

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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JUDICIAL WATCH, INC.,)	
)	
<i>Plaintiff,</i>)	
)	
v.)	Case No. 18-00491 (RBW)
)	
U.S. DEPARTMENT OF JUSTICE,)	
)	
<i>Defendant.</i>)	
_____)	

JOINT STATUS REPORT

Plaintiff Judicial Watch, Inc. (“Judicial Watch”) and Defendant U.S. Department of Justice (“DOJ”), through counsel, respectfully submit the parties’ joint status report pursuant to the Court’s minute order of May 15, 2018. The parties conferred by telephone and email on May 15, May 23 and May 25 but were not able to reach a consensus on how to proceed in this matter. Therefore, the parties submit their individual proposals below and state the following:

Plaintiff’s Proposal

1. Plaintiff’s Freedom of Information Act (“FOIA”) request is narrowly tailored and seeks communications between the Office of the Attorney General and a third party, Fusion GPS and its employee, Nellie H Ohr (spouse of former U.S. Associate Deputy Attorney General, Bruce Ohr) from January 1, 2015 to December 12, 2017. *See* Compl., ¶¶ 5-6.

2. On or around December 6, 2017, Bruce Ohr was removed from his position as U.S. Associate Deputy Attorney General after it was revealed that he conducted undisclosed meetings with dossier author Christopher Steel and Glenn Simpson, principal of Fusion GPS (the opposition research firm that hired Christopher Steel on behalf of The Democratic National Committee (“DNC”) prior to and after the 2016 Presidential Elections). *See* <http://www.foxnews>.

com/politics/2017/12/07/top-doj-official-demoted-amid-probe-contacts-with-trump-dossier-firm.html (last accessed May 29, 2018).

3. According to Defendant's initial status report (ECF No. 10),¹ and Defendant's proposal below, the DOJ proposes to exclude the dates of January 20, 2017 to December 12, 2017 from its search. *See infra*, Defendant's Proposal, p. 6; *see also* Def. Status Rpt., ¶ 3, n 2 (ECF No. 10). Plaintiff objects to the DOJ's unjustified limited search and requests that the Court order Defendant to undertake an adequate search in good faith.

4. In support of its position, the DOJ points to the fact that U.S. Attorney General Jeff Sessions recused himself from the Russian investigation. *See infra* at p. 6. Even if the Attorney General recused himself from the investigation, the recusal did not occur until March 2, 2017. *See* <https://www.justice.gov/opa/pr/attorney-general-sessions-statement-recusal> (last accessed May 29, 2018). Moreover, the recusal does mean that other current and/or former employees in the Office of the Attorney General did not in fact communicate with Fusion GPS and/or Nellie Ohr, whose husband held a senior position in the Justice Department until December 6, 2017. As further evidence that the DOJ's proposed search is unjustified and insufficient under FOIA, former Attorney General Sally Yates served as the U.S. Attorney General after January 19, 2017, who testified before the U.S. Congress on the Russian investigation and no recusal was in place. *See* https://www.washingtonpost.com/news/post-politics/wp/2017/05/08/full-transcript-sally-yates-and-james-clapper-testify-on-russian-election-interference/?noredirect=on&utm_term=.f5872f4f3d15 (last accessed May 29, 2018); *see also* <https://www.cnn.com/2017/01/30/politics/donald-trump-immigration-order-department->

¹ Plaintiff did not have an opportunity to respond previously to Defendant's initial proposal. Plaintiff noted in its May 11, 2018 status report that it was not provided with Defendant's position until after its filing. (ECF No. 9).

of-justice/index.html (last accessed May 29, 2018). Defendant's attempts to delay undertaking a search for responsive records through December 12, 2016 until after summary judgment briefing is an obvious attempt to delay meeting its obligations under FOIA.

5. To the extent the DOJ wants to prioritize its search for records from 2016 and 2015, Plaintiff does not object. *See infra* at p.6. However, to the extent that DOJ's proposal to "prioritize" the search is a masked request to bifurcate the search in two phases and delay a second part of the search until after production of an unknown volume of records, Plaintiff objects and asks that the Court order Defendant to complete the entirety of its search. *See infra* at p.6. If Defendant seeks to delay completing its search until after production of an "initial search," its proposal will cause extraordinary delay and unnecessarily complicate this case. Moreover, Defendant's proposal to exclude searching records from 2015 merely because it was publicly reported that Nellie Ohr worked for Fusion GPS in 2016 does not alleviate the DOJ from searching records from 2015. Defendant has the burden of proof under FOIA and does not provide a basis to exclude those records from its initial search. Defendant does not claim that Nellie Ohr did not work for Fusion GPS in 2015. More than six months have already passed since DOJ received Plaintiff's FOIA request in December 2017 and Defendant has not even begun its search. Any proposed bifurcation of the search will only further unduly delay this case.

6. Finally, Defendant's request for Plaintiff to identify which custodians from 2015 and 2016 within the Office of the Attorney General are reasonably likely to possess communications responsive to Plaintiff's request is another attempt to shift the burden of proof under FOIA. *Id.* at p. 6. An asymmetrical relationship exists between Plaintiff, a FOIA requester, and Defendant, a federal agency that obtains all records being sought, and Defendant's attempt to shift the burden is inappropriate under FOIA. *See, e.g., Judicial Watch, Inc. v. Food*

and Drug Admin., 449 F.3d 141, 145-46 (D.C. Cir. 2006) (noting that the “asymmetrical distribution of knowledge” between the agency and the requestor in FOIA litigation “distorts the traditional adversary nature of our legal system’s form of dispute resolution.”).

7. Plaintiff only seeks that the DOJ undertake good faith efforts to conduct a reasonable search more expeditiously and produce all non-exempt, responsive records within a reasonable timeframe. Evidenced by the parties’ differing positions in this status report, a number of issues surrounding Defendant’s search have already arisen.

8. Therefore, Plaintiff respectfully requests that the Court order a status conference to address these issues before the Court so that further delay can be avoided. In addition, Plaintiff respectfully submits that the Court order the parties to abide by the following schedule in this case:

- a. Defendant Department of Justice completes its entire search obligated under FOIA from January 1, 2015 to December 12, 2017 for all responsive records within three months (by August 29, 2019); and
- b. That the parties file a joint status report two weeks thereafter with a proposed production schedule (by September 12, 2018).

Defendant’s Proposal

At issue in this Freedom of Information Act (FOIA) lawsuit is Plaintiff Judicial Watch, Inc.’s December 21, 2017 request to Defendant, the United States Department of Justice, seeking the following records from January 1, 2015 to the present:²

- a) Any and all records of communication, including but not limited to emails, text messages and instant chats, between DOJ officials in the Attorney General’s Office and Fusion GPS employee or contractor Nellie H. Ohr.

² Although the request letter and complaint contained a two-part search, the parts are identical. *See* Compl. ¶ 5.

- b) Any and all records of communication, including but not limited to emails, text messages and instant chats, between DOJ officials in the Attorney General's Office and Fusion GPS employee or contractor Nellie H. Ohr.

In a status report filed on May 11, 2018, Defendant reported that it had identified, to date, at least 24 individuals who worked in the Office of the Attorney General from January 1, 2015, to January 19, 2017, but was not able to determine which of these individuals were reasonably likely to have communicated with a Nellie Ohr, of Fusion GPS, to be able to narrow the list of custodians to be searched for records responsive to the FOIA request. ECF No. 10 at 2.

Defendant further explained that it was able to determine that the current Attorney General, and those who worked for him, are not reasonably likely to possess responsive records and therefore was able to limit its search to the previous administration. *Id.* at 2 n.2. Defendant proposed that the parties be given additional time to determine if the parties could further limit the list of custodians to be searched in order to reduce the amount of time that the search would take. *Id.* at 2. The Court granted that request, directing the parties to “file an additional joint status report on or before May 29, 2018, regarding whether the parties are able to reduce the number of custodians whose records are to be searched, and a proposed schedule for further proceedings in this case.” May 15, 2018 Minute Order.

Defendant has identified an additional six individuals who worked in the Office of the Attorney General from January 1, 2015 to January 19, 2017, bringing the total number to 30. Consistent with the Court's order, Defendant sent Plaintiff a list identifying these 30 individuals, with their titles where it was possible to identify them, and asked Plaintiff if it could identify which individuals were reasonably likely to possess communications responsive to its request, in an effort to narrow the list of custodians to be searched. These discussions did not lead to agreement between the parties on the appropriate schedule in this case.

Absent greater selectivity on the part of Plaintiff in terms of which custodians to search, Defendant plans to search the records of all 23 custodians who worked for the Office of the Attorney General between January 1, 2016, and January 20, 2017, subject to the reservation that Defendant would search for records dating back to January 1, 2015 if the search established that Ms. Ohr had been in contact with the Attorney General's office prior to 2016. Defendant currently estimates that this search will take six months to complete. As set forth in Defendant's previous status report, when the number of custodians to be searched was at least 24, this proposed timeframe is due to the number of custodians' records to be searched and the heavy FOIA caseload of DOJ's Office of Information Policy ("OIP") (the office responsible for processing FOIA requests for records of the Office of the Attorney General and five other leadership offices), which has dramatically increased over the past two years. *See* ECF No. 10 at 2-3.

As of May 29, 2018, OIP has received more than 2,264 requests for this fiscal year, which puts OIP on pace to have another fiscal year with significantly more incoming requests than its historical average of about 1,200 per fiscal year. As of May 29, 2018, OIP has a backlog of 1,712 FOIA requests and processes requests on a first-in, first-out basis within three processing tracks ("simple," "expedited," and "complex"). As of May 18, 2018 (the most recent date for which such data is available), the request at issue here has 956 requests ahead of it in the "complex" track. OIP's backlog also extends to the search process, because most of these other "complex" track requests also require and are awaiting electronic searches. Additionally, OIP is currently engaged in 79 ongoing FOIA litigation matters—a nearly three-fold increase in the past two years. Many of the FOIA litigation matters involve upcoming document production schedules and court-ordered deadlines. Because of this significant surge in both FOIA requests

and litigation matters, OIP is under considerable strain as its FOIA processing staff, which currently consists of ten employees, struggle to keep up with this notably increased workload.

If OIP must search the records of dozens of custodians over multiple years for this case, the request will be considered a “complex track” request. Even though the search terms for the request are limited, the process of preparing this many custodians’ email accounts to be searched is time-consuming and, in light of the many other FOIA requests and cases that OIP is working on, necessitates the six months that Defendant believes it will need to complete this search. If the Court imposes a more burdensome production schedule, such as the two-month schedule proposed by Plaintiff in its prior status report, OIP would potentially be forced to reallocate resources in a way that would deprive other FOIA requesters and litigants the timely production of their documents. *See Daily Caller v. U.S. Dep’t of State*, 152 F. Supp. 3d 1, 15 (D.D.C. 2015) (“[T]he plaintiff’s effort to accelerate review of its requests necessarily will displace in processing priority those of third parties who submitted equally urgent requests before the plaintiff.”).

The parties disagree as to whether a search of 2016 records should be prioritized over a search for 2015 records. As noted above, Plaintiff is only aware of reports that Ms. Ohr was working for Fusion GPS in 2016. Defendant takes the position that it is not reasonably likely that anyone in the Attorney General’s office possesses a communication from Ms. Ohr prior to 2016. Nonetheless, Defendant is willing to revisit this issue if its search of records from 2016 indicates otherwise. In any event, the order by which Defendant conducts its search of record systems for responsive records is within its discretion in responding to Plaintiff’s FOIA request and is not properly before the Court for adjudication.

Similarly, the parties' dispute about whether a search of current administration officials is appropriate, which would of course only increase the number of custodians whose records are to be searched and increase the search time, is not before the Court for resolution. The scope and adequacy of the search that Defendant conducts for responsive records (e.g., which custodians it believes are reasonably likely to have responsive records, which search terms it uses, if any) is Defendant's determination to make and to defend – at summary judgment, not when proposing a production schedule. Defendant's position, which it is prepared to defend at summary judgment, is that the current Attorney General, and those who worked for him, are not reasonably likely to possess responsive records because the current Attorney General has recused himself and his office from matters related to Russian interference in the 2016 presidential election, the topic to which the request allegedly relates. *See* U.S. Dep't of Justice, "Attorney General Sessions Statement on Recusal," Mar. 2, 2017, <https://www.justice.gov/opa/pr/attorney-general-sessions-statement-recusal>. Ms. Ohr's husband worked in the Office of the Deputy Attorney General ("ODAG"), and Plaintiff has not requested records from ODAG.

Therefore, Defendant respectfully requests that the Court order the search to be completed by November 29, 2018, and the parties to submit a joint status report on December 10, 2018, with a proposed production schedule once Defendant knows the volume of responsive records to be processed.

Respectfully submitted,

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