IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.	)	
	)	
Plaintiff,	)	Civil Action No. 1:07-cv-01267 (JR)
	)	
v.	)	
	)	
U.S. NATIONAL ARCHIVES AND RECORDS ADMINISTRATION,	)	
	)	
Defendant.	)	
	)	

PLAINTIFF'S RESPONSE TO DEFENDANT'S
STATUS REPORT AND PROCESSING SCHEDULE

Plaintiff, Judicial Watch, Inc. ("Judicial Watch"), respectfully submits this response to Defendant's Status Report and Processing Schedule:

MEMORANDUM OF LAW

I. Factual Background.

Judicial Watch is a non-profit, educational foundation organized under the laws of the District of Columbia. Verified Complaint for Declaratory and Injunctive Relief ("Verified Complaint") at para. 3. Judicial Watch seeks to promote integrity, transparency, and accountability in government and fidelity to the rule of law. *Id.* In furtherance of its public interest mission, Judicial Watch regularly serves Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, requests on Federal, state, and local government agencies, entities, and offices, and disseminates its finding to the public. *Id.*

The Presidential Records Act ("PRA"), 44 U.S.C. § 2201 *et seq.*, establishes a five-year moratorium on the disclosure of presidential records after a president leaves office. After five years, presidential records become subject to FOIA requests, unless a president expressly

designates a longer period of time, not to exceed twelve years. On January 20, 2006, the five-year moratorium on the records of former President William Jefferson Clinton expired. On or about April 5, 2006, Plaintiff sent a FOIA request to the Clinton Presidential Library ("the Library"), which is operated and maintained by Defendant and serves as the repository for former President Clinton's records, requesting access to the following:

> First Lady Hillary Rodham Clinton's calendars, to include but not limited to her daily office diary, schedule, day planner, telephone log book, and chronological file.

Id. at para. 5. The time-frame for the request was from January 1, 1993 to January 20, 2001, which approximates the time period during which Mrs. Clinton served as First Lady. *Id.*

By letter dated April 13, 2006, the Library acknowledged receiving Plaintiff's FOIA request on April 5, 2006 and notified Plaintiff that it had assigned the request FOIA Case No. 2006-0886-F. *Id.* at para. 7. The Library also acknowledged that it possessed a substantial volume of records potentially responsive to the request. *Id.* Pursuant to 5 U.S.C. § 552(a)(6)(A)(I), the Library was required to respond to the request within twenty working days, or on or before May 3, 2006. As of July 16, 2007, in excess of one year beyond the due date for a response, the Library failed to produce any records responsive to the request or demonstrate that responsive records are exempt from production. *Id.* at para. 9. The Library also failed to avail itself of the extension of time provision contained in the statute. 5 U.S.C. § 552(a)(6)(A), (B). As a result, Judicial Watch had no other recourse but to file this lawsuit, which it did on July 17, 2007. At the same time, Plaintiff filed an application for injunctive relief.

On August 30, 2007, the Court denied Plaintiff's application for injunctive relief, but ordered Defendant to "file a dispositive motion or, in the alternative, to file a report setting

forth the schedule according to which it will complete its production of documents to Plaintiff" within thirty days. On October 2, 2007, Defendant filed a twenty-two page document entitled "Defendant's Status Report and Processing Schedule" ("Def.'s Report"), which was accompanied by a fifteen page declaration.[1] In the report, Defendant estimates that it will complete its review of approximately 10,000 pages of records, constituting Mrs. Clinton's daily schedule as First Lady, by the end of January 2008. Def.'s Report at 1. While Defendant acknowledges that there are an additional 20,000 pages of telephone log books potentially responsive to Plaintiff's request, Defendant fails to give *any* estimate of when it will complete its review of these records. *Id.*

Defendant also asserts, however, that, upon completion of its review of the records, an indefinite period of additional time is required to permit "presidential review" for possible claims of privilege before the records are made public. *Id.* at 2-3. Defendant thus requests an indefinite stay of this litigation, citing *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976).

Plaintiff does not object to Defendant's projected date of January 2008 to complete its processing of the 10,000 pages of Mrs. Clinton's daily schedule. Plaintiff does object, however, to Defendant's failure to provide *any* estimate of the date by which it will complete its processing of the 20,000 pages of telephone log books. Plaintiff also objects to staying this litigation indefinitely. Not only has Defendant failed to satisfy its burden of demonstrating that a stay is warranted to allow it additional time to complete its processing of responsive records, but Defendant's assertion that it must have an indefinite period of time to permit "presidential

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[1] Technically, Defendant's filing was one day late.

review" is contrary to Defendant's own regulations and is inconsistent with an injunction entered against Defendant on October 1, 2007.

II. Argument.

A. FOIA Requires Timely Production.

"The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). FOIA also prevents excessive government secrecy. In enacting FOIA, "Congress sought to open agency action to the light of public scrutiny." *U.S. Department of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989); *see also Department of Justice v. Reporters Committee*, 489 U.S. 749, 772 (1989); *Department of Air Force v. Rose*, 425 U.S. 352, 372 (1976). Records are "presumptively disclosable unless the government can show that one of the enumerated exemptions applies." *Consumer Federation of America v. Department of Agriculture*, 455 F.2d 283, 287 (D.C. Cir. 2006) (quoting *Bureau of National Affairs, Inc. v. U.S. Department of Justice*, 742 F.2d 1484, 1498 (D.C. Cir. 1984).

Equally important to effectuating the purpose of FOIA is ensuring that agency records be disclosed in a timely manner. As the legislative history of FOIA makes clear, Congress recognized that delay in releasing information can be "tantamount to denial" of access. *See* H. Rep. No. 876, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News, 6267, 6271. "The value of information is partly a function of time." *Fiduccia v. United States DOJ*, 185 F.3d 1035, 1041 (9th 1999). Consequently, agencies are required to determine within twenty days of the receipt of a request for records "whether to comply with such request" and "to

immediately notify the person making such request of such determination and the reasons thereof." 5 U.S.C. § 552(a)(6)(A)(i). This time limit can be extended by ten working days if the agency determines that "unusual circumstances" exist. 5 U.S.C. § 552(a)(6)(B).

Although more than eighteen months have passed since Defendant received Plaintiff's FOIA request on April 5, 2006, Defendant has not produced *any* responsive records to Plaintiff. Defendant admits that it has not yet completed processing even a portion of the records responsive to the request and did not even begin processing these records until June 14, 2007. Def.'s Report at 1, 13. Not only has Defendant completely failed to comply with FOIA's twenty-day time period, but, when pressed by the Court to provide a schedule for completing its production of records to Plaintiff, Defendant failed to provide even a final, concrete estimate of when it expects to be able to produce responsive records.[2] Defendant's conduct demonstrates a complete disregard for the law.

B. Defendant Failed to Satisfy Its Burden of Demonstrating That a Stay is Warranted.

FOIA's twenty day time limit may be extended if an agency makes a showing that it is facing "exceptional circumstances" and is "exercising due diligence" in responding to a request. *See* 5 U.S.C. § 552 (a)(6)(C)(I). This "safety valve" provision was "carefully crafted to put a substantial burden on the government to justify to the courts any noncompliance with FOIA time limits." *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605, 617 (D.C. Cir. 1976). In *Open America*, the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") found that "exceptional circumstances" exist only when an agency meets the following

[2] Indeed, in every case cited by Defendant in which a stay was sought, the agency provided a date certain by which it proposed to complete its processing of a request.

test: (1) the agency is deluged with a volume of requests for information "vastly in excess" of that anticipated by Congress; (2) the agency's existing resources are inadequate to deal with the volume of such requests within the time limits set forth by FOIA; and (3) the agency can show that it is exercising due diligence in processing the request. *Open America*, 547 F.2d at 616.

In 1996, Congress passed the Electronic Freedom of Information Act Amendments ("E-FOIA Amendments") to address, in part, "the single most frequent complaint about the operation of the FOIA: agency delays in responding to FOIA requests." *See* H. Rep. No. 795, 104th Cong., 2d Sess., *reprinted in* 1996 U.S. Code Cong. & Admin. News, 3448, 3466. In enacting the E-FOIA Amendments, Congress declared:

> In *Open America* . . . the District of Columbia Circuit Court of Appeals held that exceptional circumstances exist when the agency can show it has inadequate resources to process FOIA requests within statutory time limits . . . Relying upon overly broad dictum in this case, agencies have employed the exceptional circumstances -- due diligence exception to obtain judicial approval for lengthy delays whenever they have a backlog.
>
> Backlogs of requests for records under the FOIA should not give agencies an automatic excuse to ignore the time limits.

See H. Rep. No. 795, 104th Cong., 2d Sess., *reprinted in* 1996 U.S. Code Cong. & Admin. News, 3448, 3456-57. With the E-FOIA Amendments, Congress doubled the time allowed to agencies to respond to FOIA requests, but expressly limited those circumstances previously considered exceptional:

> For purposes of this subparagraph, the term "exceptional circumstances" does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

5 U.S.C. § 552(a)(6)(C)(ii). Courts have denied stays where agencies have shown no more than predictable workloads or have failed to show reasonable progress in reducing the backlog of pending requests. *Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 259 (D.D.C. 2005); *Wilderness Society v. United States Department of the Interior*, 2005 U.S. Dist. LEXIS 20042, *32-34 (D.D.C. September 12, 2005); *Hunter v. Christopher*, 923 F. Supp. 5, 8 (D.D.C. 1996).

1. Defendant Failed to Demonstrate the Existence of "Exceptional Circumstances" Warranting a Stay.

Defendant fails to demonstrate that "exceptional circumstances" exist warranting a stay of this lawsuit.

First, Defendant has not demonstrated that the volume of requests it has received is "vastly in excess" of anything contemplated by Congress or that this volume is anything more than a predictable agency workload. Defendant must have been aware that the Library would receive a high volume of FOIA requests, especially considering that: (1) the Clinton presidency was highly controversial and the subject of an unprecedented degree of media and public scrutiny; (2) President Clinton is one of only two presidents to be impeached in the history of the United States; (3) Mrs. Clinton played a particularly prominent role in her husband's presidency; (3) while First Lady, Mrs. Clinton ran for and was elected to the U.S. Senate and currently is a sitting U.S. Senator for the State of New York; (4) Mrs. Clinton had long been considered a likely candidate for the Presidency of the United States and formally declared her candidacy nearly a year ago; (5) Mrs. Clinton is widely considered to be the "front runner" for the Democratic Party's nomination; and (6) if elected, Mrs. Clinton would be the first female

President of the United States and the first spouse of a former president to be elected. In short, Defendant should have known that public interest in the records of the Clinton Library would be substantial, and it also should have known that the number of requests for records would likely exceed by a substantial margin the number of requests received by the libraries of President Clinton's predecessors. It simply is not credible for Defendant to assert that it has been "burdened" with an "unprecedented" number of FOIA requests. A predictable workload yields nothing more than a predictable backlog.

Second, the "sheer total volume of records" held by the Clinton Library does not constitute an "exceptional circumstance" under FOIA, nor should it excuse Defendant's delay in failing to meet FOIA's statutorily mandated time period. Defendant must have been fully aware, long before the five-year moratorium on the disclosure of Clinton presidential records expired, of the volume of records the Library would be required to review in order to process and respond to FOIA requests. Under the PRA, Defendant had five years time to coordinate, organize, and index the Library's records in order to prepare for the inevitably large number of FOIA requests the Library would likely receive. Nonetheless, Defendant admits the Library waited until shortly before the moratorium expired to send two of its archivists to the George H.W. Bush Presidential Library in College Station, Texas to review the Bush Library's handling of FOIA requests. Def.'s Report at 16. Defendant's assertion that the Library's staff participated in "one or more" training exercises and was briefed via telephone conference by Defendant's staff on "FOIA processing issues" demonstrates a particularly lackluster effort to try to satisfy its FOIA obligations. *Id.*

Third, "inadequate staff, insufficient funding or a great number of requests are not within the meaning of 'exceptional circumstances' as that language is used in the statute nor were they within the contemplation of its framers as evidenced by the legislative history." *Hamlin v. Kelley*, 433 F. Supp. 180, 182 (N.D. Ill. 1977). Defendant's claim that the Library's resources are insufficient to address the number of FOIA requests it receives does not justify a stay.

In addition to not being able to demonstrate "exceptional circumstances," Defendant has failed to show that the Library is making reasonable progress in reducing its backlog of pending requests. Instead, it appears that the backlog of requests is multiplying at an ever-increasing rate. Defendant asserts that the Library received 211 FOIA requests in the first three months following the expiration of the PRA moratorium. Def.'s Report at 10. Of these 211 FOIA requests, it has taken the Library twenty one months to process only 57 requests. *Id.* Since the first three months, however, the Library received an additional 186 requests. *Id.* Clearly, the Library has not gained any ground. Rather, it appears to be falling further behind as its backlog is increasing. Defendant's request for a stay should be denied for the additional reason that the Library has failed to demonstrate reasonable progress in reducing its backlog of pending requests.

2. Defendant Failed to Demonstrate That it Exercised "Due Diligence" in Responding to Plaintiff's Request.

Defendant's effort to show "due diligence" in responding to Plaintiff's request is also lacking. Defendant appears to try to make this showing by citing budgetary proposals for possible future increases in personnel for Fiscal Year 2009 and a 2007 in-house study conducted by the Office of Presidential Libraries and Defendant's Presidential Materials Staff discussing ways to achieve faster processing. Def.'s Report at 19-20. Neither of these points demonstrate

that Defendant has acted with due diligence in processing *Plaintiff's* request. Instead, the possibility of added personnel and "streamlining" of the FOIA request process only demonstrates how the Library *might* treat *future* FOIA requests with due diligence.

The Library has not, in fact, treated Plaintiff's request with due diligence. Defendant admits that the Library did not even begin to process a portion of Plaintiff's April 5, 2006 request until June 14, 2007, more than fourteen months after the request was received. Def.'s Report at 2, 13. Defendant also admits that, although the Library received similar requests prior to receiving Plaintiff's April 5, 2006 request and subsequently received "two or more" additional requests for similar records, the Library did not add a queue for records that are the subject of multiple requests until just "recently." Def.'s Report at 9, 13. Such treatment simply does not amount to due diligence.

In sum, Defendant has failed to carry its burden of demonstrating that "exceptional circumstances" exist and that it is exercising "due diligence" in responding to Plaintiff's request. Defendant has failed to show that any stay, much less a stay of indefinite duration, is warranted.

C. Defendants' Reliance on Executive Order 13233 to Justify An Indefinite Stay is Unlawful.

In 1978, Congress enacted the PRA to establish public ownership and control of presidential records and to provide public access to presidential records after a president leaves office. *Nixon v. United States*, 978 F.2d 1269, 1277 n.19 (D.C. Cir. 1992). The PRA directs that the "Archivist shall have an affirmative duty to make such records available to the public as rapidly and completely as possible consistent with the provisions of this Act." 44 U.S.C. § 2203(f)(1). The PRA requires that the Archivist give a former president notice "when the

disclosure of particular documents may adversely affect any rights and privileges which the former President may have." 44 U.S.C. § 2206(3).

The PRA established that the Archivist may promulgate regulations to "carry out the provisions of this chapter." *Id.* at § 2206. Defendant lawfully promulgated such regulations in accordance with the Administrative Procedure Act. *See* 36 C.F.R. § 1270.46. Those regulations provide that, whenever the Archivist intends to make public any presidential record, a former president must be given thirty days written notice to allow him to assert any rights or privileges that might foreclose access to the materials. 36 C.F.R. § 1270.46(a) and (d). Once this thirty day notice period has expired, the Archivist is free to release the records, unless the former president asserts that some or all of the records are subject to a claim of privilege. *Id.* at § 1270.46(c) and (d). If, in such case, the Archivist nevertheless determines the records in question should be disclosed, appropriate notice must be given to the former president and the Archivist must wait an additional thirty days before releasing the records. *Id.* at § 1270.46(c) and (d). Copies of all notices are to be provided to the incumbent president as well. *Id*. at § 1270.46(e).

On November 1, 2001, President Bush issued Executive Order 13233, entitled "Further Implementation of the Presidential Records Act." Executive Order 13233 provides that the Archivist must notify both the former president *and* the incumbent of any request for access to presidential records subject to the PRA and must provide both the former and incumbent president with copies of the relevant records upon their request. Executive Order 13233, § 3(a). The order further provides:

> After receiving the records he requests, the former President shall review those records as expeditiously as possible, and for no longer than 90 days for requests that are not unduly burdensome. The Archivist shall not permit access to the

> records by a requester during this period of review or when requested by the former President to extend the time for review.

Executive Order 13233, § 3(b).[3]

On October 1, 2007, the Hon. Colleen Kollar-Kotelly, U.S.D.J., declared Defendant's reliance on section 3(b) of Executive Order 13233 to be "arbitrary, capricious, an abuse of discretion, and not in accordance with law in violation of the [Administrative Procedures Act]" in another lawsuit involving the PRA. *See National Historical Association v. NARA*, Civ. No. 01-2447, Slip Op. (D.D.C. Oct. 1, 2007) (Kollar-Kotelly, J.), attached hereto as Exhibit 1. Specifically, the Court found:

> [Executive Order 13233] effectively eliminates the Archivist's discretion to release a former president's documents while such documents are pending a former president's review, which can be extended -- presumably indefinitely -- upon the former president's request . . . Furthermore, [Executive Order 13233] provides a 90-day floor for a former president's review of documents. While Defendants are correct that 36 C.F.R. § 1270.46(d) does not specify a "maximum" time for review, Defendants seem to miss that after 30 days from a former president's receipt of notice of documents to be disclosed, the Archivist may make a discretionary decision with respect to the release of such documents though they are pending the former president's review. Accordingly, in relying on § 3(b) of [Executive Order], the Archivist effectively denies himself the discretion (and accordingly the need to make reasoned, discretionary decisions with respect to the length of review) to release documents still under a former president's review as he is permitted to do pursuant to 36 C.F.R. § 1270.46(d).

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[3] Executive Order 13233 also requires that the incumbent president have the opportunity to review records for an indeterminate amount of time "to decide whether to concur with the former president's decision to request withholding or authorize access to the records" (*see* Executive Order 13233, § 3(d)), thus adding another step to the review process not set forth in the PRA or its implementing regulations and further delaying public disclosure.

Id. at 33-34 (internal citations and quotations omitted). The Court therefore enjoined "the Archivist from further relying on Section 3(b) of Executive Order 13,233."[4] *Id.* at 37-38.

Nonetheless, the very next day, Defendant filed its status report, in which it invoked the exact same portion of Executive Order 13233 that the Court in *National Historical Association* had declared to be unlawful and enjoined Defendant from relying on further. Defendant asserted:

> NARA cannot provide a *production* schedule because of the right afforded to representatives of the incumbent and former Presidents to review Presidential records prior to public disclosure. Under Executive Order 13233, 44 U.S.C. § 2206, 36 C.F.R. § 1270.46 and consistent with constitutional principles of executive privilege, the former President maintains time to review any records otherwise set for disclosure by NARA and the incumbent maintains additional time to concur with the former President's disclosure decisions.

Def.'s Report at 3. While Defendant also asserted that it would not take any action inconsistent with the Court's injunction (*see* Def.'s Report at 3 n.1 & 7 n.2), it appears to have done precisely that. *See*, *e.g.*, Def.'s Report at 3, 7-8, 20-22.

If, as Defendant asserts, it truly means to comply with the PRA, its own regulations implementing the PRA, and the Court's injunction in *American Historical Association*, it only needs to provide thirty days notice of its intent to disclose records. 6 C.F.R. § 1270.46(a). Once the thirty day notice period expires, it is free to disclose the records. 36 C.F.R. § 1270.46(c) and (d). In the event former President Clinton asserts that any or all of the records should not be made public because of some claim of right or privilege, Defendant is still free to produce the records, provided that another thirty days notice is given to former President Clinton. 36 C.F.R.

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[4] The order accompanying the Court's ruling expressly states, "This is a final, appealable order." *See National Historical Association v. NARA*, Civ. No. 01-2447, Order (D.D.C. Sept. 30, 2007), attached as Exhibit 1. No appeal has been taken, and the Court was not asked to stay its ruling pending the outcome of any appeal. Nor has any such stay been entered.

§ 1270.46(c) and (d). There is no lawful reason why Defendant must wait an indefinite period of time to "permit presidential review." As the Court found in *American Historical Association*, Defendant has the discretion to release records even though they are still pending a former president's review. Exhibit 1 at 34. Defendant can produce responsive records as early as thirty days after notice has been given under 36 C.F.R. § 1270.46. Consequently, there is no need for an indefinite stay.

It is axiomatic that an agency must abide by its own regulations. *Cherokee National of Oklahoma v. Babbitt*, 117 F.3d 1489, 1499 (D.C. Cir. 1997). If Defendant abides by 36 C.F.R. § 1270.46, responsive records could be released to Plaintiff as early as the end of February or early March 2008. If the Library completes its processing of Mrs. Clinton's daily schedule by the end of January 2008, Defendant need only provide thirty days notice before releasing the records to Plaintiff. 36 C.F.R. § 1270.46(a) and (d). The Court should not allow Defendant to use provisions of Executive Order 13233 that have been declared to be unlawful, and on which further reliance has been expressly enjoined, to indefinitely delay the production of responsive records to Plaintiff. Defendant need only comply with the requirements of 36 C.F.R. § 1270.46.

III. Conclusion.

For the foregoing reasons, Defendant should be required to complete its processing of Mrs. Clinton's daily schedule by the end of January 2008 and provide prompt notice of disclosure under 36 C.F.R. § 1270.46. Similarly, Defendant should be required to complete its processing of the telephone logs at issue by a reasonable date certain and again provide prompt notice of disclosure under 36 C.F.R. § 1270.46. To the extent Defendant determines that any responsive records should be withheld, Defendant should be required to produce appropriate

Vaughn Indexes within these same time periods. Defendant's request for an indefinite stay of this lawsuit pursuant to *Open America* should be denied.

Dated: November 7, 2007

Respectfully Submitted,

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