IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

KATE DOYLE, et al., Plaintiffs, v. U.S. DEPARTMENT OF HOMELAND SECURITY, et al., Defendants.	)	Civil Action No. 17-2542 (KPF)

REPLY IN SUPPORT OF PLAINTIFFS' MOTION
FOR AN ORDER REQUIRING THAT DEFENDANTS SHOW CAUSE

Plaintiffs' opening brief carefully laid out the record evidence showing that the government has failed to comply with this Court's order to produce "non-exempt responsive records" of "presidential visitors at Mar-a-Lago." (Dkt. 23). In short, the Court ordered the government – based on the government's representations to Plaintiffs and the Court – to process records relating to presidential visits to Mar-a-Lago *as agency records under the FOIA*. Rather than complying, however, the government now claims those records are not subject to the FOIA at all. As Plaintiffs explained in their opening brief, the government's new position flatly conflicts with its representations during the hearing on July 14, at which the government made clear it intended to dispute whether the WAVES and ACR records are subject to the FOIA, but would not do so with respect to the Mar-a-Lago records. The government's reversal of course has prejudiced Plaintiffs, whose counsel relied on the government's repeated representations that it was processing the Mar-a-Lago records as agency records under the FOIA in agreeing to the government's requests for a prolonged processing and briefing schedule, and unduly delayed the public's access to records to which it is entitled.

1. The Government Has Not Demonstrated It Complied with the Court's July 14 Order.

Instead of addressing the points raised in Plaintiffs' opening brief, the government attempts to rewrite the proceedings in this case. But no amount of contortions can change the simple fact that all parties understood this case to involve two sets of records: WAVES and ACR records, which the government maintains are presidential and not subject to the FOIA, and Mar-a-Lago visitor records, which the government from the outset has acknowledged are agency records of the Secret Service subject to the FOIA. The Court issued its July 14 Order based on these representations and shared understandings.

The government's excuses for non-compliance start from the false premise that the Secret Service could only recently confirm what responsive records[1] it possesses, and the extent, if any, they were subject to production because the records "merely indicate the possibility of a 'presidential visit,'" but do not "reveal whether a visit actually took place." (Ds' Opp. at 5). Similarly, the government alleges it could not make any determination about the status of Mar-a-Lago visitor records until it had determined the Secret Service did not maintain a system for these visitor records as it does for the White House Complex, *id.* at 12, or to determine they are "*categorically* outside the scope of FOIA." *Id.* at 12 (emphasis in original).

The government's timeline is inaccurate, as the government's own words make clear. Early in the case, during the court-ordered discussions in late June, government lawyers advised Plaintiffs that the Secret Service does not maintain the same kind of visitor records for Mar-a-Lago as it does for the White House compound, and that the Mar-a-Lago records would not confirm who actually visited Mar-a-Lago, only who was cleared for access. *See* Letter of July 26, 2017 (Dkt. 33-4) (memorializing in part what "we discussed during our [June 29, 2017]

[1] References herein to responsive records do not include any of the requested WAVES and ACR records.

conversation"). These representations were based on a document review *that already had taken place*, as that letter confirms in its statements that the Secret Service had "*conducted a search* for records of 'presidential visitors' at Mar-a-Lago," and that a broader interpretation of the term "presidential visitors" "would require the Secret Service to conduct *new, overlapping searches* and *to re-review records previously identified*." *Id.* (emphasis added). Based on these representations, the parties reached an agreement on the scope of Plaintiffs' FOIA requests and what would be included and excluded from the September production *before the Court's July 14 Order*. Accordingly, the government cannot now credibly assert that it arrived at an understanding of what kinds of documents would be responsive only after the Court issued its July 14 order.

The government also attempts to rewrite the Court's order based on a tortured construction of what constitutes an agency record. First, in its brief, the government states that it "ultimately" concluded "that the Secret Service did not maintain or have access to records of presidential visitors," while simultaneously and inexplicably acknowledging "the Secret Service had access to only a handful of emails and Presidential schedules showing that the President was expected to meet with an individual or individuals at Mar-a-Lago." Ds' Opp. at 6. This statement does not match the government's representations to Plaintiffs and this Court nearly three months ago, that it was processing all records save those in which Plaintiffs are not interested "as expeditiously as possible," Dkt. 33-3, at 10, all the while acknowledging the limitations of the Secret Service's records and their manner of storage and preservation.

Nor is the government aided by its citation to the *Judicial Watch* decision from the D.C. Circuit (Ds' Opp. at 13). In that case, of course, the court held that WAVES and ACR records are not subject to the FOIA because they are presidential, rather than agency, records. *Judicial*

Watch, Inc. v. U.S. Secret Service, 726 F.3d 208, 214 (D.C. Cir. 2013). But in this case, the government made clear almost from the outset that it would not argue that the Mar-a-Lago visitor records are presidential; instead, it committed to processing those records *under the FOIA*. The government has changed course, now characterizing a subset of the Mar-a-Lago records as "information concerning the President's schedules," Ds' Opp. at 7, that is not subject to "public disclosure under the reasoning of *Judicial Watch*." *Id.* at 13 (emphasis added). This treatment does not meet the government's obligation under the Court's order to process the Mar-a-Lago records under the FOIA, by either producing them or invoking one of the FOIA's nine enumerated exemptions.

Finally, the government's brief inaccurately characterizes Plaintiffs' motion as an effort to address the merits of this lawsuit prematurely. To the contrary, Plaintiffs' motion is predicated on the government's violation of its commitment – memorialized in this Court's order – to treat the Mar-a-Lago records as subject to the FOIA. The government had effectively conceded that point and, thereby, obtained Plaintiffs' consent to a lengthy schedule for the processing of the Mar-a-Lago records. The government has yet to acknowledge, let alone explain, its change in position. Plaintiffs seek an explanation and appropriate sanctions for the government's failure to comply with the Court's order.

Moreover, the government's opposition reflects a fundamental misunderstanding of its obligations under the FOIA, which Plaintiffs intend to address in response to the government's promised motion for summary judgment. For instance, the government appears to believe that records containing information already in the public domain or "duplicative" of other responsive records need not be processed under the FOIA, Campbell Declaration, ¶¶ 22, 29 (Dkt. 40).

These are not recognized exceptions to disclosure under the FOIA, as Plaintiffs will show; however, the Court need not resolve these issues to rule on the pending motion.

2. Because the Government's Proffered Declaration Does Not Meet Its Evidentiary Burden the Court Should Allow Limited Discovery.

Because the government has offered no credible explanation for its abrupt about-face, the Court should grant Plaintiffs limited discovery and consider other appropriate sanctions, including attorneys' fees. The government appears to have had a last-minute change of position concerning the legal status of the Mar-a-Lago records. Neither the government's brief nor its supporting declaration even acknowledge, much less explain, the change, although it seems to have occurred after consultation with the White House. *See* D's Opp. at 7 (stating that "documents, consisting of information concerning the President's schedules, were referred to EOP for consultation"); *id.* at 8 (quoting the government's subsequent assertion to Plaintiffs that certain Mar-a-Lago records that it had processed "contain, reflect, or otherwise relate to the President's schedule" and are "not subject to FOIA"). As Plaintiffs' demonstrated in their opening brief, at no point prior to its September 15 production did the government even hint at the possibility it would claim that the Mar-a-Lago records are categorically outside the FOIA's scope. The government sought a last-minute extension, which it now explains was necessary to complete its consultation with the EOP, Ds' Opp. at 7,[2] without even a suggestion that its position on the status of the requested Mar-a-Lago records had changed. Even now, the government continues to defend its position as consistent with its prior representation that it would process the Mar-a-Lago records under the FOIA.

[2] When government counsel sought Plaintiffs' position on its request for an extension, counsel pointedly refused to tell Plaintiffs why the government needed more time.

The government's proffered Declaration of Kim E. Campbell (Dkt. 40) hints at another, troubling explanation for the government's about-face – the possible destruction or transfer of responsive records. Ms. Campbell asserts that beyond records concerning the Japanese Prime Minister's visit, "the Secret Service *had access to* only a handful of e-mails and copies of Presidential schedules showing that the President was expecting to meet with an individual or individuals at Mar-a-Lago," Campbell Decl., ¶ 13 (emphasis added), and further that the Secret Service "*has no access to* any records directly responsive to Plaintiffs' request." Id., ¶13 (emphasis added). Yet at no previous point did the government advise plaintiffs or the Court that it lacked access to responsive records. Instead, it represented it needed months to process the records in its possession, and sought concessions from the plaintiffs on categories of records that could be excluded to ease the Secret Service's burden.

Moreover, as reflected in correspondence between the parties, plaintiffs sought assurances from the government that the Secret Service was preserving all potentially relevant evidence and documents and had complied with its legal obligation to put in place a "litigation hold" as of April 21, 2017, the date the government was served with the complaint.[3] Plaintiffs raised this issue when they became aware through other related litigation that the Secret Service is continuing to destroy its copies of WAVES and ACR records after transferring copies to the White House Office of Records Management notwithstanding the pendency of this litigation. *See id.* Tellingly, the government refused to confirm whether it had put a litigation hold in

[3] Letter from Anne L. Weismann to Brad P. Rosenberg, August 28, 2017 (Exhibit A hereto).

place,[4] a refusal that may now explain its carefully worded declaration suggesting a lack of access to responsive records as an explanation for its failure to comply with the Court's order.[5]

Further, many of Ms. Campbell's assertions are a distraction from the fundamental point plaintiffs raised in their motion – namely, that the government is not complying with the Court's order to process the Mar-a-Lago records as agency records under FOIA. Portions of the declaration support, not refute, the need for limited discovery or other factual inquiry to verify their veracity. As an example, the declaration contains inherently inconsistent and mutually exclusive statements. While Ms. Campbell claims "the Secret Service maintains no record, and has no access to any record directly responsive to Plaintiffs' request," ¶ 30, she also acknowledges "the Secret Service had access to only a handful of e-mails and copies of Presidential schedules showing that the President was expected to meet with an individual or individuals at Mar-a-Lago." ¶ 30. Both statements cannot be true – either the Secret Service has access to responsive records or it does not.

Finally, and notably, the Campbell Declaration omits critical details such as the basis of Ms. Campbell's knowledge; her role, if any, in the agency's FOIA process at issue; whether she has personally seen or reviewed the documents at issue; when the Secret Service conducted searches; when the Secret Service determined the nature and volume of the records it had; when the Secret Service conducted its initial review of documents; when the Secret Service conducted its more granular review; when the Secret Service processed the documents relating to the Japanese Prime Minister's visit; when the Secret Service referred documents to the EOP for consultation; and when the EOP completed its consultation. *See, e.g.*, Dkt. 40 at ¶¶ 11-32

[4] Letter from Brad P. Rosenberg to Anne L. Weismann, et al., August 30, 2017 (Exhibit B hereto).
[5] Of course, the government simultaneously claims there is a category of "Presidential schedule information" it claims "is not subject to FOIA," Ds' Opp. at 15, but offers no explanation for what this vaguely worded category encompasses.

(failing to specify the dates on which various aspects of the Secret Service's search occurred); *id.* at ¶ 35 (stating that the review of "emails and paper documents captured by the initial set of searches took at least several weeks to accomplish"). The missing facts and dates are essential in evaluating the government's conduct and whether it complied with the Court's July 14 Order, and the sufficiency of the evidence it has proffered to justify its conduct. Accordingly, given the serious remaining questions that go to the heart of resolving plaintiff's motion, the Court should permit Plaintiffs to conduct limited discovery or, at a minimum, require the government to submit a declaration or declarations fully explaining its change in position and answering the questions raised above.

CONCLUSION

The government's opposition supports, not refutes, Plaintiffs' showing of government non-compliance with the Court's order. This non-compliance has needlessly delayed this matter and calls into question the candor with which the government has approached this litigation. Because the government has yet to adequately explain its actions, the Court should grant this motion and allow plaintiffs limited discovery or, alternatively, conduct an evidentiary hearing.

Respectfully submitted,

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