

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

CITIZENS UNITED,

Plaintiff,

v.

U.S. DEPARTMENT OF STATE,

Defendant.

Civil Docket No. 16-cv-48 (RC)

**PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION
TO DEFENDANT'S MOTION FOR AN EXTENSION**

Citizens United, by and through its undersigned counsel, respectfully submits the following Opposition to Defendant's Motion for an Extension which was filed June 29, 2016:

BACKGROUND

On January 11, 2016, Plaintiff filed a Complaint against the Defendant, alleging violations of the Freedom of Information Act ("FOIA"), to which Defendant filed an Answer on February 19, 2016.

The parties submitted a meet and confer statement on March 8, 2016. Claiming that its searches would not be complete for another three days, Defendant represented that it did not know how many documents were at issue in the case, but nevertheless proposed an open-ended, rolling production. Lacking from Defendant information as to the number of documents, Plaintiff sought a production deadline of April 8, 2016. This Court then ordered Defendant to complete its searches and file a "more concrete proposal for its production" by March 18, 2016.

On that date, Defendant reported that it had found **6,082 potentially responsive documents**. Defendant sought a production schedule of four production dates, ending on July

21, 2016. In response, Plaintiff requested a more compressed production schedule. On March 24, 2016, the Court largely adopted the production schedule sought by Defendant, and ordered that production be completed by July 21, 2016. However, the Court also ordered Defendant to produce a *Vaughn* index by July 29, 2016, as Plaintiff had requested.

DEFENDANT'S PRODUCTIONS TO PLAINTIFF

On April 22, 2016, Defendant made its first production to Plaintiff. That production consisted of **only five documents**. Of those five documents, two documents consisted of 202 pages of "State Department News Clippings," which are not responsive to Plaintiff's requests that sought emails and other communications. Moreover, these news clippings are already publicly available, and obviously required almost no time to review and process. The final three documents consisted of 10 pages of emails. **Essentially, Defendant's first production consisted of 10 pages of responsive documents.**

On May 23, 2016, Defendant made its second production to Plaintiff of only **102 documents**, consisting of 230 pages.

On June 21, 2016, Defendant made its third production to Plaintiff of only **70 documents**, constituting of 120 pages.

The sum total of Defendant's first three productions has been 177 documents totaling 562 pages. Without the filler "State Department News Clippings," that total really was only 360 pages.

ARGUMENT

DEFENDANT’S MOTION FOR AN EXTENSION SHOULD BE DENIED

On June 29, 2016 — virtually the eve of the Court-ordered final production deadline — Defendant filed a Motion for an Extension, seeking 27 months (until October 20, 2018) to do what it originally proposed to do by July 21, 2016. Defendant’s basis for this request is that it claims to have improperly conducted its searches, has discovered additional documents, and now needs over two more years to process responsive documents. This is unreasonable, to say the least.

Defendant claims that its new searches have now identified 34,116 documents. Of course, Defendant’s use of this number seems intended only for its shock value, since, upon review, only 5,833 of them are actually responsive.

1. Even if this Court takes Defendant’s claims at face value, Defendant’s request is still outrageous. Defendant’s original estimate was 6,082 documents. Defendant’s responsiveness sampling indicated that 42 percent (126 out of 300 documents), or about 2,554 documents, would be actually responsive. Based on that figure, Defendant sought four months for production. Now, based on its new claim of 5,833 responsive documents (225 percent of the original estimate), Defendant seeks about 31 total months for production (775 percent of its original request). **In other words, Defendant now seeks almost eight times as many months to do just over twice as much work.**

2. What’s more, while Defendant claims that “the volume of materials ... is significantly higher than either the Plaintiff or Defendant originally anticipated,” what Defendant does not say is that it knew about this alleged increase in documents at least as long ago as its Status Report of May 17, 2016, when it reported this alleged higher number of 5,833 responsive

documents, consisting of about 12,000 pages. Yet, for whatever reason, Defendant did not seek an extension then, instead waiting well over one and one-half months before now finally asking the Court to grant it an extension of a remarkable 27 additional months.

3. Defendant claims that it “is working diligently to meet the Court’s production deadline.” To quote from Judge Leon completely out of context and from an unrelated case: “**Please.** Put simply, this argument strains credulity...”¹ On the contrary, Defendant has done almost nothing to meet the production deadline. When Defendant filed its Motion for an Extension on June 29, 2016, this Court’s ordered production timeframe was more than 75 percent complete. Yet Defendant has produced less than 7 percent of the documents Defendant itself originally estimated back in March, and only 3 percent of the documents in Defendant’s current estimate. Defendant claims it needs additional time because of its new estimate but, in reality, Defendant was nowhere even close to keeping pace with the original schedule based on its original estimate. Defendant claims it is “not able” to produce all the documents by this Court’s deadline, but even if that were so, it is because Defendant has done very little for many months now — first virtually ignoring Plaintiff’s FOIA requests, and then virtually ignoring the production deadline imposed by this Court — thus creating the very situation that it now laments.

4. Attached to Defendant’s Motion for an Extension is a lengthy Declaration from its principal FOIA official. The Declaration goes to great lengths to discuss State’s strained resources, the large number of FOIA requests it has pending, and its large caseload of pending FOIA litigation. The Declaration discusses in great detail every step and nuance of the purported typical process State employs to review documents, involving numerous agencies,

¹ Grace v. D.C., 2016 U.S. Dist. LEXIS 64681, *30 (D.D.C. May 17, 2016) (emphasis added).

departments, legal counsel, and levels of internal reviewers. Yet most of the records Defendant has been producing in this case, other than news clippings, are emails with just a few lines of text with content like: “my flight gets in at 6, do you want to meet for dinner?” This is hardly Top Secret classified information that implicates national security and requires a huge amount of time to review. The Declaration concludes by discussing Defendant’s limited resources, its finite number of staff, and the part-time nature of their work.

But even after all its explanations, Defendant still must face the reality that it has produced only 360 pages of responsive material to Plaintiff within a period of three months, despite a Court-imposed deadline implicitly requiring much more. Furthermore, the documents Defendant has provided clearly were not time-intensive to review, and all of them most likely could have been reviewed by a single person in a single day.

5. Defendant’s Motion and accompanying Declaration recite multiple errors that were made in the initial search and responsiveness review with respect to Plaintiff’s FOIA requests. Defendant explained that the initial search was not a keyword search and thus failed to capture potentially responsive emails. Thereafter, some email attachments were erroneously marked as non-responsive. While Plaintiff is appreciative of Defendant’s candor regarding its failures and its expression of deep regret, it cannot comprehend Defendant’s solution — which is for the full brunt of those failures to fall on Plaintiff and the public interest of transparency and timely disclosure. Indeed, as noted above, the extension Defendant seeks (775% of its original request) does not even correspond to its new estimate of the number of documents it must review (225% of the original estimate).

6. In its Production Proposal of March 18, 2016, Defendant stated that “State will also work with Plaintiff to determine if these requests can be narrowed in any way.” Yet Defendant

never discussed that subject with Plaintiff, nor ever suggested that any narrowing might somehow speed up production in any way. The first time Defendant mentioned the subject of Plaintiff possibly narrowing its requests was on June 6, 2016, when Defendant indicated through counsel that it would be filing its Motion for an Extension. And even then Defendant proffered no faster result if Plaintiff could do so. It appears that, rather than figuring out a way to resolve this litigation, Defendant has fashioned for itself an allegedly monumental task that it claims it cannot possibly hope to finish, with an eye towards delaying this litigation as long as possible, and in any event, well past the November presidential elections. As Judge Leon has noted in another FOIA case pending in this Court, “We’re now reaching a point where there’s mounting frustration that this is a project where the State Department may be running out the clock.”²

Plaintiff does not accept the notion that Defendant’s Motion for an Extension is justifiable or that the relief requested therein is reasonable. Nevertheless, Plaintiff recognizes the predicament caused by Defendant’s conduct in this case, whereby its disregard of the Court’s Scheduling Order of March 24, 2016 appears to have made compliance with that Order by the scheduled completion date — July 21, 2016 — almost impossible. Plaintiff would respectfully suggest consideration by the Court of an alternate schedule, whereby the end date of production would be extended for a period of almost two months (*i.e.*, to September 6, 2016), with production dates on July 21, August 8, and September 6, followed by production of a *Vaughn* index by September 13, 2016, and a status report by Defendant within ten days thereafter. Such a schedule would resolve all production issues (regarding records not claimed by Defendant to be exempt under FOIA) prior to the 2016 presidential election, leaving for resolution herein only the issue of disputed records.

² <http://bigstory.ap.org/article/01d398239bd04ed9841ffb8c23ebfa3f/clinton-related-state-dept-records-delays-are-mounting>.

Any schedule granting Defendant more time than that might have the effect of rewarding Defendant for conduct herein that can be described, at best, as lax and disrespectful to the Court and to Plaintiff, and as conduct undermining the Court's authority as well as the Congressional intent underlying passage of the FOIA. Plaintiff submits that Defendant has not demonstrated that it is deserving of an additional seven weeks to complete production but, under the circumstances that Defendant's conduct has brought about, such an extension might be a reasonable solution.

CONCLUSION

One could analogize Defendant's approach to that of a student who has waited until the night before a term paper is due before even cracking open a book. What's more, it was Defendant who suggested the due date. Now, having waited almost until the end of production, Defendant reports that it has barely even begun production, and seeks 27 additional months to do what it should have done already.

This Court can no longer assume that Defendant is acting responsibly to process Plaintiff's requests. Defendant's thinly veiled tactics point to only one thing — delay, delay, delay. Defendant clearly does not want to produce the documents at issue in Plaintiff's FOIA requests, and attempts to push this Court as far as it believes it can. Although Plaintiff's FOIA requests were filed over eight months ago (a year before the general election), and in spite of this Court's production order, Defendant still has produced almost nothing to Plaintiff — and almost half of what it has produced consists of non-responsive news clippings.

Defendant seeks to keep under wraps documents that may help the American people understand the inner workings of the State Department, along with the activities of the former Secretary of State and her closest and most trusted employees. If this Court grants Defendant the

delay that it seeks, those documents will not see the light of day until long after Hillary Clinton's **candidacy** has ended and, indeed, until almost halfway through **President** Hillary Clinton's first term in office, if she is elected. That would be precisely the opposite result than that for which the FOIA was intended and enacted.

WHEREFORE, Plaintiff requests that this Court DENY Defendant's Motion for an Extension, and ORDER Defendant to complete production as originally scheduled or, alternatively, according to a revised production schedule that would extend the end date of production to September 6, 2016, with production of a *Vaughn* index by September 14, 2016. A proposed form of Order is submitted herewith.

Dated: July 8, 2016

Respectfully submitted,

/s/ Jeremiah L. Morgan

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