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SEC Fails to Provide Records After Enforcement Staff Illegally Accessed Privileged Documents

New Civil Liberties Alliance v. Securities and Exchange Commission

Washington, DC (November 28, 2022) – The New Civil Liberties Alliance has filed a [Complaint](#) alleging that the Securities and Exchange Commission (SEC) is dragging its feet in providing access to records concerning “a control deficiency,” where agency enforcement staff illegally downloaded and gained access to privileged adjudicative documents. The agency has admitted this breach occurred in two adjudicatory matters, [SEC v. Michelle Cochran](#) and [Jarkesy v. SEC](#), both major cases challenging the constitutionality of SEC’s administrative proceedings, as well as other, undisclosed cases. Supreme Court argument in *Cochran* occurred on November 7.

On July 12, 2022, NCLA submitted a Freedom of Information Act (FOIA) request to SEC, seeking records of these “control deficiencies” that SEC had learned of by Fall 2021 but only [publicly acknowledged](#) on April 5, 2022. According to a disclosure statement filed with the Supreme Court and the U.S. Court of Appeals for the Fifth Circuit, SEC enforcement personnel accessed documents stored in the administrative adjudications section of the shared computer system that were created by SEC’s Administrative Law Judges (ALJs) and their staff. Defendants Michelle Cochran and George Jarkesy were only made aware of the Commission’s breach when it was publicly disclosed, even though SEC had known about this serious breach for months. SEC hired outside investigators and conducted an audit and “dozens” of interviews, yet critical details are still shrouded in mystery. Rather than initiate an Inspector General investigation, as the law requires, SEC hired the Berkeley Research Group, a consultancy whose millions of dollars of other SEC business create reason to doubt its objectivity.

SEC’s statement also indicates that the “control deficiency” affected other enforcement actions but found “it appropriate at this time to publish the review team’s findings regarding two matters, and [SEC] anticipate[s] publishing additional findings in the near future.” Yet SEC has published no report. NCLA’s FOIA request seeks disclosure as to all affected matters. SEC has failed to make a timely “determination” and to comply with other FOIA deadlines, putting SEC in violation of both FOIA and the law requiring the Inspector General to investigate.

This egregious breach demonstrates that in-house agency adjudications deprive defendants of due process of law and other constitutional guarantees—most notably, the right to unbiased, disinterested, and independent adjudicators. The Supreme Court has recognized that even the appearance of bias by a court toward a litigant violates the Constitution’s Due Process Clause. When investigatory, rulemaking, prosecutorial, and adjudicatory powers are concentrated in a single agency like the SEC, the opportunity for constitutional mischief is obvious—and impermissible.

NCLA is a 501(c)(3) nonpartisan, nonprofit group that regularly requests access under FOIA to the public records of federal agencies and disseminates its findings, analyses, and commentary to the public as part of its mission.

NCLA released the following statements:

“SEC has breached every imaginable duty the law requires—under the IG statute, under FOIA, to fairly adjudicate claims it brings, and to deal honestly with those it litigates against. Its defiance of law, delay, recalcitrance, and selective disclosure—not to mention a conflicted internal investigation it would never tolerate from a regulated party—call into question the entire inherently compromised enterprise of agency adjudication.”

— **Peggy Little, Senior Litigation Counsel, NCLA**

“The SEC is trying to sugarcoat this breach by calling it a ‘control deficiency,’ but SEC has violated regulated parties’ rights to an impartial adjudicator. Government agencies have a public trust, and they are sworn to protect and uphold such rights. Instead, it has been over a year since SEC was made aware of the breach and nine months since its public disclosure. Despite assurances to the contrary, there has been deafening silence from the Commission about the extent and nature of the breach or its impact on regulated parties. It is long past time for the Commission to fess up.”

— **Kara Rollins, Litigation Counsel, NCLA**

“Caught with its hand in the proverbial cookie jar, SEC now appears to be defying the law requiring an IG investigation and slow-walking disclosure of its misdeeds. Such brazen and self-serving tactics bespeak an independent agency that thinks it is above the law and beyond disciplining. This sordid episode underscores why prosecutorial and adjudicative powers must remain separate—as the Constitution requires but the administrative state flouts.”

— **Mark Chenoweth, NCLA President**

For more information visit the case page [here](#).

ABOUT NCLA

[NCLA](#) is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar [Philip Hamburger](#) to protect constitutional freedoms from violations by the Administrative State. NCLA’s public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans’ fundamental rights.

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