

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

CITIZENS FOR RESPONSIBILITY AND
ETHICS IN WASHINGTON, *et al.*,

Plaintiffs,

v.

RICHARD B. CHENEY, *et al.*,

Defendants.

Civil Action No. 08-1548 (CKK)

**ORDER SETTING SCHEDULE FOR
FURTHER PROCEEDINGS**
(November 20, 2008)

As described in several of the Court's previous orders and opinions, this case concerns the Presidential Records Act ("PRA"). *See, e.g.*, Discovery Order (Sept. 24, 2008), Docket No.

[20]. The PRA defines the term "Presidential records" as:

documentary materials, or any reasonably segregable portion thereof, created or received by the President, his immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise and assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of the *constitutional, statutory, or other official or ceremonial duties of the President.*

44 U.S.C. § 2201(2) (emphasis added). The PRA specifically directs that Vice-Presidential records are subject to the provisions of the PRA "in the same manner as Presidential records," and provides that "[t]he duties and responsibilities of the Vice President, with respect to Vice-Presidential records, shall be the same as the duties and responsibilities of the President under [the PRA] with respect to Presidential records." *Id.* § 2207. The PRA does not contain any further definitions of the terms "constitutional, statutory, or other official or ceremonial duties of the [Vice] President" when defining Vice-Presidential records. *See generally* 44 U.S.C. § 2201,

et seq.

Plaintiffs' Amended Complaint alleges that Defendants have improperly and unlawfully placed limitations on the scope of Vice-Presidential records subject to the PRA.¹ Am. Compl. ¶ 1. In particular, Plaintiffs allege that Vice President Cheney, the Office of the Vice President ("OVP"), and the Executive Office of the President ("EOP") have or will "improperly and unlawfully exclude from the PRA records created and received by the vice president in the course of conducting activities related to, or having an effect upon, the carrying out of his constitutional, statutory, or other official [or] ceremonial duties." *Id.* Plaintiffs also challenge the alleged "policies and practices" of the Archivist and the National Archives and Records Administration ("NARA") "to exclude from the reach of the PRA those records that a vice president creates and receives in the performance of his legislative functions and duties." *Id.*

In the course of litigating this case, Defendants argued, as a factual matter, that they were complying with the PRA. *See, e.g.,* Defs.' Opp'n to Pls.' Mot. for a Prelim. Inj. at 11-12. In support of this argument, Defendants submitted sworn declarations from Claire O'Donnell, Assistant to the Vice President and Deputy Chief of Staff, and Nancy Kegan Smith, the Director of the Presidential Materials Staff at NARA. Ms. O'Donnell's Declaration gave rise to a key factual ambiguity concerning Defendants' definition of Vice-Presidential records. Ms. O'Donnell first defined the term "Vice-Presidential records" by referencing the definition of the term set forth in the PRA (*i.e.*, Vice-Presidential records consist of documentary materials related

¹ Plaintiffs include Citizens for Responsibility and Ethics in Washington ("CREW") and a number of individual historians, archivists, and organizations of archivists and historians. Defendants include Vice President Richard B. Cheney in his official capacity, the Executive Office of the President ("EOP"), the Office of the Vice President ("OVP"), the National Archives and Records Administration ("NARA"), and Dr. Allen Weinstein, Archivist of the United States, in his official capacity.

to “the constitutional, statutory, or other official or ceremonial duties of the Vice President”). *Id.*, Ex. 1 ¶ 5 (O’Donnell Decl.). She then inexplicably included two “sub-definitions” that appeared to narrow the PRA’s language, stating that “[t]he constitutional, statutory, or other official or ceremonial duties of the Vice President include both [1] the functions of the Vice President as President of the Senate and [2] the functions of the Vice President specially assigned to the Vice President by the President in the discharge of executive duties and responsibilities.” *Id.* The introduction of these two sub-definitions made it unclear whether Defendants were narrowing the broad language of the PRA in a way that excluded documentary materials that legally should be covered by the PRA.

Several additional rounds of briefing and numerous conference calls with the parties failed to clarify Defendants’ PRA classification policies. The Court therefore granted Plaintiffs’ request to take limited discovery by deposing Ms. Smith and David Addington, the Vice President’s Chief of Staff. *See* Discovery Order at 18 (Sept. 24, 2008), Docket No. [20]. The Court explained that the purpose of granting discovery was to clarify the factual ambiguities that Defendants’ arguments and sworn declarations had created. *Id.* at 16. In particular, discovery was necessary to allow Plaintiffs to ask whether “Vice President Cheney *only* engages in activities that fall within the two narrow categories that Defendants assert comprise all of his ‘constitutional, statutory, or other official or ceremonial duties,’ and whether various examples of Vice Presidential activities that were proffered by Plaintiffs . . . were considered by Defendants to fall within these narrow definitions.” *Id.* at 12 (internal citation omitted). After Defendants filed an emergency petition for mandamus seeking to have the Court’s Discovery Order vacated, the D.C. Circuit denied Defendants’ petition in its entirety, except for requiring substitution of another deposition witness for David Addington, suggesting Ms. O’Donnell. *See In re Richard*

B. Cheney, No. 08-5412, slip. op. at 3-7 (D.C. Cir. Oct. 31, 2008). The Court thereafter substituted Ms. O'Donnell for Mr. Addington, and left unaffected the deposition of Ms. Smith. *See* Min. Order dated Oct. 31, 2008.

Plaintiffs deposed Ms. Smith on November 10, 2008. During the course of that deposition, Ms. Smith raised the existence of three memoranda that had been drafted by White House counsel that related to PRA instructions or guidance. Defendants' counsel objected to Plaintiffs' follow up questions about these memoranda and instructed Ms. Smith not to answer based on privilege (deliberative process or attorney-client) and the scope of discovery. *See* Smith Depo. Tr. at 93:7 - 95:6 (instructing witness not to answer). Following the deposition, the parties contacted Chambers to discuss whether Defendants' objection was proper, anticipating that the same issue would arise during the deposition of Ms. O'Donnell. The Court held two conference calls with the parties on the record and reviewed the three memoranda *in camera*. Based on the parties' arguments made during the conference calls and the Court's *in camera* review of the documents, the Court ruled that none of the memoranda were privileged. The Court nevertheless ruled that only the third memorandum, dated October 8, 2008 (hereinafter, the "2008 Memorandum"), fell within the scope of the discovery, as the first two memoranda did not specifically address Vice-Presidential records. *See* Min. Order dated Nov. 12, 2008. In contrast, the 2008 Memorandum specifically referenced Vice-Presidential records and included at least one definition of what constituted a Vice-Presidential Record. *Id.* Accordingly, the Court held that Plaintiffs could properly question Defendants' witnesses about the 2008 Memorandum. *Id.*

Plaintiffs deposed Ms. O'Donnell on November 13, 2008. The parties did not bring any issues to the Court's attention during or immediately after the deposition. Accordingly, on November 14, 2008, the Court issued an Order requiring the parties to file a Joint Status Report

indicating how they wanted to proceed.

On November 18, 2008, the parties submitted a Joint Status Report that set forth the parties' divergent proposals for how to proceed following the two depositions.² On the one hand, Plaintiffs want to depose David Addington "in light of the complete inability of Claire O'Donnell to address and resolve the questions raised by the Court that form the rationale for the authorized discovery." Joint Status Report at 1-2 (Nov. 18, 2008). Plaintiffs also explained that they asked Ms. O'Donnell about the 2008 Memorandum, but she testified that she had no knowledge of it. *See* O'Donnell Depo. Tr. at 35:7 - 35:10 ("Q: Are you familiar with a memorandum that White House Counsel Fred Fielding issued dated October 8, 2008? A: No"). Plaintiffs therefore seek to re-depose Ms. Smith to ask about the 2008 Memorandum as to which Ms. O'Donnell had no familiarity. Joint Status Report at 1-2 (Nov. 18, 2008). Defendants, on the other hand, want to immediately file a dispositive motion on legal grounds. *Id.* at 5. According to Defendants, Ms. O'Donnell's deposition testimony clarified "the guidelines and directives regarding vice presidential records," and no further discovery is necessary. *Id.* at 8.

The Court has repeatedly instructed the parties that it would decide the issues in this case through one final round of briefing – that could include any threshold legal arguments Defendants may want to advance – once discovery has been completed. *See, e.g.,* Discovery Order at 17. The D.C. Circuit supported the Court's approach in its opinion rejecting Defendants' petition for mandamus. *See In re Richard B. Cheney*, slip op. at 5 ("In the judgment of the district court here, the current litigation posture necessitates limited discovery . . . that

² In addition to filing a Joint Status Report, Plaintiffs filed a Motion for leave to take additional discovery and Defendants filed a Motion to Dismiss. The Court struck both motions because they were filed in violation of the Court's November 14, 2008 Minute Order.

judgment is not remotely one from which defendants have an indisputable right to relief”). The Court shall therefore not allow Defendants to file a Motion to Dismiss prior to the completion of discovery.

In its present posture, Plaintiffs are correct that discovery is not yet complete because neither of Defendants’ witnesses, to this point, have provided testimony concerning the 2008 Memorandum. Specifically, Ms. Smith was erroneously instructed by her counsel not to answer questions about any of the memoranda, *see* Smith Depo. Tr. 93:7 - 95:6, and although Ms. O’Donnell answered questions related to the first two memoranda, she testified that she had no knowledge of the 2008 Memorandum, *see* O’Donnell Depo. Tr. at 35:7 - 35:10. Under these circumstances, the Court finds that Plaintiffs should be allowed to re-depose Ms. Smith for the limited purpose of asking questions about the 2008 Memorandum. The Court has already found the 2008 Memorandum to be a non-privileged document that falls within the scope of the issues warranting discovery in this case, and Plaintiffs are entitled to inquire into its contents. The Court shall therefore order Defendants to make Ms. Smith available for a deposition to answer questions related to the 2008 Memorandum. If Ms. Smith testifies that she also lacks sufficient knowledge to answer Plaintiffs’ questions about the 2008 Memorandum, the Court shall require Defendants to produce the 2008 Memorandum to Plaintiffs *at Ms. Smith’s deposition*.

Unlike the discovery regarding the 2008 Memorandum, which is warranted because Defendants’ witnesses have not addressed an area of inquiry that falls within the scope of discovery, the Court finds that Plaintiffs’ request to depose David Addington is unwarranted on the present record. The Court granted Plaintiffs’ request to take discovery in this case because Defendants had created factual disputes that required resolution before the case could move forward. For example, the discovery was intended to clarify whether Vice President Cheney *only*

engages in activities that fall within his (1) functions as President of the Senate and (2) functions specially assigned to the Vice President by the President in the discharge of executive duties, as Ms. O'Donnell had stated in her Declaration. Discovery was also intended to determine how Defendants were, in fact, applying the PRA.

Contrary to Plaintiffs' assertions in the parties' Joint Status Report, the transcript reveals that Ms. O'Donnell has personal knowledge of Defendants' PRA guidelines and policies:

Q: Do you have responsibility for records management within the Office of the Vice President?

A: Yes.

O'Donnell Depo. Tr. at 19:18 - 19:20.

* * *

Q: Have you received any training specifically on records management since coming to the OVP?

A: Yes.

Q: And describe for me what that training has been.

A: It was a memo that we received when we came on board and we have been reminded on a regular basis verbally and in ethics briefings.

Id. at 21:13 - 21:21.

* * *

Q: Okay. But with respect to the implementation of that guidance, what knowledge do you have?

A: Just as kind of the overall person responsible for making sure people are keeping all their files . . .

Q: . . . Is that part of your responsibilities for the entirety of the OVP?

A: In general, yes.

Id. at 96:5 - 96:14.

Without expressing any view as to the merits of Plaintiffs' claims or Ms. O'Donnell's deposition testimony, the transcript also reveals that she answered Plaintiffs' questions concerning the disputed factual areas that justified the taking of discovery in this case. For

example, Ms. O'Donnell explained that the language used in to describe the two "sub-definitions" concerning the Vice President's functions was drafted by counsel and not her. *Id.* at 69:9 - 71:3. When asked, she explained in her own words that she understands all of the Vice President's functions to fall within his (1) duties as President of the Senate and (2) functions specially assigned by the President in the discharge of executive duties and responsibilities:

Q: Is it your understanding that everything that the Vice President does in his executive capacity is specially assigned by the President?

A: In general terms and in specific terms, yes. It's all – they are all assigned by the president.

Q: And would your answer – does the Vice President, to your knowledge, have any obligations or responsibilities beyond those that are specially assigned by the President . . .

A: He has got legislative duties as President of the Senate.

* * *

Q: Okay. And are there any other responsibilities that he has?

A: Everything would fall under those two categories, everything else he does.

Id. at 83:18 - 84:19.³ Similarly, Ms. O'Donnell responded to Plaintiffs' questions concerning whether the legislative records of the Vice President were preserved as PRA records:

Q: How are the legislative records of the Vice President treated under the Presidential Records Act?

A: The same as the executive records are kept. Everything is considered a document that has to be kept and filed.

Id. at 61:17 - 61:22. Ms. O'Donnell also repeatedly responded to Plaintiffs' questions

³ Plaintiffs also asked Ms. O'Donnell about a book commonly referred to as the "Plum Book" in which the Vice Presidency is described as "a unique office that is neither a part of the executive branch nor a part of the legislative branch, but is attached by the Constitution to the latter." O'Donnell Depo. Tr. at 89:11 - 93:15. Ms. O'Donnell testified that, although she was familiar with this language, she could not explain the "legalese" underlying it, but could state that the guidance she had received is that all of the Vice President's functions are considered executive except for his legislative responsibilities as President of the Senate, and that all records related thereto are covered by the PRA. *Id.* at 92:2 - 93:13.

concerning the policies and/or guidelines related to Defendants' interpretation of the PRA:

Q: And what is your understanding of the documents that the Vice President is required to transfer to NARA at the end of his administration?

A: All of his executive and legislative files.

Id. at 37:15 - 38:1.

* * *

Q: Okay. Will all of the papers, records, notes, recordings, memos, that the Vice President has created since January 20th, 2001, be included as Vice Presidential materials turned over to NARA under the Presidential Records Act?

A: Those are the intentions that I've been made aware of. Those are his intentions.

Id. at 87:21 - 88:6.

* * *

A: The general guidance [is] . . . any document that is created or received in our capacities to support the Vice President and in his capacity and his executive responsibilities, would be covered under the PRA.

Id. at 130:1 - 130:5.

The one area in which Ms. O'Donnell appeared to lack personal knowledge was in her responses to Plaintiffs' questions about how specific individuals in the OVP might treat documents that may or may not exist. In contrast, when Plaintiffs asked Ms. O'Donnell questions about the Vice President's particular functions that might generate records, such as his work with the Smithsonian or on the National Homeland Security Council, she responded that those functions, to the extent they create records, would be records covered under the PRA. Given that the scope of discovery in this case is necessarily limited by Plaintiffs' claims – which are based largely on allegations that Defendants have misinterpreted the PRA to exclude certain categories of documents – the Court cannot find that Plaintiffs are entitled to pursue discovery of how specific individuals are treating specific records where there has been extensive deposition

testimony related to the guidelines Defendants follow to identify and handle records subject to the PRA. This is especially so because such questions would appear to implicate Defendants' "records creation, management, and disposal" decisions, which are not judicially reviewable, *see Armstrong v. Bush*, 924 F.2d 282, 291 (D.C. Cir. 1991), rather than the policies and guidelines pertaining to classification decisions, which are reviewable, *see Armstrong v. EOP*, 1 F.3d 1274, 1293-94 (D.C. Cir. 1993).

On this record, there is simply no basis for the Court to order David Addington's deposition. Plaintiffs have not identified any particular questions that Ms. O'Donnell would not answer, or any relevant area of discovery that was not addressed based on the scope of Ms. O'Donnell's knowledge. Nor do Plaintiffs argue that Ms. Smith's deposition was deficient in any way, except for her counsel's instructions that she should not answer questions concerning the 2008 Memorandum. Because the Court has no basis to order further discovery beyond the re-deposition of Ms. Smith, the Court shall set a briefing schedule for dispositive motions to follow shortly thereafter.

Accordingly, it is, this 20th day of November, 2008, hereby

ORDERED that no later than December 1, 2008, Plaintiffs may re-depose Nancy Kegan Smith for the limited purpose of asking questions related to the 2008 Memorandum; it is further

ORDERED that if Ms. Smith lacks sufficient personal knowledge of the 2008 Memorandum to answer Plaintiffs' questions concerning the same, Defendants must produce the Memorandum to Plaintiffs at Ms. Smith's deposition; it is further

ORDERED that the parties shall comply with the following briefing schedule:
Defendants' Motion to Dismiss and/or Motion for Summary Judgment is due on or before

December 8, 2008. Plaintiffs' Opposition to Defendants' Motion and/or Cross-Motion for Summary Judgment is due on or before December 22, 2008. Defendants' Reply and Opposition to Plaintiffs' Cross-Motion is due on or before December 31, 2008. Plaintiffs' Reply is due on or before January 5, 2009.

SO ORDERED.

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge