

Howard Elisofon, Esq.
Christopher J. Sullivan, Esq.
John Oleske, Esq.
Kerry K. Jardine, Esq.
Attorneys for Plaintiffs
Herrick, Feinstein LLP
2 Park Avenue
New York, New York 10016
Tel: (212) 592-1400
Email: helisofon@herrick.com

ELECTRONICALLY-FILED DOCUMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
PHYLLIS MOLCHATSKY and STEVEN : Case No 09 CIV 8697 (LTS/AJP)
SCHNEIDER, M.D., :
: **DECLARATION OF**
Plaintiffs, : **HOWARD R. ELISOFON**
:
vs. :
:
UNITED STATES OF AMERICA, :
:
Defendant. :
:
----- X

HOWARD R. ELISOFON, an attorney duly admitted to practice before the U.S. District Court for the Southern District of New York, declares under penalty of perjury as follows:

1. I am a member of the law firm Herrick, Feinstein LLP, attorneys for plaintiffs Phyllis Molchatsky and Steven Schneider, M.D (collectively "Plaintiffs"). I have personal knowledge of the facts set forth herein. I make this Declaration on behalf of Plaintiffs in opposition to the Government's motion to dismiss this matter.

2. Attached hereto as Exhibit A is a true and correct file copy of a Freedom of Information Act Request we served upon the SEC on January 26, 2009 (the "Request"), by

which we sought additional evidence relating to the potential existence of policies, practices, and procedures of the SEC, not mentioned in the Report.

3. Attached hereto as Exhibit B is a true and correct copy of the SEC's response to the Request dated February 23, 2009 (the "Response") in which the SEC objected to most of the Requests on the grounds of burdensomeness and/or the law-enforcement privilege, referred us to publicly-available records-control and enforcement manuals, and deferred responding to one of our requests dealing with personal relationships and personal gifts between SEC staffers and employees of regulated entities. The SEC eventually responded to this last request by referring us to SEC ethics guidelines.

4. Attached hereto as Exhibit C is a true and correct copy of our appeal from the Response dated April 24, 2009 (the "Appeal") in which we demonstrated the SEC's obligation to produce the requested documents. The SEC did not respond to our appeal within the 20-day mandate required by 5 U.S.C. § 552(a)(6)(A)(ii).

5. Attached hereto as Exhibit D is a true and correct copy of a letter to the SEC dated July 27, 2009, in which we reminded the SEC of its obligation to respond to our appeal.

6. The following day, we received a telephone call from a Ms. Celia L. Jacoby with the SEC's FOIA response office. She indicated that the SEC had not received our appeal. My colleague re-forwarded the appeal, receipt of which Ms. Jacoby confirmed the email dated July 28, 2009, attached hereto as Exhibit E.

7. We have no record of any further communication from the SEC concerning our appeal after the July 28, 2009 email from Ms. Jacoby, and thereafter deemed the SEC's denial of our appeal as final.

EXHIBIT A

January 26, 2009

VIA ELECTRONIC MAIL (FOIAPA@SEC.GOV)
& REGULAR MAIL

Securities and Exchange Commission
Office of FOIA and Privacy Act Operations
100 F Street, N.E.
Washington, D.C. 20549-5100

Re: FOIA Request Concerning Bernard L. Madoff Investment Securities, LLC
and Internal SEC Practices and Procedures

Dear Sir/Madam:

This is a request under the Freedom of Information Act, 5 U.S.C. § 552, *et seq.*, which relates to Bernard L. Madoff Investment Securities, LLC, or any Bernard L. Madoff-related entity (collectively referred to as "Madoff") and the internal SEC Practices and Procedures relevant to the past collection, handling, processing, and reporting of information concerning Madoff. We request that a copy set of the following documents concerning these matters be provided to us:

1. Any written communications or documents¹ sent between any person or entity and the SEC, or between SEC employees, prior to December 11, 2008 concerning any potential violations of applicable laws, regulations or rules of any regulatory or self-regulatory agencies concerning Madoff, or concerning any allegation that Madoff's internal policies, practices and procedures were insufficient to prevent such violations.
2. Any written communications or documents concerning any audit or investigation of Madoff by the SEC which audit or investigation was ever classified as "closed" by the SEC or was concluded in any other fashion.
3. Any written communications or documents concerning any referrals or other communication of information prior to December 11, 2008 between, among, or within any SEC office, division, or other sub-unit to any other such office, division, or other sub-unit, including, but not limited to, the Commissioners and Chair of the SEC, concerning Madoff.

¹ The terms "communication," "concerning," and "document" are defined as set forth in Local Rule 26.3 of the Local Rules of the United States District Court for the Southern District of New York.

Securities and Exchange Commission

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4. Any written communications or documents concerning any referrals or other communication of information prior to December 11, 2008 from any law-enforcement, regulatory or self-regulatory agency (including, but not limited to, NASD and its successor FINRA) to any other office, division, or other sub-unit of the SEC, including, but not limited to, the Commissioners and Chair of the SEC, concerning Madoff.
5. Any written communications or documents concerning any audit, inquiry or other investigation of Madoff by any self-regulatory agency (including, but not limited to, NASD and its successor FINRA).
6. Any written communications or documents concerning any manuals, policies, procedures, practices, rules, regulations, directives, orders, instructions or customs concerning the conduct by the SEC of audits, inquiries or other investigations of broker/dealers, investment advisory firms, or hedge funds.
7. Any written communications or documents concerning any manuals, policies, procedures, practices, rules, regulations, directives, orders, instructions or customs concerning the monitoring, research, intake, collection, review, or handling of complaints from the public or industry participants regarding potential fraud or other wrongdoing by broker/dealers, investment advisory firms, or hedge funds or their employees.
8. Any written communications or documents concerning any manuals, policies, procedures, practices, rules, regulations, directives, orders, instructions or customs concerning the monitoring, research, intake, collection, review, or handling of publicly-available information regarding potential fraud or other wrongdoing by broker/dealers, investment advisory firms, or hedge funds or their employees.
9. Any written communications or documents concerning any manuals, policies, procedures, practices, rules, regulations, directives, orders, instructions or customs concerning the forwarding of information regarding potential fraud or other wrongdoing by broker/dealers, investment advisory firms, or hedge funds between, among, or within any SEC office, division, or other sub-unit to any other such office, division, or other sub-unit, including, but not limited to, the Commissioners and Chair of the SEC.
10. Any written communications or documents concerning any manuals, policies, procedures, practices, rules, regulations, directives, orders, instructions or customs concerning the assignment of SEC personnel to perform any of the functions identified in the above requests.

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11. Any written communications or documents concerning any manuals, policies, procedures, practices, rules, regulations, directives, orders, instructions or customs concerning the supervision of SEC personnel in their performance of any of the functions identified in the above requests.
12. Any written communications or documents concerning any manuals, policies, procedures, practices, rules, regulations, directives, orders, instructions or customs concerning the prohibition or removal of SEC personnel from performance of any of the functions identified in the above requests, whether on the grounds that said personnel suffer from a conflict of interest, or otherwise.
13. Any written communications or documents concerning any manuals, policies, procedures, practices, rules, regulations, directives, orders, instructions or customs concerning the prohibition of SEC personnel from accepting personal gifts or engaging in personal relationships with principals or employees of entities subject to SEC regulation.
14. Any written communications or documents concerning any manuals, policies, procedures, practices, rules, regulations, directives, orders, instructions or customs concerning the prohibition or removal of SEC personnel from performance of any of the functions identified in the above requests, whether on the grounds that said personnel suffer from a conflict of interest, or otherwise.
15. Any written communications or documents concerning any incident in which any SEC personnel were determined to have violated any of the manuals, policies, procedures, practices, rules, regulations, directives, orders, instructions or customs identified in the above requests, which incident related to Madoff, including, but not limited to, letters of reprimand, demotions, or other forms of discipline.
16. Any written communications or documents concerning any manuals, policies, procedures, practices, rules, regulations, directives, orders, instructions or customs concerning the storage, retention, and/or destruction of records.
17. Any written communications or documents concerning Harry Markopolous, including, but not limited to, all communications or documents concerning Mr. Markopolous' allegations that Madoff was operating a ponzi scheme or was otherwise engaged in any wrongdoing.
18. Any written communications or documents concerning any SEC investigation or inquiry of Madoff conducted in 1999, which was subsequently closed or otherwise terminated.

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19. Any written communications or documents concerning any SEC investigation or review of Madoff conducted in 2004, which was subsequently closed, concluded, or otherwise terminated.
20. Any written communications or documents concerning any SEC investigation or review of Madoff conducted in 2005, which was subsequently closed or otherwise terminated, including any written communications or documents concerning interviews conducted by SEC staff of Bernard Madoff or members of his family.
21. Any written communications or documents concerning the SEC investigation or review of Madoff conducted in 2006 that resulted in the requirement that Madoff register as an investment advisory firm.
22. Any written communications or documents concerning any other SEC investigation or review of Madoff.

The documents called for by this request do not include any privileged documents or material. However, the production of all non-privileged internal investigative documents or memoranda wherever located, in the possession, custody or control of the SEC, or in the possession, custody or control of its representatives, employees, agents, consultants, auditors, investigators or other persons, is requested.

To the extent the responses to these requests may be substantial, you may provide documents on a rolling basis as they become available, but in any event, all requests must be responded to, and responsive documents produced, within a reasonable time. To that end, please provide responses to individual requests to the extent documents become available, without regard to the availability of documents to satisfy other requests. Furthermore, to the extent the requests call for copies of documents maintained in electronic format by the SEC, please provide such copies in their native format.

Finally, we ask that these requests be interpreted and responded to in the spirit of President Obama's Memorandum for the Heads of Executive Departments and Agencies concerning the Freedom of Information Act, dated January 21, 2009, in which he instructed:

The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve. *In responding to requests under the FOIA, executive*

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April 2, 2009
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branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public.

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. *The presumption of disclosure should be applied to all decisions involving FOIA.*²

We would greatly appreciate your prompt response. Please do not hesitate to contact me at (212) 592-1437 if you have any questions. Thank you very much for your anticipated assistance and cooperation.

Respectfully submitted,

Howard R. Elisofon

² Text accessible at http://www.whitehouse.gov/the_press_office/FreedomofInformationAct/ (emphasis added).

EXHIBIT B



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION

STATION PLACE
100 F STREET, NE
WASHINGTON, DC 20549

Office of Freedom of Information
& Privacy Act Operations

Mail Stop 5100

February 23, 2009

Mr. Howard Elisofon
Herrick, Feinstein LLP
2 Park Avenue
New York, NY 10016

Re: Freedom of Information Act (FOIA), 5 U.S.C. § 552
Request No. 09-02219-FOIA

Dear Mr. Elisofon:

This letter is a partial response to your request, dated January 26, 2009 and received in this office on January 29, 2009, for certain information concerning any Bernard L. Madoff related entity.

The tracking software the Commission uses to process FOIA requests typically accommodates only one subject per request. Your letter enumerates twenty-two (22) separate items. For your convenience, however, I have assigned the single FOIA number referenced above to your request. I will respond to all of the subjects in your letter under this same number. In the future, however, please limit any request to a single subject. See "How to Make a FOIA or Privacy Act Request" at <http://www.sec.gov/foia/howfo2.htm>.

With regard to the following request numbers, your request is too broad and a reasonable search cannot be conducted: 6-12 and 14. For much of these requests there is extensive information available at www.sec.gov. Please review and research the publicly available material. If you are unable to locate what you need, please contact us and identify expressly those records you require.

With respect to number 16, please refer to the Commission's records control schedule at 17 CFR § 200.80f. For numbers 6 and 9 we refer you to the Commission's Enforcement Manual on our website.

EXHIBIT C

HERRICK

NEW YORK
NEWARK
PRINCETON

HOWARD ELISOFON

(212) 592-1437

EMAIL:

HELISOFON@ERRICK.COM

April 24, 2009

BY FEDERAL EXPRESS

Andrew N. Vollmer
Acting General Counsel
Office of the General Counsel
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Freedom of Information Act Appeal - Request No. 09-02219-FOIA

Dear Mr. Vollmer:

This letter constitutes our appeal from the denial by the United States Security and Exchange Commission ("SEC") of the above-referenced Freedom of Information Act request (the "Request"). The Request, dated January 26, 2009, is appended hereto as Exhibit A. SEC's letter in response denying the request, dated February 23, 2009 (the "Denial"), is appended hereto as Exhibit B. In the Denial, SEC sets forth two categories of objections (in addition to its purported ongoing consideration of a single request), each of which we address in turn.

First, the Denial characterizes Requests nos. 6-12 and 14 as "too broad" and states that "a reasonable search cannot be conducted." The Denial then refers us to the SEC's website and states that if we are unable to locate the requested documents on the website, we should contact SEC "and identify expressly those records [we] require." The Denial also refers us to SEC's records control schedule with respect to no. 16 and its Enforcement Manual with respect to nos. 6 and 9.

As a threshold matter, SEC cannot refuse to produce documents simply by characterizing FOIA requests as "too broad," without providing any basis for the assertion that "a reasonable search cannot be conducted." *See Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (agency "must conduct a search reasonably calculated to uncover all relevant documents") (emphasis added). Indeed, as you may know, the FOIA statute was amended in 1974 to change the requirement for the content of a FOIA request from a "request for identifiable records" to a "request for records which . . . reasonably describes such records." *Id.* at 545. This change was made to "make[] explicit the liberal standard for identification that Congress intended and that

Andrew N. Vollmer
April 24, 2009

courts have adopted.” *Id.* at 545. *See also* *McGehee v. CIA*, 697 F.2d 1095, 1101, *vacated in part on other grounds* 711 F.2d 1076 (1983) (agency must take reasonable steps “to ferret out requested documents”); *Sears v. Gottschalk*, 502 F.2d 122, 126 (4th Cir. 1974) (“equitable considerations of the costs, in time and money, of making records available for examination do not supply an excuse for non-production”).

Moreover, the particular nature of our Requests nos. 6-12, which call for production of documents relating to SEC’s “manuals, policies, procedures, practices, rules, regulations, directives, orders, instructions or customs,” are, as a matter of law, not overly broad, and require SEC to attempt to conduct a reasonable search before denying the Requests out of hand, as appears to have been done in this case. Specifically, in *National Cable Television Assoc. v. Federal Communications Comm.*, 479 F.2d 183 (D.C. Cir. 1973)—which was decided before the 1974 clarification of the FOIA statute noted above—the court rejected FCC’s attempt to evade its FOIA responsibilities by characterizing a request as overly broad, where the request sought documents relating to agency rule-making. There, the court stated that:

Where rulemaking proceedings have taken place, the agency has, by definition, already identified its supporting documents. Indeed, it would be a most reasonable practice for the agency to retain the documents as a group or index them for future retrieval.

[*Id.* at 192-193].

Here, the Requests at issue are no different than those in *National Cable*. Those Requests seek documents relating to SEC’s adoption and application of various internal-control mechanisms, which SEC should have no less ability to search for and review than it would the documents relating to rule-making that were the subject of the *National Cable* decision. Between that decision, the liberal standard for requests that was reinforced by Congress in its 1974 clarification, and the burden on the agency to “ferret out” responsive documents, SEC is clearly under an obligation to do more in response to our Requests than simply disregard them under the cover that they are “overly broad” and purportedly do not allow for a reasonable search. Indeed, it is SEC’s responsibility to attempt a search, and if such a search is allegedly unproductive due to overbreadth, SEC bears the “burden of showing that its search was adequate” through submission of sworn testimony. *Carney v. U.S. Dep’t of Justice*, 19 F.3d 807, 812 (2d Cir.), *cert. denied*, 130 L. Ed. 2d 38, 115 S. Ct. 86 (1994).

Second, the Denial states that SEC is withholding documents responsive to Requests nos. 1-5, 15, and 17-22 pursuant to the law enforcement exemption set forth in 5 U.S.C. § 552(b)(7)(A), 17 C.F.R. § 200.80(b)(7)(i). The Denial states, without any explanation or support whatsoever, that the disclosure of these documents “could reasonably be expected to interfere with enforcement activities.” This invocation of the law enforcement exemption is patently improper here, and is obviously being invoked to protect the SEC from embarrassment and further exposure to liability, rather than to further any legitimate law enforcement purpose.

Andrew N. Vollmer
April 24, 2009

For one thing, SEC is not entitled to deny FOIA requests based on the law enforcement exemption without conducting a reasonable search and then making an individualized assessment of the documents uncovered by this search. *Meeropol v. Meese*, 790 F.2d 942 (D.C. Cir. 1986) (requiring Department of Justice to first search before withholding production on grounds of law enforcement exemption). The logic of this rule is unmistakable, in that even though a particular request may call for documents covered by the exemption, it may also include documents that have already been made public or related only to investigative or enforcement matters no longer relevant to ongoing or future law enforcement efforts by the SEC.

Moreover, the Requests at issue here relate solely to prior, and now closed, SEC inquiries or investigations of Bernard Madoff Investment Securities ("BMIS"). They do not seek documents identifying confidential sources or SEC enforcement officers involved in any investigations. In short, none of the concerns sought to be addressed by the law enforcement exemption are at issue here. And, as you are aware, SEC has already produced similar documents to USA Today and other media outlets in response to their own FOIA requests.

Finally, the Denial states that you are "consulting with other Commission staff regarding number 13 of your request." Given that Request no. 13 is phrased identically to the Requests you have denied as overbroad, we presume that you will eventually deny this request on the same grounds, and we assert the same objection to that prospective denial. Of course, if SEC decides to produce documents relating to Request no. 13, we are more than willing to coordinate that production on a rolling basis to accommodate SEC to the extent that production is voluminous. Please let us know as soon as possible whether SEC intends to produce documents responsive to this request, or whether it intends to classify that request as overbroad prior to conducting a reasonable search.

To summarize, the SEC in one general, broad-brush denial has casually dismissed all but one of our request, and has not produced a single responsive document relating to years of SEC's development and implementation of its manuals, policies, procedures, practices, rules, regulations, directives, orders, instructions or customs, along with records of its completed audits and investigations. This blanket rejection clearly runs afoul of every legal principle and precedent applied to the FOIA statute, as well as the spirit in which it is to be interpreted and applied, as was explained by President Obama in one of his first Memoranda for the Heads of Executive Departments and Agencies:

The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve. *In responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit*

H E R R I C K

Andrew N. Vollmer
April 24, 2009

of cooperation, recognizing that such agencies are servants of the public.

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. *The presumption of disclosure should be applied to all decisions involving FOIA.*¹

We look forward to receiving your response, which we hope will not be of the reflexive-rejection variety SEC has responded with to date, but rather, will provide an explanation of the nature of the search SEC has conducted, what types of materials have been collected, confirmation that those materials will be produced, with any objections to the production of such materials supported by specific, detailed, and itemized justifications.

Respectfully submitted,

Howard Elisofon

Enclosures

¹ Text accessible at http://www.whitehouse.gov/the_press_office/FreedomofInformationAct/ (emphasis added).

EXHIBIT D

HERRICK

NEW YORK
NEWARK
PRINCETON

HOWARD ELISOFON

(212) 592-1437

EMAIL:

HELISOFON@ERRICK.COM

July 27, 2009

BY FEDERAL EXPRESS

David M. Becker
General Counsel
Office of the General Counsel
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Freedom of Information Act Appeal - Request No. 09-02219-FOIA

Dear Mr. Becker:

I write with respect to our appeal from the denial by the United States Security and Exchange Commission ("SEC") of the above-referenced Freedom of Information Act request (the "Request"), which appeal was sent to your office on April 24, 2009.

As we are sure you are aware, under the FOIA statute, administrative agencies such as the SEC *must*:

make a determination with respect to any appeal within twenty days...after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

5 U.S.C. § 552(a)(6)(A)(ii)(emphasis added). "If the agency has not responded within the statutory time limits, then, under 5 U.S.C. § 552(a)(6)(C), the requester may bring suit." *Oglesby v. United States Dep't of Army*, 920 F.2d 57, 62 (D.C. Cir. 1990).

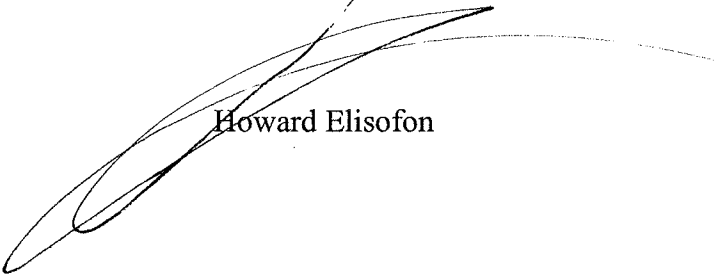
Notwithstanding the 20-day mandate, the SEC has failed to respond to our appeal for over three months. The SEC has defaulted on its obligations, and in doing so, has exhausted our administrative remedies. As a result, we are now free to seek relief from the District Court.

H E R R I C K

David M. Becker
July 27, 2009

However, without waiving our right to seek judicial intervention, and in an effort to prevent needless litigation, we request that the SEC promptly either affirm or reverse the rejection of the Request, or else state that it intends not to rule on our appeal. If we do not receive a such a response within 10 business days, we will consider our appeal to have been denied in its entirety, and will proceed accordingly.

Respectfully submitted,



Howard Elisofon

EXHIBIT E

Oleske, John

From: Jacoby, Celia L.
Sent: Tuesday, July 28, 2009 11:24 AM
To: Oleske, John
Cc: Elisofon, Howard
Subject: RE: FOIA Appeal

thank you, I have received it and will gather records from the foia office today. Celia Jacoby

From: Oleske, John [mailto:joleske@herrick.com]
Sent: Tuesday, July 28, 2009 10:59 AM
To: Jacoby, Celia L.
Cc: Elisofon, Howard
Subject: FOIA Appeal

Ms. Jacoby:

Attached please find our appeal to the denial of FOIA Request 09-02219-FOIA. Thanks again for your prompt response to our follow-up letter - we appreciate that your office is overburdened and understaffed. Please let us know if any additional information will be helpful in processing our appeal.

John

The information in this message may be privileged, intended only for the use of the named recipient. If you received this communication in error, please immediately notify us by return e-mail and destroy the original and any copies. Any tax advice contained in this communication is not intended and cannot be used for the purpose of avoiding tax-related penalties.