

Exhibit G



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

OFFICE OF THE
GENERAL COUNSEL

Stop 9613

September 16, 2021

Via electronic mail

HWalker@gibsondunn.com

Ms. Helgi C. Walker Esq.
Gibson, Dunn & Crutcher, LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036

Re: Appeal, Freedom of Information Act Request No. 20-02109-FOIA designated on appeal as No. 21-00482-APPS

Dear Ms. Walker:

This responds to your Freedom of Information Act (FOIA) appeal of the FOIA Office's decision concerning your September 22, 2020 FOIA request for the following records for the time period of 2017 to the present:

Any and all records, documents, recordings, communications, analyses, reports and other information from 2017 to the present relating in whole or in part to the impact on convertible debt lenders, microcap issuers, or the microcap industry of requiring convertible debt lenders to register as dealers under Section 15(a) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(a)) and/or the impact on convertible debt lenders, microcap issuers, or the microcap industry of treating or defining convertible debt lenders as dealers under Section 3(a)(5) of the Securities Exchange Act of 1934 (15 U.S.C. §78c(a)(5)).

By letter dated March 25, 2021, the FOIA Officer informed you that its search located a total of 56 pages of responsive records. The FOIA Officer released to you eighteen pages of records in part, redacting certain information pursuant to FOIA Exemption 6. The FOIA Officer withheld the remaining 38 pages of records in their entirety pursuant to Exemption 5.

On June 23, 2021, you filed this appeal. You assert that the "Commission's search was inadequate" and question the methodologies used to conduct the search. You also argue that the FOIA Office improperly withheld records under Exemption 5 and failed to disclose segregable information from those records. You further assert that "Exemption 6 does not protect the redacted information." Finally, you state that the "Commission failed to produce the records in their original electronic format."

On September 8, 2021, your colleague Brian Richman modified the scope of the request to seven specific categories of records to “assist the Staff in its search for responsive records.” Given your firm’s decision to modify the underlying FOIA request, there is no need to review the search conducted by the FOIA Office in response to your initial request. Your amended FOIA request is remanded to the FOIA Office for processing. I have considered the remaining issues raised in your appeal and your appeal is denied in part and remanded in part, as more fully discussed below.

- A. The FOIA Office did not perform an adequate review of the 38 pages of records withheld under FOIA Exemption 5.

The FOIA Officer asserted the deliberative process privilege under Exemption 5 to withhold 38 pages of records in their entirety. I have reviewed the 38 pages of withheld records and find that Exemption 5 was asserted to redact non-exempt information. Thus, this matter is remanded for further review of these 38 pages of records. You may contact Lizzette Katilius, FOIA Branch Chief, at 202-551-7900, regarding the status of this matter on remand.

- B. FOIA Exemption 6 applies to certain of the redacted information.

The FOIA Officer asserted Exemption 6 to withhold the following information from the eighteen pages of records released to you: the email addresses of two SEC staff members; the name of a former SEC employee; and the business telephone number of an attorney at Clyde Snow.¹ I find that one of the SEC email addresses is protected under Exemption 6.

Exemption 6 protects information in “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”² To withhold information under Exemption 6, it must first be established that the information is “contained in personnel, medical or ‘similar’ files.”³ If so, a court then assesses “whether disclosure would lead to a ‘clearly unwarranted invasion of personal privacy.’”⁴ Whether disclosure of the records “would constitute a clearly unwarranted invasion of personal privacy” requires a balancing of the interests of protecting “an individual’s private affairs from unnecessary public scrutiny” against “the public’s right to governmental information.”⁵

¹ The FOIA Office did not assert Exemption 6 to redact the telephone and facsimile numbers from the letterhead of a comment letter that was released to you. The information was already blacked out in the copy of the comment letter that was provided to the FOIA Office as part of the search for responsive records. To the extent you are interested in obtaining a copy of the Basile Law Firm’s comment letter reflecting the firm’s telephone and facsimile numbers, you may download a copy of the letter at <https://www.sec.gov/comments/s7-24-20/s72420-8507478-230062.pdf>.

² 5 U.S.C. § 552(b)(6).

³ *Wash. Post Co. v. HHS (“Wash Post (HHS)”)*, 690 F.2d 252, 260 (D.C. Cir. 1982).

⁴ *Buzzfeed, Inc. v. Dep’t of Justice*, 419 F.Supp.3d 69, 79 (D.D.C. Dec. 4, 2019) (quoting *Wash Post Co.*, 690 F.2d at 260; see also, 5 U.S.C. § 552(b)(6)).

⁵ *Lepelletier v. FDIC*, 164 F.3d 37, 46 (D.C. Cir. 1999).

The Supreme Court in *Dep't of State v. Washington Post Co.*, 456 U.S. 595 (1982), held that, based on a review of legislative history of the FOIA, Congress intended the term “similar files” to be interpreted broadly.⁶ Thus, the threshold question is satisfied when it is shown that the records at issue contain “detailed Government records on an individual which can be identified as applying to that individual.”⁷ Moreover, “similar files” covers not just the files themselves, “but also bits of personal information, such as names and addresses.”⁸ Because the redacted email addresses, name, and phone number are particular to certain individuals, this information meets the threshold privacy requirement of Exemption 6.⁹

Having met the initial requirement, the next question is whether disclosure of the withheld information implicates “a substantial, as opposed to a *de minimis*, privacy interest.”¹⁰ I find that a substantial privacy interest does not exist in the redacted name of the former SEC employee and the redacted business telephone number. SEC employees, however, have a privacy interest in not having their work email addresses publicly released. Releasing SEC employee email addresses could subject employees to harassment and unsolicited emails.¹¹

You assert that “[t]here [are] no significant privacy interests implicated by the redacted information” and that “Exemption 6 does not protect information such as publicly available email addresses.” One of the withheld SEC email addresses is identified on the SEC’s website as referenced in your appeal and, thus, is releasable to you. The other withheld SEC email address is not publicly identified on the SEC website or elsewhere on the Internet. Whether you are able to correctly identify one’s SEC email address from other previously published SEC email addresses does not diminish the privacy interest since the email address is not publicly available. Therefore, I find that a substantial privacy interest exists under Exemption 6 in the SEC email address that is not publicly available.¹²

⁶ *Dep't of State v. Wash Post Co.* (“*Wash Post (DOS)*”), 456 U.S. 595, 599-603 (citing H.R. Rep. No. 89-1497, at 11 (1966); S. Rep. No. 89-813, at 9 (1965); S. Rep. No. 88-1219, at 14 (1964)).

⁷ *Wash Post (DOS)*, 456 U.S. at 601-02.

⁸ *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 152-53 (D.C. Cir. 2006).

⁹ *Smith v. Dep't of Treasury*, 2020 WL 376641, at *3 (D.D.C. Jan. 23, 2020).

¹⁰ *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 33 (D.C. Cir. 2002) (quoting *Nat'l Ass'n of Retired Fed. Emps v. Horner* (“*NARFE*”), 879 F.2d 873, 874 (D.C. Cir. 1989)).

¹¹ See, e.g., *Waterman v. IRS*, 288 F. Supp. 3d 206, 211 (D.D.C. 2018) (holding that work telephone numbers and email addresses of IRS employees could be withheld because such information sheds little light on agency activities and release could cause harassment or threats of employees); *Shurtleff v. EPA*, 991 F. Supp. 2d 1, 18-19 (D.D.C. 2013) (protecting work email addresses of EPA Administrator and Executive Office of the President personnel due to significant privacy interest of such individuals in avoiding harassment and unsolicited email); *Wilson v. U.S. Air Force*, No. 08-324, 2009 WL 4782120, at *4 (E.D. Ky. Dec. 9, 2009) (finding that signatures, personal phone numbers, personal email addresses, and government email addresses were properly redacted).

¹² See *Hall & Assocs. v. EPA*, No. 19-1095, 2020 WL 4673411, at *5 (D.D.C. Aug. 12, 2020) (“Courts have also upheld the withholding of email addresses used for work purposes where they are not publicly available.”) (citing *Williams v. EPA*, 346 F. Supp. 61, 86 (D.D.C. 2018) (concluding that redacting employee’s work email address and mobile phone number under Exemption 6 was proper); *Shurtleff v. EPA*, 991 F. Supp. 2d 1, 18 (2013) (“Exemption 6 allows an agency to withhold personal identifying information, such as email addresses....”); *Seife v. Dep't of*

Having identified a privacy interest in one of the redacted SEC email addresses, we must balance this interest against the public's interest in disclosure.¹³ To overcome a privacy interest, it is the requester's obligation to articulate a sufficient and significant public interest.¹⁴ Under the FOIA, the relevant public interest is whether disclosing the personal information would shed light on governmental activities or operations.¹⁵

You have not articulated any public interest in disclosure or offered any argument or rationale to overcome the evident privacy interests. If a requester fails to identify a public interest in disclosure and there is a privacy interest in the requested material, the privacy interest (even a modest one) prevails.¹⁶ Therefore, the FOIA Office properly asserted Exemption 6 to withhold one of the SEC email addresses.¹⁷ The other information redacted under Exemption 6 will be released to you on remand by the FOIA Office as part of its review of the Exemption 5 material, as discussed above.

The FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such a record after deletion of the portions which are exempt."¹⁸ I find that there is no segregable information that is not protected under Exemption 6.

I have also considered whether partial disclosure of the exempt information is possible and have determined that it is not because such a disclosure would not be consistent with the

State, 298 F. Supp. 3d 592, 629 (S.D.N.Y. 2018) (concluding that Exemption 6 properly applies to official government email addresses that are not publicly available)).

¹³ *Dep't of the Air Force v. Rose*, 425 U.S. 352, 372 (1976); *see also Dep't of Justice v. Reporters Cmte. for Freedom of the Press*, 489 U.S. 749, 780 (1989) (fundamental inquiry in evaluating public interest is whether disclosure illuminates agency activity, or what the "government is up to").

¹⁴ *See Nat'l Archives and Records Admin. v. Favish*, 541 U.S. 157, 172 (2004).

¹⁵ *See Rose*, 425 U.S. at 372 (Exemption 6 cases "require a balancing of the individual's right of privacy against the preservation of the basic purpose of [FOIA] to open agency action to the light of public scrutiny"); *see also Dep't of Defense, et al. v. FLRA et al.*, 510 U.S. 487, 495 (1994) (the "only relevant 'public interest in disclosure' to be weighed in this balance is the extent to which disclosure would serve the 'core purpose of the FOIA,' which is 'contribut[ing] significantly to public understanding of the operations or activities of the government'" (quoting *Reporters Cmte.*, 489 U.S. at 775)).

¹⁶ *See e.g., NARFE*, at 879 ("We need not linger over the balance; something, even a modest privacy interest, outweighs nothing every time"); *Computer Professionals for Social Responsibility v. U.S. Secret Service*, 72 F.3d 897, 904-05 (D.C. Cir. 1996) (public interest in personal identifying information is insubstantial unless requester puts forward compelling evidence of agency or official misconduct); *FLRA v. Dep't of Defense*, 984 F.2d 370, 375 (10th Cir. 1993) ("[E]ven a minimal privacy interest ... outweighs a nonexistent public interest"); *Halloran v. Veterans Admin.*, 874 F.2d 315, 322 (5th Cir. 1989) ("[E]ven a small and potentially uncertain invasion of privacy" is unwarranted "if there are no public interests supporting the disclosure of the particular information").

¹⁷ *See Hunton & Williams v. EPA*, 346 F. Supp. 3d 61, 85 (D.D.C. 2018) (the withholding of certain information, including EPA employee's work email address and mobile phone number, was proper as no public interest was identified by Plaintiff).

¹⁸ 5 U.S.C. § 552(b).

purpose of Exemption 6. I further find that it is reasonably foreseeable that disclosure of the redacted SEC email address to you would harm interests protected by Exemption 6 because publicly disclosing this information could result in an unwarranted invasion of personal privacy.

C. The FOIA does not require agencies to produce requested records in their “original form or format.”

You argue that section 552(a)(3)(C) of the FOIA required the FOIA Office to “produce the requested records in their original ‘electronic form or format’ ... not as scanned images that cannot easily be OCR’d and searched.” Section 552(a)(3)(C) of the FOIA, however, places no such requirement on agencies; it requires agencies to “make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency’s automated information system.”¹⁹

When producing records to a requester, Section 552(a)(3)(B) requires agencies to “provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format.”²⁰ Your FOIA request made no mention of the form or format in which you preferred to receive the records, including a request to have records produced in an electronic searchable format. Thus, the FOIA Office was under no obligation to produce the releasable records in their original electronic form or format; nor was the FOIA Office required to produce them in a searchable format.²¹

* * *

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 have your principal place of business.²² 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 or contact OGIS at ogis@nara.gov or 1-877-684-6448. If

¹⁹ 5 U.S.C § 552(a)(3)(C) (“In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency’s automated information system.”).

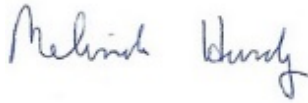
²⁰ 5 U.S.C § 552(a)(3)(C).

²¹ To the extent you are interested, you may file a new FOIA request to have the released records produced to you in a different form or format. See <https://www.sec.gov/page/office-foia-services>. However, we cannot produce documents in a native format where certain information in the document has to be redacted

²² See 5 U.S.C. § 552(a)(4)(B).

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 blue ink that reads "Melinda Hardy". The signature is written in a cursive style.

Melinda Hardy
Assistant General Counsel for
Litigation and Administrative Practice

