

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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MARK CUBAN,)	
)	
Plaintiff,)	
)	
v.)	Case: 1:09-cv-00996 (RBW)
)	Assigned: Walton, Reggie
SECURITIES AND EXCHANGE)	Description: FOIA/Privacy Act
COMMISSION,)	
)	
Defendant.)	
_____)	

STATUS REPORT

1. The United States Securities and Exchange Commission (“Commission” or “SEC”) submits this Status Report pursuant to the Court’s Memorandum and Order (“Order”) dated September 22, 2010.

INTRODUCTION

2. The Court’s Order of September 22, 2010, scheduled a status hearing for October 22, 2010. The Order stated that the Court would address two specific issues at the status hearing, namely: (i) how much additional time is needed to complete the processing of Plaintiff’s Freedom of Information Act (“FOIA”) requests, and (ii) whether FOIA Exemption 7(A) continues to apply to an SEC Office of the Inspector General (“OIG”) investigation. This report provides the Court with an update regarding these issues as well as the status of the litigation.

I.

Time Required to Process Plaintiff's FIFO Track Requests

3. The SEC processes FOIA requests on a “first in, first out” (“FIFO”) basis, where they are reviewed in the order in which they were received. The FIFO system is designed to treat all requests fairly and equitably, without affording preferential treatment to any particular individual or requester. The Commission is submitting with this report the Supplemental Declaration of Celia Winter (“Winter Decl.”) to address the status of Plaintiff’s pending FOIA requests in the FIFO Track and how much additional time is needed to begin processing Plaintiff’s requests.

4. As of January 15, 2010, the date of the First Declaration of Celia Winter, twenty-four (24) requests, consisting of approximately 2,080 boxes of potentially responsive paper records, were pending ahead of Plaintiff’s in the FIFO Track. As of October 13, 2010, ten (10) requests consisting of approximately 845 boxes of potentially responsive paper records,¹ as well as 238 CDs of computer files, 300 giga bytes (“GB”) of electronic data,² and 87 bound transcripts, are ahead of Plaintiff’s in the FIFO Track. *See* Winter Decl. ¶7.

5. The Commission respectfully requests that this Court—consistent with the D.C. Circuit’s decision in *Open America*—provide the SEC with an additional

¹ A standard 2.0 cu/ft box can contain up to approximately 3,000 pages of paper. Assuming these 845 boxes are full, they can contain up to approximately 2.5 million pages.

² 300 GB of electronic data translates roughly into the equivalent of 1.9 million Microsoft Word File pages. *See* “How Many Pages in a Gigabyte?” *Discovery Services Fact Sheet*, LexisNexis (located at http://www.lexisnexis.com/applieddiscovery/lawlibrary/whitePapers/ADI_FS_PagesInAGigabyte.pdf). Of course, not all of the files are Word files, and the actual number of pages could be significantly higher or lower.

eleven month stay, so that the Commission may continue to process FOIA requests on a “first-in, first-out” basis.

6. Several factors, as briefly outlined below, militate in favor of providing the Commission with additional time. First, Ms. Winter’s declaration explains that several of the requests pending ahead of Plaintiff’s in the FIFO Track are exceptionally voluminous. *See* Winter Decl. ¶9.

7. Second, all ten of the requests pending ahead of Plaintiff’s relate to SEC investigations. Investigative files often contain sensitive personal information and/or confidential materials and can be especially time-consuming to process. *See* Winter Decl. ¶10.

8. Third, a substantial proportion of the material that needs to be reviewed ahead of Plaintiff’s were provided to the SEC by third parties, who have requested that their material be granted confidential treatment under the Commission’s rules. *See* 17 C.F.R. 200.83 *et seq.* As such, the SEC is required to notify and provide all such third parties with an opportunity to object to the release of these records. To the extent that any of the parties requesting confidential treatment object to the release of these records, the FOIA Office will need additional time to process these materials. Indeed, the ten FOIA requests ahead of Plaintiff’s in the FIFO Track include 352 different requests for confidential treatment. *See* Winter Decl. ¶¶11-12.

9. Likewise, the approximately 107 boxes of potentially responsive materials,³ including 2.2 GB of electronic data,⁴ to Plaintiff’s FOIA requests include an additional nine different requests for confidential treatment. *See* Winter Decl. ¶13.

³ 107 boxes of records may consist of up to 321,000 pages of paper records.

10. For the above reasons, the Commission anticipates that the FOIA Office may commence processing Plaintiff's FOIA requests by September 2011. The Commission's request for this stay under *Open America* is consistent with this Court's decision in *Electronic Frontier Foundation v. DOJ*, 563 F.Supp. 2d 188 (D.D.C. 2008)(Walton J.), where the Defendant agency was provided with a 16-month stay under *Open America* because it showed "exceptional" circumstances and diligence in addressing its FOIA backlog.⁵

11. Once the SEC commences the actual processing of these documents, it will likely take a minimum of six months to finalize the necessary review and processing of the 107 boxes of records, including 2.1 GB of electronic data, potentially responsive to Plaintiff's requests, including the process of addressing various requests for confidential treatment tendered to the Commission by third parties.

II.

Applicability of Exemption 7(A)

12. The September 22 Order requires that the Commission provide "a progress report on the investigation that is the basis for the defendant's invocation of Exemption 7(A)." The Order focused specifically on four documents listed on the Commission's *Vaughn* index (records 9 and 16-18) that were withheld because they

⁴ 2.1 GB of electronic data translates roughly into the equivalent of 136,000 Microsoft Word File pages. See "How Many Pages in a Gigabyte?" *Discovery Services Fact Sheet*, LexisNexis (located at http://www.lexisnexis.com/applieddiscovery/lawlibrary/whitePapers/ADI_FS_PagesInAGigabyte.pdf).

⁵ Here, the Commission is seeking a longer stay than in *Electronic Frontier*, but it also has more documents to review and must also process—in contrast with the defendant in *Electronic Frontier*—hundreds of requests for confidential treatment.

contain information from an investigation being conducted by the OIG. The Commission is submitting with this report the Declaration of H. David Kotz (“Kotz Decl.”), the Commission’s Inspector General, to address the status of both open OIG investigations that were described in the Declaration of Noelle L. Frangipane (“Frangipane Declaration”), which was submitted with the Commission’s motion for summary judgment on January 15, 2010. *See* Kotz Decl. Ms. Frangipane’s declaration described all of the categories of documents that were being withheld because their disclosure could reasonably be expected to harm ongoing OIG investigations and was not limited to the four documents specifically listed on the *Vaughn* index.⁶

13. Mr. Kotz’s declaration explains that one investigation that was open in January 2010 is now closed, and the OIG will provide documents from that investigation for further processing. Kotz Decl. ¶ 3. As described further below, the final report from that investigation has now been provided to Mr. Cuban in redacted form.

14. The other investigation that was open in January 2010 is still open and ongoing, and the public disclosure of documents from that investigation could reasonably be expected to interfere with the investigation, as detailed in the Frangipane Declaration. Kotz Decl. ¶¶ 4, 6. However, the Commission has determined that it is no longer necessary to withhold records 9 and 16-18 under FOIA Exemption 7(A)

⁶ The Commission’s motion for summary judgment explained that the Commission was also withholding certain documents from an Enforcement investigation and resulting litigation because disclosure of those documents could reasonably be expected to harm ongoing litigation in *SEC v. Cuban*, Civil Action No. 3:08-CV-2050-D (N.D. Tex.). The Order does not ask for information about the status of that litigation. We note, however, that on September 21, 2010, the United States Court of Appeals for the Fifth Circuit vacated the district court judgment dismissing the case and remanded the case to the district court “for further proceedings including discovery, consideration of summary judgment, and trial, if reached.” *SEC v. Cuban*, No. 09-10996, 2010 WL 3633059, at *5 (5th Cir. 2010).

(although other exemptions still apply to those documents). Kotz Decl. ¶ 5.

15. The Kotz Declaration further states that the investigation that is still open will likely be concluded by March 2011. Kotz Decl. ¶ 4.

16. On October 18, 2010, Plaintiff's counsel Stephen Best advised the Commission's counsel that Plaintiff is not requesting that the Commission provide any documents from the open investigation until it is complete. *See* Exhibit 1 (Email from George E. Anhang to Juanita C. Hernandez (Oct. 18, 2010)). Further, Plaintiff is willing to accept the Inspector General's estimation of when the investigation will be concluded. *Id.* Thus, Plaintiff is not contesting the continued application of Exemption 7(A) to the open investigation records.

III.

Documents Produced to Plaintiff

17. Pursuant to the Court's September 22 Order, the Commission produced documents responsive to Plaintiff's FOIA requests. Specifically:

- (i) Records **4, 10, 20, 21, 23, 24,** and **58** of the *Vaughn* index were produced with identifying information redacted pursuant to FOIA Exemption 6 to protect the personal privacy interests of the employee and the SEC managers and staff involved in deciding that matter;
- (ii) Records **78, 79** and **80** of the *Vaughn* index were produced to Plaintiff in redacted form. Names and personally identifiable information were redacted pursuant to FOIA Exemptions 6 and 7(C) to protect the privacy interests of staff members; and
- (iii) Likewise, in connection with Plaintiff's FOIA Letter Request No. 10, which sought, among other things, "Records of any internal investigations into the 'Investigation of Alleged Unethical Instructions to Close Cases and Failure to Pursue Investigations,' 'Allegations of Conflict of Interest and Investigative Misconduct,' 'Allegation of Retaliatory Investigation,' 'Allegation of Leak of Confidential Document to the Press' and 'Other Pending Inquiries,'" the Commission produced to Plaintiff a redacted version of an 82-page OIG report regarding

“Allegations of Conflict of Interest and Investigative Misconduct.” This report, which was previously withheld by the Commission pursuant to FOIA Exemption 7(A), was produced to Plaintiff with redactions pursuant to Exemption 5, 6 and 7(C), as the relevant OIG investigation is no longer active. *See* Kotz Decl. ¶ 3.

IV.

SEC Motion for Reconsideration Will be Filed No Later Than November 5, 2010

18. The Court’s Order granted in part and denied in part the parties’ cross motions for summary judgment. The Commission intends to file a motion for reconsideration addressing the Court’s concerns on or about November 5, 2010. The Commission’s motion for reconsideration will provide the Court with additional testimony and details, including a revised *Vaughn* index, concerning the adequacy of the SEC’s search for records potentially responsive to Plaintiff’s requests and the underlying factual bases for the SEC’s assertion of various FOIA exemptions.

Respectfully submitted,

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Dated: October 20, 2010

Attorneys for Defendant

Certificate of Service

On October 20, 2010, I caused a true and correct copy of the foregoing Status Report to be served on Plaintiff's counsel electronically by means of the Court's ECF system.

Dated: October 20, 2010

/s/Juanita C. Hernandez
Juanita C. Hernandez
Office of the General Counsel
Securities and Exchange Commission