

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAKUB MADEJ,

Plaintiff,

v.

SECURITIES AND EXCHANGE
COMMISSION,

Defendant.

Case: 1:21-cv-00993 JURY DEMAND
Assigned To : Unassigned
Assign. Date : 4/8/2021
Description: FOIA/Privacy Act (I-DECK)

APRIL 5, 2021

Freedom of Information Act
5 U.S.C. § 552

COMPLAINT UNDER FREEDOM OF INFORMATION ACT, 5 U.S.C. § 552

Plaintiff Jakub Madej (“Mr. Madej”) alleges:

NATURE OF THIS ACTION

1. This is a suit to compel the Securities and Exchange Commission to produce transcripts and visual recordings of Ms. Elizabeth Holmes’s deposition taken on July 11, 2017 under the Freedom of Information Act, 5 U.S.C. § 552. The Commission, whose attorneys took the deposition, improperly withheld agency records, administratively resisted disclosure by invoking exemptions only to rescind them later, repeatedly violated the statutory deadlines, and effectively refused to produce the records upon a valid written request, contrary to its statutory obligations.

PARTIES

2. Plaintiff Jakub Madej is a natural person.
3. Defendant, the Securities and Exchange Commission (“SEC” or “Commission”), is an independent agency of the United States government and an “agency”

under FOIA. 5 U.S.C. § 552(f)(1). The SEC is headquartered at 100 F Street NE, Washington, DC 20549.

JURISDICTION AND VENUE

4. This court has subject matter jurisdiction under 28 U.S.C. § 1331 (federal question) and 5 U.S.C. § 552(a)(4)(B) (the Freedom of Information Act).

5. This court has personal jurisdiction under 5 U.S.C. § 552(a)(4)(B).

6. Venue is proper in the District of Columbia under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

FACTUAL BACKGROUND

7. Ms. Elizabeth Holmes founded Theranos, a now-defunct health technology company. American business and government leaders spent more than \$600 million by privately investing in Theranos, which the investors once valued at \$9 billion. The company's demise and dissolution in 2018 provoked a flurry of lawsuits from investors, patients, and other stakeholders – including the SEC.

8. Between 2016 and 2018, the Commission investigated whether Theranos and Ms. Holmes committed securities fraud and thus violated the securities acts of 1933 and 1934.

9. On July 11, 2017, the Commission deposed Ms. Holmes. The deposition commenced promptly at 9:00 am, and Ms. Holmes was sworn in at 9:00:52 am. She reportedly responded "I don't know" to over 600 questions.

10. The Commission later provided selected portions of recordings from Ms. Holmes's deposition to ABC News's "Nightline," which published them on January 23, 2019. A snapshot appears below.



11. The Commission deposed several other individuals in the Theranos investigation, including Ms. Holmes’s former business partner and romantic partner Ramesh “Sunny” Balwani, her brother Christian, Theranos whistleblower Tyler Shultz, a former senator from Tennessee Bill Frist, and a former U.S. Navy Chief of Naval Operations Gary Roughead.

12. A suit in the Northern District of California followed. See *Securities and Exchange Commission v. Holmes et al.*, No. 5:18-cv-01602 (EJD) (N.D. Cal.).

13. The Commission settled the case for, among other considerations, \$500,000. Quoting the SEC’s press release numbered 2018-41,

Theranos and Holmes have agreed to settle the fraud charges levied against them. Holmes agreed to pay a \$500,000 penalty, be barred from serving as an officer or director of a public company for 10 years, return the remaining 18.9 million shares that she obtained during the fraud, and relinquish her voting control of Theranos by converting her super-majority Theranos Class B Common shares to Class A Common shares.

<https://www.sec.gov/news/press-release/2018-41> (last visited Mar. 21, 2021).

14. The SEC's investigation was conducted by Jessica Chan, Rahul Kolhatkar, and Michael Foley and supervised by Monique Winkler and Erin Schneider in the San Francisco Regional Office.

15. Between June 2018 and July 2020, a grand jury sitting in the Northern District of California returned three indictments charging Ms. Holmes with wire fraud and conspiracy to commit wire fraud. See *United States of America v. Elizabeth A. Holmes and Ramesh "Sunny" Balwani*, No. 5:18-cr-00258 (EJD) (N.D. Cal.). A trial before Hon. Edward J. Davila is scheduled to begin on August 31, 2021.

16. The criminal case is separate from the Commission's case. This complaint does not seek any materials the United States gathered in support of its ongoing criminal case.

STATUTORY FRAMEWORK

17. FOIA promotes open government by providing every person with a right to request and receive federal agency records. 5 U.S.C. § 552(a)(3)(A).

18. To encourage open government, FOIA imposes strict deadlines on agencies to provide responsive documents to FOIA requests. 5 U.S.C. § 552(a)(6)(A).

19. An agency must respond to a FOIA request by issuing its determination to the requesting party within twenty business days after its receipt of the request. 5 U.S.C. § 552(a)(6)(A)(i).

20. The determination "must at least inform the requester of the scope of the documents that the agency will produce, as well as the scope of the documents that the agency plans to withhold under any FOIA exemptions." *Citizens for Responsibility & Ethics in Wash. v. Fed. Election Comm'n*, 711 F.3d 180, 186 (D.C. Cir. 2013).

21. An agency may use one 10-day extension of time to respond to a request if it provides written notice to the requester explaining that "unusual circumstances" exist

that warrant additional time. 5 U.S.C. § 552(a)(6)(B). The Commission occasionally invoked this exemption. See 1:19-cv-02849, Document 1-1, page 6.

22. If an agency fails to comply with the timing requirements, then the agency is deemed to have constructively denied the FOIA request. 5 U.S.C. § 552(a)(6)(C)(i).

23. A requester may then petition the court for injunctive and declaratory relief from the agency's continued withholding of public records and the court has jurisdiction to order the production of any agency records improperly withheld from the requester. 5 U.S.C. § 552(a)(4)(B).

24. "It is axiomatic that [a]n inadequate search for records constitutes an improper withholding under FOIA." *Rodriguez v. Department of Defense*, 236 F. Supp. 3d 26, 34 (D.D.C. 2017), citing *Schoenman v. Federal Bureau of Investigation*, 764 F.Supp.2d 40, 45 (D.D.C. 2011) (cleaned up).

25. FOIA places the burden "on the agency to sustain its action," 5 U.S.C. § 552(a)(4)(B), and the agency bears the burden of proving that it has not "improperly" withheld the requested records. *U.S. Department of Justice v. Tax Analysts*, 492 U.S. 136, 142 n.3 (1989).

FACTUAL BACKGROUND: FOIA REQUEST

26. On January 14, 2021, Mr. Madej requested deposition transcripts and full video recordings described above ("transcripts") from the Commission by letter, which is attached to this complaint as Exhibit A.

27. By letter dated February 26, 2021, the Commission invoked Exemption 7(A) and denied the request. Exemption 7(A) protects certain records compiled for law enforcement purposes if their disclosure "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). The Commission, in a leap of faith, declined to even acknowledge whether the recordings exist, although it released

them to ABC News two years earlier. The SEC's adverse determination is evidenced by letter labeled Exhibit C.

28. On February 27, 2021, Mr. Madej administratively appealed the decision. See Exhibit D.

29. On March 10, 2021, Assistant General Counsel Melinda Hardy determined that FOIA Exemption 7(A) cannot be asserted, vacated the denial, and remanded to the FOIA officer for further proceedings. See Exhibit E.

30. Two weeks have passed since the case was remanded, and Mr. Madej has not received any response from the Commission.

CLAIM FOR RELIEF

31. The statute does not provide for an administrative remand, as the Commission did here. The officer who adjudicated the appeal must determine whether any exemption apply and authorize the release of requested records.

32. Mr. Madej exhausted all administrative remedies before bringing this suit. Exhibits A through F constitute the entire administrative record in this case.

33. Under the Freedom of Information Act, Mr. Madej is entitled to the transcripts unless the Commission timely invokes an applicable exemption enumerated in the statute. 5 U.S.C. § 552(b)(1)-(9). The burden is on the Commission to justify non-disclosure. Mr. Madej need not justify his request, argue that exemption does not apply, or do anything else.

34. No exemption protects the transcripts from disclosure.

35. Even if an exemption protecting transcripts from disclosure existed, the Commission has waived its right to assert that exemption but not complying with statutory deadlines and providing illogical responses to the original request for no legitimate purpose.

36. The Commission is in violation of 5 U.S.C. § 552(6)(A) in that it:
- a. failed to conduct a reasonable search for records responsive to the requests;
 - b. failed to comply within the time limits prescribed by FOIA, 5 U.S.C. § 552(a)(6)(A)(i);
 - c. failed to properly respond to Mr. Madej's FOIA request as required by 5 U.S.C. §§ 552(a)(6)(A)(i)(I)-(III);
 - d. raised implausible arguments against withholding.

37. The Commission has unlawfully withheld the transcripts and continues to improperly delay their production.

38. Mr. Madej has unnecessarily spent hours responding to Commission's senseless arguments and implausible excuses. For example, the Commission:

- a. represented that it cannot acknowledge whether transcripts it made available to ABC News and other media outlets three years earlier exists;
- b. responded – two weeks after the statutory deadline – that it cannot acknowledge whether the transcripts exist due to its policy of not “disclos[ing] the existence or non-existence of an investigation or information gathered unless made a matter of public record in proceedings brought before the Commission or in the courts,” where the original request listed two cases, including captions and docket numbers, which the Commission brought in the Northern District of California.

39. The Commission's conduct makes it evident that it intends to deny, frustrate, or otherwise delay the release of requested transcripts.

40. Mr. Madej is entitled to reasonable attorneys' fees and costs incurred as a result of Commission's obduracy and unreasonableness.

PRAYER FOR RELIEF

Mr. Madej respectfully requests an order:

- A. Enjoining the Commission from withholding the transcripts;
- B. Enjoining the Commission from redacting information that do not meet the strict standard justifying non-disclosure;
- C. Compelling the Commission to produce the transcripts without unnecessary delay and by a date certain;
- D. Awarding Mr. Madej reasonable attorneys' fees and costs incurred in this litigation under 5 U.S.C. §552(a)(4)(E);
- E. Declaring that an agency which failed to properly invoke an exception within the statutory deadline waived its right to seek non-disclosure unless exceptional circumstances excuse non-compliance;
- F. Granting any other relief the Court deems just and proper.

Respectfully submitted,

DATED: April 5, 2021.

By: /s/ Jakub Madej
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