



UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

OFFICE OF THE  
GENERAL COUNSEL

Stop 9613

September 23, 2020



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

Re: Appeal, Freedom of Information Act Request Nos. 21-02531-FOIA through  
21-02538-FOIA, designated on appeal as Nos. 20-00631-APPS & 21-00632-APPS

Mr. Foster:

This responds to your Freedom of Information Act (FOIA) appeal of the FOIA Officer's decision concerning your August 13, 2021 FOIA request<sup>1</sup> for eight categories of records.<sup>2</sup> You

---

<sup>1</sup> Although your FOIA request is dated August 12, 2021, it was not received by the SEC's FOIA Office until August 13, 2021.

<sup>2</sup> Specifically, you requested the following records: (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" (designated as FOIA Request No. 21-02531-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" (FOIA Request 21-02532-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 (FOIA Request No. 21-02533-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" (FOIA Request No. 21-02534-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" (FOIA Request No. 21-02535-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 (FOIA Request No. 21-02536-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" (FOIA Request No. 21-02537-FOIA); 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

requested a fee waiver on the basis that “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.” You further state that “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 ...[and] it is subject only to “reasonable standard charges for document duplication.””

By letter dated July 12, 2021, the FOIA Officer denied your request for a fee waiver and placed you in the “Other Use” fee category. On September 17, 2021, you filed this appeal challenging the FOIA Officer’s decision. I have considered your appeal, and it is granted.

### *Fee Category*

You assert that the FOIA Office “should have classified Empower Oversight as a news media requester.” You state that “Empower Oversight issues ‘press releases’ describing its activities and findings [and] 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.” With respect to the materials sought in the subject FOIA request, you offer that “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.”

Given how you intend to use the materials obtained from this request and your past work, I find that the FOIA Office improperly classified you as an “other use” requester. The FOIA Office will be instructed to classify you as a “news media” requester in processing your FOIA request.

### *Fee Waiver*

As a news media requester, you can only be assessed duplication fees for the processing of your request.<sup>3</sup> The FOIA, however, precludes agencies from assessing duplication fees to news media requesters if the agency fails to meet the 20-day time limit for complying with a request and where no unusual or exceptional circumstances exist.<sup>4</sup> Because the FOIA Office has not complied with the 20-day time period for responding to your request (September 13, 2021) and because it has not informed you that unusual circumstances exist in processing your request, you cannot be assessed duplication fees at this juncture. The question of whether you are entitled to a fee waiver is moot as there are no chargeable fees for processing your FOIA request.<sup>5</sup>

---

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 (FOIA Request No. 21-02538-FOIA).

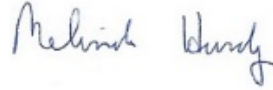
<sup>3</sup> See 5 U.S.C. § 552(a)(4)(A)(ii)(II).

<sup>4</sup> See 5 U.S.C. § 552(a)(4)(A)(viii).

<sup>5</sup> See, e.g., *Long v. Dep’t of Justice*, 450 F. Supp. 2d 42, 85 (D.D.C. 2006) (finding moot requester’s challenge to agency’s authority to request certain information in order to make fee category determination where no fee ultimately

If you have any questions regarding this determination, please contact Mark Tallarico, Senior Counsel, at 202-551-5132.

For the Commission  
by delegated authority,

A handwritten signature in blue ink that reads "Melinda Hardy". The signature is written in a cursive, slightly slanted style.

Melinda Hardy  
Assistant General Counsel for  
Litigation and Administrative Practice

---

was assessed); *Hall v. CIA*, 437 F.3d 94, 99 (D.C. Cir. 2006) (finding that agency’s release of documents without seeking payment mooted plaintiff’s “arguments that the district court’s denial of a fee waiver was substantively incorrect”).