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 MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, *et. seq.*, to obtain access to records in possession of the Securities and Exchange Commission ("SEC"). The records requested include information collected by the SEC from individuals and entities subject to SEC regulation, complaints received by the SEC from the public regarding Empire State Realty Trust, Inc. ("ESRT"), and information regarding actions taken or not taken by the SEC in response to public complaints, including, but not limited to, internal agency communications. The information requested relates to the management of the Empire State Building, and the solicitation of proxies and consents for the proposal to create a real estate investment trust ("REIT") consisting of the Empire State Building and seventeen other properties.

The Court is being asked to determine whether the SEC has complied with FOIA and SEC regulations in responding to six FOIA requests made by Plaintiff Richard Edelman. Plaintiff seeks declaratory and injunctive relief requiring the agency to disclose requested

information, and awarding Plaintiff's costs and reasonable attorney's fees. Plaintiff is submitting herewith its Cross Motion for Summary Judgment, the Affidavit of Richard Edelman, and the Response of Plaintiff to Statement of the SEC of Material Facts as to Which There Is No Genuine Dispute.

Beginning on January 6, 2014, and extending through April 4, 2014, Mr. Edelman filed six separate requests for SEC documents. The SEC failed to provide a timely response to a single one of Mr. Edelman's requests. Consequently, Mr. Edelman deemed his requests denied, and initiated judicial action on July 3, 2014. Eight months after receiving the initial requests, and two months after the complaint was filed, the SEC produced 251 pages of records on September 3, 2014, and another 2,034 pages in a final response on September 30, 2014. The records produced were replete with redactions claimed to be authorized under the Fifth and Sixth exemptions of the FOIA, 5 U.S.C. § 552(b)(5), and 5 U.S.C. § 552(b)(6).

On January 17, 2015, the SEC filed its Memorandum of Law in Support of its Motion for Summary Judgment, supported by its Statement of Material Facts as to Which There is No Genuine Dispute, the Declarations of John J. Livornese and Patti Dennis, and a Vaughn Index of the documents produced. The SEC contends that it conducted a reasonable search for the requested documents and has produced documents within the scope of the requests, subject to redactions pursuant to the Fifth and Sixth FOIA exemptions. The SEC argues that its response complies with the FOIA, and that it is therefore entitled to judgment as a matter of law.

Plaintiff contends that the SEC has failed to carry its burden of demonstrating that material facts are not genuinely in dispute, and thus the SEC is not entitled to judgment as a matter of law. To the contrary, the facts demonstrate that the SEC has not complied with the FOIA. The SEC admits that it has violated the compliance deadlines mandated by 5 U. S. C. §

552(a)(6)(A). The SEC's searches for records were not in substantial compliance with the FOIA and were not conducted in good faith. Furthermore, the SEC has failed to demonstrate that the redactions made under the (b)(5) exemption qualify for that exemption, and the Court is respectfully requested to review those redactions in camera.

At the same time, the facts show that Plaintiff is entitled to judgment as a matter of law on the issues of the unreasonableness of the search for records and the inappropriateness of the (b)(5) redactions. Upon review of the (b)(5) redactions, Plaintiff requests the Court to order that the redacted materials be produced, or that segregable portions of the redacted materials be produced. Finally, Plaintiff requests that he be awarded costs and reasonable attorney fees incurred in this action.

FACTUAL BACKGROUND

The issue in dispute is whether the SEC's response to Mr. Edelman's six requests complies with the FOIA. The facts regarding these requests are as follows.

A. Request Nos. 14-03043 and 14-03452

On January 6, 2014, Mr. Edelman submitted a request for the following information pertaining to ESRT (referred to herein as "the registrant"): all comment letters from SEC staff not currently displayed on the SEC public website; all submissions from the registrant in response to SEC comment letters; all submissions from the registrant submitted under SEC Rule 83; all emails to and from the registrant and SEC attorneys David Orlic, Tom Kluck and Angela McHale; all notes from meetings pertaining to the registrant, and which SEC attorneys David Orlic, Tom Kluck or Angela McHale attended. The SEC acknowledged receipt of this request on January 6, 2014, and designated the request No. 14-03043-FOIA. Livornese Declaration ¶¶ 3, 4; Edelman Affidavit ¶ 8.

On January 15, 2014, Mr. Edelman submitted a request for all notes, reports, emails or any other accounts from interviews with investors conducted by SEC staff attorneys David Orlic, Tom Kluck and Angela McHale in response to consumer complaints lodged by Empire State Building Associates ("ESBA") investors with the SEC regarding ESRT, including all emails to and from the listed SEC lawyers in which complaints and interviews were discussed. The SEC acknowledged receipt of this request for investor complaints on January 15, 2014, and designated the request No. 14-03452-FOIA. Livornese Declaration¶¶ 5, 6; Edelman Affidavit ¶¶ 11, 12.

The SEC's regulations provide that, if a FOIA request receives no response within the twenty (20) days provided by the statute, then the requester may treat the failure to respond as a denial and file an appeal thereof. 17 CFR § 200.80(d)(6). Mr. Edelman did not receive a timely response to either request, which responses were due on February 4 and February 13, 2014, respectively. After waiting more than a month, Mr. Edelman filed an administrative appeal of both denials on March 26, 2014, which appeal was acknowledged by SEC's Office of FOIA Services on April 2, 2014. Edelman Affidavit ¶¶ 19, 20. On April 16, 2014, Associate General Counsel Richard M. Humes acknowledged "that the statutory time periods have not been met" with respect to the two requests, and remanded them to SEC's FOIA Office for expeditious processing. Edelman Affidavit ¶ 22; Exhibit J.

On April 30, 2014, more than three months after the request was made, the SEC issued a *Glomar* response to Request No. 14-03452.[1] Livornese Declaration Exhibit 3. Mr. Edelman

[1] The *Glomar* response takes its name from the CIA's refusal to confirm or deny the existence of records about the Hughes Glomar Explorer, a ship used in a classified CIA project to raise a sunken Soviet submarine from the floor of the Pacific. *Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1171 (D.C. Cir. 2011) (*quoting Phillippi v. CIA*, 655 F.2d 1325, 1327 (D.C. Cir. 1981)).

filed an administrative appeal of the *Glomar* response on May 19, 2014, which appeal was acknowledged by the SEC on June 3, 2014. Edelman Affidavit ¶ 23. On July 2, 2014, SEC Associate General Counsel Humes reviewed the 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 Exhibit 4. Nearly another three months later, more than eight months following Plaintiff's initial requests, and after the expenditure by Plaintiff of considerable time and resources, the SEC issued on September 30, 2014, a combined response to Request Nos. 14-03043 and 14-03452 consisting of 2,034 pages of records, with numerous redactions claimed under 5 U. S. C. §§ 552(b)(5) and (b)(6). Livornese Declaration ¶ 16 and Exhibit 5.

B. Request No. 14-03257

On January 8, 2014, Mr. Edelman submitted a request for the following information pertaining to the Sublease between ESBA and Empire State Building Company ("ESBC"): all information or communications between SEC employees and Empire State Building Associates LLC or Empire State Realty Trust, Inc. and their representatives from 1/12/12 to 4/11/12 in which the Sublease for the Empire State Building is mentioned, including any and all emails from or to Mary Kosterlitz, Office of Enforcement Liaison, Tom Kluck, Division of Corporate Finance, or any other SEC employee in which the ESB Sublease is mentioned; any notes from SEC meetings where the Sublease to the Empire State Building is mentioned; any notes from phone conversations or correspondence of any nature between the SEC and Empire State Building Associate LLC, Empire State Realty Trust LLC, or their representatives where the Sublease for the Empire State Building is mentioned; any and all exhibits filed by Empire State Building Associates LLC or Empire State Realty Trust LLC that reference the Sublease of the Empire State Building; all submissions from Empire State Building Associates LLC or Empire

State Realty Trust, Inc. submitted under Rule 83 that mention the words Sublease or Lease to the Empire State Building. The SEC acknowledged receipt of this request for documents related to the Sublease on January 8, 2014, and designated the request No. 14-03257-FOIA. Livornese Declaration ¶¶ 17, 18; Edelman Affidavit ¶ 9.

Under 17 CFR § 200.80(d)(5), a response to this request was due on February 6, 2014. No response was received within this time. When the response was more than a month past due, on March 26, 2014, Mr. Edelman filed an administrative appeal. Edelman Affidavit ¶¶ 19, 20. On April 16, 2014, Associate General Counsel Humes acknowledged "that the statutory time periods have not been met" with respect to this request and remanded it to SEC's FOIA Office for expeditious processing. Edelman Affidavit ¶ 22; Exhibit J.

On September 3, 2014, fully eight months after the response was made, and nearly five months after it was remanded for expeditious processing, the SEC issued its response to this request, producing 215 pages of records, subject to redactions claimed under 5 U. S. C. §§ 552(b)(5) and (b)(6). Livornese Declaration ¶ 21; Exhibit 7.

C. <u>Request No. 14-03398</u>

On January 10, 2014, Mr. Edelman submitted a request for the following information pertaining to ESRT: a list of any and all documents submitted by the registrant (ESRT) and granted confidential treatment under SEC rules Rule 406 of the Securities Act or Rule 24b-2 of the Exchange Act or Rule 83 of the Commission's Rules of Practice. The request also asked for the date each such document was submitted to the SEC, the subject of each document, and the name of the SEC official granting confidential treatment. The SEC acknowledged receipt of this request for documents on January 10, 2014, and designated the request No. 14-03398-FOIA. Edelman Affidavit ¶ 10.

Under 17 CFR § 200.80(d)(5), a response to this request was due on February 10, 2014. Again, no response was received within the prescribed time period. When the response was more than a month past due, on March 26, 2014, Mr. Edelman filed an administrative appeal. Edelman Affidavit ¶ 21. On April 16, 2014, Associate General Counsel Humes again acknowledged "that the statutory time periods have not been met" with respect to this request and again remanded it to SEC's FOIA Office for expeditious processing. Edelman Affidavit ¶ 22; Exhibit J.

On April 29, 2014, the SEC issued a response indicating that it had located no documents within the scope to the request. Edelman Affidavit ¶ 24. An additional, wholly inconsistent response was issued one day later, on April 30, 2014, acknowledging the remand of April 16, 2014, and indicating that further processing would occur. Edelman Affidavit Exhibit L.

D. Request Nos. 14-06366, 14-06367, 14-06368, and 14-06369

On March 27, 2014, Mr. Edelman submitted a request for the following information pertaining to: emails, letters to/from Empire State Realty Trust, Inc. and/or Malkin Holdings, their representatives, and the SEC; emails, letters, and notes from meetings/phone conversations from/to SEC FOIA office and other SEC departments concerning any and all FOIA requests for Empire State Realty Trust; emails and notes from meetings/phone conversations from/to SEC Division of Corporate Finance that mention any FOIA requests for Empire State Realty Trust and/or Malkin Holdings. The SEC acknowledged receipt of this request for emails and letters related to FOIA requests on March 27, 2014, and designated the requests No. 14-06366-FOIA. Edelman Affidavit ¶13; Livornese Declaration ¶¶ 28, 29. On April 17, 2014, the SEC separated the request into four parts and designated the parts Request Nos. 14-0366 through 14-06369. Livornese Declaration ¶ 30.

Under 17 CFR § 200.80(d)(5), a response to this request was due on April 24, 2014. Not surprisingly, no response was received within this time. Mr. Edelman filed an administrative appeal on May 20, 2014. Edelman Affidavit ¶ 20, Exhibit H. On June 3, 2014, the appeal was acknowledged by the SEC. Edelman Affidavit Exhibit I.

On September 3, 2014, the SEC issued a response to Request No. 14-06367 and a response to No. 14-06369, indicating that there were no documents within the scope of the requests. Livornese Declaration Exhibits 12, 15. On September 18, the SEC issued a response to No. 14-06366, producing 2 pages of records, and a response to Request No. 14-06368, producing 36 pages of records, all subject to redactions claimed under 5 U. S. C. §§ 552(b)(5) and (b)(6). Livornese Declaration Exhibits 13, 14.

E. Request No. 14-06652

On April 4, 2014, Mr. Edelman submitted a request for the following information pertaining to ESRT: letters, emails to the SEC or notes from meetings or phone calls with the SEC from any government official other than SEC employees concerning Empire State Realty Trust, Inc., elected officials or not, federal, state or any other government official. The SEC acknowledged receipt of this request for intra-governmental communications concerning ESRT on April 4, 2014, and designated the request No. 14-06652-FOIA. Edelman Affidavit ¶ 14.

Under 17 CFR § 200.80(d)(5), a response to this request was due on May 4, 2014. No response was received within this time. On May 9, 2014, Mr. Edelman filed an administrative appeal. Edelman Affidavit ¶ 20. The appeal was acknowledged by the SEC on June 3, 2014, Edelman Affidavit Exhibit I, and in the acknowledgment, Associate General Counsel Humes again acknowledged "that the statutory time periods have not been met" with respect to this request and again remanded it to SEC's FOIA Office for expeditious processing. On July 17,

2014, the SEC issued a response indicating it had located no documents within the scope to the request. Livornese Declaration ¶44; Exhibit 17.

STANDARD OF REVIEW

Under Rule 56, summary judgment is appropriate if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2). *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986). When evaluating a Rule 56 motion, the Court must view the evidence in the light most favorable to the non-moving party. *Holcomb v. Powell,* 433 F.3d 889, 895 (D.C.Cir.2006) (citing *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150 (2000). The Court must therefore draw "all justifiable inferences" in favor of the non-moving party and accept the non-moving party's evidence as true. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The Court must then apply the law to the facts presented pursuant to this standard.

The Freedom of Information Act implements a general philosophy of full agency disclosure. *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 754 (1989); *Assassination Archives & Research Ctr. v. CIA*, 334 F.3d 55, 57 (D.C. Cir. 2003). Fundamentally, the FIOA is a public disclosure mandate, and its provisions should be interpreted with that intent in mind. Agencies are directed to implement the FOIA by publishing certain types of records. They are also directed to adopt regulations describing the information they maintain and providing procedures for the public to access their records. Section 552(a) of the FOIA requires government agencies to *promptly* make available to any person upon request the records it maintains, unless the agency finds that the requested information falls into one or more of the nine exemptions listed in Section 552(b) of the Act. An agency can withhold or redact

documents only if the information falls within one of nine statutory exemptions. *See* 5 U.S.C. § 552(b)(1)-(9). The agency bears the burden of establishing that an exemption applies. *Reporters Comm.*, 489 U.S. at 755.

Pursuant to the FOIA, an agency must search for any documents responsive to the request, and must disclose all reasonably segregable, nonexempt portions of the requested records. *Assassination Archives,* 334 F.3d at 58. Agencies are required by Subsection 552(a)(6)(A) to respond to FOIA requests within twenty days, and are required to fully explain any determination to withhold information. Subsection 552(a)(6)(B) allows an agency to extend the twenty day response time by an additional ten days, or longer in certain unusual circumstances, and pursuant to consultation with the requester. Appeals of agency denials to the head of the agency are to be concluded within twenty days.

ARGUMENT

The SEC, arguing that its submissions are entitled to substantial weight and should be given a presumption of good faith, submits that it conducted reasonable and adequate searches, and that it either produced documents that fell within the scope of Plaintiff's requests, or properly withheld documents in whole or, through redactions, in part. Defendant's Memorandum of Law in Support of Summary Judgment ("Defendant's Memorandum") at 4. The evidence shows, however, that the SEC's responses to Plaintiff's requests were not conducted in good faith, that the searches were not sufficiently compliant, and that the redactions cannot all be justified under the claimed exemptions.

I. Plaintiff Did Not Fail to Exhaust Administrative Remedies with Respect to Request No. 13-03398

The SEC first argues that Mr. Edelman failed to exhaust his administrative remedies with respect to Request No. 14-03398, in an attempt to taint Mr. Edelman, and to cite Mr. Edelman's

failure as justification for the SEC's noncompliance. Defendant's Memorandum at 5. However, the SEC's argument here is troubling, as well as both factually and legally erroneous.

First, Mr. Edelman did file an appeal with respect to Request No. 14-03398, an appeal which the SEC has itself acknowledged. The request at issue, which sought information obtained from ESRT that had been marked confidential, was received by the SEC on January 10, 2014. Pursuant to 17 CFR § 200.80(d)(5), a response to Mr. Edelman's request was due on February 10, 2014. Unfortunately, however, consistently with Mr. Edelman's other requests, no response was provided. On March 26, 2014, Mr. Edelman, deeming the failure to respond a denial, filed an administrative appeal. His appeal was explicitly acknowledged by SEC's Office of FOIA Services. Edelman Affidavit at ¶¶ 20-21; Exhibits H, page 3, and I, page 3. Thereafter, on April 16, 2014, Associate General Counsel Humes admitted that "the statutory time period has not been met" for request No. 14-03398 and three other requests, and he remanded the request to the FOIA Branch Chief with instructions to process the request expeditiously. Edelman Affidavit ¶ 22; Exhibit J. On April 29, 2014, the SEC issued a response stating that no documents within its scope had been located, but also indicated in a response dated April 30, 2014, that further action on the request was being taken. Edelman Affidavit ¶ 24; Exhibit L. Any administrative failure regarding this request clearly resides within the SEC, and cannot, more importantly, should not, be blamed on Mr. Edelman.

Second, because the time period for responding to this request was exceeded, as admitted by Associate General Counsel Humes, no administrative appeal was necessary in order to exhaust Mr. Edelman's administrative remedies. FOIA Subsection 552(a)(C)(i) states: "Any person making a request to any agency for records under paragraphs (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such

request if the agency fails to comply with the applicable time limit provisions of this paragraph." Applying this subsection the Fourth Circuit recently stated:

> Put simply, if an agency does not respond to a request within twenty working days after receiving it, the requester may typically commence litigation. *Citizens for Responsibility & Ethics in Wash. v. FEC,* 711 F.3d 180, 182–83 (D.C.Cir.2013). This court has flatly stated that even if a request "may have been burdensome to the agency or would have to be delayed because of other requests filed earlier," the constructive exhaustion provision still applies. (Citing *Pollack v. Dep't of Justice,* 49 F.3d 115, 118 (4th Cir.1995)).

Coleman v. Drug Enforcement Administration, 714 F.3d 816, 823 (4th Cir. 2013). Accordingly, Mr. Edelman has not failed to exhaust his administrative remedies, and his claim pursuant to Request No. 14-03398 cannot be dismissed on that basis.

II. The SEC Failed to Conduct a Reasonable Search within a Reasonable Time

The SEC argues that it is entitled to summary judgment if it has conducted searches reasonably calculated to uncover all relevant documents, citing *Steinberg v. Dep't of Justice,* 23 F.3d 548, 552 (D.C.Cir. 1994), *Weisberg v. Dep't of Justice,* 745 F.2d 1476, 1485 (D.C.Cir. 1984), and *Ogelsby v. Dept. of the Army,* 920 F. 2d 57, 68 (D.C.Cir. 1990). Defendant's Memorandum at 5-6. The case law makes clear, however, that the reasonableness and adequacy of a search for records under the FOIA is dependent on the facts of each case. The agency cannot limit its search to one record system and "must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Oglesby* at 68. Moreover, "if there is substantial doubt as to the sufficiency of the search, summary judgment for the agency is not proper." *Kowalczyk v. Dep't of Justice,* 73 F.3d 386, 388 (D.C.Cir. 1996) (quoting *Truitt v. Dep't of State,* 897 F.2d 540, 542 (D.C.Cir. 1990)). While the SEC argues that it has conducted a reasonable and adequate

search in response to all six requests, the evidence shows that, on the contrary, the SEC's search was neither reasonable nor adequate.

First, the SEC's search for records was unreasonably and inexcusably delayed. Nowhere in the two Declarations is there any reference to the dates that searches were commenced. In fact, the Declarations divulge that searches for records did not even commence until six months after receipt of the requests. The Declarations speak for themselves. Mr. Livornese declares with specificity that Request No. 14-03452 was received on January 15, 2014, Livornese Declaration ¶ 6, that the *Glomar* response was issued on April 30, 2014, Livornese Declaration ¶ 7, and that the matter was remanded after appeal on July 2, 2014, Livornese Declaration ¶¶ 8, 9. Thereafter, the request was combined with No. 14-03043, Livornese Declaration ¶ 10, and the FOIA Office "initially determined" that comment letters subject to the request would have been handled by the Division of Corporation Finance, Livornese Declaration ¶ 11. This sequence, conspicuously detailing each step and assigning a date, in contrast to the obvious omission of any reference to a date in Paragraph 11, reveals that the search for documents did not commence until after remand following appeal, an inexcusable delay of six months. Similar delays are revealed and reinforced by the omission of any reference dates for searches described in Paragraphs 12 through15, and the omission of any reference dates for searches that are described in equivalent detail by Ms. Dennis. Declaration of Patti Dennis ¶¶ 5-7.

These unjustified delays violate the general FOIA mandate in Subsection 552(a)(3)(A) that an agency respond "promptly" to a request for records, and thus undermine the letter and spirit of the FOIA. The SEC's disregard for its mandate under the FOIA is especially apparent in its repeated decisions to ignore the procedures described in Subsection 552(a)(6)(A) for acquiring additional time to respond under "unusual circumstances." Such blatant disregard for

its duties under the FOIA clearly undermines the presumption of good faith to which the SEC claims entitlement.

Second, the SEC was not as thorough in its search for records as it proclaims. Rather, the SEC's declaration of thoroughness is undermined by the simple fact that it failed to uncover all the records within the scope of the search. Mr. Edelman has readily identified two complaints from investors, which complaints included recordings of false proxy solicitation statements by Peter Malkin and Anthony Malkin. The two complaints clearly fall within the scope of Request No. 14-03452, but were not included among the records produced. Moreover, no documents relating to internal SEC discussion of the missing complaints were produced. Edelman Affidavit ¶ 33. Such evidence raises doubt as to the thoroughness of the searches conducted, given the likelihood that other complaints have been similarly overlooked. That the search was incomplete provides irrebuttable proof of its inadequacy, or at the very least raises a "substantial doubt as to the sufficiency of the search" thereby making summary judgment improper. *Kowalczyk*, 73 F.3d at 388.

Third, the SEC improperly invoked the *Glomar* response, apparently either as a delay tactic or to avoid responding altogether. The inappropriateness of the *Glomar* response was recognized, and the exception reversed by Associate General Counsel Humes on July 2, 2014, Edelman Affidavit ¶ 23. However, by invoking the *Glomar* response, the SEC succeeded in its purpose, as the additional appeal delayed the SEC's final response to September 30, 2014, and imposed on Mr. Edelman the cost of a second agency appeal for the 14-03452 request. The use of the *Glomar* response is further evidence of bad faith on the part of the SEC in responding to Mr. Edelman's legitimate and good faith request.

Fourth, the SEC relies extensively on *Ogelsby v. Dept. of the Army* in justifying the sufficiency of its searches for records. Defendant's Memorandum at 6-7. Interestingly, *Ogelsby* reversed a summary judgment in favor of the agency on the grounds that its search was inadequate, holding that a search reasonably calculated to locate the requested records must be conducted; "the agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested." 920 F.2d at 68. In a more recent decision applying the *Ogelsby* precedent to a FOIA response by the SEC, this Court found that the affidavits provided by the SEC were inadequate and its search for records insufficient. *Cuban v. Securities and Exchange Comm.,* 744 F. Supp. 2d 60 (D.D.C. 2010). Here, just as in *Cuban*, the affidavits submitted to justify the adequacy and reasonableness of the SEC's searches are inadequate.

The Declaration of Ms. Dennis, for example, is inadequate for several reasons pursuant to the precedent established in *Cuban.* Request No. 14-03452 pertained to interviews, conducted by three named SEC staff lawyers, of ESBA investors who had filed complaints with the SEC, and requested "all notes, reports, emails or any other accounts from these interviews with investors." Edelman Affidavit ¶ 12. Ms. Dennis describes only two sources that she searched for these records: email records of the three lawyers, and a request to each of the lawyers to search his or her own files. Dennis Declaration ¶¶ 5, 6. No other potential sources were searched for reports or other accounts of the interviews. Potential sources of "reports" and "other accounts," clearly suggest a broader search than a perusal of emails and personal files by the three staff attorneys. Such information would likely migrate to other sources or be stored in other types of agency records that were never considered. In addition, Ms. Dennis further refused to produce the notes received from the attorneys because she regarded them to be "not

agency records." However, this Court has held that such notes are subject to the FOIA, and should be disclosed if they record merely factual matters, as was likely the case here. *Williams & Connolly, LLP v. Securities and Exchange Com.,* 729 F.Supp.2d 202, 213 (D.D.C. 2010).

In describing the search pursuant to Request No. 14-03257, Ms. Dennis declares that she divided the request into five subparts. She then located 215 pages of documents under only one of the subparts, and furnished no records from any of the other subparts. Dennis Declaration ¶¶ 9-12. The search of the one subpart, moreover, was limited to an email search by the Office of Information Technology, and apparently never expanded to, or considered the possibility of, other sources of "information or communications" between SEC employees and entities requested. Dennis Declaration ¶¶ 8, 9. Consequently, the search was inadequately narrow.

In summary, the SEC's presumption that its searches were reasonable and adequate because they satisfy the criteria established by *Ogelsby* is incorrect. The SEC's searches have been unreasonably protracted in length and narrowed in scope, and were therefore inadequate. In addition, the SEC's supporting Declarations lack sufficient detail to comply with the standard set forth in *Cuban*, and summary judgment must be denied accordingly.

III. The SEC Has Failed to Justify Its Redactions Under the (b)(5) Exemption

The SEC argues that it properly withheld records protected by the deliberative process privilege pursuant to the Fifth Exemption of the FOIA, 5 U.S.C. § 552(b)(5). Defendant's Memorandum at 7-12. However, the SEC has failed to demonstrate that its use of the (b)(5) exemption to withhold information complies with the FOIA, and thus has failed to meet its burden of establishing that the Fifth Exemption applies to the redacted materials.

The fifth exemption of the FOIA exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in

litigation with the agency." 5 U.S.C. § 552(b)(5). Accordingly, Exemption 5 covers material that would be protected from disclosure in litigation under one of the recognized evidentiary or discovery privileges, such as the attorney-client privilege. *Pub. Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 874 (D.C. Cir. 2010) (citing *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980)).

The deliberative process privilege is one of the litigation privileges incorporated into Exemption 5. It allows an agency to withhold "all papers which reflect the agency's group thinking in the process of working out its policy and determining what its law shall be." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975). The "deliberative process privilege" under FOIA Exemption 5 "covers 'documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 153).

In order for the deliberative process privilege to apply, the material at issue must be both predecisional and deliberative. *Wolfe v. Dep't of Health & Human Servs.*, 839 F.2d 768, 774 (D.C. Cir. 1988). Accordingly, the withheld material must be part of the deliberative process, such as opinions and recommendations. *Heggestad v. Dep't of Justice*, 182 F.Supp.2d 1, 7 (D.D.C. 2000) (quoting *Coastal States*, 617 F.2d at 868). "In order to qualify under Exemption 5, a document must also be a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters. A document that does nothing more than explain an existing policy cannot be considered deliberative." *Pub. Citizen, Inc.*, 598 F.3d at 876. "Only those portions of a predecisionsal document that reflect the give and take of the deliberative process may be withheld." *Id.* "Portions of predecisional and

deliberative documents that contain factual information that does not 'inevitably reveal the government's deliberations'" must be produced under the FOIA." *Id.* (citations omitted).

In making a determination of whether a record is properly withheld under Exemption 5, "courts frequently examine whether 'the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest communication within the agency.' " *Wilderness Soc. v. U.S. Dep't of the Interior*, 344 F.Supp.2d 1, 15 (D.D.C.2004) (quoting *Coastal States*, 617 F.2d at 866). "The defendant bears the burden of demonstrating, with respect to each of its records, that it was candid or personal in nature, that individuals can be linked to the record, and that the information discussed in the record does more than just describe existing policy." *Cuban*, 744 F.Supp.2d at 77.

Here, the SEC's attempt to invoke the deliberative process exemption fails to meet the first criterion of the deliberative process privilege because the SEC does not identify any decision for which the redacted material can be considered "predecisional." The SEC's redactions also fail to satisfy the second criterion because the SEC has made no effort to demonstrate that the redacted material reflects the requisite "give and take of the deliberative process." The redactions are too broadly applied to qualify as "deliberative" within the meaning and intent of the privilege. Also, it is evident from the documents themselves that the SEC cannot carry its burden of satisfying either criterion necessary for claiming the privilege.

The (b)(5) redactions at issue here affect approximately 100 pages. An example of the SEC's failure to satisfy the threshold criteria of Exemption 5 is immediately evident in Document Number 1, identified in the Vaughn Index as a two-page memo to the file regarding tips and complaints received in connection with ESRT. On page 2 of this document, the SEC redacts a single bullet point and other material in an explanatory paragraph. The memo, however, is a

post-decisional document, dated October 29, 2013, thus taking place *after* the Initial Purchase Offer for the ESRT consolidation. In addition, the redacted material follows a heading entitled "Summary of the Handling of Complaints." The redacted material, therefore, is clearly a factual recitation of past events describing how the SEC handled the complaints, and is neither predecisional nor deliberative.

Document No. 5, identified in the Vaughn Index as a table of tips and complaints received in connection with ESRT, is a 38-page document consisting of four columns, labeled respectively: "general area of concern," "specific tip/complaint," "source/date received," and "notes." In fact, all information in the "notes" column has been redacted from all 38 pages, without explanation, other than a blanket restatement of the standard in the Vaughn Index that the redactions consist of "staff notes that reflect predecisional deliberations about how to handle complaints." The Livornese Declaration, on page 14, does not address the basis for any of these sweeping and heavy-handed redactions. Not one specific decision about how to handle the complaints is identified. The SEC cannot justify its redactions merely by reciting the standard and, accordingly, the entirety of its notes cannot be automatically adjudged predecisional merely upon proclamation. Such an outcome would render Exemption 5 wholly opaque, and thus undermine the purpose of the exemption, as well as the intent of the FOIA.

It is also clear upon examination of Document No. 5 that all such notes for all 38 pages cannot consist uniformly of recommendations or opinions that would reveal the agency's deliberative process. Just labeling the column as "notes" does not allow the SEC to prequalify it for redaction. *Williams & Connolly, LLP*, 729 F.Supp.2d at 213; *Cuban*, 744 F.Supp.2d at 77-78. The SEC makes no effort whatsoever to show that the redacted notes are nonfactual, or that

they actually reveal the agency's deliberative process. Consequently, the "notes" column must be produced, either in its entirety, or at least in segregable portions thereof.

Documents 6, 7, and 8 were withheld in their entirety, and the SEC produced blank sheets of paper numbered pages 68-72 in lieu of the documents. Document No. 6 is described in the Vaughn Index as a two-page document containing "draft comments to registrant." The Livornese Declaration, on page 14, further provides that the entire document was withheld because it contains recommendations for comments to ESRT, and then states further that the final comments to ESRT are nevertheless publicly available. Document No. 7 is a single page described as "typewritten rules." Both the Vaughn Index and Livornese Declaration assert that the document contains predecisional deliberations about issues raised by ESRT's filing. Document 8 is a single page memorandum described as "talking points regarding investor complaints." The Vaughn Index and the Livornese Declaration assert that the document contains recommendations about points to make in calls with investors. The justification for withholding Document No. 6 appears to be the use of the word "draft," which by itself does not meet the test for a predecisional document, and would otherwise provide a loophole, or more accurately black hole, for the redaction of all materials by virtue of a single, commonly used, stamped label. The justification for withholding Documents 7 and 8 likewise does not satisfy the predecisional standard. "Typewritten rules" and "talking points" are clearly post-decisional documents, which reflect agency policies that have already been determined and merely are being carried out. Accordingly, the SEC has failed to carry its burden for withholding Documents 6, 7, and 8, and the documents therefore should be fully disclosed.

Document No. 47 is a two-page forwarding email to McHale and Orlic from an unidentified party. The subject email, from an ESBA investor, is a complaint regarding a

threatening letter received from Dewey Pegno & Kramarsky LLP, lawyers representing the Malkins. The threatening letter is attached to the email (pages 302-305). A redaction at the top of the forwarding email (pages 301, 305) is purported to protect predecisional deliberations about ESRT's filing, as asserted in the Vaughn Index and Livornese Declaration. Here again, no decision is identified, and thus no predecisional deliberation can be presumed in the absence any decision-making event. Moreover, it is insufficiently clear whether the redacted material constitutes either an opinion or a recommendation that would inevitably reveal the agency's deliberative process. Such lack of clarity by the SEC is inadequate to justify its redaction. *Pub. Citizen, Inc.*, 598 F.3d at 876.

The remaining redactions appear in emails regarding the search for documents relating to the ESBA sublease and to the handling of the FOIA search for submissions received from ESRT. Livornese Declaration pages 15-16. The SEC relies on similarly insufficient bases for making redactions with respect to these documents as well. Accordingly, the SEC has failed to establish that its redactions satisfy the criteria for predecisional deliberations, and therefore the redacted materials must be produced.

In summary, the SEC has failed to carry its burden of demonstrating that the redactions to documents within the scope of Mr. Edelman's FOIA requests satisfy the criteria for predecisional deliberations under the Fifth Exemption of the FOIA. Therefore, Plaintiff requests that the Court grant Mr. Edelman's cross motion, and order the SEC to produce withheld Document Nos. 6, 7, and 8, and the redacted portions of Document Nos. 1, 5, 6, 47 and 48.

IV. Mr. Edelman Is Entitled to an Award of Attorney Fees and Costs

Mr. Edelman is requesting specific declaratory and injunctive relief from the Court for the SEC's violation of the FOIA. Pursuant to 5 U.S.C. § 552(a)(4)(E), Mr. Edelman is entitled to

recover reasonable attorney fees and costs upon substantially prevailing in this case, and is hereby requesting that such fees and costs be awarded. *Brayton v. Office of the United States Trade Representative*, 641 F.3d 521, 524 (D.C. Cir. 2011); *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 878 F.Supp.2d 725 (D.D.C. 2012). Mr. Edelman also requests that the fee of $440.16 assessed for his requests be waived or refunded. Edelman Affidavit ¶ 39.

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.

Respectfully submitted,

/s/ *John Wyeth Griggs*

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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 February, 2015.

/s/ John Wyeth Griggs

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