

# GIBSON, DUNN & CRUTCHER LLP

awright@gibsondunn.com

April 13, 2004

(202) 887-3770

(202) 530-9656

VIA E-MAIL

Mr. Jonathan G. Katz  
Secretary  
Securities and Exchange Commission  
450 Fifth Street, N.W.  
Washington, DC 20549-0609

Re: *Proposed Rules Regarding Security Holder Director Nominations,  
68 Fed. Reg. 60,784 (Release No. 34-48626, October 23, 2002);  
File No. S7-19-03*

Dear Mr. Katz:

I am enclosing for inclusion in the rulemaking record in the above-titled proceeding a Freedom of Information Act ("FOIA") appeal that has been submitted today to the Commission's Office of the General Counsel.

Very truly yours,

Ashley Wright  
Gibson, Dunn & Crutcher LLP

Enclosure (w/out exhibits)

awright@gibsondunn.com

April 13, 2004

(202) 887-3770

(202) 530-9656

VIA HAND-DELIVERY

FOIA/PA Office  
Securities and Exchange Commission  
Operations Center  
Room 1418  
6432 General Green Way  
Mail Stop 0-5  
Alexandria, VA 22312-2413

Re: ***Freedom of Information Act Appeal: Request No. 2004-3645;  
Expedited Treatment Requested***

Dear Sir or Madam:

Pursuant to 5 U.S.C. § 552(a) and 17 C.F.R. §§ 200.80(d)(5) and (6), I am writing to appeal the FOIA/Privacy Act Office's effective denial of a FOIA request submitted on March 8, 2004. The FOIA/Privacy Act Office (the "Office") has failed to provide the requested documents within 20 business days and has failed to indicate whether it will provide the documents at any time. *See* 5 U.S.C. § 552(a)(6)(A)(i); 17 C.F.R. § 200.80(d)(5). The Office has not indicated a need for an extension of time to consider the request, nor has it identified "unusual circumstances" that would warrant such an extension. *See* 5 U.S.C. § 552(a)(6)(B)(i); 17 C.F.R. § 200.80(d)(7).

On March 8, 2004, I submitted an electronic FOIA request to the Office, a copy of which is attached hereto as Exhibit A. The request seeks copies of any and all documents constituting or referring or relating to communications between the Securities and Exchange Commission ("Commission") and Automated Data Processing, Inc. ("ADP") concerning the Commission's proposed rules regarding "Security Holder Director Nominations" (file number S7-19-03; 68 Fed. Reg. 60,784). This request includes, but is not limited to, any notes or written records

referring or relating to such communications; any data provided by ADP; any instructions to ADP for the gathering or presentation of data; any questions asked by or of ADP regarding the data or processes used to gather or present the data; and any parameters shared with or by ADP for the gathering or presenting of the data.

Pursuant to 5 U.S.C. § 552(a)(6)(A)(i) and 17 C.F.R. § 200.80(d)(5), the Office must make a determination regarding a FOIA request within 20 business days of its submission. The Office has failed to do so.\* The Office also has not invoked the procedure for extending the time to respond to a FOIA request, which requires “written notice to the person making a request for a record or a copy, setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched.” 17 C.F.R. § 200.80(d)(7). *See also* 5 U.S.C. § 552(a)(6)(B)(i).

In response to our FOIA request, I have received one letter from the Office, dated March 12, 2004. That letter, attached hereto as Exhibit B, denied our request for expedited review but *did not indicate that an extension of time was necessary or warranted* for the Office to consider our FOIA request. To the contrary, the letter informed us that our request would be processed “in [the Office’s] usual time frame,” not that any “unusual circumstances” exist.

Accordingly, because 20 business days have passed and a “compelling need” for expedited processing of our FOIA request continues to exist under the Administrative Procedure Act (“APA”), 5 U.S.C. § 553(c), I request the immediate production of the requested records. The information requested should be readily available because it has been utilized by the Commission in a current rulemaking. Pursuant to both FOIA and the APA, we are entitled to copies of that information. *See Florida Power & Light Co. v. United States*, 846 F.2d 765, 771 (D.C. Cir. 1988). To satisfy its rulemaking obligations under the APA, the Commission must permit public access to and comment regarding such data. *See, e.g., Connecticut Light and Power Co. v. Nuclear Regulatory Comm’n*, 673 F.2d 525, 530 (D.C. Cir. 1982); *Lloyd Noland Hosp. & Clinic v. Heckler*, 619 F. Supp. 1, 6 (N.D. Ala. 1984).

---

\* A March 12, 2004 letter from the Office states that our FOIA request was received by the Office on March 9, 2004.

FOIA/PA Office  
April 13, 2004  
Page 4

For all the foregoing reasons, we request expedited treatment of this appeal and the prompt release of the information requested. Thank you for your attention to this matter.

Very truly yours,

Ashley Wright

Attachments

cc: Giovanni P. Prezioso, Esq.