EXHIBIT 3

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July 8, 2014

VIA OVERNIGHT DELIVERY

Office of the General Counsel of the
U.S. Securities & Exchange Commission
Station Place
100 F Street NE
Mail Stop 9612
Washington, DC 20549

Re: *Freedom of Information Act Appeal*
Request No. 14-07357-FOIA (Lions Gate Entertainment Corp.)

To Whom It May Concern:

In accordance with the Freedom of Information Act ("FOIA"), we appeal the U.S. Securities & Exchange Commission's ("SEC") June 10, 2014 denial of our May 20, 2014 request for records concerning the SEC's investigation of Lions Gate Entertainment Corp. (defined with all employees, agents and representatives, as "Lionsgate"). To facilitate the consideration of this appeal, a copy of our May 20, 2014 request is attached as Exhibit 1 (and incorporated by reference herein) and a copy of the SEC's June 10, 2014 denial is attached as Exhibit 2.

As we explained in our request, the SEC's investigation culminated in an *Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order*, issued on March 13, 2014 (Release No. 34-71717; File No. 3-15791) ("Order"), which required Lionsgate to pay a $7.5 million fine and admit to violations of the federal securities laws. *See* Ex. 1 at 1. The investigation involved certain transactions that Lionsgate arranged and/or effectuated to fend off an acquisition by Carl Icahn and his affiliates. We requested records concerning the investigation, the transactions (which closed in July 2010), and Lionsgate's public disclosure concerning the transactions. *Id.* at 1-3.

In response, the SEC denied our request, invoking the law enforcement exemption. *See* Ex. 2 at 1 (citing 5 U.S.C. §552(b)(7)(A) and 17 C.F.R. §200.80(b)(7)(i)). In doing so, the SEC stated: "[t]his exemption protects from disclosure records compiled for law enforcement purposes, the release of which could reasonably be expected to interfere with enforcement activities." *See* Ex. 2 at 1. Furthermore, despite the fact that Lionsgate admitted to violating the federal securities laws, the SEC also stated that "the assertion of this exemption should not be construed as an indication by the [SEC] or its staff that any violations of law have occurred with respect to any person, entity, or security." *Id.* at 2. The SEC did not invoke any other exemptions, purporting to "reserve the right" to do so when the law enforcement exemption "no longer applies." *Id.* at 1.

To establish the application of the law enforcement exemption, an agency must demonstrate that the requested records were "compiled for law enforcement purposes" and production "could reasonably be expected to interfere with enforcement proceedings . . . ." 5 U.S.C. §552(b)(7)(A); *see also* 17 C.F.R. §200.80(b)(7)(i) (noting records are nonpublic if "compiled for law enforcement purposes" and disclosure "[c]ould reasonably be expected to interfere with enforcement activities undertaken or likely to be undertaken by the [SEC]"). The exemption allows an agency to conduct an investigation without revealing nonpublic information that could undermine it. *See Dow Jones Co. v. FERC*, 219 F.R.D. 167, 174 (C.D. Cal. 2002).

"[C]onclusory statements that the release of [a] file . . . would result in . . . adverse effects on [an] investigation" are insufficient to satisfy the burden to establish application of the exemption. *Voinche v. FBI*, 46 F. Supp. 2d 26, 31 (D.D.C. 1999). Rather, an agency must show that production "will genuinely harm [its] case in an enforcement proceeding or impede an investigation." *North v. Walsh*, 881 F.2d 1088, 1098 (D.C. Cir. 1989); *cf. Carson v. U.S. Dep't of Justice*, 631 F.2d 1008, 1019 (D.C. Cir. 1980) (an agency "cannot justify withholding unless the material withheld relates to a concrete prospective law enforcement proceeding") (citation and internal quotations omitted).

Moreover, the exemption is not intended to "endlessly protect material simply because it [is stored] in an investigatory file." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 230 (1978). To the contrary, the exemption "only justifies withholding records . . . for a limited time while an investigation is ongoing." *Cuban v. SEC*, 744 F. Supp. 2d 60, 86 (D.D.C. 2010) (upholding SEC's assertion of the exemption where "the investigation is ongoing"); *see also Dow Jones*, 219 F.R.D. at 174 (noting the exemption "is aimed at preventing disclosure which would compromise an ongoing investigation").

In this case, the SEC investigation resulted in the resolution embodied in the Order, in which Lionsgate was deemed to have *admitted* to violating the federal securities laws. *See* Ex. A to Ex. 1. As the Order itself confirms, Lionsgate committed these violations by issuing materially misleading disclosures concerning transactions that occurred in July 2010. *Id.*, ¶¶34-39, 42-45. Lionsgate's misleading disclosure had the practical effect of allowing it to elect management's slate of directors at the December 14, 2010 shareholders' meeting. *Id.*, ¶¶46-47.

Because these events occurred nearly four years ago and the SEC has since resolved charges against Lionsgate, no law enforcement proceedings preclude production of the records requested. Nor has the SEC identified any such proceedings – or any harm that could result from disclosure – in its boilerplate denial letter. *See* Ex. 2 at 1-2; *Jefferson v. Reno*, No. 96-1284 (GK), 1997 U.S. Dist. LEXIS 3064, at *11 (D.C.C. Mar. 17, 1997) (rejecting prospect of harm where agency merely recited "language of the exemption"). Even if the SEC *could* conceive of some scenario in which it might pursue future action, disclosure would still be required. Indeed, "if an agency could withhold information whenever it could imagine circumstances where the information might have some bearing on some hypothetical enforcement proceeding, the FOIA would be meaningless[.]" *Badran v. U.S. Dep't of Justice*, 652 F. Supp. 1437, 1440 (N.D. Ill. 1987).

The lack of harm occasioned by production here is underscored by the fact that Lionsgate and its representatives presumably already have access to most, if not all, of the responsive records. Further, there is no risk of revealing the SEC's litigation strategy – a primary concern addressed by the exemption – because it has resolved charges against Lionsgate arising out of the events to which the records relate.[1] *See, e.g.*, *Dow Jones*, 219 F.R.D. at 174 (reasoning that "it does not appear that disclosure to a third party would undermine either investigation, especially in light of the fact that each target company has a copy of the appendix and is therefore on notice as to the government's possible litigation strategy and potential witnesses"); *accord Campbell v. Dep't of Health & Human Servs.*, 682 F.2d 256, 265 (D.C. Cir. 1982) (noting a court must closely scrutinize the exemption where a third party seeks information obtained from the target of an investigation).

Also without merit is the SEC's reservation of rights "to assert other exemptions" when the law enforcement exemption purportedly "no longer applies." Ex. 2 at 1. That position is anathema to FOIL, which embodies a "'philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.'" *Dep't of the Air Force v. Rose*, 425 U.S. 352, 360-61 (1976) (quoting S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965)). In fact, an agency must "disclose records on request, unless they fall within one of nine exemptions." *Milner v. Dep't of the Navy*, 131 S. Ct. 1259, 1262 (2011). "These exemptions are explicitly made exclusive . . . and must be narrowly construed." *Id.* (citations and internal quotations omitted).

Furthermore, the agency asserting an exemption always carries the burden of establishing it. *See U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991) (recognizing that "the strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents" and that the "burden remains with the agency when it seeks to justify the redaction of identifying information in a particular document"); *accord Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143, 147 (2d Cir. 2010) (noting "'the burden [is] on the agency to justify the withholding of any requested documents[,]'" quoting *Ray*, 502 U.S. at 173).

By not asserting other potentially applicable exemptions, the SEC has expressed an intention to continue withholding responsive records – on as-yet undisclosed grounds – when it conveniently deems the law enforcement exemption "no longer applies." Ex. 2 at 1. Thus, the SEC purports to invoke an impermissible blanket exemption that could apply for an unlimited duration as it sees fit – despite its burden to establish a statutorily-enumerated exemption. *See Robbins Tire*, 437 U.S. at 236 (noting Congress's intent "to eliminate 'blanket exemptions' for Government records simply because they were found in investigatory files compiled for law enforcement purposes"); *see also Milner*, 131 S. Ct. at 1262 (recognizing burden). Any such blanket exemption is *per se* invalid.

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[1] None of the potential harms specified in the law enforcement exemption is implicated here, because production would not: (a) interfere with law enforcement proceedings; (b) deprive anyone of a fair trial or impartial adjudication; (c) constitute an unwarranted invasion of personal privacy; (d) disclose the identity of a confidential source; (e) reveal techniques and procedures for law enforcement investigations or prosecutions; or (f) endanger anyone's life or safety.

Nevertheless, even if the SEC had attempted to demonstrate that the other exemptions apply, it could not satisfy its burden. Indeed, each of the eight remaining exemptions is inapplicable here.

For example, none of the records sought could conceivably be classified and kept secret by Executive Order "in the interest of national defense or foreign policy" (Exemption 1), nor do they relate "solely to the internal personnel rules and practices of [the SEC]" (Exemption 2). 5 U.S.C. §552(b)(1)-(2). Likewise, no statute prohibits disclosure of the records sought (Exemption 3), nor do the records implicate "trade secrets and commercial or financial information" that is "privileged or confidential" (Exemption 4) – given the publication of the Order, Lionsgate's extensive factual admissions (set forth therein), and widespread media coverage of the matter. *Id.*, §552(b)(2)-(3).

The records also do not involve protected "inter-agency or intra-agency memorandums or letters" (Exemption 5), or files whose disclosure "would constitute a clearly unwarranted invasion of personal privacy" (Exemption 6). *Id.*, §552(b)(4)-(5). Lastly, the records do not involve "reports prepared . . . for the use of an agency responsible for the regulation or supervision of financial institutions" (Exemption 8), or "geological or geophysical information and data . . . concerning wells" (Exemption 9). *Id.*, §552(b)(8)-(9).

Rather, the requested records generally involve details concerning, *inter alia*: (i) Lionsgate's 2010 transactions, as described in the Order; (ii) Lionsgate's disclosure regarding the transactions, as also described in the Order; (iii) communications concerning the transactions and investigation, some of which are expressly referenced and even quoted in the Order; (iv) the initiation and timing of the SEC investigation, which culminated in the Order and Lionsgate's admission of wrongdoing; (v) the resolution of charges, detailed in the Order, against Lionsgate; and (vi) other FOIA requests and responses concerning these matters. These records are plainly not subject to any exemption.

In any event, even if certain records contain information covered by an exemption, portions of them are reasonably segregable and must be produced. Specifically, FOIA provides that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt . . . ." *Id.*, §552(b). FOIA focuses on "information, not documents, and an agency cannot justify withholding an entire document simply by showing that it contains some exempt material." *Krikorian v. Dep't of State*, 984 F.2d 461, 467 (D.C. Cir. 1993) (citations and internal quotations omitted).

"It is the agency's burden to prove that the withheld portions are not segregable from the non-exempt material." *Davin v. U.S. Dep't of Justice*, 60 F.3d 1043, 1052 (3d Cir. 1995) (citing U.S.C. §552(a)(4)(B)); *cf. Krikorian*, 984 F.2d at 467 ("A district court that simply approve[s] the withholding of an entire document without entering a finding on segregability, or the lack thereof, errs.") (citations and internal quotations omitted). Accordingly, if the SEC cannot carry this burden or show that the *entirety* of the requested records is legitimately covered by an exemption, the SEC must produce the non-exempt portions of those records.

* * *

In a March 19, 2009 memorandum directed to heads of executive departments and agencies, the U.S. Attorney General endorsed a "presumption" of openness and instructed agencies to employ a liberal approach to FOIA. *See* U.S. Attorney General's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, at 1 (Mar. 19, 2009), available at www.justice.gov/ag/foia-memo-march2009.pdf. In fact, he "encourage[d] agencies to make discretionary disclosures of information"; supported disclosure even if, "as a technical matter, [] the records fall within the scope of a FOIA exemption"; and reminded agencies to "make partial disclosure" where they "cannot make full disclosure of a requested record . . . ." *Id.*

In responding to our May 20, 2014 request with a boilerplate denial that is inconsistent with FOIA, the SEC disregarded the Attorney General's guidelines and case law that requires disclosure. By doing so, the SEC failed to adequately discharge its FOIA obligations. Accordingly, we appeal the SEC's denial and request the prompt reversal of its decision to withhold all records responsive to our request. We also request the expedited processing of this appeal, if at all possible.

If you have any questions concerning this appeal or would like to discuss this matter, please do not hesitate to contact me or my associate, Andrew Schwartz, who is copied on this letter.

Very truly yours,

JOSEPH RUSSELLO

JR:dg
Attachments

cc: SEC Office of FOIA Services,
Mail Stop 2736

Andrew Schwartz