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 September 11, 2025 Status Report, ECF 37 ("SR").

Background

In this case, Plaintiff asserts claims in connection with three Freedom of Information Act ("FOIA") requests it submitted to the SEC in July and August 2023. *See* ECF 1. The three FOIA requests broadly seek all SEC records about Ethereum's shift to a proof-of-stake consensus mechanism and all records about the SEC Division of Enforcement's investigations of Enigma MPC and Zachary Coburn. ECF 14 at 1. Specifically, the FOIA requests seek:

1. "all records concerning Ethereum's shift to a proof-of-stake consensus mechanism that have been created since January 1, 2018, including, but not limited to:
    a. all records reflecting any external communications involving the Commission, any Commissioner, and/or any Commission Staff, including, but not limited to, meeting minutes, calendar invites, notes, e-mails, and

letters, concerning Ethereum's shift to a proof-of-stake consensus mechanism;

b. any factual or investigatory documents received by the Commission, any Commissioner, and/or any Commission Staff or otherwise in the Commission Staff's custody or control concerning Ethereum's shift to a proof-of-stake consensus mechanism; and

c. any public communications by the Commission, any Commissioner, and/or any Commission Staff concerning Ethereum's shift to a proof-of-stake consensus mechanism";

2. "all records, including all investigative files and any other factual documents received by the Commission, any Commissioner, and/or any Commission staff or otherwise in the Commission Staff's custody or control, or any internal or external communications reflecting or concerning any investigations by the Commission or Commission Staff, of" Enigma MPC;

3. "all records, including all investigative files and any other factual documents received by the Commission, any Commissioner, and/or any Commission staff or otherwise in the Commission Staff's custody or control, or any internal or external communications reflecting or concerning any investigations by the Commission or Commission Staff, of" Zachary Coburn.

None of those FOIA requests focuses specifically on text messages, including those belonging to Chair Gensler.[1]

[1] No communications from Plaintiff to SEC counsel before September 5, 2025 refer specifically to text messages. Significantly, as Plaintiff indicates (SR at 11), when counsel for the SEC sent

The SEC's Office of FOIA Services ("FOIA Office") responded to the three FOIA requests in August 2023 and October 2023, and the SEC's Office of the General Counsel responded to administrative appeals regarding the responses in December 2023, January 2024, and February 2024. ECF 20 at 2. The SEC determined that, at that time, there were records responsive to the FOIA requests but, with the exception of three pages released in part to Plaintiff, those records were protected from disclosure under FOIA Exemption 7(A). ECF 14 at 1-2.

Plaintiff filed this lawsuit in June 2024, and, in responding to the complaint, the SEC reassessed its responses to the FOIA requests in light of developments in SEC investigations that occurred after the SEC's administrative review (including the closure of the SEC's Ethereum 2.0 investigation in June 2024) and determined that Exemption 7(A) no longer protected all of the requested records. ECF 20 at 3. The SEC concluded that, because Exemption 7(A) no longer applies generally to the investigative files, the SEC would undertake the necessary review for other applicable exemptions. *Id*. The SEC determined that, given the volume of records potentially responsive to the three FOIA requests, the FOIA Office would process them in the SEC's Complex track unless Plaintiff narrowed the requests. ECF 18 at 2. Plaintiff informed the SEC that it would not agree to narrow its FOIA requests. *Id.*

During a November 8, 2024 conference, this Court ordered the SEC to respond to two narrowed subparts of the Ethereum-related FOIA request. 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" that could be "quickly" processed. ECF 24-1 at 17:17-22. In January 2025, the

an email in March 2025 describing plans for re-running some searches for emails, calendar entries, and Microsoft Teams Chats, Plaintiff did not respond by asking that the SEC include texts.

SEC released to Plaintiff non-exempt records responsive to narrowed subparts 1 and 2 and provided Plaintiff with preliminary *Vaughn* Indices reflecting the SEC's withholdings of information from those records. ECF 29 at 1. Plaintiff contested aspects of the SEC's responses to subparts 1 and 2 (ECF 26 at 5-8), and the SEC offered to conduct additional searches and apply broader responsiveness criteria (*id.* at 10). The SEC provided an additional response to subpart 1 on May 9, 2025 and an additional response to subpart 2 on June 6, 2025. ECF 33 at 2; ECF 34 at 2.

Plaintiff separately requested that the SEC process additional narrowed subparts of its Ethereum-related FOIA request. ECF 27 at 3. 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 and also provided Plaintiff with three preliminary *Vaughn* Indices. ECF 32 at 1-2. The parties subsequently disagreed on the adequacy of the SEC's production, specifically regarding the SEC's preliminary *Vaughn* Indices (*see* ECF 31; ECF 32), and the Court ordered the parties to meet and confer and provide the Court with "any resolution reached." May 1, 2025 Minute Order. The parties agreed that, by June 6, 2025, the SEC would "(1) definitively determine whether it can produce any additional responsive documents (or segregable portions of documents), and produce any such documents or portions not already produced; and (2) definitively determine whether it intends to rely on any additional FOIA exemptions for the subset of documents, and produce revised *Vaughn* indices for the subset of documents identifying all FOIA exemptions the SEC intends to assert." ECF 33 at 1-2. On June 6, the SEC provided a supplemental response to subparts 3 and 4 along with two updated preliminary *Vaughn* Indices. ECF 34 at 2.

Plaintiff is correct that the SEC did not initially focus on conducting searches for texts. The SEC, however, conducted searches for texts before it made its April 11, 2025 production in response to subparts 3 and 4, and those searches encompassed texts that would be responsive to subparts 1 and 2.[2] Specifically, the SEC's Office of Information Technology ("OIT") searched the texts it had gathered from certain high-ranking SEC officials that were sent or received after January 1, 2018.[3] OIT conducted the following searches:

- "Ethereum AND security" or "Ether AND security" in all custodians' available text messages (including Chair Gensler);[4]
- "Eth* AND securit* AND PoS"; "Eth* AND securit* AND proof of stake"; "Eth* AND securit* AND Merge"; or "Eth* AND securit* AND EIP-3675" in Chair Gensler's available text messages;
- "Ethereum" in Chair Gensler's available text messages;[5] and
- "Ethereum" OR "Ether" OR "ETH" in Commissioner Crenshaw's and her staff's available text messages.

The searches did not return any hits, so neither the documents produced to Plaintiff nor the *Vaughn* Indices provided to Plaintiff identify any texts.

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[2] The SEC did not complete some of its searches until after April 11. However, all of the text searches were complete by June 6, 2025.

[3] The SEC did not search for the texts of all custodians that Plaintiff had identified because it does not have a mechanism for searching texts that have not been gathered by OIT other than by collecting and searching each employee's phone. The SEC also had no indication that the custodians had any responsive texts.

[4] For certain custodians, the SEC simplified the search to "Ether AND security" based on the understanding that "Ether" would also return "Ethereum."

[5] OIT provided the results of a separate search for "Ethereum" in Chair Gensler's available text messages on April 2, 2025; OIT did not identify any hits from that search. This search was not included in the overview the SEC's counsel provided to Plaintiff's counsel on September 9.

On July 14, 2025, Plaintiff requested that the SEC process two additional subparts of their FOIA requests relating to Zachary Coburn and Enigma MPC. ECF 35 at 2. The parties agreed that by October 16, 2025, the SEC will (1) process and produce responsive records that discuss the Enigma MPC and Zachary Coburn investigations in more than a cursory fashion, and (2) provide spreadsheets for the remaining responsive records containing at least the title, date, sender, and recipients (to the extent that information is not exempt) for each record. ECF 36 at 2. The SEC has confirmed to Plaintiff that it will conduct a text message search in connection with subparts 5 and 6. Ex. A, ECF 37-1, at 2.

On September 3, 2025, the SEC's Office of Inspector General ("OIG") issued "Special Review: Avoidable Errors Led to the Loss of Former SEC Chair Gary Gensler's Text Messages." On Friday, September 5, Plaintiff's counsel sent the SEC's counsel a number of questions relating to this report, including about whether the SEC had searched for text messages in this litigation. Ex. A, ECF 37-1, at 4-6. That day, the SEC's counsel informed Plaintiff's counsel that the SEC "understand[s] Plaintiff's concerns and will work to provide further information as soon as possible" but "[t]his will require discussion with other staff within the agency." *Id.* at 4. The SEC's counsel also informed Plaintiff that her "understanding is that we did search for text messages but did not identify any as responsive." *Id.* On Monday, September 8, the SEC's counsel reached out to Plaintiff's counsel to let them know that the SEC was "working on gathering information in response to [their] questions." *Id.* at 3. On Tuesday, September 9, the SEC's counsel sent Plaintiff's counsel the parameters of the text message searches it had conducted in this case. *Id.* at 2; Ex. B, ECF 37-2. Plaintiff asked more questions about the text message searches conducted in this case, and, on Wednesday, September 10, the SEC provided additional information about those

searches. Ex. A, ECF 37-1, at 1. Plaintiff filed its status report the following day. On September 12, the SEC's counsel responded to the remainder of Plaintiff's September 5 questions.

Concerns Relevant to This FOIA Litigation

The issues in this case, as in all FOIA cases, are whether the SEC has conducted an adequate search for documents in the various subparts Plaintiff has identified and whether it has properly withheld information as exempt. Plaintiff's Status Report does not allege that the SEC has improperly identified information as exempt, so the only issue currently relevant is whether it has adequately searched for documents. *See* SR at 4 (questioning whether the SEC searched text messages), 10-11 (contesting the SEC's search for text messages). The issue of whether a search is adequate requires consideration of the adequacy of the search ultimately conducted, not the timeliness of the search. *See Sabra v. U.S. Customs & Border Prot.*, No. 20-681, 2021 WL 796166, at *5 (D.D.C. Mar. 2, 2021) (citing cases for the proposition that "[o]nce an agency has made its final determination under § 552(a)(6)(A), the *timeliness* of that determination is no longer a live controversy fit for judicial review" (citations omitted)); *Blank Rome LLP v. Dep't of the Air Force*, No. 15-cv-1200, 2016 WL 5108016, at *8 (D.D.C. Sept. 20, 2016) (finding that even though agency took "undue amount of time" to respond to FOIA request, "the fact of delay is not enough to cast sufficient doubt on the reasonableness of the search; 'the timing of a search is irrelevant, so long as an adequate search has been conducted and all redactions from responsive documents are justified'" (citations omitted)). Similarly, "it is well settled in this Circuit that the subsequent production of responsive documents can remedy inadequate searches. Further, that subsequent production cannot serve as proof that the agency conducted an unreasonable search initially or acted in bad faith, for such a rule would punish those agencies that attempted to correct past inadequate searches." *People for the Ethical Treatment of Animals, Inc. v. Bureau of Indian Affs.*, 800

F. Supp. 2d 173, 179 (D.D.C. 2011) (footnote omitted); *see also Am. Oversight v. U.S. Dep't of Justice*, 401 F. Supp. 3d 16, 26 (D.D.C. 2019) ("Taking their cue from *Military Audit Project* [*v. Casey*, 656 F.2d 724 (D.C. Cir. 1981)], case after case in this jurisdiction has held that the focus should be on whether the agency admits and corrects error, not on the fact that it made a mistake in the first place.").

Much of Plaintiff's Status Report addresses Plaintiff's contentions regarding the timeliness of the SEC's responses and other issues that are not before this Court.[6] While the SEC disagrees with many of Plaintiff's characterizations[7] and with its overall conclusion that the SEC did not conduct timely searches,[8] the only issues that need to be addressed at this time are those that concern whether the SEC should conduct additional searches.

The fact that some responsive records may have inadvertently been lost does not change the fact that the current focus should be on the adequacy of searches, not on the SEC's record

[6] For example, Plaintiff points to discussion in the OIG report about instances where the FOIA Office has not searched for text messages in connection with FOIA requests (SR at 7-8, 10), but the SEC searched for text messages in this case. Plaintiff also suggests that the SEC should not have applied Exemption 7(A) to all the documents it sought despite the investigations that were open when the FOIA requests were submitted (*see* SR at 3, 12), but the SEC is no longer asserting Exemption 7(A), and that issue is moot.

[7] For example, Plaintiff argues that the SEC had an obligation to inform Plaintiff and the Court that potentially responsive records might have been destroyed and points to the SEC's FOIA regulations at 17 C.F.R. § 200.80(e)(2)(iii). SR at 8, 13. That provision states that, if the FOIA Office "makes an adverse determination regarding a request, it shall notify the requester of that determination in writing. Adverse determinations, or denials of requests, include decisions that: . . . the requested record . . . has previously been destroyed . . ." The provision did not require the SEC to notify Plaintiff of the loss of texts where Plaintiff had made broad requests and not specifically requested any texts.

[8] Contrary to Plaintiff's repeated assertions (SR at 2, 13), the SEC has not filed a motion for a stay under *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976); rather, consistent with its FOIA regulations, 17 C.F.R. § 200.80(d)(4), the SEC informed Plaintiff that its requests were appropriate for the track for complex requests and notified Plaintiff that it could narrow its requests if it wanted the requests to be processed more quickly.

keeping practices regarding texts. "If the agency is no longer in possession of the document, for a reason that is not itself suspect, then the agency is not improperly withholding that document and the court will not order the agency to take further action in order to produce it." *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200, 1201 (D.C. Cir. 1991) (where group of documents was "mistakenly destroyed when the SEC's contract cleaning service discarded the box in which . . . an SEC paralegal . . . was keeping them"). Significantly, the OIG report does not identify any actions conducted in bad faith. It notes that the loss of Chair Gensler's texts was "inadvertent" and that "OIT was unable to successfully back up the mobile devices used by about 40 other Capstone officials." OFFICE OF INSPECTOR GENERAL, U.S. SEC. & EXCH. COMM'N, *Special Review: Avoidable Errors Led to the Loss of Former SEC Chair Gary Gensler's Text Messages* at i, 7 (Sept. 3, 2025), https://www.sec.gov/files/sec-oig-review-587-2025.pdf.

Rather than meaningfully engage with the SEC about its concerns about the SEC's search for text messages here (SR at 10-11), Plaintiff rushed to file its status report with the Court six days after it sent the SEC its questions. Plaintiff has not engaged in any discussions with the SEC about the reasonableness of its prior searches for texts and any additional searches for texts that Plaintiff may believe should be conducted. The record in this case is clear that the SEC has tried to work with Plaintiff, including by responding to Plaintiff's narrowed requests for records, providing information when Plaintiff has asked questions, and running additional searches for records in response to Plaintiff's concerns. *See, e.g.*, ECF 31-2 at 3, 5, 7, 9 (email correspondence showing that 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); ECF 26 at 10 ("the SEC is willing to conduct additional searches and to apply broader responsiveness criteria").

Here, similarly, the SEC is willing to provide more information to Plaintiff about its searches and to conduct additional searches for available text messages with different keywords.[9] The SEC has already explained to Plaintiff, among other things, the parameters and dates of text message searches it ran, including which text message custodians had a phone that could not be backed up as discussed in the OIG report. Ex. A, ECF 37-1, at 1, 2; Ex. B, ECF 37-2.

Plaintiff argues that the SEC "violated at least" this Court's December 27, 2024 Minute Order directing the SEC "to issue responses to two narrowed subparts of one of the FOIA requests," namely subparts 1 and 2, by January 28, 2025. SR at 10. There is no dispute, however, about whether the SEC issued responses to subparts 1 and 2. *See* ECF 26 at 9; *see also* ECF 33 at 2; ECF 34 at 2. Rather, the parties disagree about the adequacy of the SEC's search. SR at 10-11. As noted above, the SEC is willing to work with Plaintiff to conduct additional text message searches. Indeed, courts permit agencies to run additional searches and release responsive, non-exempt records to satisfy their burden under the FOIA. *See, e.g., People*, 800 F. Supp. 2d at 178 n.2 ("[I]n a FOIA case, even if defendant had failed in obtaining summary judgment because of an inadequate search, it does not necessarily follow that plaintiff prevails. Rather, the usual remedy is for the Court to remand to the agency to expand its search or to provide more detailed declarations regarding the scope of the search.").

Proposed Resolution and Next Steps

As noted above, the SEC is willing to conduct additional searches for text messages for subparts 1-4. The SEC recommends that the parties work together to seek agreement on the scope

[9] The SEC is also willing to explore the possibility of searching the phones of a limited number of custodians whose texts have not already been gathered by OIT.

of additional searches before seeking a ruling from the Court relating to additional searches. Until the parties determine whether they can resolve any disputes, a hearing is not necessary.

Discovery is also not necessary or appropriate at this time. Discovery is generally disfavored in FOIA cases. *See, e.g.*, *Harrison v. Fed. Bureau of Prisons*, 681 F. Supp. 2d 76, 80 (D.D.C. 2010) ("'[d]iscovery is not favored in lawsuits under the FOIA'") (citation omitted); *Thomas v. Dep't of Health & Hum. Servs., Food & Drug Admin.*, 587 F. Supp. 2d 114, 115, n.2 (D.D.C. 2008) ("discovery is an extraordinary procedure in a FOIA action"). Also, if discovery does occur, it is generally limited to "exceptional circumstances where a plaintiff raises a sufficient question as to the agency's good faith in searching for or processing documents." *Cole v. Rochford*, 285 F. Supp. 3d 73, 76 (D.D.C. 2018). Consequently, it usually occurs only after an agency contends that its search is complete and has moved for summary judgment and submitted declarations supporting its contention that it conducted a reasonable search. *Id.* at 77-78 (finding that despite concerns about an agency's good faith, the court could not determine if a genuine factual dispute existed and whether the plaintiff needed additional facts until after the agency moved for summary judgment). Because the SEC is willing to discuss additional searches, and the parties have not had any discussions of whether they can resolve any disputes without relying on motions for summary judgment, any discovery is premature here. Moreover, as the District of Columbia Circuit has noted, informal meetings between the parties can "serve[] many of the same functions . . . as would depositions." *Meeropol v. Meese*, 790 F.2d 942, 960-61 & n.9 (D.C. Cir. 1986) (affirming district court decision to deny discovery in a FOIA case).

Thus, the SEC recommends that the Court require the parties to submit a joint status report in thirty days to discuss whether any disputes remain about the adequacy of the SEC's

searches for text messages and whether a briefing schedule on a motion for summary judgment should be set to address the issue.

Date: September 16, 2025

Respectfully submitted,

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