

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HISTORY ASSOCIATES INCORPORATED,

Plaintiff,

v.

U.S. SECURITIES AND EXCHANGE
COMMISSION,

Defendant.

Case No. 1:24-cv-1858-ACR

**SEC’S RESPONSE TO
PLAINTIFF’S STATUS REPORT**

The SEC hereby submits this response to Plaintiff History Associates Incorporated’s April 25, 2025 Status Report, ECF 31 (“SR”).

On February 11, 2025, the parties filed a joint status report in which Plaintiff requested that the “Court [] order the agency to produce the records [responsive to subparts 3 and 4] within 60 days.” ECF 27 at 5. That day, the Court ordered that the SEC “produce to Plaintiff the prioritized subparts [3 and 4] outlined in 27 Joint Status Report by April 11, 2025.” Feb. 11, 2025 Minute Order; *see also* March 28, 2025 Minute Order (ordering the SEC “to comply with the April 11 deadline”).

On April 11, 2025, the SEC issued responses to subparts 3 and 4. Specifically, with respect to subpart 3, the SEC released to Plaintiff 14,436 pages of records, with portions withheld under FOIA Exemptions 4, 5, 6, 7(C), and 7(E), and withheld in full 446 records under FOIA Exemptions 4, 5, and 8. With respect to subpart 4, the SEC released 29 pages of records, with portions withheld under FOIA Exemptions 5, 6, and 7(C), and withheld in full 1,207 pages of records under FOIA Exemptions 4 and 5. The SEC also provided three preliminary *Vaughn* Indices reflecting the

SEC's withholdings of records withheld in full and of information from the records withheld in part. As such, the SEC has complied with the Court's order to "produce to Plaintiff the prioritized subparts outlined in 27 Joint Status Report," namely subparts 3 and 4, "by April 11, 2025."

Plaintiff, however, claims that, because the SEC's preliminary *Vaughn* Indices were provided for discussion purposes and are subject to modification, "the SEC is in violation of the Court's February 11 and March 28 orders to produce Subparts 3 and 4 and the commitment the SEC made and the Court approved on November 8 to identify all exemptions it wishes to assert." SR at 4.

The SEC strongly contests Plaintiff's claim because the SEC has both responded to subparts 3 and 4 as required by the Court and provided *Vaughn* Indices as discussed at the November 8, 2024 hearing. In connection with its April 11, 2025 records releases, the SEC fulfilled its obligations under the FOIA by analyzing responsive records for all potentially applicable FOIA exemptions, segregability, and foreseeable harm. The released records and *Vaughn* Indices reflect that analysis. At no time did the SEC agree to provide final *Vaughn* Indices, recognizing that, at this stage in the litigation, the parties will use *Vaughn* Indices to engage in the common practice of discussing withholdings and determining whether summary judgment is necessary to resolve disputes regarding any documents or whether the parties can resolve issues without further court intervention. *See, e.g., Project on Gov't Oversight, Inc. v. U.S. Dep't of Homeland Sec.*, 657 F. Supp. 3d 50, 55 (D.D.C. 2023) (at plaintiff's request, agency "produced a draft *Vaughn* index" so parties could "confer to try to resolve any remaining disputes' concerning DHS's contested Exemption 5 withholdings" and agency later provided *Vaughn* Index during summary judgment briefing); *LatinoJustice PRLDEF v. U.S. Dep't of Homeland Sec.*, No. 19-CV-3438 (BCM), 2021 WL 1721801, at *2 (S.D.N.Y. Apr. 29, 2021) ("after producing documents, defendants provided

plaintiffs with a draft *Vaughn* index” and later provided “final *Vaughn* index” with summary judgment briefing). As the SEC informed Plaintiff, it is possible that in the course of further discussions and review, some modifications to the Indices may be warranted. For example, there may be limited information subject to additional exemptions or, in the case of Exemption 5, an additional privilege may apply; in the case of Exemption 4 more information may be appropriate for release following the confidential treatment substantiation process; or a typographical error may need to be corrected. The SEC may also consider discretionary releases of information otherwise appropriately withheld under the FOIA exemptions. The SEC’s intention with the Indices was to communicate applicable withholdings so that Plaintiff may review them, and then the parties can discuss Plaintiff’s concerns and try to narrow issues to resolve on summary judgment. The SEC would then provide final *Vaughn* Indices covering disputed records in connection with summary judgment briefing.

The SEC does not believe that providing *Vaughn* Indices for discussion purposes that are subject to change means that the SEC has not complied with the Court’s orders. The Court did not require the SEC to provide *Vaughn* Indices that could not be changed. During the November 8, 2024 hearing, during which the parties discussed narrowed subparts 1 and 2, Plaintiff’s counsel requested that “on the Vaughn Index itself that [the SEC is] going to produce, it would be . . . appropriate and very helpful if it identifies whatever exemptions [the SEC] would intend to assert as to those documents so that [Plaintiff] get[s] this . . . once for all.” Tr. 19: 3-7. Counsel’s concern appeared to be with receiving *Vaughn* Indices listing exemptions at the same time it received the documents, not on receiving *Vaughn* Indices that could not be changed as the parties discussed issues and whether summary judgment motions were necessary. As Plaintiff requested, the SEC has identified on the *Vaughn* Indices provided the FOIA exemptions it intends to assert.

Plaintiff provides no evidence that the SEC seeks to “sandbag[]” Plaintiff or “assert additional FOIA exemptions at the eleventh hour.” SR at 4. To the contrary, the SEC has repeatedly informed Plaintiff that it is willing to discuss particular records and/or withholdings so that the parties could work to settle any potential concerns Plaintiff may have and try to narrow the issues that the Court would have to resolve on summary judgment. *See* SR Ex. B, ECF 31-2, at 3, 5, 7, 9. And, to date, Plaintiff has not contested any of the SEC’s withholdings made from its records releases. To the extent Plaintiff suggests that the SEC could not have actually reviewed all of the documents that were produced by the April 11 deadline, that concern is unfounded. The SEC expended significant resources to conduct the review, by pulling staff from other matters and cases, to ensure the agency was able to produce the documents and *Vaughn* Indices by the April 11 deadline. Twelve attorneys in the Office of the General Counsel, two attorneys and two staff members in the Office of FOIA Services, and additional Office of the General Counsel support staff were involved in the processing of subpart 3. Using these resources allowed the SEC to complete the review as ordered by the Court.

Additionally, the SEC would like to provide an update concerning the processing of narrowed subparts 1 and 2. The SEC released to Plaintiff non-exempt records responsive to those narrowed subparts on January 7 and 28, 2025 and provided Plaintiff with preliminary *Vaughn* Indices reflecting the SEC’s withholdings of information from those records with the productions. *See* ECF 29 at 1. As stated in the parties’ February 4, 2025 Joint Status Report, the SEC conducted reasonable searches for records and applied reasonable responsiveness criteria to the records returned by its searches based on discussion during the November 8, 2024 hearing before the Court. *See* ECF 26 at 8-10. Nevertheless, Plaintiff contests aspects of the SEC’s searches for records and the responsiveness criteria that the SEC applied. *See id.* at 4-8. In response to Plaintiff’s concerns,

the SEC stated that it “is willing to conduct additional searches and to apply broader responsiveness criteria” *Id.* at 10. The SEC anticipates providing an additional response to narrowed subpart 1 by May 9, 2025 and an additional response to narrowed subpart 2 by June 6, 2025.

Date: April 28, 2025

Respectfully submitted,

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