

EXHIBIT 17

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

OFFICE OF THE
GENERAL COUNSEL

Stop 9612

February 11, 2019

Lisa Himes, Esq.
Rogers Joseph O'Donnell
875 15th Street, NW, Suite 725
Washington, DC 20005

Re: Appeal, Freedom of Information Act Request No. 19-01818-FOIA, designated on appeal as Nos. 19-00153-APFS

Dear Ms. Himes:

This responds to your Freedom of Information Act (FOIA) appeal of the FOIA Officer's denial of your clients' September 27, 2018 FOIA request, as amended, for records concerning Nova Oculus Partners, LLC.¹ By letter dated October 10, 2018, the FOIA Office denied your request pursuant to FOIA Exemption (b)(7)(A). On December 26, 2018, the FOIA Office received this appeal challenging the FOIA Officer's invocation of Exemption 7(A). I have considered your appeal and it is denied.

I have determined that the FOIA Officer correctly asserted Exemption 7(A).² There is a two-step test to determine whether information is protected under Exemption 7(A), whether: (1) a law enforcement proceeding is pending or prospective, and (2) release of information about it could reasonably be expected to cause some articulable harm.³ We have confirmed with staff

¹ The FOIA request was amended to have the FOIA Office conduct a search of emails containing the following items: (1) the email address for Marshallmasko@amerivision.us for the period of January 1, 2013 through the present; (2) the email address for Marshall.ameritech@gmail.com for the period of January 1, 2013 through the present; (3) the email address for blairmowery@amerivision.us for the period of January 1, 2013 through the present; (4) the email address of blair.ameritech@gmail.com for the period of January 1, 2013 through the present; (5) "Wasserman, Comden, Casselman & Esenten" for the period January 1, 2008 through the present; (6) "Amerivision" and "International" for the period of January 1, 2013 through the present; and (7) "David" and "Casselmann" for the period June 2011 through June 2012.

² Exemption 7(A) authorizes the withholding of "records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information * * * could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A), 17 C.F.R. § 200.80(b)(7)(i).

³ See, e.g., *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978) (holding that the government must show how records "would interfere with a pending enforcement proceeding"); *Juarez v. Dep't of Justice*, 518 F.3d 54, 58-59 (D.C. Cir. 2008) (explaining that government must show that its ongoing law enforcement proceeding could be harmed by premature release of evidence or information).

that releasing the requested documents could reasonably be expected to cause harm to ongoing enforcement proceedings.⁴

Further, under Exemption 7(A), an agency may withhold records if they come within categories of records whose disclosure would generally interfere with enforcement proceedings.⁵ The documents you seek come within categories whose disclosure would generally interfere with enforcement proceedings.

You argue that the “SEC has failed to provide any information, let alone satisfy th[e] significant requirement” that the material relates to a concrete prospective law enforcement proceeding.” The pending law enforcement proceeding for which Exemption 7(A) applies is *SEC v. Peter H. Pocklington, et al.*, No. 5:18-cv-00701 (C.D. Cal.). We have confirmed with Commission staff that they are in active litigation and have yet to produce any documents to the opposing parties through discovery. You also assert that the “SEC has not demonstrated how the disclosure of these records would reveal the focus of such an investigation, as required.” Public release of any records prior to discovery production could harm the SEC’s position in successfully litigating this case.⁶

I have also considered whether partial disclosure of the withheld information is possible, but have determined that it is not because such a disclosure would not be consistent with the purposes of Exemption 7(A).⁷

Should you have a continuing interest in the subject information, you may contact the FOIA Office within six months of the date of this letter to determine if the status of the on-going law enforcement proceeding has changed. As Exemption 7(A) precludes the release of the information at this time, no determination has been made concerning the applicability of any

⁴ See *OKC Corp. v. Williams*, 489 F. Supp. 576 (N.D. Tex. 1980) (SEC is not required to disclose requested materials directly tied to a pending investigation); *Nat’l Pub. Radio v. Bell*, 431 F. Supp. 509, 514-15 (D.D.C. 1977) (Congress intended that Exemption 7(A) would apply where disclosure may impede any necessary investigation prior to court proceedings); *Robbins Tire*, 437 U.S. at 232 (Congress intended that Exemption 7(A) would apply “whenever the Government’s case in court * * * would be harmed by the premature release of evidence or information.”); *Accuracy in Media, Inc. v. U.S. Secret Service*, C.A. No. 97-2108, 1998 U.S. Dist. Lexis 5798 at 11 (D.D.C. April 16, 1998) (affirmation that there is an active and on-going investigation is enough).

⁵ *Robbins Tire*, 437 U.S. at 236; see also *Solar Sources, Inc. v. United States*, 142 F.3d 1033, 1038 (7th Cir. 1998) (“the Government may justify its withholdings by reference to generic categories of documents”).

⁶ See *Marzen v. HHS*, 632 F. Supp. 785, 805 (N.D. Ill. 1985) (concluding that Exemption 7(A) prohibits disclosure of law enforcement records when their release “would interfere with enforcement proceedings, pending, contemplated, or in the future”), aff’d, 825 F.2d 1148 (7th Cir. 1987).

⁷ I further find that it is reasonably foreseeable that disclosure of the withheld records would harm interests protected by Exemption 7(A) because such a disclosure could compromise ongoing enforcement proceedings.

other FOIA exemptions. The Commission reserves the right to review the information to assert any other exemption when Exemption 7(A) is no longer applicable.⁸

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.⁹ 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 you have any questions concerning my determination, please contact Mark Tallarico, Senior Counsel, at 202-551-5132.

For the Commission
by delegated authority,



Richard M. Humes
Associate General Counsel

⁸ See *LeForce & McCombs, P.C. v. Dep't of Health and Human Services*, Case No. Civ-04-176-SH (E.D. Okla. Feb. 3, 2005) (an agency does not waive the right to invoke exemptions by not invoking such exemption during the administrative processing of a FOIA request).

⁹ See 5 U.S.C. § 552(a)(4)(B).