

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 February 21, 2025 Status Report, ECF 28 (“SR”).

On November 8, 2024, this Court ordered the SEC to respond to two narrowed subparts of one of Plaintiff’s three FOIA requests at issue in this case. Narrowed subpart 1 seeks “all documents and communications that SEC Chair Gary Gensler sent, received, or considered concerning Ethereum’s shift to a proof-of-stake mechanism.” Narrowed subpart 2 seeks “all documents and communications sent by the SEC to third parties regarding Ethereum’s shift to a proof-of-stake mechanism.” With respect to these subparts, this Court noted, and Plaintiff’s counsel agreed, that the narrowed subparts should be “an initial, small subset of things.” ECF 24-1 at 17:17-22. On January 7 and 28, 2025, the SEC released to Plaintiff non-exempt records responsive to those narrowed subparts and provided Plaintiff with preliminary *Vaughn* Indices reflecting the SEC’s withholdings of information from those records. In response to narrowed subpart 1, the SEC released to Plaintiff one page in part and withheld in full 718 pages of records. In response to narrowed subpart 2, the SEC released to Plaintiff 1,217 pages in part and withheld in full 6,970 pages.

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 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 also stated that it "needs *at least* 60 days to determine exactly what records Plaintiff seeks, conduct the additional searches, review records for responsiveness, and complete the necessary consultations to release the records." *Id.* (emphasis added).

The February 4, 2025 Joint Status Report also noted that the parties were negotiating additional document productions (ECF 26 at 1), and the parties submitted a Joint Status Report regarding those additional subparts (subparts 3 and 4) on February 11, 2025 (ECF 27). This Court ordered the Commission to respond to those two new subparts by April 11, 2025.

On February 12, 2025, Plaintiff's counsel asked undersigned counsel for an update on the volume of documents at issue for the additional searches for narrowed subparts 1 and 2 that the SEC stated it was willing to conduct. On February 13, 2025, undersigned counsel sent Plaintiff's counsel proposed parameters for the additional searches in light of Plaintiff's request that the SEC "raise [] issue[s]" with Plaintiff. *See* ECF 26 at 6. Plaintiff's counsel responded that day and, among other things, asked that the searches be run. On February 21, 2025, undersigned counsel provided a partial estimated hit count of 29,684 records (not including family members or reflecting de-duplication). Undersigned counsel informed Plaintiff's counsel that, as soon as possible, she will share the hit counts and that, once family members are included, duplicates are removed,

and additional search terms are run, she will move forward with determining the total numbers of returned records.

Plaintiff's expectations that its search requests be processed immediately and be given precedence over all other email searches that SEC staff need for a variety of purposes, including many other FOIA requests, are not realistic. Staff in the SEC's Office of Information Technology, who handle email searches for all divisions and offices within the SEC; staff in the SEC's Office of FOIA Services, who process thousands of FOIA requests each year; and attorneys handling this litigation must balance this case with other responsibilities and deadlines.

The SEC is moving forward with processing the broad scope of documents Plaintiff now seeks in response to subparts 1 and 2 of its FOIA request and is also processing documents in response to two new subparts. In determining appropriate timing for further responses to subparts 1 and 2, it is necessary to consider that the partial estimated hit count is 29,684 records and that this Court has required the SEC to process subparts 3 and 4 by April 11, 2025. Also, contrary to Plaintiff's assertion that the SEC was "'willing to conduct' within 60 days" the additional responses to subparts 1 and 2 (SR at 2), the SEC had stated that it "needs at least 60 days" to process those additional responses in response to Plaintiff's demand that it do so within 14 days (ECF 26 at 10).

The SEC recommends that, before any additional deadlines are set, it should obtain more information about the volume of additional documents responsive to subparts 1 and 2 (as well as to subparts 3 and 4), conduct a preliminary review and discuss possible narrowing with Plaintiff, and determine whether the volume of documents Plaintiff continues to seek will require that it file an *Open America* motion seeking a stay of proceedings in light of the volume of documents requested. See *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605, 616 (D.C. Cir.

1976) (holding that “exceptional circumstances” exist when an agency can show that it “is deluged with a volume of requests for information vastly in excess of that anticipated by Congress, when the existing resources are inadequate to deal with the volume of such requests within the time limits of subsection (6)(A), and when the agency can show that it ‘is exercising due diligence’ in processing the requests”).

The SEC proposes providing the Court with a status update in 21 days, on March 17, 2025.

Date: February 24, 2025

Respectfully submitted,

/s/ Alexandra Verdi

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