

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

GOVERNMENT ACCOUNTABILITY)
PROJECT,)
)
Plaintiff,)
)
v.)
)
UNITED STATES)
DEPARTMENT OF STATE et al,)
)
Defendants.)
_____)

Civil Action No. 19-449 (RDM)

**PLAINTIFF’S MOTION TO COMPEL THE DEPARTMENT OF STATE’S
COMPLIANCE WITH THE COURT’S JULY 22, 2020 ORDER
AND SUPPORTING MEMORANDUM**

INTRODUCTION

Plaintiff Government Accountability Project (“GAP”) respectfully requests that the Court compel the Department of State to comply with the terms of the Court’s July 22, 2020 Order instructing the Department of State to prioritize the processing of a subset of records relating to IP3 Corporation, to identify by July 29, 2020 the volume of records that are responsive to that prioritization, and to process for the month of August as many records as possible. Hr’g. Tr. (Jul. 22, 2020), ECF No. 50 at 24:3—25:9. The Court’s instruction to process as many records as possible was made in the context of a 600-page-per-month requirement that the Court imposed on all defendants prior to the coronavirus pandemic and reflected the Court’s explicit expectation that the Department of State would process a “substantial number of records.” *Id.* at 25:5. Instead of complying with the Court’s order, the Department of State failed to accurately identify the number of responsive records by the Court’s July 29, 2020 deadline, failed to process any records by the Court’s August 31, 2020 deadline, and produced to GAP a mere 16 pages of

records on September 1, 2020, after the deadline had passed. GAP respectfully requests the Court's prompt intervention to compel the Department of State to dramatically scale-up its processing of records to satisfy the clear terms of the Court's order by requiring the Department of State to process all remaining records responsive to GAP's new prioritization by Friday, September 11, 2020 and to impose appropriate sanctions on the Department of State for violating the clear terms of the Court's July 22, 2020 order.

BACKGROUND

In response to GAP's objection to an open-ended stay of the Department of State's obligation to process 600 pages of records per month, the Court held two telephonic conferences in which it heard the parties' respective positions about how to proceed. At the second telephonic conference on July 22, 2020, the Court ordered the Defendant Department of State to resume processing records on a monthly basis and to prioritize a subset of records that Plaintiff GAP had identified. Hr'g. Tr. at 24:3-18. The Court further stated:

I think what I'm going to do is I am going to—I think it does make sense to me to try and shift the focus here in light of the delay that has resulted from the pandemic. This case has been around a long time, and it's a very old FOIA request. This does strike me as a reasonable request by the plaintiffs to try and ensure that they can more promptly get the records that they're most concerned with.

So I am going to order that the department adopt the prioritization that was proposed. I think you all have it, but as I understand it, it's correspondence from or to Keith Alexander, Michael Hewitt, Jack Kean, Robert McFarlane, Stewart Soloman or Fran Fragos Townsend with the State Department that mentions Saudi Arabia or the Middle East Marshall Plan. So I'm going to order that that be done.

And I'm going to further order that within a week of today -- so on or before the 29th of July, the State Department will just get back to plaintiffs and let plaintiffs know what volume of records they've identified and how quickly they'll be able to complete that prioritization. And I'm just going to order that *at least for the month of August*, that with that shift in prioritization, *that the State Department endeavor to process as many records from that group as they can*. I'm not going to set a

page number of 600, but I would expect that the State Department would be able to still process a substantial number of records. Because I do agree that -- at least at this point, I'm not convinced that the shifting of the prioritization would so occupy the department's resources that they would be unable to then go on and process quite a few records as well.

Id. at 24:3—25:9 (emphasis added).

On July 29, 2020, the Department of State informed GAP that it had “conducted a search for the individuals identified in Plaintiff’s prioritization request, which has resulted in approximately 2,700 documents.” Ex. 1 at 5. That estimate proved to be wildly overbroad and as of the filing of this motion is still a moving target. The Department of State notified GAP a week later on August 6 that there were in fact only 140 responsive documents (totaling 750 pages of records), *id.* at 4. On September 1, 2020, the Department of State notified GAP that it had subsequently determined that 32 of those 140 documents were non-responsive. The Department of State also informed GAP that it intended to disregard the Court’s instruction to process as many records as possible during the month of August. Instead, it intended “to make an initial production of responsive, non-exempt documents on September 17, 2020” and that it anticipated completing processing of the prioritized materials “in approximately four months.” *Id.* at 4.

In advance of the August 31, deadline, GAP communicated its expectation that State would “meet the obligation that the Court established at the July 22 status conference: to meet or to come as close as possible to meeting the 600 pages per month minimum that the Court had established for all agency defendants prior to COVID.” *Id.* at 2. GAP reiterated its expectation that, consistent with the Court’s order, the Department State would by midnight on August 31, 2020, inform GAP how many records it had processed for the month of August and produce any non-exempt records. *Id.* GAP also rejected State’s proposal to process the new prioritization at a rate of less than 190 pages per month because that pace was not consistent with the Court’s

directive to “endeavor to process as many records from that group as [State] can,” Hr’g. Tr. at 25:1-2, and the Court’s expectation that “the State Department would be able to still process a substantial number of records,” *Id.* at 25:4-5. The record also indicates that GAP’s counsel repeatedly sought to resolve this issue without filing the instant motion, as is required by Local Rule 7(m). *See* Ex. 1.

Despite GAP’s repeated insistence that the Department of State comply with the clear terms of the Court’s July 22, 2020 order, the Department of State did not produce any documents to GAP by its August 31, 2020 deadline. Nor did the Department of State seek leave from the Court to delay its obligation to process records for the month of August 2020. Instead, after business hours on August 31, 2020, the Department of State notified GAP that it would not be meeting its deadline, and on September 1, 2020, the Department of State produced a mere 16 pages of partially withheld records to GAP. *See* Exs. 2, 3.

At the same time that the Department of State has been ignoring its obligations under this Court’s orders, it has expedited the processing of partisan Congressional document requests. *See* Natasha Bertrand, Andrew Desiderio, and Kyle Cheney, [Pompeo aide orders State Department to provide Biden, Russia probe documents](#), *Politico*, Aug. 18, 2020, available at <https://www.politico.com/news/2020/08/18/pompeo-aide-biden-russia-documents-397895>. A memorandum obtained by *Politico* that is dated August 17, 2020 from a senior aide to Secretary of State Mike Pompeo to department bureaus established an August 28, 2020 deadline for responding to a variety of requests from the Senate Finance Committee and Senate Homeland Security and Government Affairs Committee. *See* Lisa D. Kenna, [Memorandum re: Congressional Request for Documents on variety of investigatory subjected on HSGAC/SFC investigation \(STATE-2020-06\)](#), (August 17, 2020), available at <https://www.politico.com/>

[f/?id=00000174-02bb-d271-adf7-77fbcba20000](#). On information and belief, the instructions contained in this memorandum will have required the Department of State to process and produce thousands of pages of records in less than two weeks.

ARGUMENT

The Department of State's conduct in this matter violates both the letter and spirit of this Court's processing orders in this case as well as its standing order, ECF No 4, which states that "[e]xtensions or enlargements of time will only be granted upon motion, and not upon stipulation by the parties." Neither the Federal Rules of Civil Procedure, the Local Rules for the United States District Court for the District of Columbia, nor the Court's standing Order permit a party to unilaterally grant itself an extension from a court-imposed deadline. Both the Federal Rules of Civil Procedure and this Court's inherent authority to manage its docket permit the Court to sanction a party for failing to comply with a pretrial order. *See* Fed. R. Civ. P. 16(f)(1) (permitting a court to "issue any just orders . . . , if a party or its attorney . . . fails to obey a scheduling or other pretrial order"); *Landmark Legal Found. v. E.P.A.*, 272 F. Supp. 2d 70, 89 (D.D.C. 2003) (relying on the court's inherent powers to sanction the EPA for failing to comply with a preservation order in a FOIA matter). *See also Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 798 F. Supp. 2d 260, 272 (D.D.C. 2011) ("Federal courts enjoy inherent contempt power."). Rule 16(f)(2) of the Federal Rules of Civil Procedure requires the court to "order the party, its attorney, or both to pay the reasonable expenses--including attorney's fees--incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust."

The Department of State's failure to identify records responsive to the new prioritization by July 29, 2020, and its processing of a trivial number of pages of records after the Court-

imposed August 31, 2020 deadline amount to clear violations of the Court's July 22, 2020 order. The Court ordered the Department of State to establish the volume of records responsive to GAP's prioritization by July 29, 2020, Hr'g. Tr. at 24:19-24, and to process "as many records from that group as they can" during the month of August, *id.* at 25:1-2, with the expectation that the Department of State would process a "substantial number of records," *id.* at 25:5. Because the Department of State ignored the Court's July 22, 2020 order and has in effect unilaterally established its own schedule for processing records without seeking leave of the Court, Plaintiff respectfully requests that the Court compel the Department of State's immediate compliance with its obligation to process records in the month of August. Accordingly, the Court should compel the Department of State to complete processing the remaining 100 documents from the new prioritization by Friday, September 11, 2020. The Department of State's conduct demonstrates that it is not going to comply with any instructions from this Court that are delivered on the record at a status hearing or that leave room for disingenuous misinterpretation. GAP also respectfully requests that the Court put the Department of State on notice that failure to comply with the September 11, 2020 deadline will result in a finding of contempt and the awarding of sanctions.¹

The Department of State's contempt for the Court's instructions prejudices GAP. Under the FOIA, GAP has a right to the non-exempt records it has requested, and the 16 pages of records produced today are the only records GAP has received from the Department of State

¹ Alternatively, the Court could immediately order the Department of State to show cause why it should not be held in civil contempt for its violation of the Court's July 22, 2020 order. *See Broderick v. Donaldson* 437 F.3d 1226, 1234 (D.C. Cir. 2006) ("The power to punish for contempts is inherent in all courts; its existence is essential to . . . the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice.") (quoting *Ex parte Robinson*, 86 U.S. 505, 510 (1874); *Commodity Futures Trading Comm'n v. Trade Exch. Network Ltd.*, 117 F. Supp. 3d 22, 26 (D.D.C. 2015) (holding defendants in civil contempt of court for violating a discovery order).

since March 2020. As the Court has recognized on multiple occasions, this is an old FOIA request for records of significant public interest, and the Court has already accommodated the Department of State by staying its processing obligations for months and lifting its obligation to process a minimum of 600 pages per month. The Department of State's unilateral decision to establish its own schedule rather than comply with the schedule established by the Court after hearing argument from both parties is causing GAP to relitigate issues that the Court has already weighed and ruled upon. The time spent filing this motion and responding to proposals from the Department of State that plainly violate orders from this Court places an unacceptable and unreasonable burden on GAP that seems destined to continue without the Court's intervention.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court compel the Department of State's compliance with its July 22, 2020 order by requiring the Department of State to complete processing of the remaining 100 documents from the new prioritization by Friday, September 11, 2020.

Dated: September 1, 2020

Respectfully submitted,

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