

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF COLUMBIA

3 CITIZENS FOR RESPONSIBILITY
4 AND ETHICS IN WASHINGTON,

5 Plaintiff,

6 vs.

7 OFFICE OF MANAGEMENT AND
8 BUDGET, ET AL,

9 Defendant.
_____/

CV Action
No. 19-3488

Washington, DC
August 26, 2020

11:00 AM

10 TRANSCRIPT OF STATUS CONFERENCE
11 BEFORE THE HONORABLE THOMAS F. HOGAN
12 UNITED STATES MAGISTRATE JUDGE

13 APPEARANCES:

14 For the Plaintiff: ANNE L. WEISMANN
15 CREW
16 6117 Durbin Road
17 Bethesda, MD 20817
18 301-717-6610

19 For the Defendant: GRACE X. ZHOU
20 U.S. Dept. of Justice, Civil Div
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25 Reported By: LORRAINE T. HERMAN, RPR, CRC
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P R O C E E D I N G S

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THE COURT: Good morning, Judge Hogan here.

CLERK: Good morning. We are ready to proceed with the hearing.

THE COURT: All right. Thank you.

CLERK: Thank you. We are hearing Civil Action 19-3488 Citizens for Responsibility and Ethics in Washington versus the Office of Management and Budget, et al.

If I could have the parties identify themselves for the record, beginning with the Plaintiff.

MS. WEISMANN: Good morning, Your Honor. This is Anne Weismann on behalf of Plaintiff, CREW.

THE COURT: Good morning. Thank you.

MS. ZHOU: Good morning, Your Honor. This is Grace Zhuo on behalf of the US Department of State.

THE COURT: Thank you, Ms. Zhuo.

We are appearing today for a status conference pursuant to earlier orders of court. In this FOIA matter, we had asked for updates, and I received the updates in the supplemental now from Paintiffs as to delay in processing the classified information and materials. The State indicated they haven't been able to do so because of the pandemic.

The State did not respond to the supplemental, the State Department, Defendant, filed by the Plaintiff as to

1 their concerns of the class net system; that they said they
2 couldn't look at because the employees are not in the office
3 who are cleared for that, et cetera; however, have agreed to
4 present documents to the Senate out of that system.

5 I need to understand what the State's position is
6 in this matter.

7 MS. ZHOU: Your Honor, this is Ms. Zhou.

8 State is currently in phase 2 of 3 of its
9 reopening. In terms of its FOIA processing capabilities,
10 approximately 22 percent of its FOIA staff have returned to
11 the office on a part-time basis. So the Department is still
12 under significant constraints on the classified processing
13 capabilities.

14 In this case in particular, Your Honor, the FOIA
15 analyst assigned to the case has decided to return to office
16 on a part-time basis, of her own accord, starting this week.
17 So we are able to resume processing of classified records in
18 this case. And we communicated this to Plaintiffs this
19 week, and the parties have met and conferred and attempted
20 to come to agreement on a processing schedule moving
21 forward, but we were unfortunately unable to do so. So the
22 FOIA analyst was able to return to the office this week and
23 access the class net system briefly yesterday. The State
24 can report that there are approximately 10 potentially
25 responsive classified records, which total approximately 20

1 pages.

2 So the State's proposal is to process these
3 records and to make a production on October 6th; that is
4 within 6 weeks, Your Honor.

5 THE COURT: Uh-huh.

6 MS. ZHOU: And while State can represent and
7 commit to making its best efforts to complete processing
8 these 10 or so records by that date, the agency is not in a
9 position to commit to any firm deadlines at this time due to
10 the constraints that it's facing with classified processing.

11 Specifically for processing these records it
12 states that it can't release any documents until it obtains
13 clearances from other stakeholders, both internal and other
14 agencies, that have equities in these documents. And
15 currently the entire federal government is facing challenges
16 with teleworking and accessing classified systems. State
17 does anticipate that it will face delays in obtaining these
18 clearances.

19 So we think the proposal of making production on
20 October 6th, with the representation that we will endeavor
21 to process all of the 10 or so records by then, is
22 reasonable, Your Honor.

23 THE COURT: Okay.

24 So you have 10 records you are talking about. Do
25 you know how many pages that represents?

1 MS. ZHOU: Your Honor, State estimates that it is
2 about 20 or so pages. The analyst hasn't done an exact page
3 count, so that is an estimate, but we estimate it's around
4 20 or so.

5 THE COURT: All right.

6 So let me just make sure I am familiar with where
7 you are and ready on this. How about the unclassified
8 documents already produced? Have they been produced now
9 after reserving whatever rights you have? Have they been
10 produced?

11 MS. ZHOU: They have, Your Honor.

12 THE COURT: All right.

13 So the only thing that remains are these
14 classified documents, these 10 records?

15 MS. ZHOU: That's correct, Your Honor. The only
16 thing that remains are the classified records in this case.

17 THE COURT: All right.

18 All right, thank you.

19 Let me hear then, Ms. Weismann, what are you
20 looking for at this point as to the classified records that
21 remain.

22 MS. WEISMANN: Yes. We are looking for a
23 production schedule that is not -- that is much shorter than
24 October 6th, which is what the government has proposed.

25 You know, I think it is very interesting, in this

1 case and elsewhere, the State Department has never said it
2 can't process these records. What it has said is that they
3 don't have adequate FOIA staff.

4 The reason I think this is relevant is precisely
5 the subject of our supplemental filing, which the State has
6 gone out of its way, even when it didn't face a deadline
7 from Congress to produce thousands of pages of responsive
8 documents and to continue to do searches in response to
9 requests for Ukraine-related documents from Republican
10 Chairs of the Senate.

11 Here we have an October 2nd FOIA. It is
12 approaching one year. We are looking at 20 pages of
13 documents, and they take the position that they can't
14 complete it or commit to completing it until October 6th.

15 THE COURT: Let me just ask the question. On the
16 supplemental material you submitted of the order concerning
17 production of documents for Congress to, apparently,
18 committees of the Senate, Republican Majority Senate.

19 MS. WEISMANN: Yeah.

20 THE COURT: Is there a timeline where they have to
21 produce or do they just produce at some point? It wasn't
22 clear whether they immediately need to produce or whether
23 they will take time on that order.

24 MS. WEISMANN: The due date that is listed on the
25 memo, at least for the documents to be gathered and

1 provided, is August 28th, which is this Friday. The memo
2 was sent on August 17th.

3 THE COURT: Right.

4 MS. WEISMANN: According to public reporting --
5 and I think that's consistent with the document request,
6 which is attached to the memo that we filed with the
7 Court -- they weren't given a date by which they had to, you
8 know, produce the documents.

9 Nevertheless, they have set into place rapid
10 response to multiple offices anticipating that they will
11 include documents that are on the classified system, and
12 they've asked for a response by August 28th.

13 THE COURT: It's not the actual production. It's
14 the research that --

15 MS. WEISMANN: It's the internal -- right. That's
16 the internal due date at least.

17 THE COURT: Yeah. Yeah. Yeah.

18 MS. WEISMANN: But, again, we are talking about 11
19 days to gather all of those documents. So we are hard
20 pressed to understand why the State Department needs until
21 October 6th.

22 They keep saying, We are not inclined to do
23 anything more. This is how it is working. But obviously
24 they could under a Court order. We think such a Court order
25 is appropriate in this case.

1 This remains a matter of extraordinary public
2 interest. And our concern is that there has already been
3 significant delay. We are down now to this very small
4 corpus of documents.

5 We just think that the -- if the State continues
6 to take the position that it shouldn't have to do anything
7 more than, frankly, it wants to do. We don't think that
8 that should be sanctioned by this Court.

9 THE COURT: Thank you.

10 Ms. Zhou, what is your response? I asked earlier
11 to the issues raised by the Plaintiff where similar
12 documents have been produced or at least found and certainly
13 can be produced shortly, including ones in the same system,
14 the concern with these 20 documents taking as long?

15 MS. ZHOU: Your Honor, this is Ms. Zhou.

16 State has represented to plaintiff multiple times
17 and in the JSR that it's not appropriate to compare the
18 processing of Congressional requests with FOIA requests
19 because State does process these requests separately. It
20 uses separate teams and separate resources. So we don't
21 believe it's appropriate to make the comparison that
22 plaintiffs are doing here, in so far as, Ms. Weismann's
23 allegations of Congressional processing of requests. CREW
24 has submitted a FOIA request regarding this topic and that
25 case is before Judge Cooper. We don't think that case is

1 the appropriate forum to address those allegations.

2 But with respect to the FOIA processing, the
3 resources are as State has articulated in the joint status
4 report. State has a plan for Phase 2 for how it handles
5 FOIA processing. And specifically in this case because the
6 analyst has agreed to return on a part-time basis, we -- our
7 proposal is based on the realistic capabilities of that
8 analyst; and, also, on the time that we expect it will take
9 for State to obtain the clearances it needs to release these
10 documents.

11 Your Honor, Plaintiff's request is specifically
12 for inter-agency communication. So these documents will
13 involve multiple stakeholders. It will take time for State
14 to obtain these clearances and engage in the complications,
15 especially during the pandemic because of the limitations
16 not only on State but also on these other executive branch
17 components because classified records cannot be accessed
18 remotely by telework.

19 THE COURT: All right. And on the documents that
20 were produced so far, have you withheld some based upon some
21 exemptions?

22 MS. ZHOU: We have, Your Honor. I believe that
23 we've withheld information and made redactions pursuant to
24 exemption 5 and 6.

25 THE COURT: All right.

1 Then we will have to see what you will do on the
2 20 pages of these 10 records or whatever they come out to be
3 so the plaintiffs can get these materials.

4 All right.

5 Over plaintiff's objections, I will put an order
6 in requiring these classified records that have been
7 discovered as part of the FOIA request in response to the
8 plaintiffs to be produced by October 6th, 2020, in so far as
9 they are properly producible. I will hold an immediate
10 status conference thereafter to make sure that these have
11 been produced.

12 I sympathize with the Plaintiffs but I think there
13 is a difference between the Congressional request and FOIA
14 request, particularly where there is need to go to other
15 agencies to get their approval; and secondly, having the
16 records, I think, in six weeks are fairly timely, based upon
17 the pandemic situation we are all in.

18 So I am going to allow but I want to set an
19 immediate status call thereafter to determine where we are
20 as to the production of documents of any remains and then as
21 to where the parties are as to resolving any of the
22 withholding that has occurred by the government and then put
23 it in a position to be briefed if we cannot resolve it.

24 So October 7th, do you want to be available for a
25 status call at that time? It will still need to be by

1 phone. We are not going to open the Court until sometime in
2 November for normal activities. We can do some emergency
3 ones but will still need to be on the phone at this time.

4 So October 7th, are the parties available if we
5 want to do a 10:00 in the morning hearing?

6 MS. WEISMANN: Your Honor, this is Anne Weisman.
7 I am available for the Plaintiff.

8 MS. ZHOU: Your Honor, this is Grace Zhou. The
9 government is available as well.

10 THE COURT: I will set a status call for 10:00
11 a.m. on Wednesday, October 7th. I have an order the
12 government produce these classified records as soon as
13 possible and any withholding they wish to make by October
14 6th, if not earlier.

15 MS. WEISMANN: Your Honor, may I make an
16 additional request, which is that if the documents are
17 processed, they could do a rolling production, if they have
18 some that are completed before October 6th?

19 THE COURT: If they can. I assumed they were
20 doing that. I thought Ms. Zhou said if they could do things
21 in order, they would. If they have any earlier ones to
22 finish reviewing and have gotten permission from the
23 agencies to release them, I think they should release them
24 as soon as they are available.

25 MS. WEISMANN: Thank you, Your Honor.

1 THE COURT: All right. Thank you, counsel. I
2 appreciate it.

3 MS. ZHOU: Thank you.

4 THE COURT: I will see you back here on the 7th.

5 MS. WEISMANN: All right. Good-bye.

6 (Hearing concluded at 11:15 a.m.)

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C E R T I F I C A T E

I, **Lorraine T. Herman, Official Court**

Reporter, certify that the foregoing is a true and correct transcript of the record of proceedings in the above-entitled matter given the fact that this hearing occurred during the COVID-19 pandemic and is subject to the limitations of technology of remote reporting.

DATE

/s/

Lorraine T. Herman