

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

-----X

JUDICIAL WATCH, INC.

Plaintiff

v.

Civil Action No. 15-687-JEB

U.S. DEPT. OF STATE,

Defendant

-----X

Washington, D.C
Monday, August 22, 2016
10:00 A.M.

TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE JAMES E. BOASBERG
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: Lauren M. Burke, Esq.
Chris Fedeli, Esq.
JUDICIAL WATCH, INC.
425 Third Street, SW, Suite 800
Washington, DC 20024
(202) 646-5172

For the Defendant: Lisa Ann Olson, Esq.
Marcia Berman, Esq.
U.S. DEPARTMENT OF JUSTICE
20 Massachusetts Avenue, NW, Room 7300
Washington, DC 20530
(202) 514-5633

Court Reporter: Lisa Walker Griffith, RPR
U.S. District Courthouse
Room 6507
Washington, D.C. 20001
(202) 354-3247

P R O C E E D I N G S

1
2 THE DEPUTY CLERK: This is civil action 15-687.
3 Judicial Watch Inc. versus U. S. Department of State.

4 Would the parties please approach the podium and
5 identify yourselves for the record.

6 MS. OLSON: Lisa Olson representing the United
7 States. With me is Marcia Berman and Laura Berlin from the
8 State Department. Marcia Berman is from the Department of
9 Justice as well.

10 THE COURT: Okay. Good morning to all of you.

11 MS. BURKE: Good morning, Your Honor. Lauren
12 Burke representing the plaintiff, Judicial Watch. With me
13 today's is cocounsel Chris Fedeli as well as the President
14 of Judicial Watch, Thomas Fitton.

15 THE COURT: Good morning to all of you.

16 All right. Let me just pull up the docket.

17 Your last status report on August 12th, you
18 claimed you would have other information for me today. So
19 I'm happy to hear what that is, Ms. Olson.

20 MS. OLSON: Thank you.

21 May it please the Court, as of August 5th, the
22 FBI had turned over the materials that were referenced in
23 that status report. And since then, the Department of
24 State has taken steps to initiate the appraisal process.
25 It is ingesting the documents into a document management

1 system hoping to finish that by the end of this week.

2 And it is developing tools to conduct the
3 appraisal and facilitate a multi-tiered review that
4 characterizes the appraisal process. That is people within
5 the State Department will separate the records from the non
6 records for those documents that are determined to be non
7 records, they will be reviewed again within the State
8 Department. Then the National Archives will be invited to
9 validate that appraisal.

10 THE COURT: When you say "records," explain to me
11 what you mean by records versus non records.

12 MS. OLSON: The federal records as opposed to
13 private personal information. And our initial review of
14 these documents suggest that there is going to be a certain
15 volume of private and personal information.

16 THE COURT: Okay.

17 MS. OLSON: So, the appraisal, once it is
18 completed, the documents will need to be reviewed for
19 possible exemptions and for any need to have inter-agency
20 or intra-agency consultation or referrals based on
21 confidential trade secrets or commercial information.

22 We are aiming to complete the appraisal by the
23 first week of October. We've presented an offer to the
24 plaintiff with a schedule. So we would complete the
25 appraisal by the first week of October to determine what

1 are agency records and what are duplicative of what has
2 already been produced. This offer is premised on there
3 being no major technical difficulties with the ingestion or
4 other I.T. issues.

5 THE COURT: Let me interrupt you for one second.
6 How many records are we talking about?

7 MS. OLSON: We're talking about tens of thousands
8 of documents. And--

9 THE COURT: Can you give me any more specific
10 number?

11 MS. OLSON: I can tell you in disk one, which is
12 the disk that the plaintiff has asked us to prioritize and
13 which we were going to prioritize anyway, there are
14 approximately 14,900 documents.

15 THE COURT: Consisting of, can you give me page
16 number?

17 MS. OLSON: I'm not in a position to give you a
18 page number, but it would be more than the number of
19 documents, I assume.

20 THE COURT: How many disks were there beyond disk
21 one?

22 MS. OLSON: There were seven total, so six more.

23 THE COURT: Can you tell me generally that you
24 would expect the number of documents on each disk to be
25 roughly equivalent?

1 MS. OLSON: I know there are 10s of thousands
2 total, and that doesn't include disk five which contains
3 the 55,000 documents. So beyond disk five there are 10s of
4 thousands. So, we would complete this appraisal in early
5 October, which is extraordinarily ambitious given the
6 volume of documents we're dealing with and the competing
7 demands on State.

8 THE COURT: The appraisal is going to be just
9 disk one or all disks?

10 MS. OLSON: That will be all the disks. And it
11 makes more sense to complete the appraisal of everything
12 before production commences, although we will be doing a
13 rolling review during the appraisal once we gather what are
14 deemed to be records.

15 We would propose post, once the appraisal is
16 complete we will start to produce documents. And we would
17 post documents every week beginning October 14th, and then
18 the 21st and 28th and November 4. And then after that we
19 would propose doing it on a non weekly basis because there
20 are a lot of -- a huge drain on resources to do it on a
21 weekly basis. This is just a more volatile process.

22 So during the time we're appraising, we will be
23 reviewing the documents. Once the entire appraisal is
24 done, we will be in a better position to estimate how much
25 time it would take to complete production. But we will

1 begin producing documents starting on October 14th to the
2 extent that are responsive records.

3 THE COURT: Can you give me any indication of
4 volume?

5 MS. OLSON: We're not in a position to give page
6 numbers just because, as far as the production, we don't
7 know how many will be personal versus agency records. How
8 many will actually be responsive. How many will be
9 duplicative of the 55,000. And the volume of records that
10 would need to be sent to other agencies or bureaus for
11 consultation. So we can't commit to a page number. But
12 the weekly productions are an indicia of our good faith.

13 State is trying to respond to Judicial Watch's
14 express interest in getting some documents before the
15 election and our understanding that there is a public
16 interest in these documents.

17 THE COURT: How about if we came back here at the
18 end of your appraisal period and you could give me a better
19 sense then of the volume of documents you expect to
20 release. In other words, to say we're going to post them
21 beginning October 14th, well maybe that means one document
22 on the 14th or two on the 21st, as opposed to hundreds.

23 So if we came back say October 11th, which is the
24 first business day after the first week in October, would
25 you be able to give me a better sense of the volume you

1 expect to produce in the succeeding few weeks?

2 MS. OLSON: Yes, we would. That would be ideal
3 because it would allow us to complete the appraisal and
4 have a sense of the scale of what is involved here in the
5 production process. I would think it would be an enormous
6 relief to the State Department. It would allow them to
7 proceed I think with maximum efficiency.

8 THE COURT: Okay. Thank you.

9 Let me hear from Ms. Burke about that proposal.

10 MS. OLSON: Thank you, Your Honor.

11 MS. BURKE: Thank you, Your Honor.

12 I did speak with counsel last week. They had
13 proposed what Ms. Olson just laid out. And it is my
14 client's position that the Department of State has been in
15 possession specifically of disk one for four weeks already.
16 They're seeking now an additional six weeks. So a total of
17 six weeks to simply determine what is a record and what
18 isn't a record.

19 I mean, the question would be what have they been
20 doing for the past four weeks. And our hesitation in
21 agreeing to that is that then, as you pointed out, we're
22 sitting in the middle of October still knowing maybe there
23 is only one record being produced. There has been no
24 actual commitment as to a number that would be reviewed
25 weekly and then produced, those records that are found to

1 be non exempt or responsive.

2 THE COURT: Can you tell me why disk one is of
3 particular interest or more important to you or what is on
4 it that you believe is different?

5 MS. BURKE: Absolutely. As I said, disk one and
6 disk two have been identified by Department of State as
7 having, they received those two disks from the FBI, July
8 21. Disk one contains, and I quote: E-mails and
9 attachments that were sent directly to or from Former
10 Secretary Clinton or e-mails that we sent to or from the
11 former secretary at a point in time in an e-mail chain, and
12 were not included on the materials provided to State
13 Department by Former Secretary Clinton in December 2014.

14 Judicial Watch's request is specifically all of
15 former Secretary Clinton's e-mails sent to or from
16 Secretary Clinton. And so as both the Department of State
17 and the Department of Justice in other cases has identified
18 this case to be FOIA request, very broad, that encompasses
19 a number of other cases. This disk one clearly identified
20 as most likely responsive documents.

21 Disk two itself has been the only information we
22 have identified as classified information. Certainly we
23 wouldn't be expecting to receive classified information.
24 We don't know how many documents are on that disk. But it
25 would seem to me that would not need to take 10 weeks to

1 appraise that they were agency records.

2 THE COURT: If your focus is disk one, then maybe
3 what you are preferring is a more expedited schedule than
4 Ms. Olson proposes, but just as to disk one. If you want
5 them to just focus on this and leave the others until
6 later, maybe we can figure out a way to do that. Does that
7 make sense?

8 MS. BURKE: That does make sense. That is what I
9 proposed to Ms. Olson on Friday. Disk one is Judicial
10 Watch's priority given the identification of what is on
11 there. We're not sure about the others. And again, it is
12 why this 10 week appraisal schedule before there is even a
13 review that begins, it just doesn't seem reasonable or
14 logical to Judicial Watch.

15 But what we would be seeking is an immediate
16 review of those documents, beginning immediately with
17 rolling production, we would propose every two weeks so
18 that as the disk itself is being appraised and, as I said,
19 an efficient effort that we would like to see in good faith
20 on the Department of State is a collaborated effort, that
21 we would appraise, determine it is a record, process,
22 review, produce, rather than we're going to appraise for 10
23 weeks, take two weeks to come up with a schedule, and then
24 in maybe six months, we'll run it through the system and
25 then we'll produce. At that point, we're looking at

1 substantive production maybe 2017.

2 THE COURT: Okay. Thank you.

3 Let me speak to Ms. Olson again.

4 So Ms. Olson, if Judicial Watch says, for now we
5 don't care about those other disks; we want you to focus on
6 disk one. So if now you only have one disk to appraise
7 instead of seven, that I would trust you would be able to
8 do more quickly than the first week of October.

9 MS. OLSON: Actually we cannot. The proposal we
10 made to start productions in mid October is based on a plan
11 to begin the records appraisal with disk one and begin FOIA
12 reviews on a rolling basis as documents are identified as
13 records.

14 There are separate teams doing the appraisal
15 versus the review. The appraisal is done by people with
16 different expertise than the people who do the FOIA review.
17 As soon as we complete the appraisal of disk one, of the
18 documents in disk one, as soon as records are identified,
19 those are turned over to the FOIA review people.

20 THE COURT: Hold on. But you say that by the
21 first week of October you could do an appraisal of all
22 disks.

23 MS. OLSON: That's right.

24 THE COURT: But if they're saying all we want is
25 an appraisal of one disk, why does that not take less time?

1 MS. OLSON: Because completing the appraisal of
2 all disks does not preclude the possibility of completing
3 the appraisal of just one and beginning the review process
4 on disk one. As soon as the appraisal of disk one is
5 complete, as soon as any documents are identified, they're
6 turned over to FOIA review people.

7 THE COURT: But we were going to meet after the
8 appraisal process. So why can't we, if we're talking just
9 appraisal, why can't we move that up and meet after -- we
10 talked about coming back for status conference on October
11 11th after the appraisal of seven disks. What we are now
12 saying, let's have appraisal of just one disk and come back
13 earlier, then we can talk about the review and the
14 production at that point.

15 MS. OLSON: I think State is more comfortable
16 that everything will be accurately and consistently done if
17 it has the opportunity to complete the entire appraisal
18 process. And it doesn't foresee completing enough review
19 of the disk one documents to produce anything before
20 October 14th. That is the absolute earliest it would be
21 able to produce under any circumstances as I'm told.

22 THE COURT: I think if we came back in let's say
23 a month, around September 22, and I give you a month to
24 complete the appraisal process of disk one only, you would
25 come back on September 22 and say, we've completed it, here

1 is where we've got and now we can talk about a production
2 schedule.

3 MS. OLSON: We can do that, Your Honor.

4 THE COURT: So Ms. Burke.

5 Thank you, Ms. Olson.

6 MS. OLSON: Thank you.

7 THE COURT: Ms. Burke, now we've moved that up
8 substantially and they just do disk one. How do you feel
9 about that?

10 MS. BURKE: I feel very good about that, Your
11 Honor. I think the key that Judicial Watch is concerned
12 about is that they will be doing an appraisal -- I thought
13 I heard Ms. Olson say, as they're doing the appraisal,
14 they're starting the review process. That's what we would
15 like to see work in collaboration, so that it is an
16 expedited and efficient process. As things are being
17 appraised they're passed on to a team, being reviewed so
18 when we come back on September 22nd, they're in a position
19 to say we reviewed X number of documents because we've been
20 doing it for the last month through appraisal process. And
21 we're prepared to produce X number in a month, in two
22 weeks, and something like that. That's what we would like
23 to see.

24 THE COURT: Thank you.

25 Ms. Olson, one last discussion with you.

1 So in other words, what I would order is that
2 State Department conduct an appraisal of disk one only,
3 which will be completed by our status of September 22nd.
4 And then on the 22nd, we'll talk about the state of the
5 review and the state of production.

6 But I agree with Ms. Burke, and it sounds like
7 that is consistent with what you're talking about is that,
8 as you complete appraisal, you'll pass it on to the review
9 team to be reviewing.

10 So in other words, what she is concerned about, I
11 think it is a legitimate concern, is that you are not going
12 to wait until September 22 to begin the review. You'll
13 begin the review as the appraisal proceeds.

14 MS. OLSON: That's right. Not only are we not
15 going to wait until September 22 to begin the review, we're
16 going to continue appraising the other disks during that
17 time period.

18 THE COURT: Although that's not a requirement
19 that I'm ordering you now. Again, if it is more efficient
20 for you to be doing so during this period, fine, but we
21 would come back and talk about that subsequently.

22 MS. OLSON: Thank you, Your Honor.

23 THE COURT: So here is the order that I'm
24 proposing to enter, which is that State Department will
25 commence the appraisal of disk one only, the appraisal

1 process to be completed by September 22nd; at which time,
2 we'll have a status conference. And we'll pick a time
3 momentarily. That the review of the documents will be
4 ongoing. And that on September 22, we'll talk about the
5 status of the review and a production schedule.

6 All right. I'm glad we have everybody on board.
7 That sounds like a reasonable and appropriate way to
8 proceed.

9 All right. Let's talk about time.

10 Ms. Burke, is 10:30 on the 22nd a convenient time
11 for you? This is September.

12 MS. BURKE: Yes, Your Honor. 10:30 on September
13 22nd.

14 THE COURT: Ms. Olson, is that convenient for
15 your team?

16 MS. OLSON: Yes, Your Honor.

17 THE COURT: Okay. I'll issue an order
18 memorializing what I just said. Thank you all so much. I
19 appreciate it. I know there is a lot of attention on these
20 issues. But I appreciate the fact that you folks continue
21 to work diligently, collaboratively and civilly among each
22 other to try to resolve them. So thanks so much. See you
23 next month.

24 (Whereupon, at 10:22 a.m., the hearing
25 concluded.)

CERTIFICATE OF REPORTER

I, Lisa Walker Griffith, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.



Lisa Walker Griffith, RPR

Date