UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION FOR RECONSIDERATION

Plaintiff's Opposition ("Opp'n") to the Securities and Exchange Commission's ("SEC") Motion For Reconsideration ("Mot.") avers that the SEC has not substantiated any exemption, yet fails to identify anything that is truly lacking.

ARGUMENT

I. The SEC's Searches of Categories 7, 11, 12, & 13 of Request I Are Adequate

With respect to Category 7, Plaintiff contends that even though the SEC has found and searched an electronic database for responsive documents, it should also be required to search voluminous paper forms.[1] Not so. "An agency is not required to undertake a search that is so broad as to be unduly burdensome." *Servicemembers Legal Def. Network v. Dep't of Def.*, 471 F. Supp. 2d 78, 86 (D.D.C. 2007). Because the SEC has already searched its electronic records, and Plaintiff has refused to narrow the scope of his request (Cunningham Decl. ¶ 8), Plaintiff's contention that the agency must duplicate its electronic search is unreasonable.[2]

With regard to Categories 11-13, Plaintiff alleges that the SEC failed to state how the

[1] The fact that the SEC did not realize earlier that it had a database that it could search has no bearing on evaluations of the SEC's good faith, contrary to Plaintiff's claim. (Opp'n at 2 n.3.) *See Nat'l Inst. of Military Justice v. Dep't of Def.*, 404 F. Supp. 2d 325, 333-34 (D.D.C. 2005) (explaining that agency's inadequate initial search does not mean agency acted in bad faith or conducted an inadequate search where agency subsequently conducted proper search).

[2] While a substantial subset of forms showing employee securities transactions are on an electronic database (Cunningham Decl. ¶ 8), it is not possible to discern which of the paper files overlap with the electronic files without doing a manual comparison of both sets. (*Id.* ¶ 16.)

indexes and databases were searched, the search terms used, and the level of information displayed in the index fields. Two of those contentions are inaccurate, and the third is irrelevant. First, as to *how* the indexes were searched, Noelle Maloney stated that she "*reviewed* indexes of investigations maintained by the OIG." (2d Suppl. Maloney Decl. ¶ 6 (emphasis added).) She also "*reviewed* the fields in the database that identify the nature of the allegations or would cause us to believe that the investigative file would contain potentially responsive documents." (*Id.* ¶ 14 (emphasis added).) In the declaration, "reviewed" is plainly a synonym for "read." Second, the search terms Maloney used for her electronic search are set forth in her declaration. (*Id.* ¶ 12.) Finally, the level of information in the indexes is irrelevant, as this dispute is not about how the SEC keeps its indexes. As the Court explained (Mem. Op. at 9), what matters here is that Maloney used all reasonable methods to find responsive information, and her declaration shows that she did so. (*Id.* ¶¶ 6, 14.)

II. The SEC Properly Withheld Documents Pursuant to Exemption 5

A. The SEC Properly Invoked the Deliberative Process Privilege

In attempting to overcome the SEC's assertion of the deliberative process privilege, Plaintiff contends that the Second Revised *Vaughn* Index is not sufficiently informative. Yet, Plaintiff does not cite the entry he criticizes in full and does not show that anything is lacking that could be included without revealing privileged materials. The Second Revised *Vaughn* Index provides some information about the nature and context of each document and what the deliberations concern.

Plaintiff also attacks Nancy Ellen Tyler's declaration because it does not address whether each document was "candid or personal in nature." (Def.'s Opp'n at 6.) However, Tyler specifically stated that the documents withheld under the deliberative process privilege "contain or reflect candid communications." (*Id.*) Moreover, Tyler lists the issues that were deliberated (2d Suppl. Tyler Decl. ¶ 5), and the Second Revised *Vaughn* Index contains information about

the nature of each document. The detail provided is more than sufficient.[3]

B. The SEC Properly Invoked the Attorney Work- Product Doctrine

Plaintiff claims that the SEC does not demonstrate the documents withheld under the attorney work-product doctrine were "prepared or obtained because of the prospect of litigation." (Def.'s Opp'n at 7-8.) But David Pinansky affirmed that "[t]his particular matter was one that I believe could result in administrative or court litigation . . . . In providing legal advice on this matter, I specifically considered issues relevant to possible litigation. The documents withheld as work-product (other than documents 49, 50, 51, 65, and 72) reflect consideration of those issues." (2d Suppl. Pinansky Decl. ¶ 4.) The remaining five documents withheld under the work-product doctrine involve work-product in enforcement actions (Second Revised *Vaughn* Index, entries 49, 50, 51, 65 & 72). Plaintiff has not opposed that claim.

C. The SEC Properly Invoked the Attorney-Client Privilege

Plaintiff argues that the declarations don't demonstrate that "'confidentiality was expected in the handling of these communications' or that the SEC was 'reasonably careful' to control the disclosure of the information." (Def.'s Opp'n at 8 (citation omitted).) However, Tyler stated that in her "experience and practice at the SEC, Commission staff members are aware that information about employee disciplinary matters is sensitive and confidential, and provide that information only to staff members responsible for imposing the discipline, namely managers of the employee, those providing advice or assistance regarding the discipline, or supervisors of those person." (2d Suppl. Tyler Decl. ¶ 4; *see also* 2d Suppl. Pinansky Decl. ¶ 5.) No additional information is needed to show that the documents were deemed confidential,

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[3] Plaintiff's assertion that "routine disciplinary matters are not covered by the deliberative process privilege" (Def.'s Opp'n at 6 n.12) is wrong. Federal agencies cannot "shield from *discovery* information otherwise subject to the deliberative process privilege when that information bears on whether or not the agency discriminated against an employee." *Waters v. U.S. Capitol Police Bd.*, 216 F.R.D. 153, 163 (2003) (emphasis added). That limitation on discovery is irrelevant to the FOIA. *Cf. McPeek v. Ashcroft*, 202 F.R.D. 332, 335 (D.D.C. 2001) (noting that government could rely on deliberative process privilege even though the privilege may not have protected the document in other contexts).

especially since there is no indication that the documents were not kept confidential.

III. The SEC Properly Withheld Documents Pursuant to Exemption 3(A)

While the SEC should have invoked Exemption 3(A) earlier, the exemption still should be considered here because of the importance of protecting SARs information. Congress has plainly stated that such information must be protected. *See* 31 U.S.C. §§ 5318(g), 5319.

Plaintiff's contention that the SEC has not provided a sufficient description to protect the information is even more baffling than his other arguments. 31 U.S.C. § 5319 exempts from FOIA disclosure a "report and records of reports" filed under, among other provisions, 31 U.S.C. § 5318(g). The SEC provided a declaration stating that the withheld documents "contain a record of a Suspicious Activity Report filed under 31 U.S.C. 5318(g)." (Wharton Decl. ¶ 4.) Nothing more is needed to show that the exemption applies.

IV. The SEC Properly Withheld Documents Pursuant to Exemption 6

Plaintiff attacks the SEC's withholding under Exemption 6 by arguing that there is a public interest in the few documents that address discipline for sending the Cuban emails. However, the identity of the individual who sent the emails is known by Plaintiff (and was publicly available long before the SEC included an attachment with his name). Thus, it is impossible to disclose these documents and also protect the individual's identity. Consequently, the documents, which include information in which the individual has a privacy interest, cannot be disclosed without an unwarranted violation of the individual's privacy rights. *Dep't of Air Force v. Rose*, 425 U.S. 352, 380-81 (1976) (holding that summaries of discipline should be withheld where redaction does not sufficiently protect the identity of the person subject to discipline); *see also Kimberlin v. Dep't of Justice*, 139 F.3d 944, 949 (D.C. Cir. 1998) (recognizing that although the public knew the name of a government attorney accused of wrongdoing and that he received a relatively mild sanction, "[h]e still has a privacy interest . . . in avoiding disclosure of the details of the investigation, of his misconduct, and of his punishment").

Plaintiff also contends that there is a public interest that outweighs privacy interests in any documents about discipline that his FOIA requests may happen to encompass. This Court's opinion, however, did not contain such a finding. It noted a public interest where a government employee was using government resources to "harass private citizens." (Mem. Op. at 35.) Plaintiff has not pointed to any matter analogous to the sending of the Cuban emails in which there might be a public interest, and there is a clear privacy interest in all matters of employee discipline.

Finally, Plaintiff argues that the SEC must provide more detail to explain why the documents withheld in full need to be withheld in full to protect identities. However, Plaintiff is again demanding explanations that would disclose protected information.[4]

CONCLUSION

For the reasons stated here and in its Motion for Reconsideration, the SEC respectfully asks the Court to grant its Motion for Reconsideration.

Respectfully submitted,

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[4] The D.C. Circuit has addressed an argument similar to Plaintiff's complaint that the Revised *Vaughn* Index is too repetitive and noted that such an argument,

> disregards the propriety of using generic terms so long as they have been defined aptly for purposes of resolving FOIA claims; any other approach would require either a sort of phony individualization (meaningless variations of language at each invocation of a specific exemption) or a degree of detail that would reveal precisely the information that the agency claims it is entitled to withhold.

Keys v. Dep't of Justice, 830 F.2d 337, 349 (D.C. Cir. 1987).