UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF JUSTICE,

Defendant.

Civil Action No. 12-1510 (JDB)

ORDER

After the last round of motions in this Freedom of Information Act ("FOIA") case concerning Operation Fast and Furious documents, this Court ordered the Department of Justice to "submit a Vaughn index . . . by not later than October 1, 2014." 7/18/14 Order [ECF No. 38] at 9. But the Department has now asked for more time. It would prefer to submit its Vaughn index on November 3, Def.'s Mot. for Extension of Time [ECF No. 43] ("Def.'s Mot.") at 1, and plaintiff Judicial Watch, Inc. has consented to this motion—in part. Judicial Watch thinks the Department should be able to complete and submit its index by October 17. See Pl.'s Resp. to Def.'s Mot. [ECF No. 44] at 2. For the reasons explained below, the Court will grant in part the Department's motion and extend the Vaughn index deadline by twenty-one days to October 22, 2014.

BACKGROUND

The facts of this case are not new. In 2011, the House Oversight and Government Reform Committee issued a subpoena to the Attorney General of the United States, seeking documents related to a congressional investigation into a Bureau of Alcohol, Tobacco, Firearms

and Explosives operation known as Operation Fast and Furious. In response, President Barack Obama invoked executive privilege and withheld the subpoenaed documents.

Two things happened next. First, the House Committee filed suit to enforce its subpoena. That case is pending before Judge Amy Berman Jackson, another judge in this district. See, e.g., Comm. on Oversight & Gov't Reform, U.S. House of Representatives v. Holder, 979 F. Supp. 2d 1 (D.D.C. 2013) ("House Committee"). And second, Judicial Watch submitted a FOIA request for all records subject to the President's executive-privilege claim—in other words, the very same records at issue in the House Committee lawsuit. See Pl.'s Compl. [ECF No. 1] at 2. The Department of Justice denied Judicial Watch's request, id. at 2–3, and this lawsuit followed. Although this Court initially stayed the FOIA case due to the pending House Committee litigation, the Court partially lifted that stay on July 18, 2014, and required the Department to produce a Vaughn index for the withheld documents by October 1.

The House Committee case has progressed further in recent weeks. On August 20, Judge Jackson denied the parties' motions for summary judgment, and directed the Department of Justice "to conduct a document-by-document analysis of the withheld material . . . and to prepare by October 1, 2014, a detailed list that identifies and describes the material in a manner sufficient to enable resolution of any privilege claims." Def.'s Mot. at 5 (internal quotation marks omitted). "The Court also ordered the Department to produce to the [House] Committee . . . all non-deliberative documents or non-deliberative portions of documents over which Executive Privilege had been asserted." Id. When the Department argued that it could not meet the court's deadline (and asked for a new one of December 15), Judge Jackson agreed to shift the due date—but only until November 3. Id. at 6–7. The Department's motion for an extension of time to file its Vaughn index in this case followed closely on the heels of that decision.

DISCUSSION

As this Court has made clear, "it is time for this case to move forward." 7/18/14 Order at 9. On July 18, this Court gave the Department of Justice 75 days—until October 1—to produce a Vaughn index. The Court did not require the government to release any documents. See id. ("To be clear, the Court is not ordering the release of any documents currently being withheld in this litigation or in House Committee."). And it did not place any obligations on the Department above and beyond those mandated by Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973). See 7/18/14 Order at 7–8 (describing the usual Vaughn index requirements). Certainly, there are several thousand documents in dispute, representing several more thousand pages of text. See Def.'s Mot. at 4 ("[T]here are approximately 15,000 documents, extending over 64,000 pages, withheld pursuant to the assertion of Executive Privilege."). But seventy-five days—plus another twenty-one, based in part on Judiciary Watch's consent—is enough time for the government to prepare the index that this Court has ordered, given that this matter has been pending for over two years. The Court will therefore extend the Department's Vaughn index submission deadline to October 22, 2014—and no further.

The government's arguments for even more time are unconvincing. The Department first points to Judge Jackson's November 3 deadline in House Committee. See Def.'s Mot at 7. Because November 3 was appropriate in that case, the argument seems to go, November 3 must be equally appropriate in this case. But this misreads Judge Jackson's opinion. As that court reasoned, "[s]ince the deadline in Judicial Watch was set first, it makes sense for defendant to complete that effort and then turn his attention to the list that is due in this case." Ex. B to Def.'s Mot. [ECF No. 43-2] at 4. In other words, Judge Jackson thought it prudent to allow the Department to complete its Vaughn index first, and then give the Department extra time to

complete the more detailed list—and produce the documents—required by the House Committee order. This rationale counsels against dramatically shifting the goalposts in this case.

The government argues next that the sheer volume of documents involved in this case requires additional time to produce a Vaughn index, and it relies on the declaration testimony of Allison Stanton, a Director of E-Discovery at the Department of Justice, to substantiate this claim. But the government makes too much of Stanton's testimony. She produced her declaration as part of the House Committee case, and her testimony describes the Department's difficulties in responding to the order in that case. Stanton's testimony begins with a run-down of the House Committee requirements: The Department must submit "a detailed list that identifies and describes the [withheld material] in a manner sufficient to enable resolution of any privilege claims"; "[t]he list must set forth at a minimum the author, recipient(s), and general subject matter of the record being withheld, as well as the basis for the assertion of the privilege"; and the list must "specify[] the decision that the deliberations contained in the document precede, the date on which such record was created and/or transmitted, and the date of any asserted underlying policy decision." Ex. A to Def.'s Mot. [ECF 43-1] ("Stanton Decl.") at 8 (internal quotation marks omitted). What's more, Stanton notes that the Department must actually "produce" some previously withheld documents to the House Committee. Id. at 3. Based on these requirements, Stanton concluded that the Department could not meet Judge Jackson's deadline. But all of this is quite beside the point in this case. Nowhere does Stanton mention the present FOIA litigation or this case's (much less onerous) Vaughn index requirement. And so nowhere does Stanton conclude that the Department is unable to meet its Vaughn obligations within the time prescribed. Without any concrete evidence to the contrary, the Court must therefore conclude that October 22 is time enough.

Finally, the government argues that it must devote significant numbers of attorneys to this matter if it hopes to comply with the current Vaughn index deadline, and it suggests that it needs an extra month to bring those attorneys up to speed on this case. See Def.'s Mot. at 8. This might be true. But the Department has known about its Vaughn index obligations since July 18, 2014. To argue now—some two months after this Court's July Order—that "new reviewers must be assigned to this matter who do not yet have detailed knowledge of this case" and who "must have time to learn the context and background of individual documents" is unpersuasive. Stanton Decl. at 5. At best, it means the Department has been slow to react to this Court's previous Order. At worst, it means the Department has ignored that Order until now. Therefore, upon consideration of [43] the government's motion for an extension of time to submit a Vaughn index, the various memoranda filed by the parties, and the entire record herein, it is hereby

ORDERED that [43] the government's motion for an extension of time is **GRANTED IN PART**; it is further

ORDERED that the deadline by which the Department of Justice must submit the Vaughn index described in this Court's Order of July 18, 2014, is **EXTENDED** until October 22, 2014; and it is further

ORDERED that the parties shall file a joint status report with the Court within fourteen days of any significant development in House Committee, but in any event by not later than November 7, 2014, at which time the Court will assess the future course of this case.

SO ORDERED.

/s/
JOHN D. BATES
United States District Judge

Dated: September 23, 2014