

EMPOWER OVERSIGHT

Whistleblowers & Research



January 19, 2022

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

SEC FOIA Request Numbers: 21-02531-FOIA, 21-02532-FOIA, 21-02535-FOIA, and 21-02537-FOIA

Dear General Counsel Coates:

Introduction

With respect to the Securities and Exchange Commission’s (“SEC”) Freedom of Information Act (“FOIA”)¹ Request Numbers 21-02531-FOIA, 21-02532-FOIA, 21-02535-FOIA, and 21-02537-FOIA, Empower Oversight Whistleblowers & Research (“Empower Oversight”)² appeals the initial determinations of the SEC FOIA Research Specialists that the SEC “conducted a thorough search of the SEC’s various systems of records” and that “no responsive records exist.” Because the SEC FOIA Research Specialists did not elaborate on the nature and scope of their searches, Empower Oversight cannot 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.

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.

Accordingly, Empower Oversight respectfully requests that the SEC review the nature and scope of the SEC FOIA Research Specialists' searches, apprise Empower Oversight of the same, and correct any deficiencies that are identified.

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 and requesting a fee waiver.³ 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

³ Empower Oversight's August 12, 2021, FOIA request is attached as Exhibit 1.

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.⁴

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.*, SEC 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.⁵

On August 16, 2021, the SEC advised—via a single letter—that it had classified Empower Oversight as an “other use” requester, and had denied its request for a waiver of any fees that may be applicable to the SEC’s processing of its FOIA request. The letter from the SEC’s FOIA Branch Chief included no analysis of either Empower Oversight’s classification or its fee waiver denial. Accordingly, Empower Oversight appealed the FOIA Branch Chief’s classification decision and fee waiver denial. The SEC granted the appeal on September 23, 2021.

On November 23, 2021, the SEC issued a “no records” response to SEC Request Number 21-02538-FOIA, stating:

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 request.

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

⁴ See, Exhibit 1.

⁵ The SEC’s eight August 13, 2021, acknowledgements of Empower Oversight’s FOIA request are collectively attached as Exhibit 2.

search. Otherwise, we conclude that no responsive records exist and we consider this request to be closed.⁶

On November 29, 2021, the SEC issued a “no records” response to SEC Request Number 21-02536-FOIA.⁷ The operative text of the SEC’s November 29th letter is identical to the text of the November 23rd “no records” response, which is quoted immediately above.⁸

On December 10, 2021, the SEC issued a “no records” response to SEC Request Numbers 21-02531-FOIA and 21-02532-FOIA.⁹ With the exception of revising the singular “request” to a plural “requests” at the end of the first paragraph, the operative text of the SEC’s December 10th letter is identical to the text of its November 23rd “no records” response, which is quoted above.¹⁰

On December 21, 2021, the SEC issued a “no records” response to SEC Request Number 21-02537-FOIA.¹¹ The operative text of the SEC’s December 21st letter is identical to the text of the November 23rd “no records” response, which is quoted above.¹²

On January 5, 2022, the SEC issued a “no records” response to SEC Request Number 21-02535-FOIA.¹³ The operative text of the SEC’s January 5th letter is identical to the text of the November 23rd “no records” response, which is quoted above.¹⁴

Empower Oversight has had no other communications with the SEC concerning SEC Request Numbers 21-02531-FOIA through 21-02538-FOIA.

⁶ The SEC’s November 23, 2021, “no records” response is attached as Exhibit 3.

⁷ The SEC’s November 29, 2021, “no records” response is attached as Exhibit 4.

⁸ *Compare*, Exhibit 3 and Exhibit 4.

⁹ The SEC’s December 10, 2021, “no records” response is attached as Exhibit 5.

¹⁰ *Compare*, Exhibit 3 and Exhibit 5.

¹¹ The SEC’s December 21, 2021, “no records” response is attached as Exhibit 6.

¹² *Compare*, Exhibit 3 and Exhibit 6.

¹³ The SEC’s January 5, 2022, “no records” response is attached as Exhibit 7.

¹⁴ *Compare*, Exhibit 3 and Exhibit 7.

**Based upon the Circumstances, Empower Oversight Is Unable to Determine
Whether the SEC Performed Searches that Were Reasonably
Calculated to Uncover All Relevant Documents, and
Is Forced to Appeal the SEC’s December 10th and 21st and January 5th
“No Records” Responses**

The adequacy of a FOIA search is generally determined by the suitability of the methods used to carry out the search.¹⁵ The legal standard governing the search for records responsive to FOIA requests requires an agency to conduct a search that is “reasonably calculated to uncover all relevant documents.”¹⁶ Such calculation involves both an understanding of the nature and scope of the FOIA request and knowledge of where information may be stored within an agency.¹⁷ 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.¹⁸

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.¹⁹ Hence, the reasonableness of an agency’s search can often depend on whether the agency properly determined where responsive records were likely to be found—and searched those locations,²⁰ or whether the agency improperly limited its search to certain platforms.²¹

¹⁵ See, Jennings v. DOJ, 230 F. App’x 1, 1 (D.C. Cir. 2007) (quoting Iturralde v. Comptroller of Currency, 315 F.3d 311, 315 (D.C. Cir. 2003)).

¹⁶ Weisberg v. DOJ, 705 F.2d 1344, 1351 (D.C. Cir. 1983).

¹⁷ Additionally, 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 (criticizing a conclusory FBI affidavit that closely resembles the operative text of the SEC’s December 10th, December 21st, and January 5th responses to Empower Oversight’s August 12th FOIA request). 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)).

¹⁸ 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).

¹⁹ See, Marino v. DOJ, 993 F. Supp. 2d 1, 9 (D.D.C. 2013) (internal citation omitted).

²⁰ See, Karantalis v. DOJ, 635 F.3d 497, 500-501 (11th Cir. 2011) (affirming the district court’s determination that the agency searched for records in the system most likely to store responsive records and described how it retrieved records from the system); Lechliter v. Rumsfeld, 182 F. App’x 113, 115-16 (3^d Cir. 2006) (concluding that the agency fulfilled its duty to conduct a reasonable search when it searched two offices that it determined would be the only ones likely to possess responsive documents) (citing Oglesby v. Dep’t of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990)).

²¹ 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).

The SEC’s December 10th response to SEC Request Numbers 21-02531-FOIA and 21-02532-FOIA, its December 21st response to SEC Request Number 21-02537-FOIA, and its January 5th response to SEC Request Number 21-02535-FOIA include no information concerning how the SEC FOIA Research Specialists interpreted the Empower Oversight’s FOIA request or how they designed their searches to implement their interpretations of such request. Without this information, Empower Oversight is unable to assess whether the SEC FOIA Research Specialists conducted searches that were reasonably calculated to uncover all documents responsive to the first, second, fifth, and seventh items of its FOIA request. Accordingly, Empower Oversight is forced to appeal the SEC FOIA Research Specialists’ initial determinations in the December 10th and 21st and January 5th “no records” responses and respectfully request that the SEC review the initial determinations, ascertain how its FOIA Research Specialists interpreted Empower Oversight’s request, confirm that they implemented their interpretations in a manner reasonably calculated to result in the discovery of all responsive records, correct any defects it discovers, and apprise Empower Oversight of its findings.

The first, second, fifth, and seventh items of Empower Oversight’s August 12th FOIA request, *i.e.*, SEC Request Numbers 21-02531-FOIA, 21-02532-FOIA, 21-02535-FOIA, and 21-02537-FOIA, seek:

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”;
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”; and
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”.²²

²² See, Exhibit 1.

In response to SEC Request Numbers 21-02531-FOIA, 21-02532-FOIA, 21-02535-FOIA, and 21-02537-FOIA, the SEC FOIA Research Specialists recited the text of the requests verbatim, and advised:

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 request(s).

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.²³

In other words, without altering or paraphrasing the first, second, fifth, or seventh items of Empower Oversight's FOIA request, the SEC FOIA Research Specialists advised Empower Oversight that:

1. The SEC had "conducted a thorough search" of "various" unidentified SEC "systems of records"; but
2. It had not "locate[d] or identif[ied] any records responsive to" Empower Oversight's requests.²⁴

Then, the SEC FOIA Specialists invited Empower Oversight—if it still believes that the SEC possesses responsive records—to "provide [the SEC] with additional information, which could prompt another search."²⁵

However, the SEC FOIA Research Specialists failed to apprise Empower Oversight in any meaningful sense how they had interpreted its requests (*i.e.*, what they searched for) and where they searched.²⁶ In former regard, when identifying SEC Request Numbers 21-02531-FOIA, 21-02532-FOIA, 21-02535-FOIA, and 21-02537-FOIA, the SEC FOIA Research Specialists quoted the first, second, fifth, and seventh items from Empower Oversight's August 12th FOIA request verbatim.²⁷ They did not alter, paraphrase, or otherwise deviate from Empower Oversight's text at all, which would provide us an inkling of how they interpreted the requests. Moreover, they

²³ See, Exhibit 5 and Exhibit 6.

²⁴ See, Exhibit 5.

²⁵ See, Exhibit 5.

²⁶ See, Exhibit 5.

²⁷ Compare, Exhibit 1 and Exhibits 5, 6, and 7.

did not contact Empower Oversight with any questions they may have had concerning the FOIA request. The implication of these circumstances is that the SEC FOIA Research Specialists believed that they understood the request and that they had all of the information that they needed to design searches that satisfies the applicable FOIA standard of a search that is reasonably calculated to uncover all responsive records.

This implication, however, seems implausible. The first, second, fifth, and seventh items of Empower Oversight’s FOIA request include a subtle distinction that we believe should have elicited questions by the SEC FOIA Research Specialists. Namely, 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.²⁸ The fifth item seeks communications between Marc Berger, who is no longer employed by the SEC, and “any personnel” the Enterprise Ethereum Alliance, as well as emails between Mr. Berger and “any email address from the” domain @entethalliance.org.²⁹ 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.³⁰ 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 “and 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 had to know names of Simpson Thatcher, Enterprise Ethereum Alliance, and One River Asset Management personnel to accomplish the “any personnel” portions of their searches. Empower Oversight cannot say that they did not know such names or have a resource that supplied them with the names; all we can say is that they did not approach us to discuss names specifically or to discover the correct interpretation of the FOIA request generally. Nor did they advise how they interpreted the

²⁸ See, Exhibit 1.

²⁹ See, Exhibit 1.

³⁰ See, Exhibit 1.

request, and we thus cannot assess whether the SEC “conducted a thorough search” as the SEC FOIA Research Specialists certified.

With regard to the “various” unidentified SEC “systems of records” that the SEC FOIA Research Specialists searched, Empower Oversight has several concerns. First, as the SEC is aware “systems of records” often has a Privacy Act of 1974³¹ connotation, *i.e.*, “[a] system of records is any grouping of information about an individual under the control of a Federal agency from which it retrieves information by the name, social security number, or some other personal identifier.”³² And, if that connotation was intended by the SEC FOIA Research Specialists (or either of them), then the use of the phrase begs the question whether platforms that are not designed to retrieve information about individuals by their identifiers, were searched. If so, which platforms, and, if not, why not?

Second, the FOIA Research Specialists claim only to have searched “the SEC’s various systems of records.”³³ However, it is inevitable that staff will make occasional use official resources for their personal needs—indeed, many Federal employers expressly allow “reasonable” or “incidental” personal use of their information technology resources.³⁴ But, when authorizing such personal use of official resources, they remind their staff of the legal reality that these information technology resources, such as Internet access and cellphones, remain the property of the Federal government and the employees have no reasonable expectation of privacy when using them.³⁵ Thus, Empower Oversight is left to guess whether the SEC FOIA Research Specialists searched for platforms (*e.g.*, Internet-based email platforms) that may not technically be official “SEC” “system of records” but may have been accessed via the SEC’s resources. For example, if Mr. Hinman had used SEC-owned resources (*e.g.*, the computer or cellphone that the SEC issued to him) to access his personal email account via the Internet or to email personnel of Simpson Thatcher and/or Enterprise Ethereum Alliance, or Mr. Clayton had used his SEC-issued cellphone to text personnel of One River Asset Management, would such personal emails or texts have been located by the SEC FOIA Research Specialists’ searches?

³¹ The Privacy Act of 1974 is codified at 5 U.S.C. § 552a.

³² SEC, *System of Records Notices* (Last Modified March 5, 2021), available at <https://www.sec.gov/oit/system-records-notice>.

³³ See, Exhibit 5 (emphasis added).

³⁴ See, *e.g.*, IRS, *10.8.27: Personal Use of Government Furnished Technology Equipment and Resources* (Last Reviewed or Updated April 22, 2020), available at https://www.irs.gov/irm/part10/irm_10-008-027#idm139724776667104; HHS, *Rules of Behavior for the Use of HHS Information and IT Resource Policy* (Last Reviewed June 7, 2019), available at <https://www.hhs.gov/web/governance/digital-strategy/it-policy-archive/hhs-rules-of-behavior-for-the-use-of-hhs-information-and-it-resources-policy.html#6.1>.

³⁵ See, *e.g.*, IRS, *10.8.27: Personal Use of Government Furnished Technology Equipment and Resources* (Last Reviewed or Updated April 22, 2020), available at https://www.irs.gov/irm/part10/irm_10-008-027#idm139724776667104; HHS, *Rules of Behavior for the Use of HHS Information and IT Resource Policy* (Last Reviewed June 7, 2019), available at <https://www.hhs.gov/web/governance/digital-strategy/it-policy-archive/hhs-rules-of-behavior-for-the-use-of-hhs-information-and-it-resources-policy.html#6.1>.

Accordingly, the circumstances of this matter compel Empower Oversight to respectfully request that the SEC review the SEC FOIA Research Specialists' December 10, 2021, December 21, 2021, and January 5, 2022, initial determinations,³⁶ ascertain how they interpreted the first, second, fifth, and seventh items of Empower Oversight's August 12, 2021, FOIA request,³⁷ confirm that they implemented their interpretations in a manner reasonably calculated to result in the discovery of all responsive records, correct any defects that are discovered, and apprise Empower Oversight of the SEC's findings.

Additionally, in light of the civil case pending between Empower Oversight and the SEC (see, *Empower Oversight v. U.S. SEC*, Civil Action No. 1:21-cv-1370 (E.D.Va.)), the parties ought to have a mutual desire to avoid protracted, costly litigation. Accordingly, Empower Oversight also requests in response to this administrative appeal—and before the SEC is required to file its answer in the FOIA litigation—that the SEC submit to Empower Oversight affidavits of the kind envisioned in *Ethyl Corp. v. U.S. Environmental Protection Agency*.³⁸

The SEC's affidavits should describe its efforts in enough detail to permit Empower Oversight to determine whether the searches were reasonable, to the extent that SEC continues claim that its "no records" responses remain accurate after having reviewed and considered this administrative appeal.

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

Cordially,

/Jason Foster/

Jason Foster
Founder & President

³⁶ See generally, Exhibit 5, Exhibit 6, and Exhibit 7.

³⁷ See generally, Exhibit 1.

³⁸ See, Footnote 17, *supra*.