

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

<p>MARK CUBAN,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>SECURITIES AND EXCHANGE COMMISSION,</p> <p style="text-align: center;">Defendant.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Case: 1:09-cv-00996</p> <p>Assigned: Walton, Reggie B.</p> <p>Description: FOIA/Privacy Act</p>
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**BRIEF IN SUPPORT OF DEFENDANT’S RENEWED MOTION FOR PARTIAL
SUMMARY JUDGMENT PURSUANT TO JULY 1, 2011 COURT ORDER**

Defendant, the Securities and Exchange Commission (“Commission” or “SEC”), respectfully files this brief in support of its Renewed Motion for Partial Summary Judgment pursuant to this Court’s Order of July 1, 2011.

BACKGROUND AND PROCEDURAL DEVELOPMENTS¹

Plaintiff, Mark Cuban, brought this action seeking the release of certain information pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C §552 and the Privacy Act, 5 U.S.C §552a. On the parties’ cross-motions for summary judgment, on September 22, 2010, this Court granted in part and denied in part the parties’ motions (Dkt. Nos. 26 & 27).

On November 5, 2010, the Commission filed a Motion for Reconsideration of the September 2010 Order and filed a second *Vaughn* Index (Dkt. No. 34). On July 1, 2011, this Court issued a second opinion and granted in part and denied in part the SEC’s Motion for Reconsideration (Dkt. Nos. 49 & 50). The Court further ordered the Commission to file a new motion for partial summary judgment and a new or

¹ The SEC incorporates by reference the underlying facts provided in its prior filings in this case. See also attached Exhibit List.

supplemental *Vaughn* Index.

The Commission is submitting this renewed motion for partial summary judgment, its Third Revised *Vaughn* Index (Exhibit 22), and the Third Supplemental Declaration of Noelle L. Maloney (Exhibit 23) to provide information the Court found was required in the July 1, 2011 Opinion.

The Third Revised *Vaughn* Index reflects the documents that still remain at issue in this case.² The Index notes which documents are no longer at issue in light of this Court's September 22, 2010 and July 1, 2011 Orders. In addition, since the July 1, 2011 Order, the Commission has determined that portions of many of the documents that remain at issue can be released. Thus, the Commission is producing portions of Document Nos. 1-3, 5-9, 12, 14-19, 22, 30, 38, 40, 46-49, 52, 56, 64, 65 and 67-76 to Plaintiff. The Third Revised *Vaughn* Index describes what is still being withheld.

ARGUMENT³

I. The SEC Properly Withheld Documents Pursuant to Exemption 5

Exemption 5 of FOIA protects those documents that are covered by the deliberative process privilege, work-product doctrine, and the attorney-client privilege. 5 U.S.C. §552(b)(5). This Court has recognized that these “three traditional evidentiary and discovery privileges” are contained within Exemption 5. (Dkt. No. 50 at 11). Among the documents still at issue in this case are documents – or portions thereof –

² All documents referred to herein are identified in the Third Revised *Vaughn* Index, attached hereto as Exhibit 22. For ease of reference, the documents are referenced by the number assigned in the Third Revised *Vaughn* Index. The document numbers are the same as in the original and second *Vaughn* Indexes.

³ The SEC incorporates by reference also the legal arguments it raised in its previous motions partial summary judgment and reconsideration.

protected by the deliberative process privilege and the work-product doctrine.⁴

A. *The SEC Properly Withheld Documents Protected by the Deliberative Process Privilege.*

The Commission maintains that the following documents – or portions thereof – are protected by the deliberative process privilege: Document Nos. 1, 40, 46, 48, 49, 52, 71, 73, and 75. The purpose of the deliberative process exemption is to “prevent injury to the quality of agency decisions.” *NLRB v. Sears*, 421 U.S. 132, 151 (1975). To this end, documents withheld under this privilege must satisfy two fundamental requirements. First, the communication must be predecisional, that is before the adoption of an agency policy or decision. *Jordan v. Dep’t of Justice*, 591 F.2d 773, 774 (D.C. Cir. 1978) (*en banc*). Second, it must be deliberative, that is, part of a recommendation or opinion. *Vaughn v. Rosen*, 523 F. 2d 1136, 1143-44 (D.C. Cir. 1975).

The portions of documents withheld under the deliberative process privilege are described individually on the Third Revised *Vaughn* Index, but they come generally within three categories. First, Document Nos. 40, 48, 52, and 75 contain hand-written notes from conversations between staff in the SEC’s Office of Human Resources (“HR”) and SEC managers and reveal opinions and recommendations expressed in the course of deciding what discipline to impose on an SEC employee. Those portions of the notes that are factual or procedural in nature are being produced. The information being withheld would reveal the deliberations of the persons involved in the process. *See, e.g., Warren v. Soc. Sec. Admin.*, 2000 WL 1209383, at *2 (W.D.N.Y. Aug. 22, 2000) (protecting score sheets used to rank applicants for a government position because decisions as to

⁴ Where this Court has ruled that one exemption fully protects a particular document from production, the Commission has deemed that document as being no longer at issue. Thus, it has not provided additional information relevant to other exemptions that it originally raised. The Commission, however, is not waiving any of its original arguments.

how many points to award for particular qualifications are deliberative).

Second, Document Nos. 71 and 73 contain draft documents that HR staff and Commission supervisors exchanged in the process of recommending a decision on employee discipline. Some of those drafts contain handwritten edits and commentary. Courts have recognized that draft documents are part of a predecisional deliberative process. *See, e.g., Pub. Employees for Env'tl Responsibility v. Bloch*, 532 F. Supp. 2d 19, 22 (D.D.C. 2008) (privilege protected draft position descriptions).

The third category contains two documents (Document Nos. 1 & 49), both of which are being produced except for small portions that contain employee considerations about future potential actions. Such considerations are predecisional and deliberative.

B. *The SEC Properly Withheld Documents Protected by the Work-Product Doctrine*

The Commission is withholding Documents Nos. 49, 65 and 72 under the attorney work-product doctrine. FED. R. CIV. P. 26(b)(3). These three documents include work product from civil enforcement actions brought by the Commission as they reflect attorney communications discussing litigation strategy and the handling of the enforcement actions, including attorney thought processes and attorney opinions. These three documents include commentary by an SEC trial attorney to his supervisors, SEC staff and/or state securities regulators handling a related enforcement proceeding. These are precisely the types of communications that are protected by the attorney work-product doctrine. *See Slater v. EOUSA*, No. 98-1663, 1999 U.S. Dist. LEXIS 8399 at *9 (D.D.C. May 24, 1999) (protects discussion in letter from Assistant United States Attorney to FBI discussing investigative strategy in case); *see also SafeCard Servs v. SEC.*, 926 F. 2d 1197, 1202 (D.C. Cir. 1991) (protecting SEC records of law enforcement investigations);

Gavin v. SEC, No. 04-4522, 2007 WL 2454156, at *9 (D.Minn. Aug. 23, 2007) (work product protected documents created as part of investigation into possible violations of securities laws).

The Court previously found that the Commission had not provided enough information to establish that these emails were protected by the attorney work-product doctrine. The Commission has included additional information in the Third Revised *Vaughn* Index to make clear that the emails were prepared in anticipation of litigation. Indeed, they were prepared in the midst of litigation. However, as the connection of these documents to litigation is apparent on their face, the Commission requests that the Court review these three documents *in camera* if it believes additional support is necessary.

II. The SEC Properly Withheld Documents Pursuant to Exemptions 6 and 7(c).

As stated above, the Commission has produced to Mr. Cuban portions of documents it previously withheld in full. The produced documents were no longer protected by Exemption 6 because the Commission released a report by its Office of Inspector General (“OIG”) that provides information that is in the documents responsive to Mr. Cuban’s FOIA requests. In addition, the discipline has resulted in litigation in federal court, and briefs filed in that case contain details about the employee discipline that was not previously available to the public.

The information that the Commission continues to withhold comes within two general categories: (1) names and other personal identifying information; and (2) details relating to the discipline that is not already public and in which the privacy interest is significantly greater than any public interest in seeing how the Commission operates.

The vast majority of Exemption 6 redactions are of names and personal identifying information from the documents. *See* Document Nos. 1-3, 5-9, 12, 14-19, 22, 30, 38, 40, 46-49, 52, 56, 64, 65 and 67-76. Most of the persons whose identity is protected are Commission staff members who were involved in the process of imposing discipline on an employee. The name of the employee who was disciplined has not been redacted.⁵ In addition, the names of Senior Officers (SO), the SEC equivalent of the Senior Executive Series (SES) at other federal agencies, have not been redacted. Non-SO SEC staff members have a reasonable expectation of privacy in their identities, and that privacy interest is greater than any public interest in knowing exactly which low and middle level civil servants carried out their agency duties. *See, e.g., Smith v. Dep't of Labor*, No. 10-1253, 2011 WL 3099703, at *5-7 (D.D.C. July 26, 2011) (protecting from disclosure under Exemption 6 names of low level agency employees, their identifying information, opinions of job performance, personal phone numbers, home addresses and personal email addresses); *Wood v. FBI*, 432 F.3d 78, 87-89 (2d Cir. 2005) (protecting names of investigative personnel of FBI); *Judicial Watch, Inc. v. United States*, 84 F. App'x 335, 338-39 (4th Cir. 2004) (protecting names of IRS nonsupervisory staff).

The names and personal identifying information, including contact information, for persons outside the Commission has also been redacted to protect their privacy interests. These persons include: (1) a witness in a civil enforcement action brought by the SEC and the witness's counsel, *see e.g.,* Doc Nos. 15, 72, 73, and 76; (2) and staff of a state securities regulatory agency, *see, e.g.,* Document Nos. 71 & 72. To the extent

⁵ That employee's social security number and birth date have been redacted in Document No. 30 in light of the heightened privacy interest all persons have in that information. *Prison Legal News v. Lappin*, No. 05-1812, 2011 U.S. Dist. LEXIS 18671, at *2-3 (D.D.C. Feb. 25, 2011) (social security numbers have "a specific relationship to [an] individual and "the privacy interest in one's social security number is self-evident").

those names occur in documents directly related to law enforcement proceedings, Exemption 7(C) also protects the names.

The second category consists of approximately nine documents that contain information in which individuals have a strong privacy interest. The information protected includes: (1) medical information concerning the family of the disciplined attorney (Document Nos. 7 & 8); (2) sensitive details about the conduct that resulted in discipline that is not already public, none of which has any direct connection to emails the employee sent to Mr. Cuban (Document Nos. 30, 47, 68, 71, 72, and 73); and (3) an email chain (the only document withheld in full) that contains emails between the disciplined employee and a person from whom he was seeking assistance and which contains personal information about both persons (Document No. 77). None of these documents will reveal significant information about Commission actions or decisions, but their release would interfere with the privacy interests of the persons involved.

III. The Search for Responsive Documents was Adequate for Categories 11, 12 & 13.

In addition to requiring more information about withheld documents, this Court's July 1, 2011 Order and Opinion required the SEC to provide additional information about its search for documents responsive to Categories 11, 12 and 13 of the FOIA Request. The Third Supplemental Declaration of Noelle Maloney addresses the issues raised by the Court and describes in detail the steps staff in the SEC's Office of the Inspector General ("OIG") took to search for documents responsive to Categories 11, 12, and 13. Those steps initially included talking to relevant staff about past and current investigations, reviewing in full the reading indexes listing the principal subject matters of those investigations, and examining all potentially relevant files. Third Maloney

Declaration ¶¶ 6-12. In addition, to verify that its manual review of the indexes was accurate, the OIG staff has recently conducted an electronic search of its indexes using terms from the FOIA Request; that search did not reveal any additional potentially responsive investigations. *Id.* at ¶ 13.

V. *In camera* review of Remaining Documents

Of the responsive documents still at issue here, the Commission recently produced 37 documents with some redactions and withheld only one document in full (No. 77). These documents can be made available for the Court for an *in camera* review.

CONCLUSION

Accordingly, the SEC respectfully asks the Court to grant its Renewed Motion for Partial Summary Judgment. A proposed order is attached to the Motion pursuant to Loc. Rule 7(h).

Respectfully submitted,

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Dated: October 13, 2011

Attorneys for Defendant

Defendant's Supplemental Exhibit List in Support of its Renewed Motion for Partial Summary Judgment *

Exhibit 1 = Declaration of Margaret Celia Winter

Exhibit 2 = *Vaughn* Index

Exhibit 3 = Declaration of Kenneth H. Hall

Exhibit 4 = Declaration of David M. Pinansky

Exhibit 5 = Declaration of Nancy Ellen Tyler

Exhibit 6 = Declaration of Julie M. Riewe

Exhibit 7 = Declaration of Noelle L. Frangipane

Exhibit 8 = Supplemental Declaration of Margaret Celia Winter

Exhibit 9= Revised *Vaughn* Index

Exhibit 10= Supplemental Declaration of David M. Pinansky

Exhibit 11= Supplemental Declaration of Nancy Ellen Tyler

Exhibit 12= *Pl. SEC's Mem. of Law in Opp'n to Def. Mark Cuban's Mot. for Attorneys' Fees and Expenses*, Civ. Action No. 3-08-cv-2050-D (SAF), United States District Court, Northern District of Dallas, filed Sept. 30, 2009. Attached thereto at Document 47-2 (page 33 of the attached adobe acrobat file) is the Declaration of Robert B. Kaplan.

Exhibit 13= Supplemental Declaration of Noelle Frangipane

Exhibit 14= Declaration of William Lenox

Exhibit 15= Second Revised *Vaughn* Index

Exhibit 16= Declaration of Shira Minton

Exhibit 17= Declaration of David Cunningham

Exhibit 18= Second Supplemental Declaration of Noelle Maloney (formerly Frangipane)

Exhibit 19= Second Supplemental Declaration of Nancy Ellen Tyler

Exhibit 20= Second Supplemental Declaration of David Pinansky

Exhibit 21= Declaration of Leslie Wharton

Exhibit 22= Third Revised *Vaughn* Index

Exhibit 23 = Third Supplemental Declaration of Noelle L. Maloney

* Exhibits 1–7 were filed on January 15, 2010, with Docket Doc. No. 10. (Def.’s Mot. for Partial Summ. J.)

Exhibits 8–14 were filed on March 16, 2010, with Docket Doc. No. 22 (Def.’s Reply to Pl.’s Opp’n to Def.’s Partial Mot. for Summ. J.)

Exhibits 15–21 were filed on November 5, 2010, with Docket Doc. No. 34 (Def.’s Motion for Reconsideration)

Exhibits 22-23 are being filed on October 13, 2011 in connection with Def’s Renewed Motion for Partial Summary Judgment