Gm

Just checking on this one.

From: Mandic, Frank

Sent: Wednesday, November 3, 2021 9:24 AM

To: Kenner, Candace (b)(6)@sec.gov

Cc: Katilius, Lizzette <KatiliusL@SEC.GOV>

Subject: FW: Attached Spreadsheet: FOIA1180-Case#21-02535-FOIA NO HITS CALENDAR ONLY and 21-02537-FOIA GM Candace,

Did your office search for emails, calendar entries or both? Please clarify.

Thanks

Frank

From: Kenner, Candace (b)(6)@sec.gov

Sent: Wednesday, September 29, 2021 8:46 AM

To: Mandic, Frank <MandicF@SEC.GOV>

Cc: Katilius, Lizzette <KatiliusL@SEC.GOV>

Subject: RE: Attached Spreadsheet: FOIA1180-Case#21-02535-FOIA NO HITS CALENDAR ONLY and 21-02537-FOIA

Per our server team There are NO hits with the search criteria provided by the requestor. That is correct. Calendar entries were provided of the whole calendar and is not searchable by domains due to Microsoft technical constraints. The calendar must be redacted if it does not contain the criteria that the requestor has asked or is not applicable. Only FOIA can determine this.

Candace Kenner

Office of Information and Technology

U.S Securities and Exchange Commission

(b)(6)

(b)(6)@sec.gov

From: Mandic, Frank <MandicF@SEC.GOV>

Sent: Tuesday, September 28, 2021 4:40 PM

To: Kenner, Candace (b)(6)@sec.gov

Cc: Katilius, Lizzette <KatiliusL@SEC.GOV>

Subject: RE: Attached Spreadsheet: FOIA1180-Case#21-02535-FOIA NO HITS CALENDAR ONLY

Hi Candace,

I noticed below "There are 0 Hits with this search criteria. There are calendar entries only for this request". see yellow highlight. Are you saying there no hits at all?

Thanks

Frank

From: Kenner, Candace (b)(6)@sec.gov

Sent: Tuesday, September 28, 2021 4:17 PM

To: Mandic, Frank <MandicF@SEC.GOV>

Subject: FW: Attached Spreadsheet: FOIA1180-Case#21-02535-FOIA NO HITS CALENDAR ONLY

Importance: High

Frank,

No hits found on this request.

Thanks

Candace Kenner

Office of Information and Technology

U.S Securities and Exchange Commission

(b)(6)

(b)(6)@sec.gov

From: Vollmers, Valerie (Contractor) (b)(6)@SEC.GOV>
Sent: Thursday, September 23, 2021 4:05 PM
To: Kenner, Candace (b)(6)@sec.gov>
Cc: Mitchell, Martha <mitchellma@SEC.GOV>
Subject: Attached Spreadsheet: FOIA1180-Case#21-02535-FOIA NO HITS CALENDAR ONLY
Importance: High

Here is the spreadsheet.

From: Vollmers, Valerie (Contractor)
Sent: Thursday, September 23, 2021 9:19 AM
To: Kenner, Candace (b)(6)@sec.gov>
Cc: Mitchell, Martha (b)(6)@SEC.GOV>
Subject: FOIA1180-Case#21-02535-FOIA NO HITS CALENDAR ONLY
Importance: High

Hello Candace,

This request has been completed. I have attached a spreadsheet. There are 0 Hits with this search criteria. There are calendar entries only for this request.

(b)(5)

Thanks



Valerie Vollmers E-Discovery Services

(b)(6)

(b)(6)@sec.gov

Exhibit D

EMPOWER OVERSIGHT

Whistleblowers & Research



February 7, 2021

Via Electronic Transmission: FOIAPA@SEC.GOV

Office of FOIA Services
Securities and Exchange Commission
100 F Street, N.E.,
Mail Stop 2465
Washington, DC 20549

RE: Freedom of Information Act Appeal Numbers 22-00164-APPS (21-02531-FOIA), 22-00165-APPS (21-02532-FOIA), 22-00166-APPS (21-02535-FOIA), and 22-00167-APPS (21-02537-FOIA)

Dear General Counsel Coates:

Introduction

With respect to the Securities and Exchange Commission's ("SEC") Freedom of Information Act ("FOIA")¹ appeal numbers 22-00164-APPS (21-02531-FOIA), 22-00165-APPS (21-02532-FOIA), 22-00166-APPS (21-02535-FOIA), and 22-00167-APPS (21-02537-FOIA), Empower Oversight Whistleblowers & Research ("Empower Oversight")² offers the following supplemental information that arose following the filing of Empower Oversight's appeal on January 19, 2022. The information that follows is pertinent to the question whether the SEC's FOIA Research Specialists—in connection with the first, second, fifth, and seventh items of Empower Oversight's August 12, 2021 FOIA request (*i.e.*, Request Numbers 21-02531-FOIA, 21-02532-FOIA, 21-02535-FOIA, and 21-02537-FOIA)—conducted searches that were reasonably calculated to uncover all relevant documents. As detailed below, this supplemental information, which became known to Empower Oversight on January 28, 2022, and February 1, 2022, shows that the SEC's FOIA Research Specialists are well aware how to seek clarifying

¹ The FOIA is codified at 5 U.S.C. § 552.

² Empower Oversight is a nonpartisan, nonprofit educational organization, which is dedicated to enhancing independent oversight of government and corporate wrongdoing. It works to help insiders safely and legally report waste, fraud, abuse, corruption, and misconduct to the proper authorities, and seeks to hold those authorities accountable to act on such reports by, among other means, publishing information concerning the same.

information from FOIA requesters, and suggests that the SEC's FOIA Staff improperly limited its search for records responsive to the first, second, fifth, and seventh items of Empower Oversight's August 12th FOIA request to emails to/from three domains (*i.e.*, @stblaw.com, @entethalliance.org, and @oneriveram.com). This improperly limited search violates the legal precedent of the Court of Appeals for the District of Columbia Circuit ("Circuit Court").

Background

On August 12, 2021, Empower Oversight submitted to the SEC a FOIA request seeking eight categories of records relating to potential conflicts of interest of former high-level SEC officials. Specifically, Empower Oversight's FOIA request seeks:

1. All records relating to communications from May of 2017 through December of 2020 between William Hinman and any personnel from Simpson Thacher, including calendar entries, notes, or emails between Mr. Hinman and any email address from the domain "@stblaw.com";
2. All records relating to communications from May of 2017 through December of 2020 between Mr. Hinman and any personnel from the Enterprise Ethereum Alliance, including calendar entries, notes or emails between Mr. Hinman and any email address from the domain "@entethalliance.org";
3. All records relating to communications, including calendar entries, notes or emails between Mr. Hinman and any personnel in the SEC's Office of the Ethics Counsel regarding Mr. Hinman's continued payments from Simpson Thacher while employed at SEC, his potential recusals or conflicts related to his prior or future employment at Simpson Thacher, as well as his discussions and negotiations with Simpson Thacher regarding rejoining the firm;
4. All records relating to communications from May of 2017 through January of 2021 between Marc Berger and any personnel from Simpson Thacher, including calendar entries, notes or emails between Mr. Berger and any email address from the domain "@stblaw.com";
5. All records relating to communications from May of 2017 through January of 2021 between Mr. Berger and any personnel from the Enterprise Ethereum Alliance, including calendar entries, notes or emails between Mr. Berger and any email address from the domain "@entethalliance.org";
6. All records relating to communications, including calendar entries, notes, or emails between Mr. Berger and any personnel in the SEC's Office of the Ethics Counsel, regarding Mr. Berger's discussions and negotiations with Simpson Thacher, including all communications regarding potential recusals or conflicts related to his potential employment with Simpson Thacher;
7. All records relating to communication from May of 2017 through December of 2020 between Jay Clayton and personnel from One River Asset Management, including calendar entries, notes or emails between Mr. Clayton and any email address from the domain "@oneriveram.com"; and

8. All records of communications, including calendar entries, notes or emails between Mr. Clayton and personnel in the SEC's Office of the Ethics Counsel regarding Mr. Clayton's discussions and negotiations with One River Asset Management, including all communications regarding potential recusals or conflicts related to his potential employment with One River Asset Management.

On August 13, 2021, the SEC—via eight separate letters corresponding to each of the eight items of Empower Oversight's FOIA request (*i.e.*, items "1" through "8" set forth above)—acknowledged receipt of Empower Oversight's request; assigned unique tracking numbers to each of the eight items of the request (*i.e.*, FOIA Request Numbers 21-02531-FOIA through 21-02538-FOIA, respectively); and advised that one or more FOIA Research Specialist(s) would be assigned to address the request.

On December 8, 2021, Empower Oversight filed, in the United States District Court for the Eastern District of Virginia, a complaint for declaratory and injunctive relief to compel the SEC's compliance with its August 12th FOIA request.³ Empower Oversight's two-count complaint alleges that the SEC failed to comply with the FOIA's statutory deadlines and that it unlawfully withheld agency records. Empower Oversight seeks, among other things, an order requiring the SEC promptly to disclose all responsive, non-exempt records, an award of costs and reasonable attorney's fees, and other such relief as the Court deems just and proper.

On December 10, 2021, SEC FOIA Research Specialist Joel Hansen issued a "no records" response to the first and second items of Empower Oversight's August 12th FOIA request, which the SEC had designated as Request Numbers 21-02531-FOIA and 21-02532-FOIA. The operative text of FOIA Research Specialist Hansen's letter states:

Based on the information you provided in your letter, we conducted a thorough search of the SEC's various systems of records, but did not locate or identify any records responsive to your requests.

If you still have reason to believe that the SEC maintains the type of records you seek, please provide us with additional information, which could prompt another search. Otherwise, we conclude that no responsive records exist and we consider this request to be closed.

On December 21, 2021, SEC FOIA Research Specialist Frank Mandic issued a "no records" response to the seventh item of Empower Oversight's August 12th FOIA request, which the SEC had designated as Request Number 21-02537-FOIA. With the exception of revising the plural "requests" to a singular "request" at the end of the first paragraph, the operative text of SEC FOIA Research Specialist Mandic's December 21st letter is identical to the text of SEC FOIA Research Specialist Hansen's December 10th "no records" response, which is quoted above.

On January 5, 2022, SEC FOIA Research Specialist Mandic issued a "no records" response to the fifth item of Empower Oversight's August 12th FOIA request, which the SEC had designated as Request Number 21-02535-FOIA. With the exception of revising the plural "requests" to a singular "request" at the end of the first paragraph, the operative text of SEC FOIA Specialist Mandic's January 5th letter is identical to the text of SEC FOIA Specialist Hansen's December 10th "no records" response, which is quoted above.

³ Empower Oversight's complaint is docketed as Case Number 1:21-cv-01370.

On January 19, 2022, Empower Oversight appealed the SEC's "no records" responses to FOIA Request Numbers 21-02531-FOIA, 21-02532-FOIA, 21-02535-FOIA, and 21-02537-FOIA. The gravamen of Empower Oversight's appeal is that, based upon the circumstances, it is unable to determine whether the SEC's FOIA Research Specialists performed searches that were reasonably calculated to uncover all relevant documents, and it is thus forced to appeal the SEC's December 10th and 21st and January 5th "no records" responses.

In support of its appeal, Empower Oversight noted that agencies responding to FOIA requests are obligated to conduct searches that are "reasonably calculated to uncover all relevant documents."⁴ Conducting such searches involve both an understanding of the nature and scope of a FOIA request and knowledge of where information may be stored within an agency. In the former regard, courts have found searches to be sufficient when they are based on a reasonable interpretation of the scope of the subject matter of the request.⁵

Regarding the issue of knowledge of the contents of an agency's records storage platforms, an agency must show that it conducted a good faith, reasonable search of all platforms likely to possess the requested records.⁶ Agencies are prohibited from intentionally excluding from their searches of platforms or reviews of files that may contain responsive records.⁷

Moreover, Empower Oversight noted that, in spite of the SEC's burden of demonstrating that FOIA Research Specialists Hansen and Mandic had implemented search plans that were reasonably calculated to uncover all relevant documents,⁸ the SEC's December 10th response to Request Numbers 21-02531-FOIA and 21-02532-FOIA, its December 21st response to Request Number 21-02537-FOIA, and its January 5th response to Request Number 21-02535-FOIA, include no information concerning how the FOIA Research Specialists interpreted Empower Oversight's FOIA request or how they designed their searches to implement their interpretations of such request. Further, the FOIA Research Specialists did not contact Empower Oversight with any questions that they may have had concerning the FOIA requests, which implies that FOIA Research Specialists Hansen and Mandic believed that they understood the requests and

⁴ Weisberg v. DOJ, 705 F.2d 1344, 1351 (D.C. Cir. 1983).

⁵ Larson v. Dep't of State, 565 F.3d 857, 869 (D.C. Cir. 2009) (affirming the adequacy of a search based on the agency's reasonable determination regarding records being requested).

⁶ See, Marino v. DOJ, 993 F. Supp. 2d 1, 9 (D.D.C. 2013) (internal citation omitted).

⁷ See, Morley v. CIA, 508 F.3d 1108, 1119-20 (D.C. Cir. 2007) (holding that because the agency retained copies of the records transferred to NARA and concedes that some transferred records are likely to be responsive, it was obligated to search those records in response to the FOIA request); Jefferson v. DOJ, 168 F. App'x 448, 450 (D.C. Cir. 2005) (reversing the district court's finding of a reasonable search when the agency offered no plausible justification for searching only its investigative database and the agency essentially acknowledged that responsive files might exist in a separate database); Oglesby v. Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990) (holding that the agency may not limit its search to one record system if others are likely to contain responsive records).

⁸ Federal agencies shoulder the burden of demonstrating that their searches are reasonable, and they typically do this by describing their efforts in affidavits that they file in support of motions for summary judgment. See, e.g., Ethyl Corp. v. U.S. Environmental Protection Agency, 25 F.3d 1241 (4th Cir. 1994); Cochran v. Dep't of Homeland Security, 2019 WL 1433014 (D. Md. March 28, 2019). However, an agency may not rely upon vague or conclusory affidavits to show that it has conducted a reasonable search. See, Cochran, 2019 WL 1433014, p. *5 – *6. Rather, a satisfactory "affidavit must be reasonably detailed, 'setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched' so as to give the requesting party an opportunity to challenge the adequacy of the search." Ethyl Corp., 25 F.3d 1246 – 1247 (quoting Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990)).

that they had all of the information that they needed to design searches that satisfy the applicable FOIA standard.

The first and second items seek both communications between William Hinman, who is no longer employed by the SEC, and “any personnel” from Simpson Thatcher and the Enterprise Ethereum Alliance, as well as emails between Mr. Hinman and “any email address from the” domains @stblaw.com and @entethalliance.org. The fifth item seeks communications between Marc Berger, who is no longer employed by the SEC, and “any personnel” from the Enterprise Ethereum Alliance, as well as emails between Mr. Berger and “any email address from the” domain @entethalliance.org. And, the seventh item seeks communications between Jay Clayton, who is no longer employed by the SEC, and “any personnel” from One River Asset Management, as well as emails between Mr. Clayton and “any email address from the” domain @oneriveram.com.

Although the SEC FOIA Research Specialists should have been able to use ediscovery tools to locate emails between Mr. Hinman and “any email address” at the @stblaw.com and @entethalliance.org domains (and between Mr. Berger and “any email address” at the @entethalliance.org domain, and between Mr. Clayton and “any email address” at the @oneriveram.com domain), such a search would not necessarily have resulted in the capture of *all* communications between Mr. Hinman and “any personnel” of Simpson Thatcher and Enterprise Ethereum Alliance (or Mr. Berger and “any personnel” of Enterprise Ethereum Alliance, or Mr. Clayton and “any personnel” of One River Asset Management) because such personnel could have used domains other than @stblaw.com, @entethalliance.org, or @oneriveram.com to communicate. For example, they could have used personal email addresses. Thus, one would expect that as a beginning point, the SEC FOIA Research Specialists would have made some effort to learn the names of key Simpson Thatcher, Enterprise Ethereum Alliance, and One River Asset Management personnel to accomplish the “any personnel” portions of their searches. They did not request such names from Empower Oversight, nor did they confer with it about them. It is unclear whether they took any other steps internally to gather names needed to conduct appropriate searches.

On January 28, 2022, in connection with its litigation against the SEC in the Eastern District of Virginia, Empower Oversight participated in a conference call with the Assistant United States Attorney assigned to its complaint and Alexandra Verdi and Mark Tallarico, who were introduced as SEC officials. During the call, Ms. Verdi and Mr. Tallarico asserted that the SEC has reviewed the records searches, identified an error with them, and—after correcting for the error—had located approximately 1,000 pages of records responsive to Request Number 21-02531-FOIA and was still working on Request Number 21-02532-FOIA. However, they claimed that the SEC’s “no records” responses to Request Numbers 21-02535-FOIA and 21-02537-FOIA are accurate.

Following up on the statements of Ms. Verdi and Mr. Tallarico, Empower Oversight asked about the actual search terms (*e.g.*, names of Simpson Thatcher, Enterprise Ethereum Alliance, and One River Asset Management personnel) used to accomplish the SEC’s searches. Mr. Tallarico advised that the SEC has confined its searches to emails with the domain names @stblaw.com, @entethalliance.org, or @oneriveram.com. Consistent with its assertions in its January 19th appeal, which are summarized above, Empower Oversight pointed out that the scope of its requests extends beyond merely emails (*i.e.*, the requests also sought calendars and notes) and beyond merely emails from the three aforementioned domain names (*i.e.*, the requests also sought records of any other types of communications). Mr. Tallarico disagreed and

rejected Empower Oversight’s interpretation of its own FOIA requests. He even rejected or seemed not to comprehend the plain meaning of the word “including” as used in the request (*i.e.*, comprising part of, but not being limited to, the whole). Rather he argued for an interpretation of the requests that limited their scope to only the “including” phrase.

To the extent that Mr. Tallarico’s representations accurately depict good faith interpretations made, and searches conducted, by FOIA Research Specialists Hansen and Mandic (and whoever performed the follow-up searches described by Ms. Verdi and Mr. Tallarico), they demonstrate that the SEC’s FOIA Staff did not interpret Request Numbers 21-02531-FOIA, 21-02532-FOIA, 21-02535-FOIA, and 21-02537-FOIA reasonably, nor did they conduct searches associated with them in a manner that was “reasonably calculated to uncover all relevant documents.”⁹ Rather, they inappropriately curtailed the scope of their searches in a fashion that likely failed to capture requested documents.¹⁰

Later on January 28, 2022, to confirm how FOIA Research Specialists Hansen and Mandic searched for records responsive to Request Numbers 21-02531-FOIA, 21-02532-FOIA, 21-02535-FOIA, and 21-02537-FOIA, Empower Oversight filed a FOIA request for processing notes (*i.e.*, all records created by the SEC’s FOIA Research Specialists and other personnel that reflects the record systems and information platforms that were searched, and the search terms used when searching for responsive records) concerning those requests.

Specifically, Empower Oversight seeks in this new FOIA request the processing notes relating to:

1. The first and second items of Empower Oversight’s August 12th FOIA request, which the SEC designated as Request Numbers 21-02531-FOIA and 21-02532-FOIA, and SEC FOIA Research Specialist Joel Hansen’s December 10, 2021, “no records” response.
2. The seventh item of Empower Oversight’s August 12th FOIA request, which the SEC designated as Request Number 21-02537-FOIA, and SEC FOIA Research Specialist Frank Mandic’s December 21, 2021, “no records” response.
3. The fifth item of Empower Oversight’s August 12th FOIA request, which the SEC designated as Request Number 21-02535-FOIA, and SEC FOIA Research Specialist Frank Mandic’s January 5, 2022, “no records” response.

On January 31, 2022, the SEC—via three separate letters corresponding to the three items of Empower Oversight’s January 28th FOIA request (*i.e.*, items “1” through “3” set forth above)—acknowledged receipt of Empower Oversight’s request; assigned unique tracking numbers to each of the three items (*i.e.*, Request Numbers 22-01118-FOIA through 22-01120-FOIA, respectively); and advised that one or more FOIA Research Specialist(s) would be assigned to address the requests.

On February 1, 2022, FOIA Research Specialist Hansen—via a single email—requested clarification concerning Empower Oversight’s January 28th FOIA request, the Instructions

⁹ See, Weisberg, 705 F.2d at 1351.

¹⁰ See, Morley, 508 F.3d at 1119-20; Jefferson, 168 F. App’x at 450; Oglesby, 920 F.2d at 68.

section of which advised, “The time period of the requested records is August 12, 2020, through the present,” but the subject FOIA request was submitted one year later on August 12, 2021. FOIA Research Specialist Hansen stated:

We are seeking clarification to your above requests. In your request you have requested a search for records from August 12, 2020, through the present. Your original requests was submitted on August 12, 2021. Please confirm the date you wish us to search for responsive records.”

Empower Oversight rapidly confirmed that the Instructions section of its FOIA request included a typographic error and that the time period of the requested records is August 12, 2021, through the present, not August 12, 2020, through the present.

FOIA Research Specialist Hansen’s February 1st email demonstrates that he knows how to seek clarification if he has questions concerning the terms of a FOIA request. Hence, it tends to support the implication that he believed that he understood the requests in Request Numbers 21-02531-FOIA and 21-02532-FOIA (*i.e.*, he did not seek clarification from Empower Oversight). It also supports Mr. Tallarico’s representation that FOIA Research Specialists Hansen and Madric improperly limited their searches to only emails from three domain names and failed to conduct reasonable searches for other types of records relating to communications, such as emails to and from other addresses, calendar entries with the names of the entity or individuals from that entity, or notes of or about communications with individuals from those entities.

Thank you for your time and consideration. Please don’t hesitate to contact me with any questions.

Cordially,

[/Jason Foster/](#)
Jason Foster
Founder & President

Exhibit E

FOIA REQUEST REFERRAL

<p>RECORDS Please provide all documents responsive to the attached FOIA request.</p>	<p>DATE: August 20, 2021</p> <p>TO: Candace Kenner, Program Analyst Office of Information Technology</p> <p>FROM: Frank Mandic, Research Specialist FOIA Office x(202) 551-7510</p> <p>YOUR REPLY DUE: September 03, 2021</p>
<p>RECOMMENDATION If you believe that responsive information should be withheld, please indicate the specific records, or portion thereof, and referring to the FOIA exemptions, explain why the information should not be released.</p>	<p>FOIA REQUEST NO: 21-02535-FOIA</p> <p>REQUESTOR: Jason Foster</p> <p>SUBJECT: 5. all records relating to communications from May of 2017 through January of 2021 between Marc Berger and any personnel from the Enterprise Ethereum Alliance, including calendar entries, notes or emails between Mr. Berger and any email address from the domain “@entethalliance.org”</p> <p>CASE NO:</p> <p>REFERRED TO:</p> <p>COMMENTS: Please advise the volume and accessibility of the above subject. Thanks.</p>
<p>FEE INFORMATION Include with your response to this referral memo, a statement as to the number of hours of research spent on this request, along with the hourly rate (or SK rating) of the person(s) who processed the request.</p> <p>Please do not hesitate to contact the FOIA Office with any questions.</p>	

FOIA REQUEST REFERRAL

<p>RECORDS Please provide all documents responsive to the attached FOIA request.</p>	<p>DATE: August 20, 2021</p> <p>TO: Candace Kenner, Program Analyst Office of Information Technology</p> <p>FROM: Frank Mandic, Research Specialist FOIA Office x(202) 551-7510</p> <p>YOUR REPLY DUE: September 03, 2021</p>
<p>RECOMMENDATION If you believe that responsive information should be withheld, please indicate the specific records, or portion thereof, and referring to the FOIA exemptions, explain why the information should not be released.</p>	<p>FOIA REQUEST NO: 21-02537-FOIA</p> <p>REQUESTOR: Jason Foster</p> <p>SUBJECT: Item: 7 all records relating to communication from May of 2017 through December of 2020 between Jay Clayton and personnel from One River Asset Management, including calendar entries, notes or emails between Mr. Clayton and any email address from the domain "@oneriveram.com";</p> <p>CASE NO:</p> <p>REFERRED TO: OGC</p> <p>COMMENTS: Please advise of the volume and accessibility of the above-referenced subject. Thanks.</p>
<p>FEE INFORMATION Include with your response to this referral memo, a statement as to the number of hours of research spent on this request, along with the hourly rate (or SK rating) of the person(s) who processed the request.</p> <p>Please do not hesitate to contact the FOIA Office with any questions.</p>	

FOIA REQUEST REFERRAL

<p>RECORDS Please provide all documents responsive to the attached FOIA request.</p>	<p>DATE: August 20, 2021</p> <p>TO: Candace Kenner, Program Analyst Office of Information Technology</p> <p>FROM: Joel Hansen, Research Specialist FOIA Office x(202) 551-8377</p> <p>YOUR REPLY DUE: September 03, 2021</p>
<p>RECOMMENDATION If you believe that responsive information should be withheld, please indicate the specific records, or portion thereof, and referring to the FOIA exemptions, explain why the information should not be released.</p>	<p>FOIA REQUEST NO: 21-02532-FOIA</p> <p>REQUESTOR: Jason Foster</p> <p>SUBJECT: All records relating to communications from May of 2017 through December of 2020 between William Hinman and any personnel from the Enterprise Ethereum Alliance, including calendar entries, notes or emails between Mr. Hinman and any email address from the domain "@entethalliance.org".</p> <p>CASE NO:</p> <p>REFERRED TO:</p> <p>COMMENTS: We are seeking confirmation as to whether responsive records for the above subject exist. If so, please confirm the volume and accessibility of the potentially responsive records.</p>
<p>FEE INFORMATION Include with your response to this referral memo, a statement as to the number of hours of research spent on this request, along with the hourly rate (or SK rating) of the person(s) who processed the request.</p> <p>Please do not hesitate to contact the FOIA Office with any questions.</p>	

FOIA REQUEST REFERRAL

<p>RECORDS Please provide all documents responsive to the attached FOIA request.</p>	<p>DATE: August 20, 2021</p> <p>TO: Candace Kenner, Program Analyst Office of Information Technology</p> <p>FROM: Joel Hansen, Research Specialist FOIA Office x(202) 551-8377</p> <p>YOUR REPLY DUE: September 03, 2021</p>
<p>RECOMMENDATION If you believe that responsive information should be withheld, please indicate the specific records, or portion thereof, and referring to the FOIA exemptions, explain why the information should not be released.</p>	<p>FOIA REQUEST NO: 21-02531-FOIA</p> <p>REQUESTOR: Jason Foster</p> <p>SUBJECT: All records relating to communications from May of 2017 through December of 2020 between William Hinman and any personnel from Simpson Thacher, including calendar entries, notes, or emails between Mr. Hinman and any email address from the domain "@stblaw.com."</p> <p>CASE NO:</p> <p>REFERRED TO:</p> <p>COMMENTS: We are seeking confirmation as to whether responsive records for the above subject exist. If so, please confirm the volume and accessibility of the potentially responsive records.</p>
<p>FEE INFORMATION Include with your response to this referral memo, a statement as to the number of hours of research spent on this request, along with the hourly rate (or SK rating) of the person(s) who processed the request.</p> <p>Please do not hesitate to contact the FOIA Office with any questions.</p>	

FOIA REQUEST REFERRAL

<p>RECORDS Please provide all documents responsive to the attached FOIA request.</p>	<p>DATE: August 20, 2021</p> <p>TO: Candace Kenner, Program Analyst Office of Information Technology</p> <p>FROM: Frank Mandic, Research Specialist FOIA Office x(202) 551-7510</p> <p>YOUR REPLY DUE: September 03, 2021</p>
<p>RECOMMENDATION If you believe that responsive information should be withheld, please indicate the specific records, or portion thereof, and referring to the FOIA exemptions, explain why the information should not be released.</p>	<p>FOIA REQUEST NO: 21-02535-FOIA</p> <p>REQUESTOR: Jason Foster</p> <p>SUBJECT: 5. all records relating to communications from May of 2017 through January of 2021 between Marc Berger and any personnel from the Enterprise Ethereum Alliance, including calendar entries, notes or emails between Mr. Berger and any email address from the domain “@entethalliance.org”</p> <p>CASE NO:</p> <p>REFERRED TO:</p> <p>COMMENTS: Please advise the volume and accessibility of the above subject. Thanks.</p>
<p>FEE INFORMATION Include with your response to this referral memo, a statement as to the number of hours of research spent on this request, along with the hourly rate (or SK rating) of the person(s) who processed the request.</p> <p>Please do not hesitate to contact the FOIA Office with any questions.</p>	

To: de la Rosa, Chris (b)(6), Kumar, Vimal (b)(6) SEC.GOV, Mitchell, Martha (b)(6) @SEC.GOV
From: eDiscovery Requests
Sent: Thur 8/26/2021 8:16:52 AM
Subject: FW: Office of Information Technology - Referral Memo - 21-02535-FOIA
Received: Thur 8/26/2021 8:16:52 AM
JFoster21-02535-FOIA.pdf
Office of Information Technology - Referral Memo.docx

From: Kenner, Candace
Sent: Thursday, 26 August 2021 08:16:50 (UTC-05:00) Eastern Time (US & Canada)
To: de la Rosa, Chris; eDiscovery Requests; Mitchell, Martha
Cc: Hossain, Akter
Subject: FW: Office of Information Technology - Referral Memo - 21-02535-FOIA

Good Morning,

The attached FOIA request is to search Outlook for email correspondence logs that include the following search criteria noted below.

Due Date:

09/03/2021

To/From:

Marc Berger

Date Range:

May of 2017 through January of 2021

Key Words:

all records relating to communications from May of 2017 through January of 2021 between Marc Berger and any personnel from the Enterprise Ethereum Alliance, including calendar entries, notes or emails between Mr. Berger and any email address from the domain “@entethalliance.org”

Please review the attachments above for more information.

Thanks,

Candace Kenner

Office of Information and Technology

U.S Securities and Exchange Commission

(b)(6)

(b)(6)@sec.gov

From: mandicf@sec.gov <mandicf@sec.gov>

Sent: Friday, August 20, 2021 6:40 AM

To: #FOIA-OIT <(b)(6)@SEC.GOV>

Subject: Office of Information Technology - Referral Memo - 21-02535-FOIA

Request for Documents for Request # '21-02535-FOIA'. Your response due date is: 9/3/2021 12:00:00 AM Message from SENDER: Request for Documents for Request # '21-02535-FOIA'. Due Date: 09/03/2021.

To: de la Rosa, Chris (b)(6) [REDACTED]@SEC.GOV, Kumar, Vimal (b)(6) [REDACTED]@SEC.GOV, Mitchell, Martha (b)(6) [REDACTED]@SEC.GOV
From: eDiscovery Requests
Sent: Thur 8/26/2021 8:18:33 AM
Subject: FW: Office of Information Technology - Referral Memo - 21-02537-FOIA
Received: Thur 8/26/2021 8:18:33 AM
JFoster21-02537-FOIA.pdf
Office of Information Technology - Referral Memo.docx

From: Kenner, Candace
Sent: Thursday, 26 August 2021 08:18:31 (UTC-05:00) Eastern Time (US & Canada)
To: de la Rosa, Chris; eDiscovery Requests; Mitchell, Martha
Cc: Hossain, Akter
Subject: FW: Office of Information Technology - Referral Memo - 21-02537-FOIA

Good Morning,

The attached FOIA request is to search Outlook for email correspondence logs that include the following search criteria noted below.

Due Date:

09/03/2021

To/From:

Jay Clayton

Date Range:

May of 2017 through December of 2020

Key Words:

All records relating to communication from May of 2017 through December of 2020 between Jay Clayton and personnel from One River Asset Management, including calendar entries, notes or emails between Mr. Clayton and any email address from the domain “@oneriveram.com”; Please review the attachments above for more information.

Thanks,

Candace Kenner

Office of Information and Technology

U.S Securities and Exchange Commission

(b)(6) [REDACTED]

(b)(6) [REDACTED]@sec.gov

From: mandicf@sec.gov <mandicf@sec.gov>

Sent: Friday, August 20, 2021 7:55 AM

To: (b)(6) [REDACTED]@SEC.GOV>

Subject: Office of Information Technology - Referral Memo - 21-02537-FOIA

Request for Documents for Request # '21-02537-FOIA'. Your response due date is: 9/3/2021 12:00:00 AM Message from SENDER: Request for Documents for Request # '21-02537-FOIA'. Due Date: 09/03/2021.

To: de la Rosa, Chris (b)(6) [REDACTED]@SEC.GOV, Kumar, Vimal (b)(6) [REDACTED]@SEC.GOV, Mitchell, Martha (b)(6) [REDACTED]@SEC.GOV
From: eDiscovery Requests
Sent: Thur 8/26/2021 8:21:30 AM
Subject: FW: Office of Information Technology - Referral Memo - 21-02532-FOIA
Received: Thur 8/26/2021 8:21:31 AM
JFoster21-02532-FOIA.pdf
Office of Information Technology - Referral Memo.docx

From: Kenner, Candace
Sent: Thursday, 26 August 2021 08:21:29 (UTC-05:00) Eastern Time (US & Canada)
To: de la Rosa, Chris; eDiscovery Requests; Mitchell, Martha
Cc: Hossain, Akter
Subject: FW: Office of Information Technology - Referral Memo - 21-02532-FOIA

Good Morning,

The attached FOIA request is to search Outlook for email correspondence logs that include the following search criteria noted below.

Due Date:

09/03/2021

To/From:

William Hinman

Date Range:

May of 2017 through December of 2020

Key Words:

All records relating to communications from May of 2017 through December of 2020 between William Hinman and any personnel from the Enterprise Ethereum Alliance, including calendar entries, notes or emails between Mr. Hinman and any email address from the domain “@entethalliance.org”.

Please review the attachments above for more information.

Thanks,

*Candace Kenner
Office of Information and Technology
U.S Securities and Exchange Commission*

(b)(6) [REDACTED]

(b)(6) [REDACTED]@sec.gov

From: hansenjo@sec.gov <hansenjo@sec.gov>

Sent: Friday, August 20, 2021 9:18 AM

To: (b)(6) [REDACTED]@SEC.GOV>

Subject: Office of Information Technology - Referral Memo - 21-02532-FOIA

Request for Documents for Request # '21-02532-FOIA'. Your response due date is: 9/3/2021 12:00:00 AM Message from SENDER: Request for Documents for Request # '21-02532-FOIA'. Due Date: 09/03/2021.

To: de la Rosa, Chris (b)(6), Kumar, Vimal (b)(6)@SEC.GOV, Mitchell, Martha (b)(6)@SEC.GOV
From: eDiscovery Requests
Sent: Thur 8/26/2021 8:22:56 AM
Subject: FW: Office of Information Technology - Referral Memo - 21-02531-FOIA
Received: Thur 8/26/2021 8:22:56 AM
JFoster21-02531-FOIA.pdf
Office of Information Technology - Referral Memo.docx

From: Kenner, Candace
Sent: Thursday, 26 August 2021 08:22:55 (UTC-05:00) Eastern Time (US & Canada)
To: de la Rosa, Chris; eDiscovery Requests; Mitchell, Martha
Cc: Hossain, Akter
Subject: FW: Office of Information Technology - Referral Memo - 21-02531-FOIA

Good Morning,

The attached FOIA request is to search Outlook for email correspondence logs that include the following search criteria noted below.

Due Date:

09/03/2021

To/From:

William Hinman

Date Range:

May of 2017 through December of 2020

Key Words:

All records relating to communications from May of 2017 through December of 2020 between William Hinman and any personnel from Simpson Thacher, including calendar entries, notes, or emails between Mr. Hinman and any email address from the domain "@stblaw.com.

Please review the attachments above for more information.

Thanks,

Candace Kenner

Office of Information and Technology

U.S Securities and Exchange Commission

(b)(6)

(b)(6)@sec.gov

From: hansenjo@sec.gov <hansenjo@sec.gov>

Sent: Friday, August 20, 2021 9:21 AM

To: (b)(6)@SEC.GOV>

Subject: Office of Information Technology - Referral Memo - 21-02531-FOIA

Request for Documents for Request # '21-02531-FOIA'. Your response due date is: 9/3/2021 12:00:00 AM Message from SENDER: Request for Documents for Request # '21-02531-FOIA'. Due Date: 09/03/2021.

Exhibit F

To: Hinman, William[hinmanw@SEC.GOV]
Cc: Seaman, Michael P (b)(6) @SEC.GOV]
From: Kennedy, Kevin
Sent: 2017-06-06T13:43:19-04:00
Importance: Normal
Subject: RE: Possible Berkeley/ SEC Conference
Received: 2017-06-06T13:43:21-04:00

Sounds great. Seeing Annie, Bruce and Ollie for dinner next week – should be fun. Talk soon.

Kevin Kennedy
Simpson Thacher & Bartlett LLP
2475 Hanover Street
Palo Alto, CA 94304

T: +1-650-251-5130
kkennedy@stblaw.com

From: Hinman, William [mailto:hinmanw@SEC.GOV]
Sent: Tuesday, June 06, 2017 10:39 AM
To: Kennedy, Kevin
Cc: Seaman, Michael P.
Subject: RE: Possible Berkeley/ SEC Conference

Thanks Kevin,
One of my counsel, Michael Seaman, is reaching out to coordinate on this. You will be hearing from him shortly.
Hope all is well back there.
Best
Bill

From: Kennedy, Kevin [mailto:kkennedy@stblaw.com]
Sent: Tuesday, June 06, 2017 1:36 PM
To: Hinman, William
Subject: RE: Possible Berkeley/ SEC Conference

Greetings Mr. Hinman. Just wanted to follow up on this and see if there's anything we can do to push things along or firm up dates from our end. Hope you're well.

Best.

KK

Kevin Kennedy
Simpson Thacher & Bartlett LLP

To: Hinman, William[hinmanw@SEC.GOV]
Cc: Seaman, Michael P (b)(6) @SEC.GOV]
From: Kennedy, Kevin
Sent: 2017-06-06T13:43:19-04:00
Importance: Normal
Subject: RE: Possible Berkeley/ SEC Conference
Received: 2017-06-06T13:43:21-04:00

Sounds great. Seeing (b)(6) for dinner next week – should be fun. Talk soon.

Kevin Kennedy
Simpson Thacher & Bartlett LLP
2475 Hanover Street
Palo Alto, CA 94304

T: +1-650-251-5130
kkennedy@stblaw.com

From: Hinman, William [mailto:hinmanw@SEC.GOV]
Sent: Tuesday, June 06, 2017 10:39 AM
To: Kennedy, Kevin
Cc: Seaman, Michael P.
Subject: RE: Possible Berkeley/ SEC Conference

Thanks Kevin,
One of my counsel, Michael Seaman, is reaching out to coordinate on this. You will be hearing from him shortly.
Hope all is well back there.
Best
Bill

From: Kennedy, Kevin [mailto:kkennedy@stblaw.com]
Sent: Tuesday, June 06, 2017 1:36 PM
To: Hinman, William
Subject: RE: Possible Berkeley/ SEC Conference

Greetings Mr. Hinman. Just wanted to follow up on this and see if there's anything we can do to push things along or firm up dates from our end. Hope you're well.

Best.

KK

Kevin Kennedy
Simpson Thacher & Bartlett LLP