

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

JUDICIAL WATCH, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF STATE,

Defendant.

Civil Action No. 15-646 (CKK)

**ORDER**

(September 21, 2017)

This case under the Freedom of Information Act (“FOIA”) concerns Plaintiff’s request to Defendant for the disclosure of (1) “[a]ny and all records of requests by former Secretary of State Hillary Rodham Clinton or her staff to the State Department Office of Security Technology seeking approval for the use of an iPad or iPhone for official government business” and (2) “[a]ny and all communications within or between the Office of the Secretary of State, the Executive Secretariat, and the Office of the Secretary and the Office of Security Technology concerning, regarding, or related to the use of unauthorized electronic devices for official government business between January 1, 2009 and January 31, 2013.” Compl., ECF No. 1, ¶ 5. Pending before the Court are the parties’ cross-motions for summary judgment. ECF Nos. 25, 29.

The dispute in this litigation has narrowed to the following document numbers, portions of which have been withheld pursuant to the deliberative process privilege by way of FOIA Exemption 5, which incorporates certain common law privileges: C05838711, C05838715, C05838716, C05838718, C05838724, C05838732, C05891089, C05891096, C05891104, C05891119, C05891125, C05891126, and C05891139. *See* Pl.’s Mem. in Supp. of Cross-Mot. for Summ. J., ECF No. 29 (“Pl.’s Mem.”), at 5–6. Plaintiff does not contest that the redacted portions are deliberative and pre-decisional—the factors that determine whether the deliberative process

privilege applies, *see Judicial Watch, Inc. v. U.S. Dep't of Defense*, 847 F.3d 735, 739 (D.C. Cir. 2017)—but contends that the privilege is vitiated by the “government misconduct” exception. Pl.’s Mem. at 7. As relief, Plaintiff seeks either the disclosure of the portions of these documents that have been redacted pursuant to the deliberative process privilege, or “at minimum,” *in camera* review by the Court. *Id.* at 1.

Given the difficulty of adjudicating the applicability of the government misconduct exception in the abstract—assuming such an exception exists at all—and the practical reality that this litigation has reduced to relatively small portions of thirteen documents, the Court shall order *in camera* review of the contested materials. 5 U.S.C. § 552(a)(4)(B); *see Larson v. Dep't of State*, 565 F.3d 857, 869–70 (D.C. Cir. 2009) (“*In camera* review is available to the district court if the court believes it is needed to make a responsible de novo determination on the claims of exception.” (internal quotation marks omitted)). Several district courts in this circuit have similarly ordered *in camera* review when assessing whether alleged government misconduct vitiates the deliberative process privilege. *Nat'l Whistleblower Ctr. v. U.S. Dep't of Health & Human Servs.*, 903 F. Supp. 2d 59, 68 (D.D.C. 2012) (Boasberg, J.) (collecting cases). Furthermore, given the nature of the deliberative process privilege and the claimed government misconduct exception, a supplemental *Vaughn* index would likely not shed additional light on the contested issues without to some degree disclosing the very matter that Defendant has determined should be withheld. *Cf. Larson*, 565 F.3d at 870 (“when the agency meets its burden by means of affidavits, *in camera* review is neither necessary nor appropriate” (internal quotation marks and alteration omitted)). Accordingly, in an exercise of its “broad discretion” on this front, *id.*, the Court shall grant Plaintiff’s motion for summary judgment solely to the extent it seeks *in camera* review of the

portions of the documents listed above that have been withheld pursuant to the deliberative process privilege.

In addition, Plaintiff contends that Defendant should be required to conduct a supplemental search of certain additional emails allegedly recovered by the Federal Bureau of Investigation on October 28, 2016. *See* Pl.’s Mem. at 9. Defendant responds principally on the basis that it is not required to search these materials, because they “are not yet in State’s possession, nor is there any indication when they will be.” Def.’s Opp’n to Pl.’s Cross-Mot. for Summ. J., ECF No. 30, at 8. FOIA reaches “only records the agency controls at the time of the request,” and four factors are used to evaluate whether an agency controls a document: “(1) the intent of the document’s creator to retain or relinquish control over the records; (2) the ability of the agency to use and dispose of the record as it sees fit; (3) the extent to which agency personnel have read or relied upon the document; and (4) the degree to which the document was integrated into the agency’s record system or files.” *Judicial Watch, Inc. v. Fed. Hous. Fin. Agency*, 646 F.3d 924, 926–27 (D.C. Cir. 2011) (internal quotation marks omitted). While it may be true that the additional October 2016 materials were not within Defendant’s control at the time of Plaintiff’s FOIA request, the Court cannot rely on Defendant’s bald assertion to that effect in a legal brief. Rather, Defendant must furnish the Court with an affidavit addressing the four elements by which agency control is assessed in the FOIA context.

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In light of the foregoing, Plaintiff’s [29] Motion for Summary Judgment is GRANTED solely to the extent it seeks *in camera* review. For all other purposes, the pending cross-motions for summary judgment, ECF Nos. 25, 29, are DENIED WITHOUT PREJUDICE. The thirteen documents listed above shall be furnished to the Court, under seal and *ex parte*, for *in camera*

