

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

_____		)
MARK CUBAN,		)
		)
	<b>Plaintiff,</b>	)
		)
	v.	)
		)
SECURITIES AND EXCHANGE		)
COMMISSION,		)
		)
	<b>Defendant.</b>	)
_____		)

**Case: 1:09-cv-00996 (RBW)**  
**Assigned: Walton, Reggie B.**  
**Description: FOIA/Privacy Act**

**SUPPLEMENTAL DECLARATION OF MARGARET CELIA WINTER**

I, Margaret Celia Winter, declare and state as follows:

1. I am the Freedom of Information Act and Privacy Act Officer at the U.S. Securities and Exchange Commission in Washington, D.C. (“SEC” or “Commission”). As the head of the SEC’s Office of FOIA Services (formerly Office of Freedom of Information Act and Privacy Act Operations) (“FOIA Office”), my duties include, among other things, supervising the operations of the SEC’s FOIA Office in processing and responding to FOIA requests.

2. The statements contained in this declaration are based on my personal knowledge, upon information provided to me in my official capacity, and upon conclusions and determinations reached and made in accordance therewith.

3. Due to the nature of my official duties, I am familiar with the procedures followed by the SEC in responding to requests for information from its files pursuant to the provisions of the Freedom of Information Act (“FOIA”), 5 U.S.C. 552 and the Privacy Act of 1974, 5 U.S.C. 552a. Specifically, I am aware of the treatment which has been afforded the FOIA and Privacy

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Act requests of plaintiff, Mark Cuban, which are attached as **Attachments A and B** to my earlier declaration.

4. This declaration supplements, and hereby incorporates, my prior declarations submitted in this case and dated January 15, 2010 (“First Winter Declaration”) and March 2, 2010 (“Second Winter Declaration”), which provided the Court and Plaintiff with, among other things, an overview of the Commission’s FOIA Office and the current backlog of FOIA/Privacy Act (“PA”) requests, an explanation of the Commission’s multi-track “First-in, First-out” (“FIFO”) system of processing FOIA and PA requests, a summary of the reasonable progress achieved by the Commission in addressing its FOIA backlog, and a description of how Plaintiff’s FOIA and PA requests were handled by the SEC. The First and Second Winter Declarations were tendered in support of both the SEC’s motion for summary judgment and its motion to bifurcate and stay proceedings to permit the Commission to process Plaintiff’s remaining requests as they reach the front of the SEC’s Complex FIFO Track (“FIFO Track”).

5. The purpose of this Supplemental Declaration is to update the Court on the progress the SEC FOIA Office has continued to make in addressing its FOIA backlog, and to provide the Court with an estimate as to when the SEC FOIA Office reasonably expects to commence processing Plaintiff’s FOIA/Privacy Act Letter Request No. 1 and FOIA Letter Request Nos. 6 and 10, which are currently pending in the FIFO Track .

**STATUS OF PLAINTIFF’S FOIA REQUESTS**

6. As of January 15, 2010, the date of the First Winter Declaration, twenty-four (24) requests, consisting of approximately 2,080 boxes of potentially responsive records, were pending ahead of Plaintiff’s in the FIFO Track.

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7. As of October 13, 2010, ten (10) requests consisting of approximately 845 boxes of potentially responsive paper records, as well as 238 CDs of computer files, 300 giga bytes (“GB”) of electronic data, and 87 bound transcripts, are ahead of Plaintiff’s in the FIFO Track.

8. In nine months, the number of requests pending ahead of Plaintiff’s has been reduced by approximately 58 percent and the number of potentially responsive materials that need to be reviewed ahead of Plaintiff’s has been reduced by approximately 59 percent.

9. Nonetheless, several of the requests ahead of Plaintiff’s remain exceptionally voluminous in nature. One request concerning Computer Associates International, for instance, will require the FOIA Office to review 600 boxes of potentially responsive materials. Likewise, another FOIA request concerning a different SEC investigation will require the FOIA Office to review approximately 235 CDs, 15 boxes of paper records, and ten bound transcripts. At this time, there is no estimate of the amount of material contained on the 235 CDs and the amount of time needed to review that electronic data.

10. As all ten of the requests pending ahead of Plaintiff’s in the FIFO Track relate to SEC investigations, the process of performing a page-by-page, and sometimes line-by-line, review of these investigative files, which often contain sensitive personal information and/or confidential materials, will be particularly time-consuming, based on past experience of such reviews.

11. A substantial proportion of the approximately 845 boxes, 235 CDs, and 300 GB of material that need to be reviewed by the FOIA Office ahead of Plaintiff’s were provided to Commission staff by third parties, who have requested that the material be granted confidential treatment under the Commission’s rules, *see* 17 C.F.R. 200.83 *et seq.* Therefore, the FOIA

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Office is required to notify and provide all such third parties with an opportunity to object to the release of these records. Even if the FOIA Office determines that such materials may be released in full or in part under FOIA, the parties requesting confidential treatment are entitled under the Commission's rules to appeal the FOIA Office's initial determination to the Commission's Office of the General Counsel ("OGC"). Therefore, to the extent that any of the parties requesting confidential treatment of these records object to their release, this may further delay the FOIA Office's capacity to process these materials.

12. Indeed, the ten FOIA requests ahead of Plaintiff's in the FIFO Track include 352 different requests for confidential treatment. Before any of these documents can be released, the SEC is required to comply with the procedures outlined above.

13. The approximately 107 boxes of potentially responsive materials to Plaintiff's FOIA requests include an additional nine different requests for confidential treatment. As these records were produced to the SEC by third parties along with requests for confidential treatment, and may contain confidential commercial or financial information, the third parties who provided such materials to the SEC are entitled to be notified that the materials have been requested under FOIA. These third parties must be notified that Mr. Cuban has requested the material under FOIA and be given the opportunity to substantiate their request(s) for confidential treatment.

**SEC Workload Demands**

14. As of January 15, 2010, a significant factor that impacted the SEC's ability to reduce its FOIA backlog was the number of FOIA lawsuits pending against the SEC at that time. First Winter Decl. ¶ 53. Although the SEC remains involved in several FOIA lawsuits, (i) *Aguirre v. SEC* (D.D.C.)—one of the matters pending as of January 2010—has been resolved,

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and (ii) the district court's ruling in *Williams & Connolly v. SEC* (D.D.C.) granting the Commission's motion for summary judgment has been appealed by the plaintiff to the D.C. Circuit.

15. In addition, the SEC has streamlined operations between the FOIA Office and the SEC's Branch of Records Management ("BRM"). BRM is responsible primarily for maintaining and storing agency records and documents. By placing both the FOIA Office and BRM within the same administrative unit—the SEC's new Office of FOIA and Records Management Services (OFRMS)—and under a single manager—the SEC's Chief FOIA/Privacy Act Officer, the FOIA Office's contacts and procedures for obtaining access to agency records has been further streamlined.

16. Finally, the FOIA Office has requested additional resources to target and eliminate its FIFO backlog. Specifically, the FOIA Office has requested funding to hire contractors to review documents in the FIFO Track and work towards eliminating the SEC's FIFO backlog.

17. The SEC is confident that it will continue to make substantial progress in further reducing its FOIA backlog and in enhancing its capacity to provide the public with access to public records in a transparent and responsive manner.

18. The SEC takes its responsibilities under FOIA seriously, and continues to expend substantial resources in attempting to comply with the statutory deadlines. While regrettably compliance with these deadlines is not always possible, the SEC has made great strides in cutting its backlog over time, reducing the size of its FOIA backlog by approximately 95 percent over a

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period of three years (2006-2009) and the length of its FIFO Track by 99 percent over five years (2004-2009). First Winter Decl. ¶ 37, 41, 43, 45.

19. The fairest way to continue to make progress in eliminating this backlog is to process requests on a “first-in, first-out” basis. Indeed, it is unfair to process a FIFO Track request that was filed later in time before those requests that were filed earlier.

20. Given the circumstances outlined above, I anticipate that the FOIA Office may commence processing Plaintiff’s requests by September 2011. Once the FOIA Office commences the actual processing of these documents, the SEC expects that it will take a minimum of six months to finalize the necessary review and processing of the 107 boxes of paper records, including the process of addressing various requests for confidentiality tendered to the Commission by third parties.

21. For the above reasons, the SEC submits this declaration in support of its request that the Court allow the SEC an additional eleven months to begin processing documents responsive to Plaintiff’s request without having to reconfigure its FIFO Queue or to place Mr. Cuban’s request ahead of others who filed their requests earlier in time.

I declare under penalty of perjury that the forgoing is true and correct.

Executed on October ~~13~~, 2010.



Margaret Celia Winter  
Freedom of Information Act and Privacy Act Officer  
Office of FOIA Services  
Securities and Exchange Commission