

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