

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

_____	)	
MARK CUBAN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	Civil Action No. 09-0996 (RBW)
SECURITIES AND EXCHANGE	)	
COMMISSION,	)	
	)	
Defendant.	)	
_____	)	

**ORDER**

This case is currently before the Court on the defendant's October 13, 2011 Renewed Motion for Partial Summary Judgment Pursuant to July 1, 2011 Court Order ("10/13/2011 Def.'s SJ Mot.").<sup>1</sup> Additionally, two issues that arose earlier in the course of this litigation, which were not addressed in the defendant's motion, remain before the Court. They are: (1) the status of records that are potentially responsive to the plaintiff's Freedom of Information Act ("FOIA") request that remain in the defendant's first in, first out ("FIFO") track;<sup>2</sup> and, (2) the plaintiff's offer to cover the costs of expedited review for these documents. See Plaintiff Mark Cuban's Response to the SEC's Renewed Motion for Partial Summary Judgment ("Pl.'s 11/28/2011 Resp.") at 2-3.

<sup>1</sup> The facts giving rise to this litigation were set forth in detail in the Court's September 22, 2010 Memorandum Opinion. See Cuban v. S.E.C., 744 F. Supp. 2d 60, 66-68 (D.D.C. 2010).

<sup>2</sup> The defendant "processes FOIA requests on a 'first in, first out' ('FIFO') basis, where they are reviewed in the order in which they were received." See October 20, 2010 Status Report, ¶ 3.

First, in its brief in support of its renewed motion for summary judgment, Brief in Support of Defendant's Renewed Motion for Partial Summary Judgment ("Def.'s Mem."), the defendant represents that it "has determined that portions of many of the documents that remain at issue can be released," and that it is thus producing those portions of those documents. Def.'s Mem. at 2. It then argues that the documents still at issue in this case—or portions thereof—have been properly withheld pursuant to Exemptions 5, 6, and 7(c) of the FOIA, id. at 2-7, and that its searches for records responsive to the defendant's request were adequate, id. at 7-8. The plaintiff responded not by filing an opposition and cross-motion for summary judgment, as he did in response to the defendant's previous motion for partial summary judgment, but by simply filing a five-page response to the defendant's renewed motion for partial summary judgment. See generally Pl.'s 11/28/11 Resp. In his response, the plaintiff observes that "[i]ndeed, the [defendant] has now produced . . . nearly all of the documents remaining on the Third Revised Vaughn Index." Id. at 1. The plaintiff continues: "Although Mr. Cuban believes that [the] redactions [that] the SEC has made to some of the produced documents are completely unwarranted, Mr. Cuban does not wish to add to the burdens already imposed on the Court by the SEC. Therefore, . . . Mr. Cuban will not present any further argument with regard to the remaining redactions or ask the Court to address them." Id. at 1-2. The plaintiff also indicates that he will not "present any further argument regarding the SEC's searches with respect to [Categories 11, 12, and 13] or . . . ask the Court to address the continuing inadequacies in the SEC's searches." Id. at 2. Accordingly, the Court will dismiss as moot (1) the plaintiff's claims concerning the documents listed on the Third Revised Vaughn Index, Def.'s Mot., Exhibit 22 (Third Revised Vaughn Index) at 1-16, which the defendant has produced with reactions, and (2)

the plaintiff's claims regarding the adequacy of the defendant's searches for records responsive to his Category 11, 12, and 13 requests.

Next, on January 31, 2011, the defendant represented to the Court that it would "try to the best of its ability to commence reviewing the 107 boxes of materials, including 2.2 GB of electronic data," that has been requested by the plaintiff, by September 2011. Defendant Securities and Exchange Commission's Supplemental Status Report Regarding Plaintiff's Proposal to Pay for Search ("Def.'s 1/31/11 Status Report") at 2. As the defendant has provided no information on whether it has yet begun reviewing this material that remains in its FIFO track, the Court will Order the defendant to file a status report on this material within thirty days of the entry of this Order.

Finally, because it is not an issue over which this Court has any authority, the Court will not attempt to decide one way or the other whether the defendant should be compelled to accept the plaintiff's offer to cover the costs of an expedited review of the potentially responsive documents remaining in the defendant's FIFO review track. Fortunately, the FOIA does not direct courts to order agencies how to respond to FOIA requests; rather, the Court's role in the "peculiar nature [of judicial review] of the FOIA," Summers v. U.S. Dep't of Justice, 140 F.3d 1077, 1080 (D.C. Cir. 1998), is to provide a check on agency claims regarding the adequacy of its searches or the propriety of agency reliance on FOIA exemptions to withhold responsive records. The Court thus agrees with the defendant that the plaintiff "does not—and cannot—contend that [his offer to pay for expedited review] is a legal issue for the Court to decide." Def.'s 1/31/11 Status Report at 1. Therefore, the Court will not comment on the plaintiff's proposal.

Accordingly, it is hereby

**ORDERED** that all of the plaintiff's claims concerning the documents listed in the defendant's Third Revised Vaughn Index and all of the plaintiff's claims with respect to the adequacy of the defendant's search for documents in Categories 11, 12, and 13 are hereby **DISMISSED AS MOOT**. It is further

**ORDERED** that the defendant shall submit a status report regarding its processing of the potentially responsive records remaining in its FIFO track no later than thirty days after the entry of this Order.

**SO ORDERED** this 8th day of December, 2011.

REGGIE B. WALTON  
United States District Judge