

# **Exhibit B**

EMERY CELLI BRINCKERHOFF ABADY WARD & MAAZEL LLP

RICHARD D. EMERY  
ANDREW G. CELLI, JR.  
MATTHEW D. BRINCKERHOFF  
JONATHAN S. ABADY  
EARL S. WARD  
ILANN M. MAAZEL  
HAL R. LIEBERMAN  
DANIEL J. KORNSTEIN  
O. ANDREW F. WILSON  
KATHERINE ROSENFELD  
DEBRA L. GREENBERGER  
ZOE SALZMAN  
SAM SHAPIRO

ATTORNEYS AT LAW  
600 FIFTH AVENUE AT ROCKEFELLER CENTER  
10<sup>TH</sup> FLOOR  
NEW YORK, NEW YORK 10020

TEL: (212) 763-5000  
FAX: (212) 763-5001  
www.ecbawm.com

DIANE L. HOUK  
EMMA L. FREEMAN  
DAVID BERMAN  
HARVEY PRAGER  
SCOUT KATOVICH  
MARISSA BENAVIDES  
NICK BOURLAND  
ANDREW K. JONDAHL  
ANANDA BURRA  
MAX SELVER

October 2, 2020

***By Email and U.S. Mail***

Ryan Law  
Director, FOIA and Transparency  
Department of the Treasury  
Washington, D.C. 20220  
FOIA@treasury.gov

*Re: FOIA #2018-04-186 / #2019-04-186*

To Whom It May Concern:

This firm represents William Cohan, an investigative reporter and *New York Times* best-selling author, whose Freedom of Information Act (“FOIA”) request has been languishing with the U.S. Department of Treasury (“Treasury”) for almost two-and-a-half years. We write to provide Treasury with a final opportunity to provide Mr. Cohan with the requested documents before commencing litigation.

***Factual Background***

On April 28, 2018, Mr. Cohan submitted a FOIA request to Treasury seeking:

All documents, emails, printed or electronic communications or records related to the July 8, 2013 decision by the Financial Stability Oversight Council, because of "material financial distress," to designate General Electric Capital Corporation, Inc. a Systemically Important Financial Institution pursuant to Section 113 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

Mr. Cohan was told that this request was best directed to the Federal Deposit Insurance Corporation (“FDIC”), and so, on February 8, 2019, Mr. Cohan submitted a FOIA request to the FDIC for similar documents. On February 21, 2019, the FDIC sent Mr. Cohan a final response to this request, which found that Mr. Cohan’s “request does not reasonably describe FDIC agency records, is not in compliance with applicable requirements, and cannot be processed under the

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FOIA.” Mr. Cohan submitted a new FOIA request to the FDIC on February 25, 2019, which was administratively closed on March 18, 2019 because it was found to be duplicative of the February 8, 2019 request. The FDIC responses suggested that Mr. Cohan should pursue his request with Treasury.

Mr. Cohan resubmitted his request to Treasury in April 2019, and was assigned case number #2019-04-186. In a letter dated May 31, 2019, Treasury acknowledged Mr. Cohan’s April 28, 2018 Request, denied Mr. Cohan’s request for expedited processing, and informed Mr. Cohan that an additional processing extension of ten days was required to process his request. The Treasury letter did not indicate that Mr. Cohan’s FOIA request was deficient in any manner. The Treasury letter did not indicate the scope of the records it would produce nor whether the requested records were subject to any FOIA exemption.

Over the course of the next 15 months, Mr. Cohan diligently followed up with Treasury on his FOIA request but, to date, has received neither responsive records nor a coherent explanation for the long delay.<sup>1</sup> A chronology of Mr. Cohan’s exchanges with Treasury show that Treasury has unjustifiably shirked its duty to promptly respond to Mr. Cohan’s FOIA request.

- July 10, 2019: Mr. Cohan emails Treasury about his request. Karen Edwards, a Treasury FOIA Analyst, responds to Mr. Cohan acknowledging his email and indicating that the case manager assigned to his request will contact him upon her return to the office.
- July 23, 2019: Mr. Cohan follows up with Ms. Edwards by email but receives no response.
- August 22, 2019: Mr. Cohan again follows up with Ms. Edwards by email but receives no response.
- September 16, 2019: Mr. Cohan follows up again by email with Ms. Edwards.
- September 17, 2019: Mr. Cohan receives a response by email from Michelle Henshaw, a Treasury FOIA Case Manager, informing him that she is the new case manager for his request and that she has reached out to the program office about the status of the request. Later that day, Ms. Henshaw emails Mr. Cohan again to tell him that the program office is working on his request and “should have an update . . . next week.”
- October 22, 2019: Having received no update, Mr. Cohan follows up by email with Ms. Henshaw.
- October 23, 2019: Ms. Henshaw responds explaining that she has reached out to the program office and will be in touch once she hears back.
- November 27, 2019: Mr. Cohan follows up by email with Ms. Henshaw.
- November 29, 2019: Ms. Henshaw responds explaining that she had been told that “a search request was submitted to [Treasury’s] IT office regarding” Mr. Cohan’s request and promising to follow up the following week.

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<sup>1</sup> Although the May 31, 2019 letter referenced Mr. Cohan’s April 28, 2018 FOIA request, his subsequent communications with Treasury reference his April 2019 FOIA, listing “FOIA Case #2019-04-186” in the subject of the emails.

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- December 11, 2019: Mr. Cohan follows up by email with Ms. Henshaw but receives no response.
- January 28, 2020: Mr. Cohan follows up again and receives a response from Ms. Henshaw that day explaining that “the last [she] heard from [the program office] they were waiting for search results regarding email searches” which “will take a while due to how many emails there might be.”
- April 12, 2020: Mr. Cohan emails Ms. Henshaw but receives no response.
- May 8, 2020: Mr. Cohan again emails Ms. Henshaw.
- June 23, 2020: Ms. Henshaw emails Mr. Cohan in response to a voicemail message that he left. She informs him that the “program office . . . [is] still waiting on search results.”
- September 9, 2020: Mr. Cohan follows up by email with Ms. Henshaw. Mr. Cohan has not received a response to date.

### ***Applicable Law***

FOIA requires an agency to determine within 20 days whether or not to comply with a FOIA request. 5 U.S.C. § 552(a)(6)(A)(i). An agency can extend this timeline by 10 days if unusual circumstances delay the agency's ability to search for, collect, examine, and consult about the responsive documents. *Id.* § 552(a)(6)(B). “[W]ithin the relevant time period, the agency 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 Washington v. Fed. Election Comm'n*, 711 F.3d 180, 186 (D.C. Cir. 2013).

While “a ‘determination’ does not require actual production of the records to the requester at the exact same time that the ‘determination’ is communicated to the requester . . . FOIA requires that the agency make the records ‘promptly available,’ which depending on the circumstances typically would mean within days or a few weeks of a ‘determination,’ not months or years.” *Id.* at 188 (citing 5 U.S.C. § 552(a)(3)(A), (a)(6)(C)(i)). Additional time between “determination” and production is justifiable “to physically redact, duplicate, or assemble for production the documents that it has already gathered and decided to produce.” *Id.* at 189. However, “the statute does not allow agencies to keep FOIA requests bottled up for months or years on end while avoiding any judicial oversight.” *Id.* at 190. *See also Am. Civil Liberties Union v. Dep't of Def.*, 339 F. Supp. 2d 501, 505 (S.D.N.Y. 2004) (finding, one year after a FOIA request was submitted that “to permit further delays in disclosure or providing justification for not disclosing would subvert the intent of FOIA”).

If an agency does not respond to a FOIA request in accordance with the statutory time limits, the requester may seek judicial review “to enjoin the agency from withholding agency records and to order the production of any agency records and to order the production of any agency records improperly withheld.” 5 U.S.C. § 552(a)(4)(B). Courts find that “repeated missed deadlines, unexplained timeline adjustments, and limited communication from the Government” indicate that the agency has not exercised due diligence in responding to a FOIA request and that any further delay is unwarranted. *Bloomberg, L.P. v. United States Food & Drug Admin.*, 500 F. Supp. 2d 371, 376 (S.D.N.Y. 2007).

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***Treasury's Delay Violates FOIA***

Treasury has failed to abide by the strict statutory timelines of FOIA and, unless Treasury promptly provides Mr. Cohan with records responsive to his FOIA request, he intends to seek these documents in court. Almost two-and-a-half years after he submitted his FOIA request, Treasury still has not provided Mr. Cohan with the determination it is statutorily obligated to provide within thirty days of a request. Mr. Cohan does not know anything about the scope of the records Treasury will produce nor whether Treasury will assert that FOIA exemptions apply to these records. Treasury has also failed to provide any viable explanation for the long delay. It is implausible that Treasury has been conducting searches for the nearly eighteen months since they acknowledged his April 2019 request. Responding to Mr. Cohan's single request concerning a single incident cannot take this long.

Treasury's unjustified delays have left Mr. Cohan empty handed, deprived of important governmental information that, under the statutory promise of FOIA, should be readily available to the public. Absent swift production of the requested records, Mr. Cohan will seek judicial intervention.

Sincerely,

/s

Andrew G. Celli, Jr.