UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RICHARD EDELMAN, Plaintiff,	)	
v.	)	Case No. 1:14-CV-1140 (RDM)
SECURITIES AND EXCHANGE COMMISSION, Defendant.	)	

PLAINTIFF'S REPLY BRIEF IN OPPOSITION TO DEFENDANT'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT

Pursuant to the Court's Minute Order entered on October 20, 2014, Plaintiff Richard Edelman hereby submits this Reply Brief in response to Defendant's Reply Brief in Support of Its Motion for Summary Judgment and in Opposition to Plaintiff's Cross Motion for Summary Judgment ("SEC's Reply Brief"). The Securities and Exchange Commission ("SEC") asserts in its Reply Brief that SEC is entitled to summary judgment because it has done a proper search and turned over all documents responsive to Plaintiff's six Freedom of Information Act requests. Plaintiff respectfully disagrees.

The present case illustrates an all too typical problem with the Freedom of Information Act ("FOIA"). Despite Congress' intention to foster openness and transparency in government with a statute that generally makes government records available to the public on request, agencies too often choose to stonewall the public or to delay responding to requests for records to such an extent that requesters often give up out of frustration. The Associated Press in a recent article, a copy of which is appended to this brief, reports that the current administration set a new record for censoring government files or outright denying access to them under the FOIA.

The AP reported that in nearly one in three cases agencies that initially denied requests for records were reversed when challenged, but that the requesters were forced to mount expensive challenges to obtain reversals of the denials.

In the present case, Mr. Edelman was forced to hire counsel and initiate court action when, after six months, SEC had failed to produce a single document in response to six separate FOIA requests he had made. Notwithstanding official government policy that encourages cooperation and open communication with members of the public who make FOIA requests,[1] Mr. Edelman encountered "many roadblocks" and was told by SEC that "this was an adversarial process." Second Affidavit of Richard Edelman at ¶ 12. Convinced that only by going to court would he be able to obtain the records he had requested, Mr. Edelman hired counsel and filed this action. *Id.* Three months after this suit was filed, SEC first began producing documents that Mr. Edelman had requested.

While SEC produced some 2,500 pages of documents after this suit was filed, questions remain outstanding. Did the agency conduct an adequate search for the requested records? Are 113 pages of attorney notes that it located but refused to produce "agency records" subject to the FOIA? Were the numerous redactions SEC made to the produced documents justified under the Fifth Exemption of the FOIA? It is to those questions that we now turn.

ARGUMENT

In its Reply Brief, SEC launches immediately into an argument that Plaintiff Richard Edelman failed to exhaust administrative remedies with respect to one of the six FOIA requests. Defendant's opening argument is both misleading and distracting because it attempts to taint all six FOIA requests with the same objection. There is no argument that Mr. Edelman failed to

[1] U.S. Department of Justice, Office of Information Policy, DOJ Guide to the FOIA, http://www.justice.gov/oip/doj-guide-freedom-information-act-0.

exhaust administrative remedies with respect to the other five FOIA requests. SEC does not contest that the issues raised by these five requests are properly before the Court. We address these issues first before returning to the exhaustion issue regarding the one single request.

A. SEC FAILED TO CONDUCT REASONABLE SEARCHES FOR THE REQUESTED DOCUMENTS

In order to meet its burden of demonstrating that there are no genuine issues of material fact, SEC must show that it has conducted a search reasonably calculated to uncover all relevant documents. The adequacy of the search, in turn, is judged pursuant to a standard of reasonableness and depends upon the facts of each case. *Steinberg v. U.S. Dept. of Justice*, 23 F.3d 548, 551(D.C. Cir. 1994) (summary judgment for defendant reversed for failure to prove adequacy of search); *Weisberg v. United States Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir.1984); *Weisberg v. U.S. Dept. of Justice*, 627 F.2d 365, 368 (D.C. Cir. 1980). SEC has not met this burden, as there exist genuine issues of material fact with respect to the adequacy of its search for records responsive to the requests.

1. Timeliness

SEC creates a straw man concerning the issue of timeliness. SEC states that Mr. Edelman bases his claim that SEC should not enjoy a presumption of good faith on SEC's delays in responding to Mr. Edelman's requests. SEC then argues that courts have found that delays in responding do not establish bad faith. SEC Reply Brief at 4. In fact, Mr. Edelman's argument that SEC should not enjoy a presumption of good faith rests on a combination of six factors: delays in responding; failure to invoke the procedures described in Subsection 552(a)(6)(a) of the FOIA for acquiring additional time to respond; failure to produce known documents that are clearly within the scope of the requests; inappropriate invocation of the *Glomar* response; failure to search an adequate number of files; and assertion that certain records within the scope

of the requests are not agency records. Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment at 12-16. With respect to the issue of delay, Mr. Edelman claims that SEC's "blatant disregard for its duties under the FOIA clearly undermines the presumption of good faith," but not that delay alone establishes proof of bad faith.

Moreover, SEC is wrong to suggest that the agency's delays cannot be taken into account. Delay coupled with other factors is considered by courts to determine whether the agency has made a good faith effort to comply with the FOIA, or whether its behavior has been obdurate so as to entitle the requester to an award of attorney fees. *Nationwide Bldg. Maintenance, Inc. v. Sampson*, 559 F.2d 704, 715 (D.C. Cir. 1977)(holding that the FOIA's time limitations "are intended to prevent the government from utilizing administrative delay to shield FOIA disputes from judicial review"); *LaSalle Extension University v. Federal Trade Comm'n*, 627 F.2d 481, 484 (D.C. Cir. 1980) ("Congress also provided attorneys' fees, however, as compensation for enduring an agency's unreasonable obduracy in refusing to comply with the Freedom of Information Act's requirements."); *Davy v. CIA*, 550 F.3d 1155, 1162 (D.C. Cir. 2008)(agency delay of more than a year coupled with abandonment of initially claimed basis for withholding documents constituted evidence of obdurate behavior). Courts have found delay to be evidence that undermines the presumption of good faith. *See, e.g., Carter, Fullerton & Hayes v. FTC*, E.D. Va. No. 1:12-CV-448 (Memorandum Opinion February 21, 2013)("The unjustifiably long delay leaves the Court with doubts that the agency's search was conducted in keeping with the FOIA statue, or in keeping with the Act's intent.").

Following several attempts by Mr. Edelman to persuade SEC to respond to the FOIA requests, Mr. Edelman was informed that his relationship with SEC was adversarial in nature. Edelman Second Affidavit at ¶ 12. This was surprising and disturbing to Mr. Edelman, who

rightfully assumed that SEC would be faithful to the underlying goals and purposes of the FOIA in responding to his requests. Instead, it became apparent to Mr. Edelman that SEC was utilizing delay as a tactic to frustrate requesters, a majority of whom lack resources to hire counsel to assist with FOIA requests. Mr. Edelman concluded that he would be forced to hire counsel in order to compel a response from SEC to his FOIA requests. *Id*. Mr. Edelman did not reach this conclusion solely on the basis of the delays he encountered, but rather based on a combination of the factors listed above, and more specifically addressed below.

2. Consumer complaints were clearly requested

SEC claims that the failure to produce complaints known to Mr. Edelman does not provide evidence that SEC's search was inadequate. To support its position, SEC asserts that Mr. Edelman's FOIA request "did not seek complaints," but rather sought "notes, reports, emails or other accounts" regarding investor complaints. SEC Reply Brief at 5. This assertion is wholly lacking in credibility and directly contradicts FOIA Request No. 14-03452, which on its face requests "consumer complaints." Moreover, as explained in his Second Affidavit, Mr. Edelman submitted his request for consumer complaints through SEC's website, which the agency maintains for the purpose of facilitating public requests for documents. Edelman Second Affidavit at ¶¶ 5-6. The website provides a box with a drop-down menu to identify the type of request being made. Among the options that can be selected is "consumer complaints." Edelman Second Affidavit, Exhibit Q. Mr. Edelman clicked on the box, selected "consumer complaints," and then filled in additional information in a separate box labeled "other pertinent information." Edelman Second Affidavit at ¶ 6.

As noted by Mr. Edelman, SEC clearly understood that the request for consumer complaints was not limited by the other "pertinent information" Mr. Edelman had provided.

SEC's electronic acknowledgment, Exhibit D to Mr. Edelman's first affidavit, acknowledged that "consumer complaints" were the type of documents requested, and that the additional items specified were intended by Mr. Edelman and interpreted by SEC as "comments." SEC reinforced this interpretation in its written letter containing the *Glomar* response, Livornese Declaration Exhibit 3, which states: "This letter responds to your request, dated and received in this office on January 15, 2014, ***seeking all consumer complaint records*** concerning Empire State Realty Trust, Inc., to include email messages to and from SEC lawyers David Orlick, Tom Kluck and Angela McHale, where consumer complaints and interviews were discussed." (Emphasis added). Under these circumstances, SEC's insistence that Mr. Edelman's request "did not seek complaints" is entirely disingenuous. Furthermore, SEC's efforts to frustrate Mr. Edelman and to undermine the FOIA process are evidence of SEC's bad faith in responding to Mr. Edelman's requests.

On September 30, 2014, SEC produced a Memo to the File (Vaughn Document No. 1), which states that all written complaints and telephone complaints were scanned into a "Sharepoint" website. Edelman Second Affidavit Ex. R. On the same date, three logs of telephone calls, and a table of tips and complaints were produced (Vaughn Documents 2-5, Bates Nos. 3-66). According to the memo, the Sharepoint website contains all consumer complaints requested by Mr. Edelman. As noted by Mr. Edelman, SEC has produced some of the consumer complaints, but it has not demonstrated that it has produced all of them. Edelman Second Affidavit ¶ 9. SEC has neither produced a print-out of the Sharepoint website nor a listing of all consumer complaints. Furthermore, Ms. Dennis in her Second Declaration identified "SEC's file on the ESRT transaction" as a file separate from the attorneys' files, Second Dennis Declaration at ¶ 7e, but there is no clear evidence that this file has been searched or produced.

What is clear, however, is that consumer complaints were requested by Mr. Edelman and that SEC interpreted the request accordingly. SEC therefore should be required to produce all of the requested consumer complaints, or to clarify that it has done so in the production made on September 30, 2014. SEC should not be permitted to avoid its obligations under the FOIA by resorting to wordplay.

3. SEC's search was incomplete and missed documents within the scope of the request

SEC next asserts that it had no obligation to search for emails containing internal discussions about consumer complaints because Mr. Edelman has not provided evidence that such emails exist. SEC Reply Brief at 5. However, on the very next page, SEC contradicts this assertion by acknowledging that emails actually were searched. In fact, Mr. Livornese states that the Office of Information Technology ("OIT") was instructed to search the emails of Orlic, Kluck, and McHale, and that the results of that search were provided to Ms. Dennis. Livornese Declaration at ¶ 14.

SEC must misunderstand Mr. Edelman's complaint about the search for records within the scope of Request No. 14-03452. Mr. Edelman requested consumer complaints, as well as "all notes, reports, emails and any other accounts" from the interviews conducted by Orlic, Kluck, and McHale of people who had filed consumer complaints. Livornese Declaration Exhibit 2. For the requested items, SEC searched three filing systems: Edgar, OIT emails, and records maintained by Orlic, Kluck, and McHale. Dennis Declaration ¶5. It appears that some of the complaints and accounts of telephone interviews were included in the production made on September 30, 2014, as Document Nos. 1-5 on the Vaughn Index, Bates Nos. 1-66, but all consumer complaints have not been produced. With respect to notes within the scope of the

request, SEC asserts that 113 pages of notes discovered in the search are not agency records, an issue addressed below.

In response to Mr. Edelman's claim that SEC's search was inadequate, SEC cites cases to suggest that Mr. Edelman has failed to provide the specific evidence necessary to support his claim that SEC's search has missed documents. SEC Reply Brief at 5-6.[2] Mr. Edelman, in fact, has complied with the obligations set forth in the cases upon which SEC relies. In his first affidavit, Mr. Edelman included specific evidence of consumer complaints sent to Mr. Kluck that were not produced in SEC's response. Edelman Affidavit Exhibit M. Mr. Edelman identifies additional consumer complaints in his second affidavit. Second Edelman Affidavit ¶ 8. Contrary to SEC's assertion, Mr. Edelman's claim that SEC's search was inadequate is not based on "mere speculation that as yet uncovered documents may exist," *SafeCard Services, 926 F.2d at 1201,* but on evidence of real, actual complaints that were either missed or otherwise improperly withheld.

4. The Glomar response

On April 30, 2014, more than three months after Request No. 14-03452 was submitted, SEC issued a *Glomar* response. Livornese Declaration Exhibit 3. Mr. Edelman filed an administrative appeal of the *Glomar* response on May 19, 2014. Edelman Affidavit ¶ 23. On July 2, 2014, SEC Associate General Counsel Humes reviewed Mr. Edelman's appeal and held: "On appeal, you question the applicability of the *Glomar* response in this situation. I have reviewed your appeal and it is remanded." Livornese Declaration Exhibit 4. Use of the *Glomar* tactic delayed the response to Mr. Edelman's request by at least three months.

[2] *Steinberg v. U.S. Dept. of Justice*, 23 F.3d 548, 552 (D.C. Cir. 1994); *Ogelsby v. Dept. of the Army*, 920 F. 2d 57, 67 n. 13 (D.C. Cir. 1990); *SafeCard Services, Inc. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991); *Saldana v. Fed. Bureau of Prisons*, 715 F.Supp.2d 10, 23 (D.D.C. 2010); *Clemente v. Fed. Bureau of Investigation*, 741 F.Supp.2d 64, 79 (D.D.C. 2010).
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In its Reply Brief, SEC totally ignores the issue of the *Glomar* response. There is no attempt by SEC to justify invoking the *Glomar* response. Nor does SEC address the subsequent reversal of its *Glomar* response on administrative appeal. It is clear, however, that the invocation of the *Glomar* response was improper and cannot be justified.

A *Glomar* response, by refusing to acknowledge whether the agency has documents within the scope of a request, completely denies the request without further explanation. Judicially approved for a narrow range of situations to protect sensitive national security information and law enforcement activities,[3] a *Glomar* response constitutes a nonresponse that completely frustrates a requester. The *Glomar* response thereby provides great potential for abuse. "Most criticism directed at the practice is that the response is used too often or that courts treat it too deferentially, and that it allows the government to withhold information excessively." [4] SEC's failure to address its *Glomar* response leaves unresolved the issues of whether DOJ was consulted about using the tactic,[5] whether use of the *Glomar* tactic is consistent with current DOJ guidance on FOIA policy, whether there was an active criminal investigation when the response was made, or whether use of the *Glomar* was abused by SEC in order to delay its response.

How a *Glomar* response would be warranted in the context of Mr. Edelman's request is difficult to comprehend. The *Glomar* letter to Mr. Edelman states as follows:

> We can neither confirm nor deny the existence of any records responsive to your request. If such records were to exist, they may be exempt from disclosure pursuant to one or more of the following exemptions under the FOIA: 5 U.S.C. §

[3] *Phillippi v. C.I.A.*, 546 F.2d 1009, 1013 (D.C. Cir. 1976); *Roth v. United States Dep't of Justice*, 642 F.3d 1161, 1199 (D.C. Cir. 2011).

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[4] N. F. Wessler, "[We] Can Neither Confirm Nor Deny The Existence Or Nonexistence Of Records Responsive To Your Request: Reforming The Glomar Response Under FOIA," 85 NYU L. Rev 1381, 1394-5 (2010).

[5] Department of Justice ("DOJ") guidelines require that agencies confer with DOJ before invoking statutory exclusions under 5 U.S.C. 552(c), which are similar to and sometimes confused with a *Glomar* response. Department of Justice Office of Information Policy, OIP Guidance, Implementing FOIA's Statutory Exclusion Provisions, http://www.justice.gov/oip/blog/foia-guidance-6. Department of Justice Guide to the Freedom of Information Act: Exclusions at 1, 2, 13, www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exclusions.pd.

> 552(b)(3), which protects records or information that are specifically exempted from disclosure by statute, including 15 U.S.C. 78u-6(h)(2)(A); 5 U.S.C. § 552(b)(4), 17 CFR § 200.80(b)(4), since it contains confidential commercial or financial information, the release of which could cause substantial competitive harm to the submitter; 5 U.S.C. § 552(b)(7)(A), which protects records or information when disclosure could reasonably be expected to interfere with law enforcement proceedings; 5 U.S.C. § 552(b)(6) and/or (7)(C), which protects records or information when disclosure could reasonably be expected to constitute an unwarranted invasion of personal privacy; and/or 5 U.S.C. § 552(b)(7)(D), which protects records or information that could reasonably be expected to reveal the identity of a confidential source.

Livornese Declaration Exhibit 3.

The *Glomar* letter claims multiple grounds for refusing even to respond to Mr. Edelman's request, including the bold assertion that SEC could refuse to respond on the grounds that the request might include documents containing commercial or financial information. The FOIA is structured to deal with such information under the fourth exemption and does not authorize a *Glomar* response for this purpose. Whatever the efficacy of a *Glomar* response when national security information or a criminal investigation is at stake, it cannot be employed merely to protect "confidential commercial or financial information, the release of which could cause substantial competitive harm to the submitter." Although SEC reversed itself on appeal, the unwarranted use of *Glomar* improperly delayed SEC's response to Mr. Edelman, and provides clear evidence of SEC's bad faith in its dealings with Mr. Edelman.

In summary, SEC has failed to demonstrate that its searches were reasonable and adequate. SEC's searches have been unreasonably protracted in length and narrow in scope. SEC's representations regarding the adequacy of its search for records should not be accorded a presumption of good faith. SEC's supporting declarations lack sufficient detail to comply with the standard set forth in *Steinberg, Weisberg, and Cuban*. Accordingly, given that there is "substantial doubt as to the sufficiency of the search[es], summary judgment for the agency is

not proper." *Kowalczyk v. Dep't of Justice*, 73 F.3d 386, 388 (D.C. Cir. 1996); *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990).

B. THE 113 PAGES OF ATTORNEY NOTES ARE NOT AGENCY RECORDS AND ARE SUBJECT TO THE FOIA

SEC creates a tautology in order to defend its unreasonably narrow search for records within the scope of Request No. 14-03452. SEC argues that it was reasonable to limit its search to the emails and files of three specific people, Orlic, Kluck, and McHale, because Mr. Edelman's request focused on these individuals.

> Edelman's request focused on three specific people, so it was reasonable to focus on their files. It was also reasonable to assume that attorneys would keep their own file copies of reports or accounts they sent to others.

SEC Reply Brief at 6. At the same time, SEC claims that their files, 113 pages of notes maintained by these three individuals, are not agency records, and are thus not subject to FOIA. SEC Reply Brief at 7.

To support its assertion that the 113 pages of notes are not agency records, SEC relies on a four-part test borrowed from *Tax Analysts v. U.S. Dep't of Justice*, 845 F.2d 1060, 1069 (D.C. Cir. 1988). SEC fails to point out, however, that *Tax Analysts* was affirmed by the Supreme Court, and that the Supreme Court applied a different, more lenient, two-part test for agency records. Justice Marshall held as follows:

> Two requirements emerge from *Kissinger* and *Forsham*, each of which must be satisfied for requested materials to qualify as "agency records." First, an agency must "either create or obtain" the requested materials "as a prerequisite to its becoming an 'agency record' within the meaning of the FOIA."
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> Second, the agency must be in control of the requested materials at the time the FOIA request is made. By control we mean that the materials have come into the agency's possession in the legitimate conduct of its official duties.

U.S. Dep't of Justice v. Tax Analysts, 492 U.S. 136, 144-145 (1989) *citing Kissinger v. Reporters Committee for Freedom of the Press,* 445 U.S. 136, 150 (1980), *and Forsham v. Harris,* 445 U.S. 169, 182 (1980). In 2013, this Court revisited the four-part test in light of the Supreme Court's ruling, and explained that the four-part test is still used with modification to decide the control issue in the second part of the *Tax Analysts* test:

> In the usual case, this circuit looks to four factors to determine "whether an agency has sufficient 'control' over a document to make it an 'agency record.' " *Tax Analysts,* 845 F.2d at 1069. They are: [1] the intent of the document's creator to retain or relinquish control over the records; [2] the ability of the agency to use and dispose of the record as it sees fit; [3] the extent to which agency personnel have read or relied upon the document; and [4] the degree to which the document was integrated into the agency's record system or files. *Id.* The circuit first announced this test in our own decision in the *Tax Analysts* case, which the Supreme Court subsequently affirmed, albeit on different grounds. Since then, we have reaffirmed the four-factor test on several occasions.

Judicial Watch, Inc. v. U.S. Secret Serv., 726 F.3d 208, 219 (D.C. Cir. 2013).

The Court proceeded to analyze the documents requested, and concluded that the four-part test was indeterminate because some factors favored the agency while others favored the requester. *Id.* at 220. The Court then considered other factors and determined that a large number of the documents were not agency records because they fell within a class of records that Congress had intended to exclude from FOIA coverage. *Id.* at 231. For a narrow class of records, the Court found no such special consideration applied, and held that the documents were indeed agency records:

> For the reasons discussed in Part III.A, application of the four-part control test to WHACS records that reveal visits to those offices is indeterminate. And because the "burden is on the agency to demonstrate, not the requester to disprove, that the materials sought are not 'agency records,' " *Tax Analysts,* 492 U.S. at 142 n. 3, 109 S.Ct. 2841, that indeterminacy resolves the matter in Judicial Watch's favor.

Id, at 232.

Therefore, to support a ruling that the attorney notes are not agency records, SEC must prove that the notes satisfy each of the four-parts of the test. If SEC fails to do so, then the indeterminacy must be resolved in Mr. Edelman's favor, and the Court must rule that the notes are agency records. SEC cannot satisfy this requirement, and thus Mr. Edelman must be provided copies of the notes in dispute. The proper application of the four-part test is as follows.

(1) The intent of the document's creator to retain or relinquish control over the records:

SEC argues that "Orlic, Kluck and McHale had no intention of relinquishing control of the notes." SEC Reply Brief at 3. However, there is nothing in the Second Dennis Declaration to support this assertion. Rather, there is simply no evidence in any of the SEC's declarations concerning the intentions of the creators of the notes

Ms. Dennis asserts that Orlic, Kluck, and McHale took notes "only to keep track of what he or she had done and what he or she needed to do." Dennis Second Declaration at ¶ 7a. This assertion has no bearing on whether Orlic, Kluck, and McHale intended to retain or relinquish control of the notes. More importantly, the statement by Ms. Dennis suggests that the notes relate to official duties and not to entirely personal matters. At best, the intentions of Orlic, Kluck, and McHale remain indeterminate, and thus the issue must be resolved in Mr. Edelman's favor.

(2) The ability of the agency to use and dispose of the records as it sees fit:

Ms. Dennis states in her declaration that each attorney "kept their notes in their individual SEC offices and did not share them with each other or any other SEC employees," and that they did not incorporate the notes into SEC's file on ESRT. Dennis Second Declaration at ¶ 7 d, e. This statement does not establish that the notes are beyond SEC's ability to treat as the agency deems appropriate. Orlic, Kluck, and McHale were functioning in their official capacities when

they created the notes, and the notes are located in the agency's offices, thereby satisfying the two parts of the Supreme Court's test for agency records. Absent evidence to the contrary, it must be assumed that SEC has the ability to use and dispose of the notes as it sees fit.

Ms. Dennis asserts that "no one instructed Orlic, Kluck or McHale to keep the notes" or required them to create or retain the notes. Dennis Second Declaration at ¶ 7 b, c. The ramifications of this assertion are indeterminate. By contrast, Mr. Edelman has submitted evidence tending to show that the attorneys were following official agency guidelines for conducting telephone interviews when they created the notes. Edelman Second Affidavit at ¶10. Mr. Edelman also provided evidence indicating that all "staff notes" are regarded as agency records for archival purposes, and that incorporation into the specific ESRT file was irrelevant. Edelman Second Affidavit at ¶11. Thus, regardless of whether Orlic, Kluck, and McHale were "instructed" or "required" to take notes, clearly they were following SEC guidelines when they did so, and their notes are treated as agency records. Accordingly, SEC has the ability to use and dispose of the attorney notes as it sees fit, the notes are within "the dominion and control" of SEC, and the notes are therefore agency records. *Tax Analysts, supra,* 492 U.S. at 145.

[3] The extent to which agency personnel have read or relied upon the documents:

SEC has provided no evidence whatsoever regarding the extent to which agency personnel, including Orlic, Kluck, and McHale, have read and relied upon the notes. Ms. Dennis states that the notes were retained in the attorneys' offices, but this fact fails to demonstrate that the notes were not useful, or at least not to Orlic, Kluck, and McHale.

There is likewise no testimony that the notes reflect entirely personal matters. There is no evidence that they are the same type of "personal notes, and perhaps even doodlings or jottings, of agency officials" that the court found not to be agency records in *British Airports*

Authority v. CAB, 531 F.Supp. 408, 417 (D. D.C. 1982), or the personal appointment calendars, telephone message slips, and staff notes found not to be agency records in *Judicial Watch v. Clinton,* 880 F.Supp. 1, 11 (D. D.C.1995), or a voluntary piece of unofficial scholarship found not to be an agency record in *American Fed'n of Gov't Employees, Local 2782 v. Department of Commerce,* 632 F.Supp. 1272, 1277 (D. D.C. 1986), *aff'd,* 907 F.2d 203 (D.C. Cir.1990). One cannot assume that the notes are limited to personal matters based entirely upon an absence of information about their content.

To the contrary, since Orlic, Kluck, and McHale conducted telephone interviews of investors who had filed complaints, it must be assumed, absent contrary evidence, that the notes were taken during those interviews and record information related thereto. Under such circumstances, the notes are in the same class or of the same nature as those found by courts to be agency records subject to the FOIA. *See, e.g., Cuban v. SEC,* 744 F.Supp.2d 60, 77 (D.D.C. 2010)(agency failed to carry its burden of showing that notes of an internal investigation qualified for (b)(5) exemption); *Families for Freedom v. U.S. Customs & Border Prot.*, No. 10 Civ. 2705, 2011 WL 4599592, at *6 (S.D.N.Y. Sept. 30, 2011) (finding that notes taken by Assistant Chief Border Patrol Agent during meeting were agency records because the document "memorialize[d] the discussion and outcomes of the meeting" and, therefore, "[took] the form of meeting minutes"); *Williams & Connolly, LLP v. Securities and Exchange Com.,* 729 F.Supp.2d 202, 213 (D.D.C. 2010) (segregable factual material in notes of conversations ordered to be disclosed).

> [4] The degree to which the document was integrated into the agency's record system or files:

On this issue, Ms. Dennis has stated that “Orlic, Kluck and McHale did not place or incorporate any of the notes into the SEC’s file on the ESRT transaction,” and that they kept the

notes in their individual offices. Dennis Second Declaration at ¶ 7d, e. This statement is indeterminate as to the issue of integration into the agency's record system or files. Ms. Dennis has identified only one specific file into which the notes had not been integrated. She was herself able to locate the notes pursuant to a search of the agency's records. To the extent that the issue is indeterminate, it must be resolved in favor of Mr. Edelman.

Accordingly, SEC cannot satisfy this Court's four-part test, and thus has not met its burden of showing that the attorney notes satisfy all elements, or even a predominant number of elements, of the *Tax Analysts* four-part test. As the "burden is on the agency to demonstrate, not the requester to disprove, that the materials sought are not 'agency records,'" the matter must be resolved in Mr. Edelman's favor. *Judicial Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d at 232. Therefore, the 113 pages of attorney notes are subject to the FOIA and must be produced.

C. SEC HAS FAILED TO JUSTIFY ITS REDACTIONS UNDER THE (b)(5) EXEMPTION

In Part III of his Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment, Mr. Edelman summarized the legal standard for applying the (b)(5) exemption to the redacted and withheld documents produced by SEC on September 30, 2014. Mr. Edelman argued that SEC had failed to satisfy its burden of demonstrating that the redacted material and withheld documents qualify for the (b)(5) exemption. In making these points, Mr. Edelman addressed the following documents specifically: Vaughn Index Nos. 1, 5, 6, 7, 8, 47 and 48.

Along with its Reply Brief, SEC has disclosed portions of the redacted column of Document No. 5. Mr. Edelman welcomes this change, and notes that it further narrows the dispute between the parties, but also notes that over half of the information in the right hand column of Document 5 remains redacted and undisclosed. While SEC provides additional

argument in its Reply Brief for withholding undisclosed material under the deliberative process privilege of the (b)(5) exemption, it is clear that SEC has still failed to meet its burden of proving that the redactions are warranted.

As noted in *Wolfe v. Department of Health and Human Services*, 839 F.2d 768, 774 (D.C. Cir. 1988), "the Supreme Court has limited the deliberative process privilege to materials which are both predecisional and deliberative," *citing EPA v. Mink*, 410 U.S. 73, 88, (1973), *and Renegotiation Bd. v. Grumman Aircraft*, 421 U.S. 168, 184-85 (1975). SEC still has failed to clearly identify which particular SEC decision its redacted and withheld documents precede. Furthermore, for the deliberative process to apply, the agency must do more than make sweeping declarations of a conclusory nature. SEC must show that the withheld information is truly deliberative, that it reflects opinions, advice, and proposals in a give and take process. "Exemption 5 disputes can often be resolved by the simple test that factual material must be disclosed but advice and recommendations may be withheld." *Wolfe*, 839 F.2d at 774, *citing Mead Data Cent. Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 256 (D.C.Cir.1977).

In its Reply Brief, SEC reiterates that disclosure of the redacted materials would have a "chilling effect" and "would harm SEC's deliberative process." SEC Reply Brief at 9. SEC provides absolutely no support for this assertion, and instead relies on the expectation that such dire consequences will speak for themselves. SEC's declarations fail to reveal the deliberative processes involved, the context of the deliberative materials, or the basis for any dire consequences that would result from their disclosure. In addition, SEC has failed to demonstrate that all of the withheld information is comprised of advice and recommendations, and is not factual.

Mr. Edelman believes that the right of the public to access the requested information outweighs the agency's objections. FOIA litigation is asymmetrical because only one side has access to the documents in dispute, pitting the entire resources of the agency against a single individual. In order to address this asymmetry and resolve this dispute, Mr. Edelman would need and respectfully requests the Court to review the contested documents *in camera*.

D. THE EXHAUSTION ISSUE

As noted above, SEC's exhaustion argument has no effect on this case because it is limited to only one of Mr. Edelman's six FOIA requests. SEC concedes that Mr. Edelman has exhausted his administrative remedies with respect to the other five FOIA requests. SEC's exhaustion argument regarding Request 14-03398 is therefore misleading and distracting.

Moreover, in its insistence that Mr. Edelman failed to exhaust his administrative remedies with respect to Request 14-03398, SEC replies to only one of the two arguments asserted by Mr. Edelman. The unanswered argument, that Mr. Edelman had previously made an administrative appeal, is admitted in SEC's own documents, thus acknowledging that Mr. Edelman has exhausted administrative remedies with respect to that request. Edelman Affidavit at ¶¶ 20-21; Exhibits H, page 3, and I, page 3.

SEC apparently would insist that, even after an administrative appeal has been pursued, a second administrative appeal must be filed if the agency "remands" the case. The problem with this argument is that the FOIA, while it acknowledges and encourages administrative appeals, does not explicitly recognize the concept of a "remand" in the administrative context. SEC has cited nothing in the FOIA or its legislative history implying that more than one administrative appeal is required, and imposing this requirement would be unprecedented and unduly burdensome.

Hence, while it is correct that a right of immediate appeal pursuant to 5 U.S.C. § 552(a)(6)(C) arises due to the agency's failure to make a timely response, and that this right of immediate appeal can be lost if the agency makes a tardy response before a judicial complaint is filed, *Coleman v. Drug Enforcement Admin.,* 714 F.3d 816, 824 (4th Cir. 2013); *Oglesby,* 920 F.2d at 63, the cases do not state that a requester who has previously made an administrative appeal must file a second administrative appeal after "remand" in order to exhaust his administrative remedies. To so rule would allow agencies to avoid judicial review altogether simply by repeatedly remanding administrative appeals to internal agency divisions.

The logical approach is to hold that the duty to exhaust administrative remedies is satisfied by a mandatory administrative appeal, but if there is a remand from the appeal, then the option of a second administrative appeal is permissive. The permissive appeal may be pursued, but is not required in order to exhaust administrative remedies. *See Oglesby,* 920 F.2d at 63; *Spannaus v. U.S. Dept. of Justice,* 824 F.2d 52, 58 (D.C. Cir. 1987).

Mr. Edelman exhausted his administrative remedies for Request 14-03398 with his administrative appeal, and did not lose his right to seek judicial review of this single request merely because the agency remanded the request to another internal division. This is consistent with the reasoning in *Oglesby*. Mr. Edelman satisfied his obligation to allow the agency an opportunity to correct its errors, and he filed suit after the agency had exercised that opportunity. Accordingly, Mr. Edelman was not required to make a second administrative appeal regarding Request 14-03398.

CONCLUSION

For the foregoing reasons, Defendant's motion for summary judgment should be denied, and Plaintiff's cross motion for summary judgment should be granted. Plaintiff should be awarded his costs and reasonable attorney fees.

Respectfully submitted,

/s/ John Wyeth Griggs

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griggsandadler@comcast.net

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing document has been served by email and/or U.S. Mail, postage prepaid, on Philip J. Holmes, Esq., and Melinda Hardy, Esq., Securities and Exchange Commission, 100 F Street, N.E., Washington, D.C. 20549-9612, on this 17th day of April, 2015.

/s/ John Wyeth Griggs

John Wyeth Griggs
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APPENDIX

US sets new record for denying, censoring government files

TED BRIDISMar 18th 2015 5:45AM

WASHINGTON (AP) - The Obama administration set a new record again for more often than ever censoring government files or outright denying access to them last year under the U.S. Freedom of Information Act, according to a new analysis of federal data by The Associated Press.

The government took longer to turn over files when it provided any, said more regularly that it couldn't find documents, and refused a record number of times to turn over files quickly that might be especially newsworthy.

It also acknowledged in nearly 1 in 3 cases that its initial decisions to withhold or censor records were improper under the law - but only when it was challenged.

Its backlog of unanswered requests at year's end grew remarkably by 55 percent to more than 200,000. It also cut by 375, or about 9 percent, the number of full-time employees across government paid to look for records. That was the fewest number of employees working on the issue in five years.

The government's new figures, published Tuesday, covered all requests to 100 federal agencies during fiscal 2014 under the Freedom of Information law, which is heralded globally as a model for transparent government. They showed that despite disappointments and failed promises by the White House to make meaningful improvements in the way it releases records, the law was more popular than ever.

Citizens, journalists, businesses and others made a record 714,231 requests for information. The U.S. spent a record $434 million trying to keep up. It also spent about $28 million on lawyers' fees to keep records secret.

The government responded to 647,142 requests, a 4 percent decrease over the previous year. It more than ever censored materials it turned over or fully denied access to them, in 250,581 cases or 39 percent of all requests. Sometimes, the government censored only a few words or an employee's phone number, but other times it completely marked out nearly every paragraph on pages.

On 215,584 other occasions, the government said it couldn't find records, a person refused to pay for copies or the government determined the request to be unreasonable or improper.

The White House touted its success under its own analysis. It routinely excludes from its assessment instances when it couldn't find records, a person refused to pay for copies or the request was determined to be improper under the law, and said under this calculation it released all or parts of records in 91 percent of requests - still a record low since President Barack Obama took office using the White House's own math.

"We actually do have a lot to brag about," White House spokesman Josh Earnest said.

Separately, the Justice Department congratulated the Agriculture and State departments for finishing work on their oldest 10 requests, said the Pentagon responded to nearly all requests within three months and praised the Health and Human Services Department for disclosing information about the Ebola outbreak and immigrant children caught crossing U.S. borders illegally.

The government's responsiveness under the open records law is an important measure of its transparency. Under the law, citizens and foreigners can compel the government to turn over copies of federal records for zero or little cost. Anyone who seeks information through the law is generally supposed to get it unless disclosure would hurt national security, violate personal privacy or expose business secrets or confidential decision-making in certain areas. It cited such exceptions a record 554,969 times last year.

Under the president's instructions, the U.S. should not withhold or censor government files merely because they might be embarrassing, but federal employees last year regularly misapplied the law. In emails that AP obtained from the National Archives and Records Administration about who pays for Michelle Obama's expensive dresses, the agency blacked-out a sentence under part of the law intended to shield personal, private information, such as Social Security numbers, phone numbers or home addresses. But it failed to censor the same passage on a subsequent page.

The sentence: "We live in constant fear of upsetting the WH (White House)."

In nearly 1 in 3 cases, when someone challenged under appeal the administration's initial decision to censor or withhold files, the government reconsidered and acknowledged it was at least partly wrong. That was the highest reversal rate in at least five years.

The AP's chief executive, Gary Pruitt, said the news organization filed hundreds of requests for government files. Records the AP obtained revealed police efforts to restrict airspace to keep away news helicopters during violent street protests in

Ferguson, Missouri. In another case, the records showed Veterans Affairs doctors concluding that a gunman who later killed 12 people had no mental health issues despite serious problems and encounters with police during the same period. They also showed the FBI pressuring local police agencies to keep details secret about a telephone surveillance device called Stingray.

"What we discovered reaffirmed what we have seen all too frequently in recent years," Pruitt wrote in a column published this week. "The systems created to give citizens information about their government are badly broken and getting worse all the time."

The U.S. released its new figures during Sunshine Week, when news organizations promote open government and freedom of information.

The AP earlier this month sued the State Department under the law to force the release of email correspondence and government documents from Hillary Rodham Clinton's tenure as secretary of state. The government had failed to turn over the files under repeated requests, including one made five years ago and others pending since the summer of 2013.

The government said the average time it took to answer each records request ranged from one day to more than 2.5 years. More than half of federal agencies took longer to answer requests last year than the previous year.

Journalists and others who need information quickly to report breaking news fared worse than ever.

Under the law, the U.S. is required to move urgent requests from journalists to the front of the line for a speedy answer if records will inform the public concerning an actual or alleged government activity. But the government now routinely denies such requests: Over six years, the number of requests granted speedy processing status fell from nearly half to fewer than 1 in 8. In January, the U.S. reminded agencies that it should carefully consider such "breaking news" requests.

The CIA, at the center of so many headlines, has denied every such request the last two years.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RICHARD EDELMAN, Plaintiff,	)	
v.	)	Case No. 1:14-CV-1140 (RDM)
SECURITIES AND EXCHANGE COMMISSION, Defendant.	)	

SECOND AFFIDAVIT OF RICHARD EDELMAN

STATE OF CALIFORNIA :
:
COUNTY OF SAN DIEGO :

BEFORE ME, THE UNDERSIGNED AUTHORITY, personally appeared RICHARD EDELMAN, who, being duly sworn, deposes and says:

1. My name is Richard Edelman. I reside at 608 North Rios Avenue, Solana Beach, California 92075. I have personal knowledge of the facts set forth herein.

2. I have operated for the past several years a website, empirestatebuildinginvestors.com, that provides information to investors in the Empire State Building. I personally submitted to the Securities and Exchange Commission ("SEC") the six FOIA requests that are the subject of this case and which I described in my first affidavit.

3. I submit this affidavit in response to certain statements in the SEC's reply brief, which was filed on March 17, 2015.

4. The SEC asserts in its reply brief that my Request No. 14-03452 "did not seek complaints" but rather was limited to "notes, reports, emails or other accounts from interviews with Empire State Building Associates investors conducted by certain SEC attorneys and emails

in which SEC lawyers discussed investor complaints and interviews." Defendant's Reply Brief at 5.

5. SEC is incorrect. My request clearly asked for consumer complaints. SEC's description of my request ignores the way its own FOIA system works. SEC maintains a website for receipt of FOIA requests that are submitted to SEC electronically. Attached hereto as Exhibit Q is a printout of what a requester sees when he accesses the SEC's FOIA website. The paragraph at the top of the first page explains that SEC maintains public and non-public records, and that non-public records will be released on request unless the record is protected by one of nine FOIA exemptions. Requesters are asked to use the online form provided to submit their requests: "Please use the form below to obtain non-public records, such as records compiled in investigations, ***consumer complaints,*** and staff comment letters." (Emphasis added).

6. On January 15, 2014, I accessed the SEC website and submitted an online request that was designated FOIA Request No. 14-03052. I followed the instructions on the website by filling in the contact information noted on page 1 of Exhibit Q. I then proceeded to the "Type of Document" designation near the top of page 2. Note that what the website provides is a small window with a drop down selection. If you toggle the drop down arrow, several options appear, including ***consumer complaints.*** I clicked on "consumer complaints," as shown in the second version of Exhibit Q, page 2, and then filled in additional information below that in the box provided for "other pertinent information." The additional information, as indicated on the SEC form, is supplemental to the type of document checked above, and is not limiting or exclusive of the documents requested, as SEC maintains in its reply brief. The additional information I added was:

> Dozens of investors in Empire State Building Associates LLC lodged complaints during the SEC review process for Empire State Realty Trust, Inc. These investors

> were interviewed by SEC lawyers by phone. The SEC lawyers who conducted the interviews were David Orlick, Tom Kluck and Angela McHale. I request all notes, reports, emails or any other accounts from these interviews with investors. I request all emails to and from the above named SEC lawyers where those complaints and interviews are discussed. I understand and expect the names of investors to be redacted to protect confidentiality.

See Affidavit of Richard Edelman, Exhibit D; Livornese Declaration, Exhibit 2.

7. SEC clearly understood that I was seeking the complaints themselves as well as the additional items listed in the "other pertinent information" box. SEC's electronic acknowledgment, Exhibit D to my first affidavit, acknowledges that "consumer complaints" was the type of document requested, and that the additional things requested were included as "comments." SEC reinforced this interpretation in their written letter of acknowledgement, Livornese Declaration Exhibit 3, which states: "This letter responds to your request, dated and received in this office on January 15, 2014, ***seeking all consumer complaint records*** concerning Empire State Realty Trust, Inc., to include email messages to and from SEC lawyers David Orlick, Tom Kluck and Angela McHale, where consumer complaints and interviews were discussed." (Emphasis added). It seems plain to me that "all consumer complaint records" would include the complaints themselves.

8. In addition to mischaracterizing my request for consumer complaints, SEC's reply brief fails to explain why two specific complaints of which I am aware were not produced in response to Request No. 14-03052. *See* Edelman Affidavit, ¶ 33 and Exhibit M. In fact, there are numerous additional complaints about which I have been made aware that were not produced, and it is disingenuous for SEC to dodge this issue by asserting I did not request consumer complaints. I have been advised by Mr. Robert Machleder that Document Numbers 1 through 5 on the Vaughn Index, which purport to list all calls made by SEC regarding investor complaints, does not include six with Mr. Kluck and Ms. McHale that Mr. Machleder had during the period

from May to October, 2013. Thus, I am aware of at least eight documented "consumer complaints" that were not produced and which SEC has avoided by its unwarranted limiting of my request to exclude the consumer complaints themselves.

9. Nowhere on the list of documents included in the Vaughn Index is there a document titled or identified as "consumer complaints." In fact, Document No. 1 on the Vaughn Index, which was produced by SEC on September 30, 2014, states: "All written complaints received have been scanned into a Sharepoint site so that Corp Fin and Enforcement could both view the complaints at any time. The Sharepoint site can be found at the following link: https://collaboration/sites/RSFI/tcrob/ESBREIT/default.aspx." The document also states that "All phone call complaints were returned and documented in a phone log which can be found on the AD8 J:// drive and also on the Sharepoint site." *See* Document No. 1, Bates No. 14-03043-14-03452-000002, attached as Exhibit R. Obviously, the Sharepoint site contains all of the consumer complaints which I requested, but what is not clear in light of the reply brief statement is whether SEC has produced a print-out of the documents from the site or otherwise produced all of the consumer complaints.

10. It is quite possible that a listing of the consumer complaints themselves resides in the 113 pages of notes compiled by Messrs. Kluck and Orlic and Ms. McHale. Yet SEC insists that the notes of these staff attorneys are not agency records. It appears, however, that the notes *are* agency records. I have attached as Exhibit S excerpts from the SEC's Enforcement Manual which outline how SEC enforcement staff are advised to conduct voluntary telephone interviews. The Manual specifically states that, "While conducting a voluntary telephone interview, the staff may take written notes of the interview." The Manual further provides that two staff members should conduct each telephone interview, and that one staff member should take notes while the

other asks questions. SEC Division of Enforcement, Enforcement Manual § 3.3.3.2. Thus, it is clear that when Kluck, Orlic and McHale were conducting telephone interviews (a) they were acting in their official capacity, (b) their official responsibilities included taking notes, (c) they were following official agency procedures when the notes were taken, and (d) the notes are official agency records, not personal notes. Accordingly, if the 113 pages of notes addressed in Paragraph 7 of the Second Declaration of Patti Dennis were notes of voluntary telephone interviews, then Kluck, McHale, and Orlic were "instructed" by the Guidelines to take the notes, and they were following SEC policy and official guidance in doing so. I therefore contest the assertions made by Ms. Dennis in Paragraph 7 of her affidavit.

11. That the attorneys' notes are agency records is reinforced by Exhibit T, a request by the SEC to the National Archives, which shows what records of the SEC Division of Enforcement are archived. Included are "Staff notes, including notes of meetings or phone calls." If staff notes are archived along with other Division of Enforcement records, then they are clearly controlled by the agency, and not personal records.

12. I do not understand why the SEC FOIA office has thrown up so many roadblocks concerning these FOIA requests. About a year ago, after months of delays I called a FOIA branch chief, who revealed this was an adversarial process. I was flabbergasted at that view. I took it to mean I had to hire a lawyer. Sure enough, only after filing this lawsuit did the SEC start to provide requested documents. With the assistance of counsel, I've attempted to follow the letter of the FOIA law in pursuing these requests. Even where we've assiduously dotted the i's and crossed the t's, the SEC's legal team has attempted to obstruct our access to agency documents. As an average citizen without organizational support, the SEC's actions have turned

this into a prohibitively expensive experience. I hope future revisions to the FOIA law discourage government agencies from engaging in the behavior I've faced.

FURTHER AFFIANT SAITH NAUGHT.

Richard Edelman

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this Certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California

County of San Diego } SS.

Subscribed and sworn to (or affirmed) before me on this 15 day of April, 2015, by Richard Edelman, proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.

DANIEL LEVY
COMM. # 1997519
NOTARY PUBLIC - CALIFORNIA
SAN DIEGO COUNTY
MY COMM. EXP. DEC. 7, 2016

NOTARY'S SIGNATURE

EXHIBIT Q

Request for Copies of Documents

This form is currently unable to be submitted using a screen reader. Please call the FOIA Office phone: (202) 551-7900 for assistance requesting non-public records.

The Securities and Exchange Commission (SEC) maintains public and non-public records. Many records, such as registration statements and reports filed by regulated companies and individuals, SEC decisions and releases, staff manuals, no-action and interpretive letters, and public comments on proposed rules, can be viewed and printed for free by using the SEC on-line search feature. Please use the form below to obtain non-public records, such as records compiled in investigations, consumer complaints, and staff comment letters. We will release non-public records, unless the record is protected by one of nine FOIA exemptions. If we can reasonably segregate or delete exempt information from a requested record, we will release to you the rest of the record. You may also use the form below for records not posted to the web (usually dated prior to 1996) including SEC records and documents, historic Commission filings, special reports and studies, speeches, and testimony.

If you have any difficulties using this form please send a fax to 202-772-9337.

If you require certified copies, please click here.

Please submit only one company or entity name per request. Do not submit multiple subjects in one request.

Fields marked with an asterisk (*) are required.

Contact Information

Prefix:

First: *

MI:

Last: *

Suffix: (If any):
Examples: Jr., Ph.D., CPA, Esquire

Telephone: *

Email: *
Example: name@domainname.domain

Company Name, if Applicable:

Address line 1: *

Address line 2:

City: *

State / Province: *

Country: * United States

Zip: *

Request Details

Subject/Company Name: *
Please submit only one company or entity name per request. Do not submit multiple subjects in one request.

Date or range of document: *

Film/Document Control #:

File Number:

CIK #:

Type of document: * ...Please select one...

Other pertinent information - Provide a clear and complete description of document(s) requested. If you do not know the specific date, you must provide a date range, i.e. month and/or year.

Note: Only files with .txt, .doc, and .pdf extension are allowed.

Attachment File: Browse...

Fee Authorization

To avoid delays in processing your request, please provide your willingness to pay at least $28. Check the box to indicate your agreement. Pre-authorization of fees to a specific dollar amount in your request letter will speed the processing of your FOIA request. However, do not send pre-payment for your request. If you incur billable charges, an itemized invoice will accompany our final response to your request. You will be provided the option of paying the invoice online or by mail. Note that if fees are likely to exceed $250, the SEC does have the discretion to require advance payment prior to commencing any work.

Fee Authorization is required *

- Willing to Pay $28
- Other Amount $

Requesting a Fee Waiver

If you are seeking a fee waiver, it is your responsibility to provide detailed information to support your request. You must submit this information with your FOIA request. Each fee waiver request is judged on its own merit. The SEC does not grant "blanket" fee waivers. The fact that you have received a fee waiver in the past does not mean you are automatically entitled to a fee waiver for other requests you submit, because an essential element of any fee waiver determination is whether the release of the particular documents sought will likely contribute significantly to public understanding of the operations or activities of the Government.

Fee Waiver Criteria

An essential element of any fee waiver determination is whether the release of the particular records sought will likely contribute significantly to public understanding of the operation or activities of the Government. The SEC will release records responsive to a request without charge or at a reduced rate if the SEC determines, based on all available information, that you have demonstrated that disclosing the information is:

1. Is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government, and

Subject/Company Name: *
Please submit only one company or entity name per request. Do not submit multiple subjects in one request.

Date or range of document: *

Film/Document Control #:

File Number:

CIK #:

Type of document: * Consumer complaints

Other pertinent information - Provide a clear and complete description of document(s) requested. If you do not know the specific date, you must provide a date range, i.e. month and/or year.

Note: Only files with .txt, .doc, and .pdf extension are allowed.

Attachment File: Browse...

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Fee Authorization is required *

- Willing to Pay $28
- Other Amount $

Requesting a Fee Waiver

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Fee Waiver Criteria

An essential element of any fee waiver determination is whether the release of the particular records sought will likely contribute significantly to public understanding of the operation or activities of the Government. The SEC will release records responsive to a request without charge or at a reduced rate if the SEC determines, based on all available information, that you have demonstrated that disclosing the information is:

1. Is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government, and

2. Is not primarily in your commercial interest.

In deciding whether you have met the criteria above, the SEC will consider the following factors:

1. The subject of the request must concern identifiable operations or activities of the Federal government, with a connection that is direct and clear, not remote or attenuated.
2. The disclosable portions of the requested records must be meaningfully informative about government operations or activities to be "likely to contribute" to an increased public understanding of those operations or activities. Information that already is in the public domain, in either the same or a substantially identical form, would not contribute to such understanding.
3. The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to your individual understanding. The SEC will consider your expertise in the subject area as well as your ability and intention to effectively convey information to the public.
4. The public's understanding of the subject must be enhanced to a significant extent by the disclosure.

Fee Waiver is Requested

Yes No

If you meet the criteria, please explain below.

Requesting Expedited Treatment

If you would like expedited treatment you must show "compelling need" in one of two ways: by establishing that your failure to obtain the records quickly "could reasonably be expected to pose an imminent threat to the life or physical safety of an individual"; or, if you are a "person primarily engaged in disseminating information," by demonstrating that an "urgency to inform the public concerning actual or alleged Federal Government activity" exists.

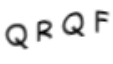
Expedited Service is Requested

Yes No

If you meet the criteria, please explain below.

Please read our Privacy Act Notice to learn more about how we may use the information you send to us.

Finish/Submit Reset Note: Finish/Submit button is activated upon successful Captcha completion



https://tts.sec.gov/cgi-bin/request_public_docs

EXHIBIT R

MEMO TO FILE
RE: TIPS AND COMPLAINTS RECEIVED IN CONNECTION WITH REVIEW OF EMPIRE STATE REALTY TRUST, INC

DATE : October 29, 2013

FROM : Tom Kluck, Legal Branch Chief
Angela McHale, Attorney-Advisor
Division of Corporation Finance

COMPANY : Empire State Realty Trust, Inc

FILE NOS. : 333-179486 and 333-179485

BACKGROUND

These filings relate to the consolidation of several real estate properties in the greater New York metropolitan area (including the Empire State Building) and the IPO of Empire State Realty Trust, Inc., a Maryland corporation organized to qualify as a real estate investment trust. The S-4 registration statement pertained to the consolidation of three public LLCs (ESBA LLC, 60 E 42nd St. Associates LLC, and 250 W 57th St. Associates, LLC), along with 22 private entities, by way of a "roll-up transaction." The S-4 went effective on December 21, 2012. The S-11 registration statement pertained to the IPO portion of the transaction and went effective on October 1, 2013.

Throughout the course of our nearly two-year review of these transactions, we received hundreds of complaints and phone calls from many investors. Early in the review process, Enforcement and the Office of Enforcement Liaison in the Division of Corporation Finance (OEL) determined that it would be best for the review team in Corporation Finance to receive and handle these complaints directly, rather than having them submitted into the TCR database, since some of the complaints pertained to the review of the filings. Below is a summary of how those complaints were generally handled. This approach and this memo documentation explaining how complaints were generally handled and resolved are being made pursuant to instructions from OEL.

SUMMARY OF THE HANDLING OF COMPLAINTS

We received investor complaints mostly by email, but we also received phone calls and letters by mail. We considered each and every complaint we received and took one of the following actions, depending on the nature and substance of the complaint:

- Pursued the complaint through disclosure during the comment process for the S-4 and/or the S-11

- Followed up with the registrant orally
- (b)(5);(b)(6)
- Shared with OMA to consider issuing a separate comment letter (w/r/t complaints regarding the solicitation process)
- Took no further action because the complaint fell outside the scope of the federal securities laws or was otherwise addressed or determined to be a non-issue.

All written complaints received have been scanned into a Sharepoint site so that Corp Fin and Enforcement could both view the complaints at any time. The Sharepoint site can be found at the following link: https://collaboration/sites/RSFI/tcrob/ESBREIT/default.aspx. Support staff for OEL helped create the site and granted access to the following: (b)(6) (Enf), Tom Kluck (CF), David Orlic (CF), Angela McHale (CF), (b)(6) (OEL), and OMI.

(b)(5)

All phone call complaints were returned and documented in a phone log which can be found on the AD8 J:// drive and also on the Sharepoint site.

EXHIBIT S

Securities and Exchange Commission
Division of Enforcement

Enforcement Manual

Office of Chief Counsel

October 9, 2013

Enforcement Manual
Table of Contents

3.3 Witness Interviews and Testimony

3.3.1 Privileges and Privacy Acts

In connection with any witness interviews or testimony, staff must comply with the Privacy Act of 1974, the Right to Financial Privacy Act of 1978, and the Electronic Communications Privacy Act of 1986 and the rules regarding the assertion of privileges, contacting witness's counsel, parallel proceedings, ongoing litigation, and Freedom of Information Act requests. Those rules and statutes are discussed in Section 4 of the Manual.

3.3.2 No Targets of Investigations

Unlike the grand jury process in which targets of an investigation are often identified, the SEC investigative process does not have targets. Thus, the SEC is not required to provide any type of target notification when it issues subpoenas to third parties or witnesses for testimony or documents in its nonpublic investigations of possible violations of the federal securities laws. The Supreme Court, in *SEC v. O'Brien*, 467 U.S. 735, 750 (1984), noted that "the imposition of a notice requirement on the SEC would substantially increase the ability of persons who have something to hide to impede legitimate investigations by the Commission." Citing the SEC's broad investigatory responsibility under the federal securities laws, the Court found no statutory, due process, or other standard regarding judicial enforcement of such subpoenas to support the proposition that notice is required.

Although some parties involved in investigations eventually may be named as defendants or respondents in subsequent litigation, the SEC does not have targets of its inquiries or investigations.

3.3.3 Voluntary Telephone Interviews

3.3.3.1 Privacy Act Warnings and Forms 1661 and 1662

Basics:

- The Privacy Act, 5 U.S.C. Section 552a, requires, among other things, certain disclosures to individuals from whom the SEC's staff solicits information.

- When the staff contacts a person to request a voluntary telephone interview, before asking any substantive questions, the staff should provide an oral summary of certain information contained in Form 1661 or 1662, as appropriate (*see* Section 3.2.3.1 of the Manual), including at least the required Privacy Act information.

- The Privacy Act requires that the staff provide the following information:

- That the principal purpose in requesting information from the witness is to determine whether there have been violations of the statutes and rules that the SEC enforces.

- That the information provided by members of the public is routinely used by the SEC and other authorities, to conduct investigative, enforcement, licensing, and disciplinary proceedings, and to fulfill other statutory responsibilities.

- That the federal securities laws authorize the SEC to conduct investigations and to request information from the witness, but that the witness is not required to respond.

- That there are no direct sanctions and no direct effects upon the witness for refusing to provide information to the staff.

Considerations:

When appropriate, the staff also sends a Form 1661 or 1662 (along with a cover letter) to the witness after the telephone interview has taken place. If practicable, for example, if the staff contacts the witness and the witness asks to delay the interview to a later date, the staff may send the Form 1662 in advance of the telephone interview.

3.3.3.2 Notetaking

Basics:

While conducting a voluntary telephone interview, the staff may take written notes of the interview.

Considerations:

A minimum of two staff members are encouraged to be present to conduct a witness interview. However, for litigation reasons, staff should consider having only one staff member take notes. Advantages to having a minimum of two staff members present to conduct a witness interview include having more than one person who can ask questions and later have recollections and impressions of the interview. Moreover, one of the staff members may subsequently need to serve as a witness at trial.

3.3.4 Voluntary On-the-Record Testimony

Basics:

The staff may request voluntary transcribed ("on the record") testimony from witnesses. The staff cannot require and administer oaths or affirmations without a formal order of investigation. Nevertheless, the staff can conduct voluntary testimony with a

court reporter present and a verbatim transcript is produced. Voluntary testimony may be recorded by audio, audiovisual, and/or stenographic means. Staff should identify the method or methods of recording to be used in writing to the witness prior to the occurrence of the voluntary testimony.

If a witness is voluntarily willing to testify under oath, the staff, after obtaining the witness's consent, will have the court reporter place the witness under oath. If the witness is placed under oath, false testimony may be subject to punishment under federal perjury laws. In addition, 18 U.S.C. Section 1001, which prohibits false statements to government officials, applies even if a witness is not under oath.

While conducting voluntary on-the-record testimony, the witness may have counsel present. Also, at the beginning of the testimony, the staff should consider asking the witness questions on the record to reflect that the witness understands: (1) that the witness is present and is testifying voluntarily; (2) that the witness may decline to answer any question that is asked, and (3) that the witness may leave at any time.

Considerations:

Staff can otherwise conduct the voluntary on-the-record testimony as it would any other testimony, including providing the witness with the Form 1662 prior to testimony.

3.3.5 Testimony Under Subpoena

3.3.5.1 Authority

The SEC may require a person to provide documents and testimony under oath upon the issuance of a subpoena. Prior to issuing any subpoenas in a matter, the staff must obtain a formal order of investigation. Pursuant to 17 C.F.R. Section 202.5(a), the Commission, may issue a formal order of investigation to determine whether any person has violated, is violating, or is about to violate any provision of the federal securities laws or the rules of a SRO of which the person is a member or participant.

In authorizing the issuance of a formal order of investigation, the Commission delegates broad fact-finding and investigative authority to the staff. Various statutes provide for the designation of officers of the Commission who can administer oaths, subpoena witness, take testimony, and compel production of documents. *See* Sections 8(e) and 20(a) of the Securities Act, Sections 21(a)(1) and (2) of the Exchange Act, Section 209(a) of the Advisers Act, and Section 42(a) of the Investment Company Act. These statutory provisions do not limit the designation of Commission officers to attorneys. Staff accountants, analysts, and investigators also may be designated as officers and empowered to take testimony and issue subpoenas.

Testimony may be recorded by audio, audiovisual, and/or stenographic means. Staff should identify in the subpoena or subpoena cover letter the method(s) for recording the testimony. With reasonable prior notice to the witness, staff may designate another

EXHIBIT T

REQUEST FOR RECORDS DISPOSITION AUTHORITY

LEAVE BLANK (NARA use only)

JOB NUMBER N1-266-09-04

To NATIONAL ARCHIVES & RECORDS ADMINISTRATION
8601 ADELPHI ROAD COLLEGE PARK, MD 20740-6001

Date received 6/3/09

1 FROM (Agency or establishment)
Securities and Exchange Commission

2 MAJOR SUBDIVISION
Division of Enforcement (ENF)

3 MINOR SUBDIVISION

NOTIFICATION TO AGENCY
In accordance with the provisions of 44 U S C. 3303a, the disposition request, including amendments, is approved except for items that may be marked "disposition not approved" or "withdrawn" in column 10

4 NAME OF PERSON WITH WHOM TO CONFER	5 TELEPHONE NUMBER	DATE	ARCHIVIST OF THE UNITED STATES
Curt Francisco	(202) 551-6126	7 Jun 13	

6 AGENCY CERTIFICATION

I hereby certify that I am authorized to act for this agency in matters pertaining to the disposition of its records and that the records proposed for disposal on the attached __4_ page(s) are not needed now for the business for this agency or will not be needed after the retention periods specified, and that written concurrence from the General Accounting Office, under the provisions of Title 8 of the GAO Manual for Guidance of Federal Agencies,

X is not required ☐ is attached, or ☐ has been requested

DATE	SIGNATURE OF AGENCY REPRESENTATIVE	TITLE
6/15/2012	Curt Francisco	Records Officer

7 ITEM NO	8 DESCRIPTION OF ITEM AND PROPOSED DISPOSITION	9 GRS OR SUPERSEDED JOB CITATION	10 ACTION TAKEN (NARA USE ONLY)
	SECURITIES AND EXCHANGE COMMISSION Records of the Division of Enforcement (ENF) (See attached)	N1-266-91-2-1A N1-266-91-2-1B NC1-266-84-1	1

115-109 PREVIOUS EDITION NOT USABLE **STANDARD FORM 115** (REV 3-91)
Prescribed by NARA 36 CFR 1228

SECURITIES AND EXCHANGE COMMISSION
Division of Enforcement (ENF)

1. Tips, Complaints, and Referrals (predating the Tips, Complaints, and Referral (TCR) system)

Documents generated prior to the opening of a MUI or Investigation through any complaint systems that predated the Tips, Complaints, and Referral system These documents include

- Correspondence, including cover letters, external emails, voluntary requests, white papers, FOIA requests, and confidential treatment requests
- Staff work product, including
    - Drafts of correspondence or voluntary requests
    - Inter or Intra-agency memoranda and any drafts thereof
    - Staff notes, including notes of meetings or phone calls
    - Internal emails
    - Any other records the staff deem necessary to retain, such as key documents produced to the staff

TEMPORARY Cutoff when inquiry deemed NO FURTHER ACTION (NFA)
Destroy/delete 10 years after cutoff

2. Matter Under Inquiry ("MUI") Files

Documents generated during the course of a MUI. These documents may include.

- MUI opening and closing reports
- Correspondence, including cover letters, external emails, voluntary requests, white papers, FOIA requests, and confidential treatment requests
- Staff work product, including.
    - Drafts of correspondence or voluntary requests
    - Inter or Intra-agency memoranda and any drafts thereof
    - Staff notes, including notes of meetings or phone calls
    - Internal emails
    - Transcripts of recordings of interviews and interview notes
    - Any other documents the staff deem necessary to retain, such as key documents produced to the staff

TEMPORARY Cutoff when closed Destroy/delete 10 years after cutoff

3. Landmark Investigative Case Files

Investigative case files selected by the Division at the time of case closing that meet one or more of the following criteria:

- Cases that are prosecuted by the Department of Justice (DOJ) as criminal cases pertaining to the conduct alleged in the SEC case (to apply the SEC Staff must be aware of the DOJ filing at time of case closing)
- Cases listed in the SEC's Annual Report as "Major Enforcement Cases" (or any successor designation)
- High impact or national priority investigations designated by the Enforcement Division

Records generated during the course of an investigation, including during litigation and the collections and distributions process. These documents may include.

- Correspondence, including cover letters, external emails, voluntary requests, subpoenas, Wells or other similar submissions, white papers, FOIA requests, and confidential treatment requests
- Staff work product, including.
    - Drafts of correspondence, voluntary requests or subpoenas
    - Inter or Intra-agency memoranda and any drafts thereof
    - Staff notes, including notes of meetings or phone calls
    - Internal emails
    - Transcripts of investigative testimony
    - Exhibits to investigative testimony
    - Transcripts of recordings of interviews and interview notes
    - Reports of monitors or independent consultants
    - Formal orders of investigation, including all amendments and supplements thereto
    - Case Opening Report, Case Closing Recommendation, and Case Closing Report
    - Litigation records including correspondence, pleadings, consents, offers of settlement, final judgments, orders, other court and administrative proceeding filings, and deposition transcripts and exhibits
    - Documents unique to the collections and distributions process, including audited financial files, and support materials in cases involving financial waivers, terminated collection efforts, or discharged debts
    - Any other documents the staff deem necessary to retain, such as key documents produced to the staff

PERMANENT Cutoff when closed or becomes inactive Transfer entire case file to NARA after applying one or more of the selection criteria and 10 years after case is closed or becomes inactive

4. Non-Landmark Investigative Case Files

Investigative case files not selected by the Division at the time of case closing under the criteria above These documents may include.

- Correspondence, including cover letters, external emails, voluntary requests, subpoenas, Wells or other similar submissions, white papers, FOIA requests, and confidential treatment requests
- Staff work product, including
    - Drafts of correspondence, voluntary requests or subpoenas
    - Inter or Intra-agency memoranda and any drafts thereof
    - Staff notes, including notes of meetings or phone calls
    - Internal emails
    - Transcripts of investigative testimony
    - Exhibits to investigative testimony
    - Transcripts of recordings of interviews and interview notes
    - Reports of monitors or independent consultants
    - Formal orders of investigation, including all amendments and supplements thereto
    - Case Opening Report, Case Closing Recommendation, and Case Closing Report

- Litigation records including correspondence, pleadings, consents, offers of settlement, final judgments, orders, other court and administrative proceeding filings, and deposition transcripts and exhibits
- Documents unique to the collections and distributions process, including audited financial files, and support materials in cases involving financial waivers, terminated collection efforts, or discharged debts
- Any other documents the staff deem necessary to retain, such as key documents produced to the staff

TEMPORARY Cutoff when closed or inactive Destroy/delete 10 years after cutoff

5. Policy and Procedure Files

a.) Division Director and Office of Chief Counsel Program Policy Files, documenting Enforcement policies and procedures not present in the Chairmen's Subject Files including: reports; studies; correspondence; inter or intra-agency memoranda; and related records

PERMANENT Cut off file at end of each Chairman's tenure in office Transfer to NARA 10 years after cut off

b.) Individual or Staff Division files related to Enforcement's non-case file activities, but not elevated to the Division Director for decision.

TEMPORARY ~~*Destroy when 6 months old or when no longer needed, not to exceed 3 years*~~
Destroy when 6 months old or when no longer needed, whichever is longer, but not to exceed 3 years
HL per email w/ David Brown
12/10/12