

## **Exhibit J**

*Empower Oversight Whistleblowers & Research*

*v.*

*Securities and Exchange Commission*



UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

OFFICE OF THE  
GENERAL COUNSEL

Stop 9613

September 9, 2022

*Via electronic mail*  
[jf@empowr.us](mailto:jf@empowr.us)

Mr. Jason Foster  
Empower Oversight  
2615 Columbia Pike, #445  
Arlington, VA 22204

Re: Appeal, Freedom of Information Act Request Nos. 22-01118-FOIA, 22-01119-FOIA & 22-01120-FOIA, designated on appeal as Nos. 22-00516-APPS, 22-00517-APPS & 22-00518-APPS

Dear Mr. Foster:

This responds to your Freedom of Information Act (FOIA) appeal of the FOIA Office's interim response to your January 28, 2022 FOIA request for "all processing notes"<sup>1</sup> related to the searches conducted by the Securities and Exchange Commission (SEC) in response to FOIA Request Nos. 21-02531-FOIA, 21-02532-FOIA, 21-02535-FOIA, and 21-02537-FOIA.<sup>2</sup> You identify the time period of your document request as August 12, 2021 to the present.

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<sup>1</sup> Your request defines "processing notes" as "all records created by the SEC's FOIA Research Specialists and other personnel that reflects the record systems and information platforms that were searched, and the search terms used, to respond to Empower Oversight's August 12th FOIA request."

<sup>2</sup> FOIA Request No. 21-02531-FOIA sought "[a]ll records relating to communications from May of 2017 through December of 2020 between William Hinman and any personnel from Simpson Thacher, including calendar entries, notes, or emails between Mr. Hinman and any email address from the domain '@stblaw.com.'" FOIA Request No. 21-02532-FOIA sought "[a]ll records relating to communications from May of 2017 through December of 2020 between William Hinman and any personnel from the Enterprise Ethereum Alliance, including calendar entries, notes or emails between Mr. Hinman and any email address from the domain '@entethalliance.org.'" FOIA Request No. 21-02535-FOIA sought "[a]ll records relating to communications from May of 2017 through January of 2021 between Marc Berger and any personnel from the Enterprise Ethereum Alliance, including calendar entries, notes or emails between Mr. Berger and any email address from the domain '@entethalliance.org.'" FOIA Request No. 21-02537-FOIA sought "[a]ll records relating to communication from May of 2017 through December of 2020 between Jay Clayton and personnel from One River Asset Management, including calendar entries, notes or emails between Mr. Clayton and any email address from the domain '@oneriveram.com.'"

The FOIA Office initially determined that there were no responsive records in response to each of these four requests. With regard to Request No. 21-02531-FOIA, a subsequent email search was performed after it was discovered that the incorrect email address domain name for Simpson Thacher was used to perform the initial search. The second email search located responsive records and 1,109 pages of responsive emails and calendar entries were released to you. In response to your prior administrative appeals (Nos. 22-00165-APPS, 22-00166-APPS, and 22-

By letter dated May 20, 2022, the FOIA Office issued an interim response and released to you 233 pages of records with certain information redacted pursuant to FOIA Exemptions 5 and 6. The FOIA Office informed you that its interim response was to all three FOIA requests since the responsive records are often responsive to more than one request.<sup>3</sup>

On August 15, 2022, you filed this appeal challenging the adequacy of the search conducted by the FOIA Office. You assert that “[b]ased upon an analysis of the records produced, it appears that the SEC did not conduct a search that was reasonably calculated to lead to the discovery of all responsive records.” You further state that “[c]ircumstances and the records produced by the SEC tend to reveal the existence [of] other responsive records.” You identify a number of examples of responsive records that, in your estimation, should exist based on your review of the 233 pages released to you.

I have considered your appeal and find that the issue of whether the SEC conducted a reasonable search is not ripe for determination. To locate potentially responsive records, the SEC’s Office of Information Technology (OIT) conducted a search of the emails of seventeen SEC employees’ who were involved in the processing of the four FOIA requests at issue.<sup>4</sup> A total of thirteen search terms were used in the search, including variations of each FOIA Request Number to maximize the ability to locate responsive records. The email search covered emails generated from August 12, 2021 to January 28, 2021, the date of your FOIA request.

On its face, it appears that the search methods used to search for responsive records were appropriate.<sup>5</sup> However, you have identified records that indicate other responsive records exist, and it is premature to address that issue until the FOIA Office completes its production of documents. I am advised that the FOIA Office has hundreds of pages of additional records to review for release to you. It is possible that the emails and records you identify as missing in your appeal do exist, but have not been reviewed and released to you.

I am instructing that the FOIA Office complete its records review as soon as practicable. If you still have reason to question the adequacy of the SEC’s search after the review is complete and all non-exempt responsive records are released to you, you may file another administrative appeal concerning this issue.

You have the right to seek judicial review of my determination by filing a complaint in the United States District Court for the District of Columbia or in the district where you reside or

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00167-APPS), this office affirmed the FOIA Office’s no records determinations in response to Request Nos. 21-02532-FOIA, 21-02535-FOIA, and 21-02535-FOIA.

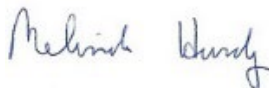
<sup>3</sup> The FOIA Office also informed you that it was administratively closing Request Nos. 22-01119-FOIA and 22-01120-FOIA, with the remaining records processed under Request No. 22-01118-FOIA.

<sup>4</sup> The seventeen employees are from the Office of FOIA Services, the Office of the General Counsel, and the Division of Enforcement.

<sup>5</sup> “[T]he adequacy of a FOIA search is generally determined not by the fruits of the search, but by the appropriateness of the methods used to carry out the search.” *Jennings v. Dep’t of Justice*, 230 F. App’x 1, 1 (D.C. Cir. 2007) (quoting *Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003)).

have your principal place of business.<sup>6</sup> Voluntary mediation services as a non-exclusive alternative to litigation are also available through the National Archives and Records Administration's Office of Government Information Services (OGIS). For more information, please visit [www.archives.gov/ogis](http://www.archives.gov/ogis) or contact OGIS at [ogis@nara.gov](mailto:ogis@nara.gov) or 1-877-684-6448. If you have any questions concerning my determination, please contact Mark Tallarico, Senior Counsel, at 202-551-5132.

For the Commission  
by delegated authority,

A handwritten signature in cursive script that reads "Melinda Hardy".

Melinda Hardy  
Assistant General Counsel for  
Litigation and Administrative Practice

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<sup>6</sup> See 5 U.S.C. § 552(a)(4)(B).