

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

JUDICIAL WATCH, INC.

Plaintiff,

v.

U.S. DEPARTMENT OF STATE,

Defendant.

Civil Action No. 14-cv-1242 (RCL)

**DEFENDANT’S OPPOSITION TO PLAINTIFF’S
MOTION FOR A STATUS CONFERENCE**

There is no need, let alone an urgent one, for a status conference in this Freedom of Information Act (“FOIA”) case. The purported need is the recent media reports about former Secretary of State Clinton’s use of personal email for official business, but the Department of State (“the Department”) has already searched the emails provided by former Secretary Clinton for records responsive to plaintiff Judicial Watch’s FOIA request, enabling it to meet the deadlines in place in this case. Specifically, on April 2, 2015—a mere week after the status conference Judicial Watch seeks—the Department will provide Judicial Watch with any responsive records, a draft search declaration, and, if necessary, a revised *Vaughn* index. In light of the Department’s intention to meet the April 2 deadline, of which Judicial Watch is aware, there is simply no need for a status conference at this time.

BACKGROUND

In this FOIA case, Judicial Watch sought from the State Department’s Office of the Secretary copies of talking points, given to Ambassador Rice by the White House or any federal agency, about the September 12, 2012 attacks on the U.S. consulate in Benghazi, and

communications about such talking points. In September, 2014, the Department filed a motion seeking to revise the Court's scheduling order; Judicial Watch did not object to the relief sought in that motion. The Court adopted the proposed schedule, setting the following deadlines:

(1) November 12, 2014 for the Department to produce to Judicial Watch all non-exempt, responsive documents subject to the FOIA; (2) December 5, 2014 for the Department to produce to Judicial Watch a draft *Vaughn* index; (3) December 19, 2014 for Judicial Watch to provide to the Department any objections to the withholdings described in the draft *Vaughn* index and the parties to confer thereafter to attempt to resolve this matter without litigation; (4) January 2, 2015 for the parties to file a joint status report. *See* Def.'s Mot. for Scheduling Order (ECF No. 8); Order of Sep. 15, 2014 (ECF No. 9).

These deadlines were met: the Department conducted a search reasonably calculated to uncover all responsive documents in its custody and control and produced four responsive documents on November 12, 2014¹ and a draft *Vaughn* index on December 5, 2014. Judicial Watch raised no objections to the withholdings described in the *Vaughn* index, but asked for a description of the search. The parties conferred and, in an effort to resolve the litigation, the Department agreed to provide a draft declaration describing the searches it had conducted. Judicial Watch agreed to allow the Department until February 2, 2015, to provide the draft search declaration. The parties filed a joint status report on December 31, 2014 reflecting this agreement. Joint Status Report (ECF No. 10).

¹ Though Judicial Watch expresses "surprise" at the limited number of responsive documents, Pl.'s Mot. at 4, its FOIA request is, in fact, quite limited in scope. It does not seek all records relating to the attacks of September 11, 2012 in Benghazi, but rather only "talking points and updates to those talking points, not general intelligence updates about the Benghazi attacks (unless those updates were sent in furtherance of developing or updating talking points)," Ex. 1 (Email from Ramona Cotca, Sep. 12, 2014) (confirming scope of request). Judicial Watch does not even allow for the possibility that there are no emails by or to Secretary Clinton responsive to the request. *See, e.g.*, Pl.'s Mot. at 2 (assuming the existence of responsive emails within the Office of the Secretary).

The Department became aware of several additional searches it needed to conduct, including a search of the emails of former Secretary of State Hillary Clinton that the Department received after the conclusion of the search for, and production of, responsive documents.² After discussions between counsel, during which counsel for Judicial Watch was informed by phone that the searches involved emails that were not addressed during the initial search, Judicial Watch agreed to give the Department until April 2, 2015 to conduct the additional searches, produce any responsive documents and, if necessary, a revised *Vaughn* index, and to provide a draft search declaration.

The Department has completed the additional searches. The Department is in the process of drafting a declaration describing those searches, as well as the searches conducted in September, 2014, and will provide it to counsel for Judicial Watch, as agreed, on or before April 2, 2015.

When Judicial Watch informed the Government of its intention to seek a status conference because of news reports about former Secretary Clinton's emails, the Government told Judicial Watch that the Department had searched the emails provided by former Secretary Clinton for responsive records, and that it still planned on meeting the April 2 deadline. Pl.'s

² Given the considerable public interest generally in the emails provided by former Secretary Clinton to the Department of State, the Department plans to review the collection for public release and to make the documents available to the public by posting them on a Department website. This will make the maximum number of records available in the shortest amount of time, and, as a general matter, will be considerably more efficient than reviewing the documents piecemeal in response to subject-specific FOIA requests. In this case, the supplemental search of the records that Ms. Clinton provided was completed before the Department's March 5, 2015 announcement that it would be processing all of the records provided by former Secretary Clinton for public release.

Mot., Ex. 3 at 1. Judicial Watch nonetheless pressed forward with its demand for a status conference.³

ARGUMENT

Judicial Watch provides no basis for its request for the Court to hold a status conference next week. It first contends that a status conference is necessary because it “should not have to rely on public reports to understand what efforts are being undertaken to produce all responsive, non-exempt, records” Pl.’s Mot. at 5. But Judicial Watch has not had to rely on public reports—the Government has been communicating directly with Judicial Watch about its search efforts, as it has previously done in this case and as is its practice in FOIA litigation. Judicial Watch also contends that it will “save the Court and the parties time and resources to address these issues while a supplemental search is being conducted,” *id.*, but as the Government made clear to Judicial Watch before Judicial Watch filed its motion, a search by the Department of the Clinton emails for records responsive to the request in this case has already been done.⁴

Nor is a status conference necessary to prevent spoliation. *See* Pl.’s Mot. at 5, 8. Judicial Watch provides nothing but conjecture in support of this assertion, alluding to the conduct of former Secretary Clinton, who is not a party to this case. *Cf. Landmark Legal Foundation v. Environmental Protection Agency*, -- F. Supp. 3d --, 2015 WL 971206 at *7 (D.D.C. 2015) (Lamberth, J.) (“Circuit law establishes that the Court may only grant a motion for punitive

³ As a courtesy to the Court, and in response to Judicial Watch’s request for its availability, the Government told Judicial Watch that it was available for a status conference during the last full week of March. The Government, however, does not believe a status conference is necessary, as explained more fully below.

⁴ Contrary to Judicial Watch’s suggestion, *see Pl.’s Mot. at 5*, the Department is not obligated under FOIA to produce documents that the Department neither possesses nor controls. *See, e.g., Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 152, 154-55 (1980); *Nat’l Sec. Archive v. Archivist of the U.S.*, 909 F.2d 541, 545 (D.C. Cir. 1990); *Competitive Enterprise Institute v. Office of Science and Technology Policy*, -- F. Supp. 2d --, 2015 WL 967549, at * 4-5 (D.D.C. Mar. 3, 2015).

spoliation sanctions if the moving party demonstrates by clear and convincing evidence that the *opposing party* destroyed relevant evidence in *bad faith*.”) (first emphasis added). A status conference to discuss spoliation is unwarranted.⁵

The quickest and least resource-intensive way to resolve this case is for the parties to proceed according to the agreed-to schedule and, if unable to resolve the issues themselves, to brief them for the Court in the normal course of litigation. After the Department submits its draft search declaration to Judicial Watch on April 2, Judicial Watch will have several options available to it, including conferring with the Department to obtain more information about the declaration. If the Court believes a status conference is necessary, it would make far more sense to hold one after the Department has provided its draft search declaration to Judicial Watch and Judicial Watch has provided its objections, if any, per the existing schedule.

Additional issues discussed in Judicial Watch’s motion are beyond the bounds of a FOIA case. FOIA is not a proper vehicle for enforcement of the Federal Records Act. *See Competitive Enterprise Institute*, 2015 WL 967549, at *5 (reliance on FOIA to solve problems arising from the use of personal email accounts to conduct government business is “misplaced” because “Congress never intended when it enacted [] FOIA, to displace the statutory scheme embodied in the Federal Records Act and the Federal Records Disposal Act providing for administrative remedies to safeguard against wrongful removal of agency records as well as to retrieve wrongfully removed records.”) (quoting *Kissinger v. Reporters Comm. for Freedom of the*

⁵ The fact that the Department did not list former Secretary Clinton’s emails in its draft *Vaughn* index or otherwise note that it had not searched those emails, *see* Pl.’s Mot. at 4, was neither a misrepresentation nor a material omission, because those documents were not in its possession and control when the original search was completed. Once those emails were provided to the Department and thus entered the Department’s possession and control, the Department, on its own initiative, searched them for records responsive to the FOIA request. As noted above, this search is complete.

Press, 445 U.S. 136, 154 (1980)); *cf. Armstrong v. Bush*, 924 F.2d 282, 294 (D.C. Cir. 1991) (In post-*Kissinger* amendments to the Federal Records Act “Congress again decided to rely on administrative enforcement, rather than judicial review at the behest of private litigants to prevent the destruction or removal of records.”).

CONCLUSION

Judicial Watch has failed to justify its request for a status conference. In nine business days, on the date the parties already agreed to, the Department will provide a draft declaration describing its searches. Judicial Watch then will be able to formulate any objections it might have to those searches. A status conference before then would not save the parties or the Court time or resources, nor would it serve any purpose with respect to alleged spoliation by a third party. Finally, many of the other issues Judicial Watch raises are beyond the reach of FOIA.

For these reasons, the Department of State respectfully opposes Plaintiff’s Motion for a Status Conference.

Date: March 20, 2015

Respectfully submitted,

BENJAMIN C. MIZER
Acting Assistant Attorney General

ELIZABETH J. SHAPIRO
Deputy Branch Director

/s/ Robert J. Prince

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Counsel for Defendant

Exhibit 1

Email from Ramona Cotca, Sep. 12, 2014

Prince, Robert (CIV)

From: Ramona Cotca <rcotca@JUDICIALWATCH.ORG>
Sent: Friday, September 12, 2014 9:45 AM
To: Prince, Robert (CIV)
Subject: RE: JW v State 14-1242

All good. Confirmed your language below is ok. Thanks.

Ramona R. Cotca
Senior Attorney
Judicial Watch, Inc.
425 Third Street, SW
Suite 800
Washington, DC 20024
(202)646-5172, ext. 328
(202)646-5199, facsimile
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-----Original Message-----

From: Ramona Cotca
Sent: Friday, September 12, 2014 9:35 AM
To: 'Prince, Robert (CIV)'
Subject: RE: JW v State 14-1242
Importance: High

Btw, hold off on filing anything. Still hearing from the client on the scope paragraph below. Will confirm soon, but JW wanted it broader, I understand we may have to change our proposed deadlines. Thanks.

Ramona R. Cotca
Senior Attorney
Judicial Watch, Inc.
425 Third Street, SW
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-----Original Message-----

From: Prince, Robert (CIV) [mailto:Robert.Prince@usdoj.gov]
Sent: Thursday, September 11, 2014 4:42 PM
To: Ramona Cotca
Subject: RE: JW v State 14-1242

Ramona,

Attached as a courtesy are drafts of the motion and proposed order we agreed to yesterday regarding the schedule in this case. Can you please let me know by noon tomorrow (Friday) if there is any aspect that you feel does not accurately reflect our agreement? I need to file before I leave on my trip.

Also, to confirm my earlier discussion with you about the scope of your client's FOIA request, the Department is interpreting the phrases "updates and/or talking points" and "talking points or updates" to focus on talking points and updates to those talking points, not general intelligence updates about the Benghazi attacks (unless those updates were sent in furtherance of developing or updating talking points).

Thanks,

Rob

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-----Original Message-----

From: Ramona Cotca [mailto:rcotca@JUDICIALWATCH.ORG]
Sent: Tuesday, September 09, 2014 1:03 PM
To: Prince, Robert (CIV)
Subject: RE: JW v State 14-1242

Sure. Now is good

Ramona R. Cotca
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-----Original Message-----

From: Prince, Robert (CIV) [mailto:Robert.Prince@usdoj.gov]
Sent: Tuesday, September 09, 2014 1:00 PM
To: Ramona Cotca
Subject: RE: JW v State 14-1242

To clarify, I'm out of the office but can call on my cell. Just let me know when.

----- Original message -----

From: Ramona Cotca
Date:09/09/2014 12:52 PM (GMT-05:00)
To: "Prince, Robert (CIV)"
Subject: RE: JW v State 14-1242

Rob,

I spoke with my client. It will be easier to discuss by phone at this point. Let me know when you have time for a call.
Thanks.
Ramona

Ramona R. Cotca
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-----Original Message-----

From: Prince, Robert (CIV) [mailto:Robert.Prince@usdoj.gov]
Sent: Tuesday, September 09, 2014 9:24 AM

To: Ramona Cotca
Subject: RE: JW v State 14-1242

Ramona, if you need to get in touch with me today about this, email will reach me much more quickly than voicemail.

----- Original message -----

From: Ramona Cotca
Date:09/05/2014 2:24 PM (GMT-05:00)
To: "Prince, Robert (CIV)"
Subject: RE: JW v State 14-1242

Sure. How about 4?

Ramona R. Cotca
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From: Prince, Robert (CIV) [mailto:Robert.Prince@usdoj.gov]
Sent: Friday, September 05, 2014 1:07 PM
To: Ramona Cotca
Subject: JW v State 14-1242
Importance: High

Are you available for a call today about this case? According to the Court's order, we have to file dispositive motions by September 29. I'd like to talk about the scope of the search and a disclosure schedule we could propose to the Court; I think we need to file next week, absed on my experience with Judge Lamberth.

Please let me know when would be a good time to talk.

Thanks,

Rob

Robert Prince
Trial Attorney

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