

EXHIBIT D



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

OFFICE OF
THE GENERAL COUNSEL

Stop 9613

November 22, 2019

Mr. Stephen Astley
Robbins Geller Rudman & Dowd LLP
120 E. Palmetto Park Rd., Suite 500
Boca Raton, FL 33432

Re: Appeal, Freedom of Information Act Request No. 19-03009-FOIA, designated on appeal as No. 20-00022-APPS

Dear Mr. Astley:

This responds to your Freedom of Information Act (FOIA) appeal of the FOIA Officer's denial of your August 28, 2019 FOIA request for "copies of all documents relating to any SEC investigation(s) into OvaScience, Inc. or its former officers, directors, or employees." By letter dated September 30, 2019, the FOIA Officer denied your request pursuant to FOIA Exemption 7(A). On October 25, 2019, you filed 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).¹ 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.² We have confirmed with staff that releasing the withheld information could reasonably be expected to interfere with on-going enforcement proceedings.³

¹ 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).

² 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).

³ 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

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.⁴ The documents you seek come within categories whose disclosure would generally interfere with enforcement proceedings.

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).⁵

Please be aware that my decision to affirm the FOIA Officer's assertion of Exemption 7(A) should not be construed as an indication by the Commission or its staff that any violations of law have occurred with respect to any person, entity, or security. 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 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.⁶

You have the right to seek judicial review of my determination with respect to Exemption 7(A) 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.⁷ 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

harmful 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).

⁴ *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”).

⁵ 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.

⁶ 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).

⁷ See 5 U.S.C. § 552(a)(4)(B).

1-877-684-6448. If you have any questions concerning my determination, please contact Carin Cozza, Senior Counsel, at 202-551-7958.

For the Commission
by delegated authority,

A handwritten signature in black ink, appearing to read "R. Humes".

Richard M. Humes
Associate General Counsel