

EMPOWR OVERSIGHT

Whistleblowers & Research



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December 15, 2022

VIA ELECTRONIC TRANSMISSION: FOIAPA@SEC.GOV

Olivier Girod, Chief FOIA/PA Officer
Office of FOIA Services
100 F Street, N.E.
Washington, DC 20549-2465

RE: Request for Records Regarding Potential Conflicts of Interest Related to the SEC's Cryptocurrency Enforcement Decisions

Dear Chief 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 such reports by, among other means, publishing information concerning the same.

BACKGROUND

On August 12, 2021, Empower Oversight submitted to the Securities and Exchange Commission (“SEC”) a Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, request seeking eight categories of records relating to potential conflicts of interest of former high-level SEC officials in the context of the SEC’s emerging regulatory approach to cryptocurrencies. 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](mailto: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](mailto: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](mailto: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—having received from the SEC no further response to its August 12th FOIA request—Empower Oversight filed, in the United States District Court for the Eastern District of Virginia (“E.D.Va.”), a complaint for declaratory and injunctive relief to compel the SEC’s compliance with its FOIA request.¹ Empower Oversight’s 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:

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

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.

On January 19, 2022, Empower Oversight administratively 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 was that, based upon the circumstances, it was unable to determine whether the SEC's FOIA Research Specialists performed searches that were reasonably calculated to uncover all relevant documents, and Empower Oversight was thus forced to appeal the SEC's December 10th and 21st and January 5th "no records" responses.

The Clarifying Conference Call

On January 28, 2022, Empower Oversight participated in a conference call with SEC officials and the Assistant United States Attorney ("AUSA") assigned to our lawsuit. During the call, SEC officials notified us of errors in their initial searches and that after correcting the errors, they had located approximately 1,000 pages of records responsive to Request Number 21-02531-FOIA. They indicated they were still working on Request Number 21-02532-FOIA. On the other hand, they maintained that the SEC's "no records" responses to Request Numbers 21-02535-FOIA and 21-02537-FOIA were accurate.

Empower Oversight asked about the actual search terms used to identify communications with personnel from Simpson Thatcher, Enterprise Ethereum Alliance, and One River Asset Management. The SEC explained that it had made no efforts to identify or search for personnel associated with those entities who may have communicated with the SEC. Instead, the SEC officials advised that the agency limited its searches to emails with the domain names @stblaw.com, @entethalliance.org, or @oneriveram.com.

"Including" Does Not Mean "Limited to"

Consistent with its assertions in its January 19th appeal, Empower Oversight pointed out that the scope of its requests extends beyond emails (*i.e.*, they also include calendars and notes) and beyond emails from the three aforementioned domain names (*i.e.*, they also include communications with all personnel of Simpson Thatcher, Enterprise Ethereum Alliance, and One River Asset Management, regardless of domain that they used for their emails). An SEC

official stridently disagreed with Empower Oversight's interpretation of its own FOIA request, arguing that by listing the domain names in the request, that Empower Oversight limited the scope of the requested documents to only emails from those domain names. Of course, this is entirely inconsistent with the plain meaning of "including" (*i.e.*, comprising, but not being limited to, the whole), as Empower Oversight explained on the call.²

SEC officials then pivoted and claimed that they had no way of knowing the names of personnel from those entities, and thus no way to search for them.³ They asked Empower Oversight to provide a list of names to guide additional searches, which Empower Oversight supplied on February 18, 2022.

Bad Faith and Misrepresentations about the List of Names

After having solicited a list of names from Empower Oversight to ensure that the searches were complete, the SEC then refused to conduct those searches. It then falsely claimed in litigation that the January 28th conversation was merely part of a settlement negotiations, rather than the normal process of communicating with FOIA requestors to clarify the scope of their requests. The SEC suggested that the court should ignore the SEC's refusal to use the list of names in searches, as opposed to viewing it for what it is: evidence that its search was intentionally and unreasonably narrow.

The scope of Empower Oversight's request has been clear from the beginning. It always sought all records of communications from any personnel associated with the listed entities, not merely emails from certain domain names. By agreeing to the SEC's request to provide a specific list of names, Empower Oversight offered a concession to limit the scope of the SEC's search to particular named people rather than all personnel from each entity. Empower Oversight was also trying to assist the SEC by providing specific search terms at its request. The SEC dismissed those good faith efforts at accommodation and wasted everyone's time and resources to litigate the issue rather than simply conducting searches on the names it had requested.

RECORDS REQUEST

Accordingly, although they are already sought by Empower Oversight's August 12, 2021 request, pursuant to the FOIA, Empower Oversight specifically requests:

1. All records relating to communications from May of 2017 through December of 2020 between William Hinman and William Allen, David Azarkh, Richard Beattie, Martin Bell, Thomas Bell, Stephen Blake, Stephen Cutler, William Dougherty or Chris Lin, including calendar entries, notes, or emails;
2. All records relating to communications from May of 2017 through December of 2020 between Mr. Hinman and Marc Andreessen, Darren Azman, Alfred Browne, Brad Burnham, Vitalik Buterin, John Buttrick, Luke Cadigan, Derek Colla, Matt Corva, Chris Dixon, Joseph Evans, Patrick Gibbs, Nick Grossman, J. Dax Hansen, Ben Horowitz, Rick Howell, Jong in Jun, Rebecca Kaden, Jonathan Kim, Stephane Leavy, Joseph Lubin, Jeremy Millar, Aya Miyaguchi, Wendy Moore, Michael Morgan, Steve Nerayoff, Lowell Ness, Mike Novogratz,

² Use of the word "including" is not meant to convey a limitation. See, *In re Zick*, 931 F.2d 1124, 1126 (6th Cir. 1991). "It is hornbook law that the use of the word 'including' indicates that the specified list of carriers that follows is illustrative, not exclusive." *Puerto Rico Maritime Shipping Authority v. ICC*, 645 F.2d 1102, 1112 n.26 (D.C. Cir. 1981).

³ At least with respect to Simpson Thacher and One River Asset Management, the names of such persons easily can be accessed using open-source information available online. See, *e.g.*, www.stblaw.com, and www.oneriveram.com.

- Carlos Ortiz, Alexandra Scheibe, Katharine Suominen, Andy Weissman, Albert Wenger, Fred Wilson, or Nancy Wotjas, including calendar entries, notes or emails;
3. All records relating to communications from May of 2017 through January of 2021 between Marc Berger and William Allen, David Azarkh, Richard Beattie, Martin Bell, Thomas Bell, Stephen Blake, Stephen Cutler, William Dougherty, or Chris Lin, including calendar entries, notes or emails;
 4. All records relating to communications from May of 2017 through January of 2021 between Mr. Berger and Marc Andreessen, Darren Azman, Alfred Browne, Brad Burnham, Vitalik Buterin, John Buttrick, Luke Cadigan, Derek Colla, Matt Corva, Chris Dixon, Joseph Evans, Patrick Gibbs, Nick Grossman, J. Dax Hansen, Ben Horowitz, Rick Howell, Jong in Jun, Rebecca Kaden, Jonathan Kim, Stephane Leavy, Joseph Lubin, Jeremy Millar, Aya Miyaguchi, Wendy Moore, Michael Morgan, Steve Nerayoff, Lowell Ness, Mike Novogratz, Carlos Ortiz, Alexandra Scheibe, Katharine Suominen, Andy Weissman, Albert Wenger, Fred Wilson, or Nancy Wotjas, including calendar entries, notes or emails; and
 5. All records relating to communication from May of 2017 through December of 2020 between Jay Clayton and Sebastian Pedro Bea, Tutting Chen, Qin Chen, Joseph Chung, Jason Cummins, Paul Ebner, Courtney Simmons Elwood, Nathan Faber, Harold Ford Jr., Ian Gardiner, Kevin Hassett, Marcel Kasumovich, Patrick Kazley, Chris Lawn, Matt Lundy, Edward Major, Ian Malloch, Shaun Martiniak, Chase Muller, Ryan McRandal, John Orszag, Eric Peters, Lindsay Politi, Stephen Pranja, Hardin Ramani, Will Wallin, or Doug Wilson, including calendar entries, notes or emails.

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, Slack 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,” “CONCERNS,” “BEARS UPON,” 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.

“INCLUDING” means comprising part of, but not being limited to, the whole.

INSTRUCTIONS

The time period of the requested records is May 1, 2017, through December 31, 2020.

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 FOIA request.

If you have any questions about this request, please contact Bryan Saddler by e-mail at bsaddler@empowr.us.

FEE WAIVER REQUEST

Empower Oversight agrees to pay up to \$25.00 in applicable fees, but notes that the SEC has classified it as a “representative of the news media”⁴ and 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, which helps 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. Empower Oversight has no commercial interest in making this request.

Further, the information that Empower Oversight seeks is in the public interest because it is likely to contribute significantly to the public’s understanding of the SEC’s emerging regulation of cryptocurrencies and whether any private financial interests have improperly influenced its decision-making.

Empower Oversight is committed to government accountability, public integrity, and transparency. In the latter regard, the information that that Empower Oversight receives that tends to explain the subject matter of this FOIA request will be disclosed publicly via its website, and copies will be shared with other news media for public dissemination.

⁴ On September 23, 2021, in connection with a FOIA appeal arising from Empower Oversight’s August 12th FOIA request, the Securities Exchange Commission conceded that Empower Oversight qualifies as a news media requester for purposes of fees assessed pursuant to the FOIA. “Empower Oversight Wins Appeal of Erroneous SEC Fee Decision: Must be treated as a “media requester” in seeking ethics records of senior officials,” Empower Oversight Press Release (Sep 24, 2021), <https://empowr.us/empower-oversight-wins-appeal-of-erroneous-sec-fee-decision-must-be-treated-as-a-media-requestor-in-seeking-ethics-records-of-senior-officials/>.

For ease of administration and to conserve resources, we ask that documents be produced in a readily accessible electronic format. Thank you for your time and consideration. Please don't hesitate to contact me with any questions.

Cordially,

[/Jason Foster/](#)

Jason Foster
Founder & President