

# EMPOWER OVERSIGHT

*Whistleblowers & Research*



September 17, 2021

VIA ELECTRONIC TRANSMISSION: [foiapa@sec.gov](mailto:foiapa@sec.gov)

John Coates, General Counsel  
c/o Office of FOIA Services  
Securities and Exchange Commission  
100 F Street, N.E.,  
Washington, DC 20549

**RE: Freedom of Information Act Appeal:**  
Request Numbers: 21-02531-FOIA through 21-0538-FOIA

Dear General Counsel Coates:

## **Introduction**

Empower Oversight Whistleblowers & Research (“Empower Oversight”)<sup>1</sup> appeals the SEC’s determination that it is an “other use” requester and the SEC’s denial of its request for a fee waiver. As set forth below, the FOIA Officer’s conclusory determination and denial are incorrect. Under applicable law the SEC should have determined that Empower Oversight is a news media requester. The SEC FOIA Officer issued a swift and summary denial, without making an effort to request clarifying information.<sup>2</sup> A more thorough and fair evaluation would have found that the records sought concern operations or activities of the SEC and that the disclosable portions of the requested records would inform the public’s understanding of the SEC’s operations and activities.<sup>3</sup> Empower Oversight’s request meets the standards applicable to the fee waiver decisions.

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<sup>1</sup> 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.

<sup>2</sup> See 17 C.F.R. § 200.80(g)(1).

<sup>3</sup> *I.e.*, A reasonably broad audience of persons interested in the subject matter of Empower Oversight’s FOIA request.

## 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 officials at the SEC, and requesting a fee waiver (attached). The eight categories of records sought by Empower Oversight's were narrowly devised to shed light on:

- The officials' communications with potential employers that held financial interests in particular cryptocurrencies that the SEC was evaluating for purposes of federal supervision, and
- Whether the officials sought advice from the SEC's Office of Ethics concerning such communications.

On August 13, 2021, the SEC—via eight separate letters—acknowledged receipt of Empower Oversight's FOIA request. Parallel to the eight categories of records identified in Empower Oversight's request, the SEC assigned a unique FOIA request number (*i.e.*, SEC FOIA Request Numbers: 21-02531-FOIA through 21-0538-FOIA) to each of the eight categories of records.

On August 16, 2021, the SEC advised via a single letter that it classifies Empower Oversight as an "other use" requester and denies its request for a fee waiver (attached). The letter from the SEC's FOIA Officer includes zero analysis of either its classification or its fee waiver denial. Instead the FOIA Officer merely recites applicable standards and renders conclusory remarks. Regarding the SEC's classification of Empower Oversight, the FOIA Officer states "Under the FOIA, you are considered an 'Other Use' requester"—without any explanation or reasons offered.

With respect to the SEC's denial of Empower Oversight's fee waiver request, the FOIA Officer merely recites the standard for fee waivers included in the FOIA at 5 U.S.C. § 552(a)(4)(A)(iii)—which is, whether the requested information is likely to contribute to public understanding of the operations and activities of the government, and whether disclosure of the requested information is not primarily in the commercial interest of the requester—and the SEC's six-factor regulatory approach for applying the statutory standard.<sup>4</sup> The FOIA Officer then concludes without any support: "Based on my review of your request, I determined that your fee waiver request is deficient because it does not provide substantive information relating to any of the six factors. Therefore, I am denying your request for a fee waiver."

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<sup>4</sup> SEC's implementation of the FOIA standard for fee waivers is published at 17 C.F.R. § 200.80(g)(12).

## The SEC Should Have Classified Empower Oversight as a News Media Requester

The slogan on Empower Oversight’s website is “Accountability and public integrity through the power of information.” In its FOIA request, Empower Oversight plainly advised that it is a nonpartisan, nonprofit educational organization as defined under Section 501(c)(3) of the Internal Revenue Code, and it is dedicated to enhancing independent oversight of government and corporate wrongdoing. The request further advised that Empower Oversight works to help government and corporate insiders safely and legally report waste, fraud, abuse, corruption, and misconduct to the proper authorities, and “to hold those authorities accountable to act on those reports by, among other means, ***publishing information to inform the public.***” (See first paragraph of the attached FOIA request. (Emphasis added.))

Although Empower Oversight publicly launched only a couple of months ago on July 2, 2021, it has built a steadily expanding public following through digital media, primarily email, Twitter, and its website. On its website, Empower Oversight issues “press releases” describing its activities and findings. It also emails research papers, FOIA updates, and news accounts of its activities to an address list more than 9,400 members of the press, Capitol Hill staff, and key thought leaders. Between the period immediately before Empower Oversight’s launch, through August 10, 2021, Empower Oversight delivered more than 78,000 emails and more than 39,000 of the recipients of those emails clicked on at least one of the links included in them.

Additionally, Empower Oversight maintains a presence on social media that is driven largely by Twitter postings on the account of its founder and president, Jason Foster (@JsnFostr). Since the founding of Empower Oversight, Mr. Foster generated 20 Twitter postings relevant to the organization’s mission, activities, and findings. These postings garnered about 850,000 impressions, and two of them earned over 100,000 impressions each.<sup>5</sup> Further, his postings have been “re-tweeted” by contributors, journalists, and editors with *The Federalist*, Newsmax, Fox Nation, and *The Washington Free Beacon*, among others. Moreover, Mr. Foster has contributed editorial content to *The Wall Street Journal*, *Newsweek*, *The Washington Examiner*, *The Hill*, and *The Federalist*.<sup>6</sup>

According to the FOIA, “a representative of the news media” means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the information into a distinct work, and distributes that work to

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<sup>5</sup> In this context, “impression” means that someone viewed the posting, even briefly.

<sup>6</sup> See <https://empowr.us/leadership/>; <http://jasonfoster/substack.com>.

an audience. *See* 5 U.S.C. § 552(a)(4)(A)(ii)(III); *accord*, Cause of Action v. FTC, 799 F.3d 1108, 1120 (D.C. Cir. 2015).

Empower Oversight satisfies the first two prongs of FOIA’s news media standard: (1) it gathers information of potential interest to a segment of the public, and (2) it uses its editorial skills to turn the information into a distinct work. It was established to hold authorities accountable to act on whistleblower reports of waste fraud abuse and misconduct by, among other means, publishing and informing the public.

These activities are sufficient under the applicable standard. There is no basis to require that an entity, be “organized and operated” expressly and solely to disseminate news to the public in a traditional fashion in order to qualify as a representative of the news media. *See Cause of Action*, 799 F.3d at 1125 (holding that there is no basis for adding an “organized and operated” requirement to statutory definition after Congress omitted such requirement, originally derived from 1987 OMB Guidelines, in 2007 FOIA amendments). What is important is what the news media requester does and intends to do. Empower Oversight gathers information about potential wrong-doing, and publicizes that information, and informs the public about the authorities’ response, or lack of response in hopes of enhancing public integrity.

With respect to its underlying FOIA request, Empower Oversight seeks to gather from the SEC documents regarding potential conflicts of interest by former high-level SEC officials relating to the SEC’s emerging regulatory approach to cryptocurrencies. It has also publicly solicited any insiders wishing assistance in making a protected disclosure on the same issues. The specific documents Empower Oversight seeks from the SEC are narrowly focused on informing the public about the appearance that former SEC officials may have picked cryptocurrency winners and losers consistent with the financial interests of entities that employed them before and after their stint at the SEC.

Empower Oversight intends to evaluate the materials that the SEC produces in response to its FOIA request and to create original work discussing the contents of such materials and the public integrity concerns that arise from this matter. Consistent with that intent, the District of Columbia Circuit has made it clear that a requester need not gather information from multiple sources to qualify as a news media representative; rather, a “distinct work” can be created based solely on FOIA-released documents. *See Cause of Action*, 799 F.3d at 1121 – 122 (explaining that “[a] substantive press release or editorial comment can be a distinct work based on the underlying material, just as a newspaper article about the same documents would be — and its composition can involve ‘a significant degree of editorial discretion’”).

As an example of the editorial content Empower Oversight has already disseminated, its August 16<sup>th</sup> press release associated with the underlying FOIA request advises its audience:

From May 2017 to December 2020, senior SEC official William Hinman reportedly participated in the SEC's regulation of cryptocurrencies while receiving millions of dollars from his former employer, the law firm Simpson Thacher. Simpson Thacher is a part of the Enterprise Ethereum Alliance, an industry organization whose objective is to drive the use of Enterprise Ethereum. Hinman, while in his capacity at the SEC, declared that the Ethereum cryptocurrency, Ether, was not a security, causing its value to rise significantly.

Later, the SEC sued one of Ethereum's competitors, Ripple, declaring its cryptocurrency, XRP, was a security. Shortly thereafter, XRP's value plummeted 25%. After Hinman left the SEC in December of 2020, he returned to Simpson Thacher as a partner. The leader of the SEC division that brought the XRP lawsuit, Marc Berger, similarly left the SEC for Simpson Thacher.

Additionally, there are potential concerns regarding former SEC Chairman Jay Clayton's handling of cryptocurrency issues at the SEC. As with Mr. Hinman and Ether, while at the SEC, Mr. Clayton declared that Bitcoin wasn't a security, and its value rose. The SEC's lawsuit against Ripple was filed at the end of Mr. Clayton's tenure at the commission. Once he left the SEC, Mr. Clayton joined One River Asset Management, a cryptocurrency hedge fund exclusively focused on Bitcoin and Ether.

Empower Oversight also satisfies the third prong of the standard: distribution of editorial content to an audience. With respect to the means of distribution used by a news media requester under the FOIA, the statute notes that as methods of news delivery evolve alternatives to traditional print and broadcast news media shall be considered to be news media entities for purposes of the FOIA's fee provisions. *See* 5 U.S.C. § 552(a)(4)(A)(ii)(III). Accordingly, the District of Columbia Circuit has opined that "posting content to a public website can qualify as a means of distributing it— notwithstanding that readers have to affirmatively access the content, rather than have it delivered to their doorsteps or beamed into their homes unbidden." *See Cause of Action*, 799 F.3d at 1123.

Empower Oversight posts on its website content, such as its August 16, 2021 press release describing the basis for this FOIA request, raising questions concerning

the activities of the three former high-level SEC officials.<sup>7</sup> Empower Oversight also uses emails to its list of interested parties and Twitter postings to educate the public about the content on its website, which largely concerns government operations and activities and its efforts to obtain information about the same.<sup>8</sup>

Furthermore, the District of Columbia Circuit has noted that disseminating editorial content to even a relatively small readership will suffice because the size of the “audience” is not prescribed in the FOIA. *See Cause of Action*, 799 F.3d at 1122, 1124 (noting that “‘an audience’ contemplates that the work is distributed to more than a single person . . . [b]ut beyond requiring that a person or entity have readers (or listeners or viewers), the statute does not specify what size the audience must be”). Empower Oversight’s publishing via email, its website, and social media more than satisfies the requirement that it publish to an audience of any size. Moreover, as a sign of the significant public interest in the SEC’s timely and complete response to the request, traffic to Empower Oversight’s website spiked on the day that it published the August 16<sup>th</sup> FOIA update on this request. The tweet that linked to the press release had more than 236,000 impressions and more than 4,400 engagements.<sup>9</sup>

### **SEC Should Have Granted Empower Oversight’s Request for a Fee Waiver**

In contrast to the SEC’s FOIA Officer assertion that the FOIA request “does not provide substantive information relating to any of the [SEC’s] six factors,” a cursory review of the request reveals the FOIA Officer’s claim to be false. The FOIA Officer’s failure to appreciate that the FOIA request met the applicable standard on its face is aggravated by her failure to exercise the SEC’s right to request clarifying information to resolve any questions that she may have had.<sup>10</sup>

Empower Oversight’s FOIA request furthers the public interest in examining further the appearance that conflicted SEC officials may be picking cryptocurrency winners and losers based on the financial interests of their once or future employers. The request seeks information that would either confirm, *or dispel*, the appearance of potential conflicts of interest involving former high-level officials at the SEC. Failure to timely and satisfactorily respond would only aggravate the existing public skepticism about these issues.

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<sup>7</sup> See <https://empowr.us/empower-oversight-seeks-information-on-conflicts-of-interest-in-cryptocurrency-at-sec/>.

<sup>8</sup> See [https://twitter.com/EMPOWR\\_us/status/1427330213038465024](https://twitter.com/EMPOWR_us/status/1427330213038465024).

<sup>9</sup> As used in this context, an “engagement” is a higher level of interaction than an “impression.” To qualify as an engagement, someone has to not only view a posting but also has to stop scrolling through his/her Twitter account, click on the posting, read it (*i.e.*, spend measurable time viewing it), and then actively interact with it (*i.e.*, forward it, “like” it, click on Empower Oversight profile, etc.).

<sup>10</sup> See 17 C.F.R. § 200.80(g)(1).



To avoid any misunderstanding about the public integrity basis for its FOIA request, Empower Oversight comprehensively explained the facts in the request itself, as quoted extensively above. It has been publicly reported that William Hinman worked as the Director of the Division of Corporate Finance at the SEC from May 2017 through December of 2020. Previously, Mr. Hinman had been a partner at the law firm Simpson Thacher, and he reportedly continued to receive millions of dollars from the firm while he was employed at the SEC. Further, Simpson Thacher reportedly is a member of the Enterprise Ethereum Alliance, which describes itself as an “industry organization whose objective is to drive the use of Enterprise Ethereum.”

In a June 2018 speech in his official capacity as an SEC official, Mr. Hinman declared that the Ethereum cryptocurrency, Ether, is not a security, stating that “based on my understanding of the present state of Ether, the Ethereum network and its decentralized structure, current offers and sales of Ether are not securities transactions.” After his declaration, Ether’s value has risen significantly.

When Mr. Hinman departed the SEC in December of 2020, he rejoined Simpson Thacher as a partner. That same month, the SEC filed a lawsuit against one of Ethereum’s rivals, Ripple, alleging that its XRP cryptocurrency was a security, such that the company’s offering and sales of XRP had been in violation of federal securities laws. The value of XRP fell 25% immediately after the announcement of the SEC lawsuit. Of note, the leader of the SEC’s Enforcement Division that brought the suit, Marc Berger, left the SEC shortly thereafter, and joined Mr. Hinman as a partner at Simpson Thacher.

Additionally, there are potential concerns regarding former SEC Chairman Jay Clayton. As with Mr. Hinman and Ether, while at the SEC, Mr. Clayton publicly stated that Bitcoin is not a security, and the value of Bitcoin has risen. Moreover, the SEC’s lawsuit against Ripple was filed at the end of Mr. Clayton’s tenure there. Shortly after he left, he reportedly joined One River Asset Management, a cryptocurrency hedge fund that focuses exclusively on Bitcoin and Ether—not XRP.

Public oversight of the integrity of government operations is the essence of “public interest” under the FOIA, one of the purposes of which is to “check against corruption and to hold the governors accountable to the governed.” NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978); *see also*, Multi Ag Media LLC v. USDA, 515 F.3d 1224, 1232 (D.C. Cir. 2008). The text of Empower Oversight’s FOIA request is filled with details that raise significant questions about the integrity of the SEC’s operations and activities relative to its emerging regulatory approach to cryptocurrency (*See* the attached FOIA request at pp. 1 - 2), and yet the SEC’s FOIA Officer claims that Empower Oversight provided *no* substantive information responsive to the “six factors” that SEC considers to resolve fee waiver requests.

The FOIA Officer's conclusion is clearly erroneous.

First, her conclusion is inconsistent with her classification of Empower Oversight as an "other use requester" entitled to two hours of search time and 100 pages duplicated records for free. Under the SEC's regulation at 17 C.F.R. §§ 200.80(g)(3)(i) and 200.80(g)(4)(ii), to be entitled two hours of search time and 100 pages for free, one cannot have a commercial interest in the records. And, yet, the SEC's FOIA Officer claims, in connection with Empower Oversight's request for a fee waiver, that it provided no "substantive information relating to any of the [SEC's] six factors" (emphasis added). That obviously cannot be reconciled given that two of those six factors bear on commercial interest, necessary to the FOIA Officer's "other use requester" determination. *See* 17 C.F.R. § 200.80(g)(12)(iii)(A) –(B).

The FOIA Officer cannot have it both ways. If she found sufficient information that Empower Oversight does not have a commercial interest in the records for purposes of classifying it as an other use requester, she cannot also claim Empower Oversight provided no information relative to the two commercial use factors used to deny the fee waiver request. Moreover, Empower oversight certified in its FOIA request that it "has no commercial interest in making th[e] request." It also notified the SEC of its nonprofit status, its public interest mission to education and inform, and its intent to publish the records in order to encourage public accountability. None of those factors suggest any commercial interest. (*See* attached FOIA request at p. 5.)

Second, regarding the four factors that SEC evaluates to ascertain whether disclosure of requested information is likely to contribute to public understanding of the operations and activities of the government, Empower Oversight contends that the FOIA Officer either failed to review the full text of the FOIA request or failed to grasp the public's keen interest in the integrity of government operations and activities and how that interest is invoked by circumstances recounted in the FOIA request and reiterated above.

The District of Columbia Circuit has held that the standard for fee waiver eligibility is that "[d]isclosure of the requested information must: (1) shed light on 'the operations or activities of the government'; [and] (2) be 'likely to contribute significantly to public understanding' of those operations or activities." *See Cause of Action*, 799 F.3d at 1115. Additionally, the Circuit has reminded us that fee-waiver applications are to be "liberally construed" in favor of finding that requesters meet FOIA's standard, *See Nat'l Security Couns. v. DOJ*, 848 F.3d 467, 473 (D.C. Cir. 2017), not mechanically rejected.

The SEC, for its part, elongated the applicable standard in to four factors:



(A) *The subject of the request*: whether the subject of the requested records concerns the operations or activities of the government. The subject of the requested records must concern identifiable operations or activities of the Federal Government, with a connection that is direct and clear, not remote or attenuated.

(B) *The informative value of the information to be disclosed*: whether the disclosure is likely to contribute to an understanding of government operations or activities. The disclosable portions of the requested records must be meaningfully informative about government operations or activities to be likely to contribute to an increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either a duplicative or a substantially identical form, would not be likely to contribute to such understanding.

(C) *The contribution to an understanding of the subject by the public likely to result from disclosure*: whether disclosure of the requested information will contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area and ability and intention to effectively convey information to the public shall be considered. It shall be presumed that a representative of the news media satisfies this consideration.

(D) *The significance of the contribution to public understanding*: whether the disclosure is likely to contribute significantly to public understanding of government operations or activities. The public's understanding of the subject in question prior to the disclosure must be significantly enhanced by the disclosure.

17 C.F.R. § 200.80(g)(12)(ii)(A) – (D).

### **The Records that Empower Oversight Seeks Are Informative of the SEC's Operations and Activities**

The initial step of the legal standard for deciding fee waiver requests in the District of Columbia Circuit is to consider whether the requested records concern identifiable “operations or activities of the government,” Cause of Action, 799 F.3d at 1115, or – in the vernacular of the first and second factors of the SEC's regulation at 17 C.F.R. § 200.80(g)(12)(ii)(A) - (B) – whether the subject of the requested records concerns the operations or activities of the government and whether the requested records are meaningfully informative about such operations or activities. It is difficult to imagine a reasonable argument to the effect that the records that Empower Oversight has requested do not meet the applicable standard.

Three former high-level SEC officials—by virtue of their public statements and initiation of litigation—clearly had roles in the SEC’s emerging approach to the regulation of cryptocurrencies. Empower Oversight has requested records relating to their communications with:

- Former and/or potential employers, which reportedly have interests in one or more cryptocurrency(ies) that was(were) being considered for regulation by the SEC;
- An industry organization whose objective is to promote the use of a particular cryptocurrency that was being considered for regulation by the SEC; and
- The SEC’s Office of Ethics concerning potential recusals or conflicts of interest related to their discussions and negotiations with potential future employers.

These records should be informative about whether either or all of the former SEC officials arranged for future employment with entities that had interests in cryptocurrencies that the SEC was considering for regulation, while they participated in the SEC’s decision-making with respect to such cryptocurrencies;<sup>11</sup> and, if so, whether they conferred with the SEC’s Office of Ethics concerning the propriety of such arrangements.

In short, the requested records are narrowly focused on confirming or dispelling concerns arising about the integrity of one the official’s public statement that Ether is not a security; another of the official’s litigation against XRP on the grounds that it is a security; and the third official’s public statement that Bitcoin is not a security and acquiescence to or support of litigation against XRP. All of which actions may have financially benefited entities that employed the officials after they left the SEC.

It is simply not credible to dispute that the requested records include information about the operations and activities of the SEC and, more particularly, about the integrity of those operations and activities relative to its emerging regulation of cryptocurrencies.

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<sup>11</sup> The government-wide ethics regulation at 5 C.F.R. § 2635.604(a)(1) prohibits a federal employee from participating personally and substantially in any matter that, to the employee’s knowledge, has a direct and predictable effect on the financial interests of a prospective employer with whom/which the employee is seeking employment.

## **The Records that Empower Oversight Seeks Will Contribute Significantly to the Public’s Understanding of the SEC’s Operations and Activities**

The second step of the legal standard for deciding fee waiver requests in the District of Columbia Circuit is to consider whether the information sought by the underlying FOIA request is “likely to contribute significantly to the public understanding” of government activities. Cause of Action, 799 F.3d at 1115; *accord*, 17 C.F.R. § 200.80(g)(12)(ii)(C) – (D). The Circuit Court has explained that “[a]pplication of this criterion may well require assessment along two dimensions: the degree to which ‘understanding’ of government activities will be advanced by seeing the information; and the extent of the ‘public’ that the information is likely to reach.” Cause of Action, 799 F.3d at 1116.

With respect to the former criterion, Empower Oversight’s FOIA request is designed to elicit records that are dispositive of the integrity of the three former high-level SEC officials’ actions relative to Ether, XRP, and Bitcoin. The requested records should reveal (*i.e.*, advance the public’s understanding of) whether they did or did not communicate with potential employers with financial interests in particular cryptocurrencies at the same time as they were personally and substantially participating in decision-making regarding the SEC’s regulation of the same, and whether they vetted their actions with the SEC’s Office of Ethics.

Moreover, the SEC should keep in mind, that an agency’s “view that there is nothing to be gained from information about ‘standard, routine operations,’” assuming that is how it may choose to characterize the above-described actions of its former officials, can be “irrelevant” and “without merit.” Citizens for Resp. & Ethics in Wash. v. HHS, 481 F. Supp. 2d 99, 112 – 113 (D.D.C. 2006).

With regard to the extent of the “public” that the information is likely to reach, the Circuit Court has held that the fee waiver standard does not “require a requester to show an ability to convey the information to a ‘broad segment’ of the public or to a ‘wide audience.’” Cause of Action, 799 F.3d at 1115 – 116 (rejecting a requirement of an agency regulation that requester must show an increase in understanding by the “public at large”); *accord* Carney v. DOJ, 19 F.3d 807, 814 – 815 (2d Cir. 1994). Rather, “the relevant inquiry ... is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject.” Cause of Action, 799 F.3d at 1116. Empower Oversight has demonstrated its intent and capability to satisfy this criterion.

In addition to the spike in the traffic to Empower Oversight’s website and social media on the date that it published its August 16, 2021, press release, the FOIA Update was also covered extensively by cryptocurrency, financial, and other websites, discussing Empower Oversight’s FOIA request and the above-described public integrity questions that it identified.<sup>12</sup> This reaction by an audience of persons with an informed interest in the subject matter is far greater than the three public service websites, which were found sufficient in *Bartko v. DOJ*, 898 F.3d 51, 75 (D.C. Cir. 2018). More importantly, the reaction is indicative of a broad interest in the information by a wide audience of cryptocurrency, financial, and other websites and their viewers.

For the reasons set forth herein, Empower Oversight respectfully requests that the SEC reverse its prior requester classification and fee waiver denial.

Sincerely,

/Jason Foster/

Jason Foster  
Founder & President

Attachments

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<sup>12</sup> See, e.g., <https://news.bitcoin.com/government-watchdog-investigates-conflicts-of-interest-sec-officials-crypto-xrp-ripple-lawsuit/>; <https://financefeeds.com/sec-v-ripple-was-filed-by-jay-clayton-now-he-joins-fireblocks-while-under-investigation-for-potential-conflict-of-interest/>; <https://oicanadian.com/sec-vs-ripple-organization-investigates-sec-officials-after-suspecting-possible-conflict-of-interest/>; <https://financefeeds.com/sec-suspicious-handling-of-ripple-and-xrp/>; <https://ripplecoinnews.com/secs-official-under-scrutiny-as-an-oversight-firm-alleges-agencys-officials-of-conflict-of-interest/>; <https://thecurrencyanalytics.com/regulations/ripple-xrp-recap-the-sec-vs-ripple-and-why-it-might-be-a-good-time-to-buy-32641.php>; <https://upnewsinfo.com/suspected-conflict-of-interest-between-sec-and-xrp-by-coinquora/>; <https://d1softballnews.com/ripple-for-sec-legal-problems-conflict-of-interest-allegations/>.

# **Attachment 1**

# EMPOWER OVERSIGHT

*Whistleblowers & Research*



EMPOWR.us

August 12, 2021

VIA ELECTRONIC TRANSMISSION: FOIAPA@SEC.GOV

Olivier Girod, Acting Chief FOIA/PA Officer  
Office of FOIA Services  
100 F Street NE  
Washington, DC 20549-2465

## **RE: FREEDOM OF INFORMATION ACT REQUEST**

Dear FOIA Officer:

### **Introduction**

Empower Oversight Whistleblowers & Research (“Empower Oversight”) is a nonpartisan, nonprofit educational organization dedicated to enhancing independent oversight of government and corporate wrongdoing. We work to help insiders safely and legally report waste, fraud, abuse, corruption, and misconduct to the proper authorities, and seek to hold those authorities accountable to act on those reports by, among other means, publishing information to inform the public.

### **Background**

We write today seeking information regarding the appearance of conflicts of interest by former high-level officials at the SEC relating to cryptocurrencies. It is in the public’s interest that the government’s emerging regulatory approach to cryptocurrencies is based on objective legal principles, without the appearance that conflicted SEC officials may be picking cryptocurrency winners and losers based on personal financial interests. The way in which these former SEC officials declared whether particular cryptocurrencies were securities—and thus subject to SEC regulation—raises public integrity concerns.

As publicly reported, Mr. William Hinman worked as the Director of the Division of Corporate Finance at the SEC from May 2017 through December of 2020, having previously been a partner at the law firm Simpson Thacher.<sup>1</sup> Mr. Hinman reportedly continued to receive millions of dollars from Simpson Thacher while employed at the

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<sup>1</sup> <https://www.sec.gov/news/press-release/2017-97>



SEC.<sup>2</sup> Notably, Simpson Thacher is a member of the Enterprise Ethereum Alliance, an “industry organization whose objective is to drive the use of Enterprise Ethereum.”<sup>3</sup> In a June 2018 speech in his official capacity as an SEC official, Mr. Hinman declared that the Ethereum cryptocurrency, Ether, was not a security, stating that “based on my understanding of the present state of Ether, the Ethereum network and its decentralized structure, current offers and sales of Ether are not securities transactions.”<sup>4</sup> After his declaration, Ether’s value then rose significantly.<sup>5</sup> When Mr. Hinman departed the SEC in December of 2020, he rejoined Simpson Thacher as a partner.<sup>6</sup>

That same month, the SEC filed a lawsuit against one of Ethereum’s rivals, Ripple, alleging that its XRP cryptocurrency was a security, such that the company’s offering and sales of XRP had been in violation of federal securities laws.<sup>7</sup> The value of XRP fell 25% immediately after the announcement of the SEC lawsuit.<sup>8</sup> Of note, the leader of the SEC’s Enforcement Division that brought the suit, Marc Berger, then left the SEC shortly thereafter, joining Mr. Hinman as a partner at Simpson Thacher.<sup>9</sup>

Additionally, there are potential concerns regarding former SEC Chairman Jay Clayton. As with Mr. Hinman and Ether, while at the SEC, Mr. Clayton publicly stated that Bitcoin was not a security,<sup>10</sup> and the value of Bitcoin rose.<sup>11</sup> The SEC’s lawsuit against Ripple was filed at the end of Mr. Clayton’s tenure there. Shortly after he left, he reportedly joined One River Asset Management, a cryptocurrency hedge fund that focuses exclusively on Bitcoin and Ether—not XRP.<sup>12</sup>

The SEC’s handling of cryptocurrency issues is of significant public importance, and these appearances of conflicts of interest raise substantial issues. Transparency from the SEC is the only way to ensure accountability to the public. In light of this, we are filing this FOIA request to seek the facts.

### **Records Request**

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”;

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<sup>2</sup> <https://www.businessinsider.com/sec-simpson-partner-pay-biden-golden-parachutes-2021-1>

<sup>3</sup> <https://entethalliance.org/about/>

<sup>4</sup> <https://www.sec.gov/news/speech/speech-hinman-061418>

<sup>5</sup> <https://www.wsj.com/articles/crypto-market-rallies-on-secs-officials-ether-stance-1529007646>

<sup>6</sup> [https://www.stblaw.com/docs/default-source/related-link-pdfs/bill-hinman-rejoins-simpson-thacher\\_2021.pdf](https://www.stblaw.com/docs/default-source/related-link-pdfs/bill-hinman-rejoins-simpson-thacher_2021.pdf)

<sup>7</sup> <https://www.sec.gov/news/press-release/2020-338>

<sup>8</sup> <https://www.financemagnates.com/cryptocurrency/news/xrp-plummets-25-after-secs-1-3-billion-lawsuit-against-ripple/>

<sup>9</sup> [https://www.stblaw.com/docs/default-source/related-link-pdfs/marc-berger-to-join-simpson-thacher\\_2021.pdf](https://www.stblaw.com/docs/default-source/related-link-pdfs/marc-berger-to-join-simpson-thacher_2021.pdf)

<sup>10</sup> <https://www.cnn.com/video/2018/06/06/sec-chairman-cryptocurrencies-like-bitcoin--not-securities.html>

<sup>11</sup> <https://www.bloomberg.com/news/articles/2018-07-17/bitcoin-surges-after-breaking-back-through-7-000-level>

<sup>12</sup> <https://markets.businessinsider.com/news/currencies/bitcoin-hedge-fund-sec-chair-jay-clayton-one-river-crypto-2021-3?op=1>

2. 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”:
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 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”:
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”;
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.

## **Definitions**

“COMMUNICATION(S)” means every manner or method of disclosure, exchange of information, statement, or discussion between or among two or more persons, including but not limited to, face-to-face and telephone conversations, correspondence,

memoranda, telegrams, telexes, email messages, voice-mail messages, text messages, meeting minutes, discussions, releases, statements, reports, publications, and any recordings or reproductions thereof.

“DOCUMENT(S)” or “RECORD(S)” mean any kind of written, graphic, or recorded matter, however produced or reproduced, of any kind or description, whether sent, received, or neither, including drafts, originals, non-identical copies, and information stored magnetically, electronically, photographically or otherwise. As used herein, the terms “DOCUMENT(S)” or “RECORD(S)” include, but are not limited to, studies, papers, books, accounts, letters, diagrams, pictures, drawings, photographs, correspondence, telegrams, cables, text messages, emails, memoranda, notes, notations, work papers, intra-office and inter-office communications, communications to, between and among employees, contracts, financial agreements, grants, proposals, transcripts, minutes, orders, reports, recordings, or other documentation of telephone or other conversations, interviews, affidavits, slides, statement summaries, opinions, indices, analyses, publications, questionnaires, answers to questionnaires, statistical records, ledgers, journals, lists, logs, tabulations, charts, graphs, maps, surveys, sound recordings, data sheets, computer printouts, tapes, discs, microfilm, and all other records kept, regardless of the title, author, or origin.

“PERSON” means individuals, entities, firms, organizations, groups, committees, regulatory agencies, governmental entities, business entities, corporations, partnerships, trusts, and estates.

“REFERS,” “REFERRING TO,” “REGARDS,” REGARDING,” “RELATES,” “RELATING TO,” or “PERTAINS TO” mean containing, alluding to, responding to, commenting upon, discussing, showing, disclosing, explaining, mentioning, analyzing, constituting, comprising, evidencing, setting forth, summarizing, or characterizing, either directly or indirectly, in whole or in part.

### **Instructions**

The words “and” and “or” shall be construed in the conjunctive or disjunctive, whichever is most inclusive.

The singular form shall include the plural form and vice versa.

The present tense shall include the past tense and vice versa.

In producing the records described above, you shall segregate them by reference to each of the numbered items of this Freedom of Information Act request.

If you have any questions about this request, please contact Bryan Saddler by e-mail at [bsaddler@empowr.us](mailto:bsaddler@empowr.us).

## Fee Waiver Request

Empower Oversight agrees to pay up to \$25.00 in applicable fees, but requests a waiver of any fees that may be associated with processing this request, in keeping with 5 U.S.C. § 552 (a)(4)(A)(iii).

Empower Oversight is a non-profit educational organization as defined under Section 501(c)(3) of the Internal Revenue Code, and has no commercial interest in making this request. Accordingly, pursuant to 5 U.S.C. § 552 (a)(4)(A)(ii)(II), it is subject only to “reasonable standard charges for document duplication.”

Moreover, the information that Empower Oversight seeks is in the public interest because it is likely to contribute significantly to the public understanding of the operations or activities of the government.

The public has a significant interest in understanding (1) the facts and circumstances surrounding senior SEC officials past and future private sector employment, (2) whether any such relationships presented potential conflicts or public integrity concerns related to their official actions at the SEC, and (3) whether, how, and to what extent the SEC and its ethics officials properly mitigated any such issues.

Empower Oversight is committed to government accountability and public integrity and is committed to public disclosure of documents via its website, and by providing these documents to the media for public dissemination. Hence, information it receives that either confirms or dispels the public integrity concerns described above will be published in order to increase public confidence in the integrity of the SEC, making this request undeniably eligible for a waiver or reduction of fees under 5 U.S.C. § 552 (a)(4)(A)(iii)

Thank you for your prompt attention to this matter.

Cordially,

[/Jason Foster/](#)

Jason Foster  
Founder & President

# **Attachment 2**



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

Office of FOIA Services

August 16, 2021

Mr. Jason Foster  
Empower Oversight  
2615 Columbia Pike, #445  
Arlington, VA 22204

Re: Freedom of Information Act (FOIA), 5 U.S.C. § 552  
Request No. **21-02531-FOIA - 21-02538-FOIA**

Dear Mr. Foster:

This letter is in reference to your request, dated August 12, 2021, and received in this office on August 13, 2021, for eight subjects as shown below. Please note each subject was assigned a FOIA tracking number.

Request No.	Subject
21-02531-FOIA	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"
21-02532-FOIA	2. 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"
21-02533-FOIA	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
21-02534-FOIA	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"



(continued)

<b>Request No.</b>	<b>Subject</b>
21-02535-FOIA	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"
21-02536-FOIA	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
21-02537-FOIA	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"
21-02538-FOIA	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

You requested a fee waiver of all costs associated with your request. We may waive or reduce search, review, and duplication fees if (A) disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations and activities of the government and (B) disclosure is not primarily in the commercial interest of the requester, 5 U.S.C. § 552(a) (4) (iii).

We will determine whether disclosure is likely to contribute significantly to the public's understanding of the operations or activities of the government based upon four factors:

- Whether the subject matter of the requested records concerns the operations or activities of the Federal government;
- Whether the requested records are meaningfully informative on those operations or activities so that their disclosure would likely contribute to increased understanding of specific operations or activities of the government;

- Whether disclosure will contribute to the understanding of the public at large, rather than the understanding of the requester or a narrow segment of interested persons; and
- Whether disclosure would contribute significantly to public understanding of government operations and activities.

We will determine whether disclosure of the requested records is not primarily in the commercial interest of the requester based on these two factors:

- Whether disclosure would further any commercial interests of the requester; and
- Whether the public interest in disclosure is greater than the requester's commercial interest under 17 CFR § 200.80 (g) (12).

While SEC grants waivers of FOIA fees where appropriate, we are also obligated to safeguard the public treasury by not granting waivers except as provided by the FOIA. As a requester, you bear the burden under the FOIA of showing that the fee waiver requirements have been met. Based on my review of your request, I determined that your fee waiver request is deficient because it does not provide substantive information relating to any of the six factors. Therefore, I am denying your request for a fee waiver.

Under the FOIA, you are considered an "Other Use" requester. As such, you are entitled to two (2) hours of search time and 100 pages free of charge. Once these entitlements are met you are required to pay search and duplication fees, in accordance with our [fee schedule](#).

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.

Mr. Jason Foster  
August 16, 2021  
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21-02531-FOIA thru 21-02531-FOIA

You may file your appeal by completing the online Appeal form located at [https://www.sec.gov/forms/request\\_appeal](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.

We are consulting with other SEC staff regarding your request. As soon as we complete our consultation, we will notify you of our findings.

If you have any questions, please contact Joel Hansen of my staff at [hansenjo@sec.gov](mailto:hansenjo@sec.gov) or (202) 551-8377. You may also contact me at [foiapa@sec.gov](mailto:foiapa@sec.gov) or (202) 551-7900. You may also contact the SEC's FOIA Public Service Center at [foiapa@sec.gov](mailto: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 style with a large initial "L".

Lizzette Katilius  
FOIA Branch Chief

Enclosure

## 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](mailto: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.