

**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

HISTORY ASSOCIATES' RESPONSE TO SEC STATUS REPORT

The SEC's response to History Associates' serious concerns about the OIG Report displays a stunning lack of self-awareness and shows why a prompt hearing before this Court is necessary. The SEC admits that it failed to search for the potentially responsive text messages of former Chair Gensler and other top SEC officials until long after History Associates submitted its FOIA requests and initiated this lawsuit. ECF 38 at 5. The SEC also admits that it did not search for texts at all until *months* after it purported to comply with this Court's November 2024 order requiring the agency to produce Gensler's communications. *Id.* It halfheartedly suggests it had no duty to search for its officials' text messages—in response to Court-ordered subparts requiring production of “all documents and communications” sent or received by those officials, ECF 21-1; ECF 27 at 3—on the Simon-says theory that those subparts did not “focu[s] specifically on” or “refer specifically to text messages.” ECF 38 at 2 & n.1. But the SEC knows better, claiming it later did search for texts in secret (without disclosing as much). And it has fined companies more than a billion dollars for failing to preserve text messages under an SEC regulation that does not refer specifically to text messages but instead requires brokers to preserve “all communications ... relating to [their] business.” 17 C.F.R. § 240.17a-4(b)(4); *see, e.g.*, SEC Press Release No. 2024-

98, *Twenty-Six Firms to Pay More than \$390 Million Combined to Settle SEC's Charges for Widespread Recordkeeping Failures*, (Aug. 14, 2024), <https://tinyurl.com/y62y6hpn>.

The SEC also never disputes its OIG's findings that nearly a year's worth of Chair Gensler's texts were destroyed in September 2023—*after* History Associates submitted its FOIA requests—and that texts of other senior officials are at risk of imminent deletion *today*. And it nowhere explains why it never alerted this Court or History Associates to these issues until now.

Yet the agency still claims there is nothing to see here because FOIA cares only about “the adequacy of the search ultimately conducted, not the timeliness of the search.” ECF 38 at 7. That response reflects indifference toward the immediacy of the problems the agency's OIG identified and the ongoing danger that responsive records may be lost forever. The timeliness of a search is self-evidently critical where, as the SEC's OIG found here, potentially responsive records have long been and remain at risk of destruction. The SEC has known for more than two years that the text messages of its top officials have been—and may continue to be—permanently destroyed. Surely the SEC would expect greater responsiveness from entities *it* investigates.

The SEC's proposed “next steps”—that the parties “submit a joint status report in thirty days,” so that the agency can “explore the possibility of searching the phones of a limited number of custodians whose texts have not already been” searched, ECF 38 at 10 n.9, 11—similarly shows an agency ignoring the gravity and urgency of the issues. This Court should hold a prompt hearing to get answers from the SEC, to ensure that it conducts a complete search immediately, and to hold the agency accountable for its actions.

Date: September 17, 2025

Respectfully submitted,

/s/ Jonathan C. Bond _____

Eugene Scalia

Jonathan C. Bond

Nick Harper

GIBSON, DUNN & CRUTCHER LLP

1700 M Street, 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