IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARK CUBAN,	)	
	)	
Plaintiff,	)	
	)	**Case No. 1:09-cv-00996 (RWB)**
vs.	)	**Judge Reggie B. Walton**
	)	
SECURITIES AND EXCHANGE COMMISSION,	)	
	)	
Defendant.	)	

PLAINTIFF MARK CUBAN'S RESPONSE TO DEFENDANT'S STATUS REPORT REGARDING PLAINTIFF'S PROPOSAL TO PAY FOR SEARCH AND APPLICATION OF EXEMPTION 7(A) TO DOCUMENTS RELATING TO ONGOING ENFORCEMENT ACTION

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INTRODUCTION

In its most recent attempt to avoid producing, in any reasonably useful timeframe, documents to which Mr. Cuban is entitled under his two-year-old FOIA request, the SEC puts forth perhaps its most bizarre argument yet – one contradicted by the facts, the law, and the SEC's own documented processes for handling payment for FOIA requests. To wit: the SEC claims that it is statutorily prohibited from accepting Mr. Cuban's offer to provide funds to expedite the processing of his requests. This position is not only unsupported by the law, but, incredibly, completely ignores:

- the fact that the SEC has already notified Mr. Cuban in writing that he will be required to pay the SEC more than $23,000 for the search and review costs of his requests;
- the fact that the SEC has already invoiced and been paid by Mr. Cuban for processing a limited portion of his requests; and
- the fact that FOIA requires the SEC to promulgate a fee schedule that reflects the direct costs of FOIA searches, that these fees are assessed against commercial requesters, and that the SEC has already determined that Mr. Cuban is a commercial requester.

Mr. Cuban's offer to cover the costs of expediting the search for and review of the documents he requested is simply a natural extension of his compliance with the SEC's documented requirement that he cover the costs of searching for and reviewing those documents in the first place. For the SEC to claim that it is prohibited from accepting funds from Mr. Cuban when it has already done so and has notified Mr. Cuban that it must do so again is disingenuous and another attempt to delay the processing of Mr. Cuban's FOIA requests and obstruct his access to the documents he has requested.

I. The SEC's Rejection of Mr. Cuban's Proposed Solution Illustrates its Continued Bad Faith and Obstructionism

During the October 22, 2010, hearing before the Court, Mr. Cuban's counsel proposed that if the SEC lacks the resources to process FOIA requests in a timely fashion, Mr. Cuban could provide financial assistance to the SEC to allow it to do so. The Court pointed a specific question at the SEC: "can you accept money from a litigant?" Status Hr'g Tr. 16, Oct. 22, 2010 ("Tr."). The SEC was unsure of the answer at the time, but ultimately determined, as detailed in their Status

Report, that "it cannot accept Cuban's offer." Def.'s Status Rep. at 2. This position is unsupported by both the facts and the law.

First, the SEC's protest that it cannot accept payment from Mr. Cuban is wholly undermined by the fact that the SEC has ***told*** Mr. Cuban that he will have to submit a large sum of money for the processing of documents in response to his FOIA requests, and that Mr. Cuban has paid costs as requested by the SEC. "In order to carry out the provisions" of FOIA, agencies are required to set and promulgate fee schedules for the recovery of "the direct costs of search, duplication, or review" of documents that are requested under FOIA. 5 U.S.C. §§ 552(a)(4)(A)(i), 552(a)(4)(A)(iv). The SEC has promulgated a fee schedule for FOIA requests, *see* 17 C.F.R. § 200.80e, which it has reproduced on its website. This website also directs FOIA requesters to make out their checks to the Securities and Exchange Commission and mail them to the SEC's Office of the Comptroller. *See* Securities and Exchange Commission, *Schedule of Fees for Records Services* (last modified July 16, 2009), http://www.sec.gov/foia/feesche.htm (last visited December 14, 2010). The SEC bizarrely rejects Mr. Cuban's offer to submit money when its own website contains detailed instructions for how FOIA requesters should submit money to the SEC.

In this matter, the SEC specifically has informed Mr. Cuban that it will charge him for the costs of search and review (as well as for copying fees). When Mr. Cuban submitted his original FOIA requests two years ago, his counsel stated:

> I understand that I am responsible for the costs of searching, reviewing, copying, and shipping the requested records, and I agree to pay reasonable fees for the processing of this request in an amount not to exceed $10,000. Please notify me before any expenses are incurred in excess of that amount. You may send an invoice with the requested records, or you may bill me in advance."

December 19, 2008, FOIA Request from David Ross to Securities and Exchange Commission at 3.[1] Because two such letters were sent,[2] Mr. Cuban authorized the SEC to bill him for up to $20,000 in initial processing costs.

[1] This letter may be found in Def.'s Mot. for Partial Summ. J. (ECF No. 8), Ex. 1, Decl. of Margaret Winter at Attach. A.

[2] The other letter may be found in Def.'s Mot. for Partial Summ. J., Ex. 1, Decl. of Margaret Winter at Attach. B.

The SEC did not, as it does now, refuse to accept this money. Instead, it ***sent Mr. Cuban a bill***. In a letter dated July 2, 2009, the SEC informed Mr. Cuban that it had found responsive documents that it was withholding under a FOIA exemption, and it also stated that "[t]he total cost incurred to process your FOIA request is $56.00. Please send the enclosed invoice and your payment to our Office of Financial Management." Ex. A, July 2, 2009, Letter from Mark P. Siford to David M. Ross at 2.[3] Mr. Cuban paid this sum as requested. The SEC later informed Mr. Cuban that it considered him a "commercial requester" under FOIA, and that "[a]s such ***you are required to pay search and review fees*** beyond the first one-half hour, in accordance with our fee schedule." Accordingly, with respect to certain records, "the estimated cost to search and review [them] is $23,352. This estimate does not include the cost of copying any releasable records at $.24 per page." Ex. B, September 22, 2009, Letter from Mark P. Siford to David M. Ross at 1.[4] Mr. Cuban authorized the fees that the SEC noted it would be charging him. September 25, 2009, Letter from David M. Ross to Mark P. Siford at 1.[5]

In short, the SEC protests that the Miscellaneous Receipts Statute, 31 U.S.C. § 3302(b), prohibits it from accepting Mr. Cuban's money. The sheer ridiculousness of this position is exposed by the SEC's history of ***asking*** Mr. Cuban for money and Mr. Cuban's history of paying when invoiced and authorizing future payments. The SEC, both at the October 22 hearing and in its status report, either was or should have been aware that Mr. Cuban has already been charged for his FOIA requests and that the SEC has declared that it intends to bill him more than $20,000 in regular FOIA fees for the processing of documents (plus the cost of copying at approximately four pages per dollar). These payments, according to the SEC, are for the costs of search and review. But, contrary to all of the interactions between Mr. Cuban and the SEC before the filing of the status report, the SEC now takes the outrageous position that it cannot accept additional payments from Mr. Cuban

[3] This letter may also be found in Def.'s Mot. for Partial Summ. J., Ex. 1, Decl. of Margaret Winter at Attach. K.

[4] This letter may also be found in Pl.'s Mot. for Partial Summ. J. (ECF No. 13), Decl. of David M. Ross at Ex. 4.

[5] This letter may be found in Pl.'s Mot. for Partial Summ. J., Decl. of David M. Ross at Ex. 5.

even though the SEC knows that it has already accepted Mr. Cuban's money for FOIA processing and plans to do so in the future.

Mr. Cuban's proposal offered a common-sense solution to the problems that the SEC continues to raise. But the SEC is not interested in solutions. It initially asserted that it "ha[d] to go through government contracting procedures in order for [the SEC] to even be able to hire anybody," that the documents might be "very sensitive materials," and that the contractors would not be able to "access [] those confidential documents if they don't have correct clearance." Tr. at 15-16, 18. It now changes course entirely, apparently abandoning its reliance on the government-contracting process and newly contending that it is statutorily required to reject Mr. Cuban's proposal and continue to violate the time limitations set forth in FOIA. The SEC provides no explanation for why it shifted positions between the previous hearing and its status report.[6] But even ignoring the fact that the SEC has abandoned its original rationale for rejecting Mr. Cuban's solution and instead has chosen to rely upon an entirely new argument, the SEC's new rationale simply cannot be taken seriously.

Mr. Cuban's proposal would defray the costs of processing documents just as regular FOIA fees do. The SEC protests that additional payments from Mr. Cuban would be subject to the Miscellaneous Receipts Statute, but regular FOIA fees – which, as the SEC acknowledges in its correspondence, are intended to defray the costs of FOIA compliance – are supposed to be subject to the Statute as well.[7] Accordingly, if Mr. Cuban were to pay additional fees to the SEC for the processing of his FOIA request, these fees would cover the costs of search and review in precisely the same way that ordinary FOIA fees would.

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[6] Presumably, the SEC had to abandon its original reason for rejecting Mr. Cuban's proposal and search for another because its initially stated concerns proved to be meritless. As noted below, numerous federal agencies use contractors in FOIA processing without encountering the problems that the SEC originally identified. In addition, as the SEC well knew during the hearing, it had already made clear that it planned to hire contractors to assist with its FOIA duties. *See* Tr. at 9 (statement that the SEC is "thinking about hiring two to three contractors to work on the FIFO [queue] full time . . . [and] through the government contracting process some people could be on board this spring").

[7] *See* United States General Accounting Office, *Principles of Federal Appropriations Law* 6-199 (3d ed. 2006) (citing *Effect of 31 U.S.C. § 484 on Settlement Authority of the Attorney General*, 4B U.S. Op. Off. Legal Counsel 684, 1980 WL 20970, at *3 (1980)); *see also Matter of Retention of Fees Received by EPA Contractors Providing Information Services to the Public*, B-166506, 1975 WL 7967, at *1 (Comp. Gen. Oct. 20, 1975).

Overall, this problem is thus simply not as serious as the SEC pretends that it is. The Miscellaneous Receipts Statute does ***not*** require the SEC to refuse any money that Mr. Cuban offers to assist it with its resource problem. Instead, the Statute prescribes that an agency, when accepting money, "shall deposit the money in the Treasury." 31 U.S.C. § 3302(b). Therefore, under Mr. Cuban's proposal, the Government will incur costs in processing the documents to which Mr. Cuban is entitled under FOIA, and the Government will be compensated in return. The SEC does not seriously contest that this is the case.

In addition, the Government has specifically recognized that an agency may, as an alternative to FOIA, allow a requester to obtain agency records directly from private contractors without running afoul of the Miscellaneous Receipts Statute. *See Matter of Retention of Fees Received by EPA Contractors Providing Information Services to the Public*, B-166506 Comp. Gen., 1975 WL 7967, at *2-3 (Oct. 20, 1975) (neither FOIA nor the Miscellaneous Receipts Act are offended when agency allows private contractors, acting as "independent entrepreneurs," to provide documents to FOIA requesters as an alternative to FOIA). The Comptroller General has on two occasions opined that an agency may allow a requester to deal directly with a contractor as a method of obtaining documents from the government, and these amounts paid to the contractor are not subject to the Miscellaneous Receipts Act. *See id.*; *Matter of Federal Election Commission – Sales of Microfilm Copies of Candidate and Committee Reports*, 61 Comp. Gen. 285, 285-87, 1982 WL 26592 (1982) (highly similar procedure proposed by the Federal Election Commission).[8] An agency may thus, under these decisions, properly allow private contractors to handle its FOIA burdens as long as those contractors act as independent entrepreneurs and not as agents of the government, charge the same amounts that the SEC would charge for its FOIA searches, and do not "delay or deny access to information or otherwise circumvent the intent or specific provisions" of FOIA. *Matter of Retention of Fees Received by EPA Contractors*, 1975 WL 7967, at *2.

[8] The letter from the General Accounting Office that the SEC offers as a justification for refusing Mr. Cuban's proposal specifically notes that the situation it addresses "differs substantially" from the FOIA-workaround arrangements addressed here, and it thus poses no obstacle to such arrangements. *See* Def.'s Status Rep., Ex. 1 at 9 (available electronically at 2004 WL 77861, at *9 (Comp. Gen. Jan. 15, 2004)).

The mere fact that a contractor would be involved in processing documents would pose no problem for the SEC. Using contractors to process documents in response to FOIA requests is commonplace. *See* United States Department of Justice, Office of Information and Privacy, *The Use of Contractors in FOIA Administration*, FOIA Post (Sept. 30, 2004), *available at* http://www.justice.gov/oip/foiapost/2004foiapost27.htm (last visited December 14, 2010). Numerous agencies – including agencies that handle sensitive documents, such as the Department of Defense, the Department of State, and the Department of Homeland Security – use contractors to assist with FOIA processing. *Id.* The SEC also apparently uses contract attorneys to perform various functions. *See* Def.'s First Status Report (ECF No. 32), Supp. Decl. of Celia Winter at ¶ 16 (stating that the SEC intended to hire contractors to process FOIA requests); Tr. at 9.[9]

In short, the SEC, in response to Mr. Cuban's proposal to solve the problem posed by the Commission's FOIA backlog, expressed pragmatic concerns with the hiring of government contractors (even though doing so is commonplace and the SEC planned to do so already). In its status report, having switched course from this position, the SEC simply declares that it cannot accept any money – despite the fact that it has already done so and has indicated that it will do so in the future – and implicitly advises Mr. Cuban and other FOIA requesters to wait patiently for however many years it takes the agency to find time to look through the documents. This glib and obstructionist response illustrates that the SEC is not interested in working to find actual solutions to its backlog. By now it is abundantly clear that, instead of working in good faith to circumvent an administrative problem, the SEC is using its backlog as just another litigation tactic in an effort to avoid producing documents to which Mr. Cuban is entitled under FOIA.

[9] *See also The S.E.C. Is Hiring 800 New Employees…And They Want to Spend an Evening With You*, The Posse List (Sept. 1, 2010), http://www.theposselist.com/2010/09/01/the-s-e-c-is-hiring-800-new-employees-%E2%80%A6-and-they-want-to-spend-an-evening-with-you/ (last visited December 14, 2010) ("There have been hundreds of contract attorneys who have worked the government side of document reviews including work at the S.E.C."). In addition, it is likely that the SEC already uses contract attorneys to process FOIA requests as well. An agency that makes so much of its efforts to reduce its backlog must, at some point, have contacted outside reviewers to assist with the review.

II. The SEC Has Apparently Given Up on Providing Estimates of When It Will Begin Reviewing Documents Responsive to Mr. Cuban's Requests

After years of delay and obstruction, the SEC's earlier submissions asked the Court to allow it to delay producing documents for several additional years. Now the SEC's status report states that, although the Commission has previously estimated that it might finally get around to reviewing responsive documents years upon years after Mr. Cuban's FOIA requests were made, the SEC is likely to take even longer than those unreasonable estimates suggested. The SEC does not provide an updated estimate of how long it will take to process these documents. Instead, it puts the Court and Mr. Cuban on notice that the process will take longer than it last predicted and that Mr. Cuban should continue to wait.

Mr. Cuban filed his FOIA requests in December of 2008, nearly two years ago. *See* Def.'s Mot. for Partial Summ. J., Ex. 1, Decl. of Margaret Winter at Attach. A-B. In January 2010, the SEC requested a three-year stay from the Court. This stay was to expire in January 2013, more than ***four years*** from Mr. Cuban's original request. *See* Def.'s Mot. to Bifurcate and Stay Proceedings (ECF No. 8). As recently as October 2010, the SEC revised its estimate and predicted that it would ***begin*** reviewing the documents in September 2011 – which, of course, would mean that it received a *de facto* stay of more than two and a half years from the time it first received Mr. Cuban's requests. *See* Def.'s First Status Rep. at 2-4 (ECF No. 32). And now the SEC has given up on providing estimates at all. This leaves Mr. Cuban with no certainty. He can now only expect that the SEC will finish processing the documents at some point within four or five years after he first made his requests.

If the SEC had taken a fraction of the time, effort, and money that it has spent fighting in court for its right to obstruct FOIA requests and directed these resources toward compliance with its FOIA obligations, this issue would already have been resolved and neither the Court, the SEC, nor Mr. Cuban would be forced to endlessly haggle over when the SEC would begin reviewing the documents. But this is not what the SEC has done. Instead, the SEC continues to grasp for any excuse to avoid its FOIA obligation to produce documents, while trying to create the ridiculous illusion that it is complying in good faith with its statutory obligations. The SEC's most recent

status report does nothing more than add to a record already boiling over with bad faith and obstructionism.

III. The SEC's Reliance on Exemption 7(A) is Unsupported, and it is Not Entitled to Pretend that Exemption 5 Arguments are Actually Exemption 7(A) Arguments

The SEC, in the partial sur-reply to the original summary judgment briefs it includes in its status report, argues that it may rely upon Exemption 7(A) to withhold documents related to the investigation of Mr. Cuban. Exemption 7(A) applies to documents that were compiled for law-enforcement purposes and the disclosure of which could reasonably be expected to interfere with law-enforcement proceedings. *See* Mem. Op. (ECF No. 27) at 37-38. The Commission does not provide additional evidence to support its claims. Instead, it asserts that there has been no substantial change since it filed its original summary judgment briefs, and thus the existing record is sufficient to support the application of the Exemption.

The SEC is not entitled to rely on Exemption 7(A) because its legal theories have been disclosed in the ongoing litigation and the evidence it presents to the Court is manifestly too flawed to establish otherwise.[10] Mr. Cuban made these arguments in his earlier summary judgment briefs, and because the SEC has not attempted to supplement the existing record, Mr. Cuban incorporates by reference all his earlier arguments demonstrating why the SEC's position with respect to the investigation of Mr. Cuban is not supportable.[11]

Only a few additional comments need be made in response to the SEC's sur-reply. Notably, SEC bizarrely continues to argue that Exemption 7(A) applies to certain documents because they include "attorney-client privileged and/or work product protected materials." *See* Def.'s Mot. for Partial Summ. J. (ECF No. 10), Ex. 6, Decl. of Julie Riewe at ¶¶ 9-12 ("Riewe Decl."). As the Court has recognized, arguments such as these, which contend that civil discovery privileges should apply to FOIA requests, are properly considered under Exemption 5. *See* Mem. Op. at 19-20 (noting that courts have incorporated the deliberative-process privilege, the attorney-client

[10] Contrary to the SEC's mischaracterizations, Mr. Cuban does not take the position that Exemption 7(A) always expires once litigation begins, nor has he at any point.

[11] *See, e.g.*, Pl.'s Mot. for Partial Summ. J. (ECF No. 13) at 29-36; Pl.'s Reply (ECF No. 24) at 20-23.

privilege, and the attorney-work-product privilege into Exemption 5). Yet the SEC continues to pretend that its arguments are actually arguments for the application of Exemption 7(A), even though Congress added Exemption 5 to FOIA as a different and wholly separate exemption to address precisely the concerns that the SEC brings up.

The SEC should not be permitted to repackage its Exemption 5 arguments as Exemption 7(A) arguments. *See Goodrich Corp. v. EPA*, 593 F. Supp. 2d 184, 194 (D.D.C. 2009) ("Exemption 5, not Exemption 7(A), covers privileges that would arise in the civil discovery context").[12] The SEC cites cases to establish that it is ***possible*** for documents subject to Exemption 5 to be subject to Exemption 7(A) as well[13] – a point that Mr. Cuban does not dispute – but it presents no authority supporting the proposition that a document may be withheld under Exemption 7(A) simply ***because*** it is exempt under Exemption 5.[14] Simply put, the SEC has provided nothing to the Court that Exemption 7(A) also is concerned with protecting documents under the civil discovery privileges, as the SEC seems to believe it is.

The SEC's reason for trying to blend the FOIA exemptions together is manifest. According to the SEC, the declaration that supposedly supports the application of Exemption 7(A) purports to rely on "functional categories" of documents as opposed to describing each document and providing an explanation as to why it is subject to the Exemption. *See* Riewe Decl. at ¶ 6; *see also Bevis v. Dep't of State*, 801 F.2d 1386, 1389-90 (D.C. Cir. 1986). Accordingly, the declaration makes no

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[12] The SEC struggles to distinguish *Goodrich* by suggesting that the "harm" contemplated by Exemption 7(A) can be something that is directly and entirely addressed by another FOIA exemption. FOIA exemptions, of course, are narrowly construed, *see FBI v. Abramson*, 456 U.S. 615, 630, 102 S. Ct. 2054, 2064 (1982), yet the SEC still contends that the Court should interpret Exemption 7(A) so broadly that it would entirely displace Exemption 5 in this context and render it mere surplusage. This argument is all the more remarkable because the SEC would suffer ***no harm*** if it honestly presented its Exemption 5 arguments as Exemption 5 arguments. If the documents actually contain materials that are subject to Exemption 5 as the SEC suggests, than they could be protected under that Exemption. But instead, the SEC has crafted a novel theory that blends the two exemptions together.

[13] In addition, the SEC cites *Judicial Watch, Inc. v. Dep't of Justice*, 306 F. Supp. 2d 58 (D.D.C. 2004), although this case is concerned with the harm that disclosure of documents would pose to the future of an incomplete investigation. *See id.* at 75-76 ("Revelation of [information contained in requested documents] during the course of the SEC's investigation of Enron could damage that agency's ability to obtain all relevant information and could reveal premature and/or unfounded questions that full investigation might resolve."). As the investigation of Mr. Cuban is presumably complete, this case is not entirely on point.

[14] In making these observations, Mr. Cuban does not concede that any documents might actually be subject to Exemption 5. In fact, the record plainly does not support such a finding.

attempt to describe individual documents or provide any level of detail beyond broad and generic characterizations. Riewe Decl. at ¶¶ 6-12. The Court, however, has made clear that the SEC must make a more specific showing if it wishes to seek the protections of Exemption 5. *See, e.g.*, Mem. Op. at 22 ("the defendant's declaration completely lacks any detail regarding any particular record and does nothing more than generally state that Exemption 5 is satisfied"); *see also id.* at 26-27, 30-31. Thus, the SEC pretends that its Exemption 5 arguments are actually Exemption 7(A) arguments because its supporting declaration is grossly insufficient to establish that Exemption 5 applies.

The FOIA exemptions have well defined and narrowly construed applications; they do not simply mean whatever the SEC wants them to mean. If the SEC wishes to argue that the documents in question are subject to Exemption 5, it must abide by the evidentiary standards that the Court has found appropriate to that Exemption, and it should not be allowed to continue to avoid its FOIA obligations through spurious legal arguments.

CONCLUSION

The SEC's status report amply demonstrates that it continues to obstruct the FOIA process as much as it can. It can hardly be said that the SEC has instituted a "presumption of disclosure" as the President of the United States has directed it to. Rather, the SEC is operating under a presumption of fighting against disclosure as hard as its limited resources allow, taking advantage of bureaucratic backlog and obstructing the FOIA process as frequently and as intensely as possible. It has rejected Mr. Cuban's commonsense proposal on flimsy grounds, it no longer feels that it must provide estimates of when it will finally comply with its statutory obligations, and it continues to assert unmeritorious arguments for the suppression of documents. In short, the status report does nothing more than supplement the existing evidence of the SEC's bad faith.

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Respectfully submitted,

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