

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.)
)
Plaintiff,)
)
v.)
)
DEPARTMENT OF STATE,)
)
Defendant.)

Civil Action No. 14-1242 (RCL)

PLAINTIFF’S OPPOSITION TO DEFENDANT’S MOTION TO STAY

Plaintiff Judicial Watch, Inc., by and through counsel, respectfully submits this opposition to Defendant’s Motion to Stay Pending Resolution of Its Motion for Designation of Coordinating Judge. As grounds therefor, Plaintiff states as follows:

MEMORANDUM OF LAW

I. Introduction.

There is nothing to be gained by Defendant’s request for a stay of the proceedings as there is no action left to be taken in this lawsuit by the “coordinating judge” Defendant seeks in its pending “coordination motion.” Defendant conducted the searches it alleges it was obligated to complete under the Freedom of Information Act (“FOIA”) and moved for judgment as a matter of law – Plaintiff cross-moved for discovery under Rule 56(d) – and now Defendant seeks an indefinite stay of the proceedings pending its request for a “coordinating judge” to oversee a search of records Defendant claims it is under no obligation to take in this action. Either the motion to stay is frivolous – as Defendant claims it already completed the search it was obligated to undertake under FOIA – or Defendant’s motion for summary judgment is frivolous if it now claims that it is obligated to search under FOIA the records returned by Cheryl Mills, Huma

Abedin and Jacob Sullivan. In the latter scenario, the appropriate action for Defendant would be to withdraw its motion for summary judgment – not to seek further delay of its obligations under FOIA.

II. Factual background and procedural history.

Subject to FOIA, Plaintiff submitted a request for all records from the Office of the Secretary that relate to copies, updates and/or communications about the talking points provided to Ambassador Rice by the White House or any federal agency concerning the September 11, 2012 attack on the U.S. consulate in Benghazi, Libya. *See* Compl. at ¶ 5. The parties agree that records from Secretary Clinton and three of her senior aides, Cheryl Mills, Huma Abedin and Jacob Sullivan, are relevant to Plaintiff's FOIA request.¹

On July 7, 2015, Defendant moved for summary judgment on the grounds that it did what it was obligated to do under FOIA. *See* Def. Motion for Summary Judgment (“Def. SJM”) (ECF No. 19). In response, Plaintiff moved for discovery pursuant to Rule 56(d). *See* Pltf. Mot. To Allow Time for Limited Discovery Pursuant to Rule 56(d) (“Pltf. Rule 56(d) Mot.”) (ECF No. 22). Defendant filed its opposition to Plaintiff's Rule 56(d) motion on Friday, September 18, 2015, where it alleges once more that it is under no obligation to search the records received from Ms. Mills, Mr. Sullivan and Ms. Abedin subsequent to the filing of its motion for summary judgment. *See* Def. Opposition to Pltf. Rule 56(d) Mot. at p. 3 (ECF No. 27).

After it moved for summary judgment, Defendant now seeks to stay proceedings in this case, as well as in 25 other FOIA lawsuits (not the 32 represented in Defendant's “coordination motion”) pending its motion for a “coordinating judge” to oversee the search and production of

¹ Plaintiff contends that records from Phillippe Reines are also relevant to the FOIA request in light of Defendant's failure to records manage emails in the Office of the Secretary.

records returned to Defendant from Secretary Clinton, Ms. Mills, Ms. Abedin, Mr. Sullivan and Mr. Reines. *See* Def. Motion for Stay Pending Resolution of its Motion for Designation of Coordinating Judge (“Def. Mot. for Stay”) at p. 2 (ECF No. 25); Def. Mot. for Designation of Coordinating Judge, *In re U.S. Dep’t of State FOIA Litigation Regarding Emails of Certain Former Officials*, Case No. 15-ms-1188 (Unassigned) (D.D.C.) (ECF No. 24) (Sept. 14, 2015). In its motion to stay, Defendant submits that the case would be transferred back to the presiding judge here to adjudicate summary judgment and other proceedings, as appropriate. *See* Def. Mot. for Stay at p. 2.

III. A Stay is nonsensical in this case.

Defendant already moved for summary judgment in this case. By Defendant’s own admission, there is nothing left for a “coordinating judge” to do before this case would be transferred back to the presiding judge for summary judgment. *Id.* “Once searches of the recently provided documents are completed, the case would be sent back to the judge to which the case is assigned, for summary judgment or other necessary proceedings, as appropriate.” Def. Mot. for Stay at p. 2. This case is already at the point of summary judgment. Defendant’s request for a stay of the summary judgment briefings already before this Court pending its request for a “coordinating judge” is nonsensical in this case. Defendant’s request should be denied on this ground alone.

IV. Defendant’s “Coordination Motion” is unlikely to succeed.

Although Defendant downplays it in its “coordination motion,” Defendant not only seeks an order designating a “coordinating judge,” but also an order transferring 32 ongoing FOIA cases pending before 16 district judges to whomever is designated as the “coordinating judge.”

This “coordinating judge” will then decide “common legal, factual, and procedural issues.” The law could not be any clearer that one district judge cannot order another district judge to take action in a case pending before that judge. *See, e.g., Klayman v. Kollar-Kotelly*, 2013 U.S. App. LEXIS 10148 (D.C. Cir. May 20, 2013); *In re McBryde*, 117 F.3d 208 (5th Cir. 1997). As a result, it is highly unlikely that the State Department will prevail on its coordination/transfer motion.² Notwithstanding the fact that there is no action left for the “coordinating judge” to take in this case, there is no reason to stay this action pending a ruling in the Defendant’s meritless miscellaneous action. *See also* Respondent Judicial Watch, Inc.’s Motion to Dismiss, or, in the Alternative, Opposition to Designation/Transfer Motion, *In re U.S. Dep’t of State FOIA Litigation Regarding Emails of Certain Former Officials*, Case No. 15-ms-1188 (Unassigned) (D.D.C.) (ECF No. 24) (Sept. 14, 2015).

V. Conclusion.

For all of the foregoing reasons, Defendant’s motion for a stay should be denied.

² On September 3, 2015, the Hon. Reggie B. Walton also raised concerns about the lack of authority by anyone, including the Chief Judge, to order another judge to consolidate these cases. “But at least from information I’ve heard I think there may be some reluctance on the part of judges to go along with that because we’re so far along in the process and there’s so many different cases at different procedural postures that I’m not sure that the judges, because it would have to be a buy in. I don’t know if anyone even the chief judge would have the authority to order us to consolidate the cases, so there’d have to be a buy in on the part of the judges that consolidation would be appropriate.” *See* Transcript of Status Conference, *Judicial Watch, Inc., v. U.S. Dep’t of State*, Case No. 12-2034 (D.D.C.) (RBW) (Sept. 3, 2015), attached hereto as Exhibit 1, at 13.

As of September 17, 2015, the State Department had filed motions to stay in only 26 lawsuits, not the 32 it identified in its “consolidation motion.” Of those 26 motions, 6 have been denied. *See* Minute Order, *Judicial Watch, Inc. v. U.S. Dep’t of State*, Case No. 13-1363 (EGS) (D.D.C.) (Sept. 11, 2015); Minute Order, *Bauer v. Central Intelligence Agency*, Case No. 14-963 (APM) (D.D.C.) (Sept. 16, 2015); Minute Order, *Joseph v. U.S. Dep’t of State*, Case No. 14-1896 (R JL) (D.D.C.) (Sept. 10, 2015); Minute Order, *Citizens United v. U.S. Dep’t of State*, Case No. 15-374 (EGS) (D.D.C.) (Sept. 11, 2015); Minute Order, *Judicial Watch, Inc. v. U.S. Dep’t of State*, 15-692 (APM) (D.D.C.) (Sept. 16, 2015); Minute Order, *Citizens United v. U.S. Dep’t of State*, Case No. 15-1031 (EGS) (D.D.C.) (Sept. 11, 2015). Only one motion has been granted, and that ruling was issued before the requestor even filed a response. *See* Minute Order, *Judicial Watch, Inc. v. U.S. Dep’t of State*, Case No. 14-1511 (ABJ) (D.D.C.) (Sept. 10, 2015). A second was granted in part and denied in part. *See* Minute Order, *Citizens United v. U.S. Dep’t of State*, Case No. 15-518 (ABJ) (D.D.C.) (Sept. 18, 2015). A third is being held in abeyance. *See* Minute Order, *Judicial Watch, Inc. v. U.S. Dep’t of Justice*, Case No. 15-321 (CKK) (D.D.C.) (Sept. 9, 2015).

Dated: September 21, 2015

Respectfully submitted,

JUDICIAL WATCH, INC.

/s/ Ramona R. Cotca
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EXHIBIT 4

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC. .
 Plaintiff, .
vs. . Docket No. CV 12-2034
 .
U.S. DEPARTMENT OF STATE . Washington, D.C.
 . September 3, 2015
 Defendant. .
* * * * * x 9:33 a.m.

TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE JUDGE REGGIE B. WALTON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: Chris Fedeli, Attorney-at-Law
 Paul Orfanedes, Attorney-at-Law
 Tom Fitton, Attorney-at-Law
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For the Defendant: Elizabeth Shappiro, Attorney-at-Law
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 Civil Division
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Court Reporter: Cathryn J. Jones, RPR
 Official Court Reporter
 Room 6521, U.S. District Court
 333 Constitution Avenue, N.W.
 Washington, D.C. 20001

Proceedings recorded by machine shorthand, transcript
produced by computer-aided transcription.

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P R O C E E D I N G S

THE DEPUTY CLERK: Civil Action Number 12-2034, Judicial Watch, Inc. versus U.S. Department of State Counsel, can you come forward and identify yourselves for the record.

MR. FEDELI: Good morning, your Honor. Chris Fedeli for the plaintiffs Judicial Watch.

THE COURT: Good morning.

MS. SHAPPIRO: Good morning, your Honor. Elizabeth Shappiro on behalf of the Department of State and with me is Marsha Edney.

THE COURT: Good morning. How do you all propose we deal with this case? As you know, this case was closed out at one point, but the parties ask it be reopened based upon the revelation that there had been some additional, actually a large number of emails that had been identified that may be subject to a disclosure pursuant to this case. But there are as I understand, I don't how many, but a number of other cases also pending in this court before other judges. And as I understand it at least in some of those cases or at least one of them, all of the documents being requested in this case would be encompassed by the production in at least one of the cases.

Am I wrong in that regard?

MR. FEDELI: Yes. If I can address that briefly.

1 MS. SHAPPIRO: But what he's suggesting is wild
2 speculation. Has no basis to think they exist elsewhere.

3 THE COURT: Well, unfortunately, if this private
4 server had not been used we wouldn't be in this situation.

5 MS. SHAPPIRO: I understand that, your Honor. We
6 are, the government is trying to cope the best we can with
7 these circumstances. And have really gone, taken great
8 lengths to reopen cases like these to ensure that searches
9 are done pursuant to FOIA, and to remedy the FOIA situation
10 the best that we can, which is what we're here in this court
11 about. That's why we asked former employees to return
12 records. That's why we are undergoing this enormous
13 production process of putting all of them on online.

14 THE COURT: What's your position regarding the
15 plaintiff's request for some type of order from this court
16 related to that 31,000-plus documents which I assume are
17 documents that former secretary Clinton concluded were
18 private documents and therefore, not subject to disclosure?

19 MS. SHAPPIRO: We would oppose it because I don't
20 know how we could comply with such an order, one. And two,
21 we think the court should stay its hand entirely because
22 there's a motion pending to appoint a coordinating judge who
23 would deal with all of these sorts of issues across all of
24 the cases.

25 THE COURT: I don't know how successful you'll be

1 in reference to that. I can understand why you would want
2 it. But at least from information I've heard I think there
3 may be some reluctance on the part of judges to go along
4 with that because we're so far along in the process and
5 there's so many different cases at different procedural
6 postures that I'm not sure that the judges, because it would
7 have to be a buy in. I don't know if anybody even the chief
8 judge would have the authority to order us to consolidate
9 the cases, so there'd have to be a buy in on the part of the
10 judges that consolidation would be appropriate. And at
11 least from what I've heard there may be some reluctance to
12 do that because the cases are in different postures and this
13 request wasn't made earlier.

14 MS. SHAPPIRO: Right. I guess I would just say
15 that at least two judges have expressed a desire to have
16 some sort of coordination. What we're asking for is not
17 consolidation because of the very reasons you cite. But
18 just coordination of these particular search and discovery
19 issues and courts --

20 THE COURT: I mean that may make sense in this
21 case since we are early on in the process. Because the
22 process had been halted based upon the parties'
23 understanding of what the status of the matter was late,
24 back I think it was in May.

25 What do you propose? I mean, obviously to the

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CERTIFICATE

I, Cathryn J. Jones, an Official Court Reporter for the United States District Court of the District of Columbia, do hereby certify that I reported, by machine shorthand, the proceedings had and testimony adduced in the above case.

I further certify that the foregoing 30 pages constitute the official transcript of said proceedings as transcribed from my machine shorthand notes.

In witness whereof, I have hereto subscribed my name, this the 8th day of September, 2015.

/s/ Cathryn J. Jones
Cathryn J. Jones, RPR
Official Court Reporter

IN THE 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)

[PROPOSED] ORDER

Upon consideration of Defendant’s Motion to Stay Pending Resolution of Its Motion for Designation of Coordinating Judge, Plaintiff’s Opposition thereto, any reply, oral argument, and the record herein, it is hereby

ORDERED that Defendant’s Motion to Stay Pending Resolution of Its Motion for Designation of Coordinating Judge is **DENIED**.

Dated:

U.S. District Court Judge

Cc: All counsel of record