

**A Failure of Transparency:**  
**The Securities and Exchange Commission**  
*A Pattern and Practice of FOIA Violation*



**Report prepared by Probes Reporter for the  
House Committee on Oversight and Government Reform**

**John P. Gavin, CFA  
Founder & CEO, Probes Reporter, LLC**

**Charles J. Glasser, Esq.  
Counsel for Probes Reporter, LLC**

**Spring 2015**

## **FOIA Abuses at the SEC**

### **Overview and Executive Summary**

#### **Spring 2015**

The Securities and Exchange Commission (SEC) spends untold time and public money conducting its investigations. Many public companies do not disclose the existence of an SEC probe, let alone its substance. To help bring transparency to SEC proceedings, we have filed thousands of FOIA requests and related appeals with the SEC since the late 90's. Inconsistent responses and blanket use of the B5 Exemption<sup>1</sup> leave us unable to tell the investing public exactly what took place in an SEC investigation, even long after it is closed. Too often, this has grave consequences for investors.

We have repeatedly found the SEC willful in its failures to comply with FOIA, including:

- **There is one critical document in particular that the SEC consistently refuses to release, even in redacted form. It is known as a “Case Closing Recommendation.”** This one document summarizes why an SEC investigation was opened, the investigator's factual findings and the conclusions reached. The SEC routinely makes blanket assertions of the B5 Exemption of the FOIA to deny the public access to its Case Closing Recommendations.
- Repeatedly making false or incomplete statements regarding the existence of documents related to SEC investigations, including Case Closing Recommendations.
- Blatant disregard for the President's instruction to federal agencies to disclose documents within the agency's discretion to do so.

The SEC's posture is simple: Unless compelled by Congress or a Federal judge, we believe it has no intention of changing its abusive practices regarding the FOIA.

Since the late 90's, John P. Gavin, CFA, the owner of Probes Reporter, has personally filed thousands of Freedom of Information Act (FOIA) requests with the SEC. Mr. Gavin is one of the most active FOIA requesters to the SEC.

Mr. Gavin's FOIA requests primarily seek records related to SEC investigations of publicly traded companies. Data and analysis of this research are then published. As Mr. Gavin said in his letter published by *The Economist*:

“If the SEC simply complied with the FOIA, transparency would be improved. Investors in capital markets would benefit as regulators and the regulated would be held more accountable.”<sup>2</sup>

---

<sup>1</sup> B5 is an exemption meant to protect, “... inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5 USC § 552(b).

<sup>2</sup> THE ECONOMIST, September 13, 2014 <http://www.economist.com/news/letters/21616859-letters-editor>

## **About Probes Reporter, LLC & John P. Gavin, CFA**

Probes Reporter, LLC (probesreporter.com) is an independent publisher of investment research and news focused on public company interactions with the Securities and Exchange Commission (SEC).

Probes Reporter, based in Minnesota, was founded by John P. Gavin, CFA. Mr. Gavin is a Chartered Financial Analyst with over 30 years of experience as a professional investor. Since the late 90's, Mr. Gavin has been steadily filing FOIA requests with the SEC. These requests primarily seek records pertaining to investigations the SEC conducts on publicly traded companies.

Responses received and records released in response to these FOIA requests may then be incorporated into research reports published and disseminated to the investing public by Probes Reporter.

Mr. Gavin's FOIA efforts with the SEC have been extensively covered in mainstream media including the *New York Times*, *Wall Street Journal*, and *The Economist* (**See Exhibit "A"**). He has regularly appeared on CNBC and in other media to comment on the SEC and public company disclosure practices. He also brought litigation against the SEC in 2004 for previous failures to comply with the FOIA.<sup>3</sup>

As a matter of journalistic ethics, Probes Reporter has no interest in publishing a story that might interfere with any ongoing investigation or active prosecution of wrongdoing. Probes Reporter also maintains strict prohibitions against personal trading in the securities of those companies on which we publish.

## **About Charles J. Glasser, Jr., Esq.**

Charles Glasser is counsel to Probes Reporter on FOIA and media matters. Mr. Glasser is a media law attorney and media consultant providing legal, ethical and business advice to a wide variety of news and information platforms.

Mr. Glasser served as Global Media Counsel to Bloomberg News for more than 12 years and among other Freedom of Information issues, litigated the precedent-setting *Bloomberg L.P. v. Board of Governors of the Federal Reserve System*, 601 F.3d 143 (2d Cir., 2010) which vindicated the public's right to know about billions of dollars in secret bank bailouts through the Fed's Discount Window.

---

<sup>3</sup> *Gavin v. United States Securities Comm.*, (D. Minn.), No. 04-4522 (PAM/JSM), Aug. 23, 2007.

## The Primary Records Being Kept Secret: SEC Case Closing Recommendations

“The mission of the U.S. Securities and Exchange Commission is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation ... We are the investor’s advocate.”<sup>4</sup> In order to achieve that mission, each year the SEC brings hundreds of civil enforcement actions against individuals and entities who violate the Federal securities laws.

According to the Enforcement Manual of the SEC, once a decision has been made to close an investigation, preparation of a so-called “**Case Closing Recommendation**” is one of several steps that the staff of the SEC *must take* to officially close the matter. The SEC’s own Enforcement Manual states that “The closing recommendation is a short memorandum and serves as the basic historical record summarizing what the staff did in the investigation and action.”<sup>5</sup>

Regrettably, in violation of the FOIA and the President’s directive, not one page, not even one word, from a Case Closing Recommendation has ever been intentionally released to us by the SEC.<sup>6</sup>

In the calendar year 2014, in response to our FOIA requests, the SEC asserted the B5 exemption more than 150 times to deny the public access to Case Closing Recommendations. Every administrative appeal we have ever filed with the SEC to obtain the Case Closing Recommendations has been denied in its entirety.

- Instead of releasing (even in redacted form) the Case Closing Recommendation, the most the SEC has been willing to produce is a fact-free, single page cover sheet called a “Case Closing Report.” These reports consist of the single line: “I hereby close this case pursuant to delegated authority.” Aside from the case number and the date closed, no other information is included in this document. (**See Exhibit “B”**)

Having exhausted all administrative appeals, our only option is to bring protracted and expensive litigation against the SEC – for the second time – for failure to comply with the FOIA. While we feel confident we would prevail after judicial review of any Case Closing Recommendation, we know from experience that suing the SEC is a costly and painful experience.

---

<sup>4</sup> “*The Investor’s Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*”, available at <http://www.sec.gov/about/whatwedo.shtml>

<sup>5</sup> “These steps create the official record and ensure that documents obtained during the investigation are handled properly”) ENFORCEMENT MANUAL -- SECURITIES AND EXCHANGE COMMISSION DIVISION OF ENFORCEMENT, page 17, available at <http://www.sec.gov/divisions/enforce/enforcementmanual.pdf>

<sup>6</sup> We say “intentionally released” as the SEC has accidentally released Case Closing Recommendations several times, as detailed below.

## Why Case Closing Recommendations Should Be Made Public Under FOIA

Not only would a Case Closing Recommendation inform the public about what publicly traded companies have done (improperly or otherwise), such transparency also serves as a check upon the efficacy and engagement of the SEC itself. The public has a right to examine the facts and ask why and on what factual findings the SEC choose not to pursue regulatory action.

Three Case Closing Recommendations discussed below demonstrate how the SEC is refusing to comply with the FOIA. They show a pattern where the SEC:

- Lied about the existence of records that did, in fact, exist;
- Denied the release of records on the B5 Exemption; and/or,
- Redacted the records sought in their entirety.

### The Example of Multi-Fineline Electronix, Inc.

This example will allow the Committee to compare what the SEC hides from the public in a Case Closing Recommendation (the entirety of three pages) versus an un-redacted version of the same document inadvertently released to us.

In January of 2014 we filed a FOIA request with the SEC for investigative records on publicly traded Multi-Fineline Electronix, Inc. In final response to this request, the SEC gave us two wildly different responses on Multi-Fineline; one intentional, one accidental.

In its intentional (official) response, in July of 2014, the SEC gave us three pages of a Case Closing Recommendation, blacked-out in their entirety based on Exemption B(5) of the FOIA. Specifically, the SEC said the denied materials,

“...form an integral part of the predecisional process, and contain advice given to the SEC or senior staff by the SEC’s attorneys, it is protected from release by the attorney work-product, deliberative process and/or attorney-client privileges embodied in FOIA Exemption 5.”<sup>7</sup> (**See Exhibit “C”**).

Along with the redacted pages, the SEC inadvertently also sent us the exact same three pages with no redactions. (**See Exhibit “C”**). Comparing the two, it is plain to see that the SEC withheld facts from public view that should have been released. To hide these facts, the SEC treated the *entirety* of the document as “attorney’s thought process” or “deliberative” conversational material. See, *“The Abuse of Exemption B(5) as an Excuse for Secrecy,”* *infra*.

---

<sup>7</sup> B5 is an exemption meant to protect “... inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b).

## The Example of FOIA Request Re: 3M Corporation

Until December 2013, we had never seen or even heard of a Case Closing Recommendation. This is despite many years of having made thousands of FOIA requests to the SEC for investigative records pertaining to public companies. The very first time we saw a complete Case Closing Recommendation happened by accident that December when a staff member from the FOIA office inadvertently sent us the full Case Closing Recommendation on an investigation concerning 3M Corporation (**See Exhibit “D”**).

Case Closing Recommendations are laden with factual information that investors have a right to know. It shows what was learned in the course of the investigation. It also serves as the only rational and legal basis for the SEC to decide what a suitable case for enforcement action is.<sup>8</sup> Yet, the official response from the SEC to our request for records on 3M spoke of no such document. In fact, the SEC falsely denied that such a record even existed. The following is excerpted from the SEC response to us on 3M dated December 18, 2013:

“... we conducted a search for records since your previous request, and have located and determined that *the only document* responsive to your request that is contained in the investigation files is the case closing report. Access is granted entirely to the enclosed one page report.” (Emphasis added)(**See Exhibit “E”**).

## The Example of FOIA Request Re: Tangoe, Inc.

On May 22, 2014 we filed a FOIA request with the SEC for investigative records on publicly traded Tangoe, Inc. In its final response to this request, the SEC provided us with a copy of a one-line, fact-free Case Closing Report. The existence of a Case Closing Recommendation was not referenced or even disclosed. (**See Exhibit “F”**).

The full Case Closing Recommendation for the Tangoe matter was inadvertently released to us. (**See Exhibit “F” –Part 2**). By comparing what was actually released versus what was withheld from the public, it is clear that the SEC kept from public view facts and findings that are squarely in the investing public’s interest.<sup>9</sup>

## The Abuse of Exemption B(5) as an Excuse for Secrecy

This Committee has heard testimony from other news organizations about various Federal agencies abusing Exemption B(5) as a way to avoid disclosure. Sadly, the SEC is no different. The public deserves to understand what facts were uncovered in any investigation that the SEC chose to overlook or ignore in deciding not to prosecute a case.

---

<sup>8</sup> The SEC even went so far as to ask that we destroy it. We informed them that we are under no such obligation.

<sup>9</sup> As distinguished from “attorney’s thought process” or “deliberative conversational” material that might appropriately be privileged from disclosure

As the Committee is most likely aware, the applicability of Exemption B(5) turns largely on whether or not the document in question represents a “final decision.” This in turn is examined by whether or not the agency in question relied upon the sought-after document in making the decision not to prosecute.

It bears noting here that one of the central tenets of FOIA law is that our system eschews “secret law making” and the Supreme Court has held consistently that final agency decisions (in this case, the decision not to prosecute) are squarely within the reach of the FOIA and that information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose.<sup>10</sup>

In order to keep the Case Closing Recommendations secret, the SEC has actually said in writing that the decision of whether or not to launch enforcement actions is based on conversations or communications *other* than their own investigators’ fact-finding.

These Case Closing Recommendations are not long and convoluted documents, are easily segregable and can be redacted with a minimum of effort. (See Exhibits “C – Part 2”, “D” and “F” as exemplars of a complete Case Closing Recommendation).<sup>11</sup>

The SEC refuses to disclose these, and instead either denies their existence at all or claims blanket secrecy for the entire factual finding of the Case Closing Recommendation.

In a legalistic argument to try and bolster the SEC’s reliance on Exemption B(5) for wholesale secrecy, SEC Associate General Counsel Richard M. Humes claimed that the SEC did not rely on its own investigators’ findings in a decision not to prosecute (and thus, those finding were allegedly “deliberative.”) In one letter typical of the language he uses in denying our B(5) appeals, Mr. Humes claimed that:

“[T]he authors of the internal records did not have decision making authority. Rather, they presented their opinions, evaluative commentary, analysis and evaluation of the evidence obtained during the course of their investigation. These internal records were created to assist the decision maker in the appropriateness of opening, continuing or ending an investigation. The internal records also preceded and informed any decision, and so reflect the consultative process among agency personnel. Nor is there any demonstration that the decision maker adopted or incorporated these internal records into his decision.” (See Exhibit “G” attached).

---

<sup>10</sup> See, e.g., *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975). See also, *U.S. Dep’t. of Justice v. Reporters Committee*, 489 U.S. 749, 773 (1989) (holding that FOIA “ focuses on the citizens’ right to be informed about “what their government is up to.”)

<sup>11</sup> It is worth noting that we do not seek the mental thought process of an attorney nor the deliberative back-and-forth that SEC staff may have had: in these requests we seek *the facts and only the facts* that investigators uncovered.



This argument is too cute by half. The SEC is actually telling the public that it did *not* rely on the factual findings uncovered by its own investigators. Of course, this staggering admission begs the larger and far more serious question:

- *If the SEC claims their own investigators' fact-finding are not the basis of deciding to give a corporation a pass on potential wrong-doing (a final agency decision within the meaning of FOIA), then upon what document or communication, and from whom, did the SEC rely?*

### **Provably False Statements Regarding Existence of Documents Related to SEC Investigations**

The SEC has displayed a haphazard and inconsistent approach to acknowledging the existence of Case Closing Recommendations. Despite the fact that the Enforcement Manual *requires* the creation of those reports, in some cases the SEC has *denied the very existence* of this document.

#### **The Example of FOIA Request Re: Taro Pharmaceutical Industries, Ltd.**

Our experience with FOIA requests and related appeals made over a multi-year period on public company Taro Pharmaceutical Industries, Ltd. shows factual inconsistencies in the identification of documents in responsive to the same. This underscores a woeful, if not deliberate, inadequacy of search.

In November of 2012, we requested investigative records concerning Taro Pharmaceutical created since 2010. We were told by the SEC in December of 2012 that the SEC “could not locate or identify any information responsive to [our] request.”

About a year later, in October of 2013, we requested later investigative records concerning Taro Pharmaceutical created since 2011. The SEC gave us its final response to this request in March of 2014 by disclosing only a fact-free Case Closing Report. No other investigative records were referenced in the SEC’s response. (**See Exhibit “H”**).

At the very same time, we obtained an internal SEC memorandum that proved that there were *at least 31 boxes of material responsive to our original November 2012 request*. (**See Exhibit “I”**). This material spanned 2008 to 2013 and should have been acknowledged in both our 2012 and 2013 requests for records on Taro. We made subsequent appeals and requests.

As a result of those appeals, the SEC told us Taro Pharmaceutical was named in a single matter which opened on August 22, 2006 and closed on April 19, 2013.

But only three days later, in a letter dated January 30, 2015, which was sent as part of the earlier appeals we had filed with the SEC, we were told there were in fact *three* investigations involving Taro Pharmaceutical. According to the SEC:



- One opened on January 30, 2006, and closed May 27, 2014;
- Another opened August 22, 2006, and closed April 19, 2013; and,
- A third opened August 11, 2011, and closed September 8, 2014.

We took the SEC at its word when it initially informed us there were no investigative records available on Taro. Today we routinely publish such findings. When investigations are hidden from public view, investors are given a skewed history of the marketplace and may be given a false sense of security about a public company in which they may be invested or considering the same.

### **Blatant Disregard for the President's Instruction That Federal Agencies Disclose Documents Which are Within the Agency's Discretion to Release**

As the Committee must surely know, on his first full day in office, January 21, 2009, President Obama issued a memorandum to the heads of all departments and agencies on FOIA, directing that "FOIA should be administered with a clear presumption: In the face of doubt, openness prevails" and further instructing agencies that "information should not be withheld merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears."<sup>12</sup>

The President also called on agencies to "adopt a presumption in favor of disclosure" and to apply that presumption "to all decisions involving [the] FOIA."<sup>13</sup>

The SEC has bluntly and on the record rejected the President's presumption of disclosure, particularly when being held accountable for its abuse of Exemption B(5), which allows the partial withholding of documents that are claimed to be a product of the "deliberative process."<sup>14</sup>

### **The Example of FOIA Request Re: Allergan**

On March 6, 2014, we requested investigative records for pharmaceutical giant Allergan. The SEC responded by again only supplying the factually bereft one-line "Case Closing Report" cover sheet and denying public access to the substantive factual findings of the Case Closing Recommendation.

<sup>12</sup> "President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines: Creating a "New Era of Open Government," UNITED STATES DEPARTMENT OF JUSTICE, OFFICE OF INFORMATION POLICY, available at <http://www.justice.gov/oip/blog/foia-post-2009-creating-new-era-open-government>.

<sup>13</sup> *Id.*

<sup>14</sup> The FOIA requires that "any reasonably segregable portion of a record" must be released "after deletion of the portions which are exempt" under the Act's nine exemptions. 5 U.S.C. § 552(b). The SEC instead routinely violates this provision and claims that the *entire document* – not just deliberative discussions but factual findings – are subject to "blanket secrecy" and steadfastly refuses to perform the required redaction.

On April 14, 2014, we appealed the denial, arguing that among other things, given the President's order, and the fact that when it appears to be in the interest of the SEC's public relations interest, the underlying Case Closing Recommendation has been released in the past.<sup>15</sup> In his final denial dated July 1, 2014, SEC Associate General Counsel Richard M. Humes admitted that while it was within the discretion of the SEC to release the information, he said obliquely that:

“Agencies may generally make ‘discretionary disclosures’ of exempt information as a matter of their administrative discretion if they are not otherwise prohibited from releasing the information”

Mr. Humes then went on to cite case law from 1997, which long predated the President and Attorney General's Executive Order. Mr. Humes made no effort to rationalize or distinguish the President's directive: *he simply ignored it*. (See, again, Exhibit “G” attached).

## Conclusion

A generous view might excuse the SEC's deliberate misrepresentations of a document's existence as the result of overwork, clerical error or incompetence. But given the public interest and given the President's directive to presume in favor of disclosure, there is simply no excuse for consistently hiding factual findings of SEC investigators from the public.

As shown above and through the attached Exhibits, the SEC is engaged in a pattern and practice of abusing Exemption B(5) as an excuse for blanket secrecy; deceiving requesters about the existence of documents that are responsive to FOIA requests; and as a matter of standard procedure, refusing to follow the President's direction to assume a presumption of openness, even when the matter is *by their own admission* a matter of their discretion.

Our message is clear: The SEC is supposed to be the watchdog of the public interest. It is the self-proclaimed “investor's advocate.” Yet the evidence is clear the SEC appears more interested in protecting corporate interests – and even the SEC itself – by keeping the public in the dark about how what really takes place in its investigations.

- Respectfully submitted,  
Charles J. Glasser, Jr., Esq. for  
Probes Reporter, LLC  
Spring 2015

---

<sup>15</sup> See, e.g., *Case Closing Recommendation Regarding Bernard Madoff*, available at [http://online.wsj.com/public/resources/documents/Madoff\\_SECRecommend\\_20081217.pdf](http://online.wsj.com/public/resources/documents/Madoff_SECRecommend_20081217.pdf)