

**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

**JOINT STATUS REPORT**

Pursuant to this Court’s August 8, 2024 Minute Order, Plaintiff, History Associates Incorporated (“History Associates” or “HAI”), and Defendant, the U.S. Securities and Exchange Commission (“SEC”), by and through their respective undersigned counsel, hereby submit this joint status report. The parties previously submitted joint status reports on August 23, 2024, Dkt. 14, and September 23, 2024, Dkt. 17.

In July and August 2023, History Associates submitted three Freedom of Information Act (“FOIA”) requests to the SEC seeking documents related to the SEC’s investigations relating to Ethereum, Zachary Coburn, and Enigma MPC. Aside from releasing in part three pages of records responsive to the Enigma MPC request, the SEC’s Office of FOIA Services (“FOIA Office”) denied each of the requests and informed History Associates that it was withholding records responsive to each request under FOIA Exemption 7(A), which applies to “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings.” 5 U.S.C. § 552(b)(7).

On June 27, 2024, History Associates filed this suit against the SEC. Dkt. 1. The SEC filed its answer on August 7. Dkt. 13.

On August 15, the parties met and conferred regarding procedural next steps in this case. The SEC informed History Associates that, in light of intervening developments since the SEC's responses to the FOIA requests, some or all of the withheld documents may no longer be exempt under Exemption 7(A) but may be exempt under other FOIA provisions. Dkt. 14 (Aug. 23, 2024 JSR). The SEC also asked whether History Associates would agree to narrow its FOIA requests.

On August 20, History Associates informed the SEC that it does not agree to narrow its requests. History Associates asked the SEC how much additional time it would need to reprocess the documents to determine whether they can be released or are exempt on other grounds.

On September 19 and 20, the SEC informed History Associates that over 132,700 records were produced to the SEC by third parties that may be responsive to the FOIA requests and that that volume does not include the SEC's internal investigative files, internal correspondence relating to SEC investigations, or any other potentially responsive records. The SEC further informed History Associates that, given the volume of records, if History Associates would not agree to narrow the requests, the SEC's FOIA office would reprocess the requests on the Complex track and that it may take three years before the FOIA office can begin to reprocess the requests. The SEC further stated that, if History Associates disputes the processing of the requests on the Complex track, the SEC would seek an *Open America* stay from this Court.

On September 26, History Associates stated that it does not agree to narrow the scope of the FOIA requests and proposed to the SEC a two-track approach to reprocessing the documents responsive to the requests. On the first track, the SEC would prioritize the reprocessing of responsive documents and communications the SEC has sent to third parties and the SEC's

responsive internal documents and communications. On the second track, the SEC would reprocess the third-party productions (*i.e.*, the over 132,700 records noted above), without holding up the reprocessing of records on the first track.

On October 1, the SEC informed History Associates that the agency has on occasion agreed to prioritize processing certain parts of a request if they are sufficiently narrowed and the remaining parts of the request are placed on the Complex track, but that in the SEC's view the subset of documents that History Associates proposed prioritizing was insufficiently narrow.

On October 3, History Associates again informed the SEC that it cannot agree to narrow its FOIA requests and does not believe that the requests should be placed on the Complex track.

Having regrettably reached an impasse, the parties intend to proceed as follows:

***History Associates.*** History Associates intends promptly to file a pre-motion notice for partial summary judgment to compel the SEC to produce the subset of responsive documents and communications the SEC has sent to third parties and the SEC's responsive internal documents and communications. Partial summary judgment is appropriate because the SEC has already affirmed its denials of History Associates' FOIA requests, has since indicated the exemption the SEC asserted in doing so may no longer apply, but now—many months after affirming the denials of the requests—the agency has failed to identify any other applicable FOIA exemption. *See, e.g., CREW v. U.S. Dep't of Justice*, 746 F.3d 1082, 1097 (D.C. Cir. 2014).

History Associates intends to oppose any SEC motion for an *Open America* stay. *Open America* stays may be appropriate in “exceptional circumstances” when a plaintiff sues *before* an agency responds to a FOIA request within the 20-day statutory deadline. *See* 5 U.S.C. § 552(a)(6)(C)(i). But here, History Associates submitted its FOIA requests more than a year ago, and the SEC identified responsive documents in denying the requests many months ago. Having

denied the requests on a ground it says may no longer apply—a possibility the SEC should have accounted for, given that “Exemption 7(A) may become outdated when the [law-enforcement] proceeding at issue comes to a close,” *CREW*, 746 F.3d at 1097—the SEC should not be permitted to send History Associates to the back of the queue, where it would be forced to wait three more years before the agency even *begins* to consider whether other grounds for denial might apply. That is particularly so because History Associates has agreed to prioritize a subset of responsive documents.

***The SEC.*** The SEC believes that Plaintiff’s proposed motion for partial summary judgment would not advance the resolution of this case because the present dispute concerns the timeline of processing the three FOIA requests at issue. Whether the SEC is entitled to additional time to process the FOIA requests is most efficiently addressed in an *Open America* motion for a stay. Plaintiff’s proposed partial summary judgment motion concerning whether the SEC must process the FOIA requests in light of intervening developments since the SEC responded to those FOIA requests would be duplicative of an *Open America* motion.

As the SEC has informed Plaintiff, the SEC responded to the three FOIA requests at issue in August 2023 and October 2023, and provided additional information on appeal in December 2023, January 2024, and February 2024, based on determinations made at the time of those responses. The FOIA does not require the SEC to update or supplement a prior response to a request for records. Nonetheless, in responding to this lawsuit filed in June 2024, the SEC has reassessed its responses to the FOIA requests in light of developments in SEC investigations that occurred after those responses were provided.

The SEC believes that working with Plaintiff to narrow its FOIA requests to focus on processing those requests outside of the SEC’s Complex track is the more expeditious and efficient

approach to resolving the parties' disputes. Plaintiff, however, refuses to narrow its FOIA requests and seeks internal SEC investigative files and correspondence, which, as the SEC has informed Plaintiff, are likely protected from release under the attorney-client and deliberative process privileges and the attorney work-product doctrine embedded in FOIA Exemption 5. Plaintiff's request that the SEC follow a "two-track approach" to "prioritize" certain records does not narrow the request and does not address the fact that the FOIA permits agencies to provide for "multitrack processing of requests for records based on the amount of work or time (or both) involved in processing requests." 5 U.S.C. § 552(a)(6)(D)(i); *see also* 17 C.F.R. § 200.80(d)(4) ("The [SEC's] Office of FOIA Services shall use two or more additional processing tracks that distinguish between simple and more complex requests based on the estimated amount of work and/or time needed to process the request.").

Should Plaintiff pursue a motion for partial summary judgment, the SEC will oppose that motion and file a motion for an *Open America* stay.

Date: October 7, 2024

/s/ Jonathan C. Bond

Eugene Scalia  
Jonathan C. Bond  
Nick Harper  
GIBSON, DUNN & CRUTCHER LLP  
1050 Connecticut Avenue, N.W.  
Washington, D.C. 20036  
Telephone: 202.955.8500  
Facsimile: 202.467.0539  
escalia@gibsondunn.com  
jbond@gibsondunn.com  
nharper@gibsondunn.com

*Attorneys for Plaintiff*

Respectfully submitted,

/s/ Alexandra Verdi

Alexandra Verdi  
U.S. Securities and Exchange Commission  
Boston Regional Office  
33 Arch Street, 24<sup>th</sup> Floor  
Boston, Massachusetts 02110  
Telephone: 202.551.5057  
verdim@sec.gov

*Attorney for Defendant*