

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

**CITIZENS FOR RESPONSIBILITY)
AND ETHICS IN WASHINGTON,)**

Plaintiff,)

v.)

U.S. DEPARTMENT OF JUSTICE,)

Defendant.)

Civil Action No. 18-cv-1766 (RBW)

**PLAINTIFF’S MOTION TO PRIORITIZE PROCESSING OF DOCUMENTS
PERTAINING TO LISA PAGE AND MICHAEL KORTAN AND SUPPORTING
MEMORANDUM OF POINTS AND AUTHORIES**

INTRODUCTION

An ongoing challenge here, where plaintiff Citizens for Responsibility and Ethics in Washington (“CREW”) seeks records of extraordinary public interest that bear on the conduct of the President and top Department of Justice (“DOJ”) officials, is ensuring public access to these records in a timely manner. Considering the limited FOIA resources the Office of the Inspector General (“OIG”) has represented to this Court it has and the importance of the requested records, the Court has ordered the OIG to process at least 200 pages of records per month. Even with this processing rate, however, it will be many months before the public sees many of the requested records. In these circumstances, CREW made the imminently reasonable request that DOJ prioritize its processing to ensure high-value documents are made publicly available as quickly as possible. While agreeing in theory to prioritizing, DOJ in practice has refused to accommodate CREW’s request, claiming to do so is “not compatible with the an [sic] efficient use of agency

resources and the need to satisfy the court's order."¹ DOJ's claim is nonsensical and suggests its true reason is delaying the production of records that would raise questions about the findings of the Inspector General and the legitimacy of DOJ's newly disclosed decision to refer to the U.S. Attorney's Office for the District of Columbia allegations that former Acting FBI Director Andrew McCabe made false statements in violation of criminal law. As the author of its FOIA request, CREW should be entitled to designate those documents it seeks to obtain first where, as here, accommodating that request will cause DOJ no harm.

FACTUAL BACKGROUND

The Court is familiar with the facts of this case, which seeks on an expedited basis all documents related to any investigation or inquiry the FBI's Office of Professional Responsibility ("OPR") conducted of or related to Mr. McCabe. Compl. ¶ 12. Following the status conference on November 14, 2019, in which this Court ordered the OIG to process 200 pages per month, Order at 1, CREW and DOJ discussed which documents to prioritize for release. CREW requested prioritizing interview transcripts and notes, and that DOJ first release transcripts and notes of interviews with former FBI Assistant Director for Public Affairs Michael Kortan and former Special Counsel to Mr. McCabe Lisa Page.² DOJ refused this request, saying that it would be an inefficient use of agency resources and may undermine privacy redactions that, "if claimed, would otherwise protect the identities of witnesses." *See* Ex. A.

The root of Mr. McCabe's termination stems from his decision to authorize Ms. Page and Mr. Kortan to speak with the *Wall Street Journal*. Matt Zepotosky, Inspector general report faults Andrew McCabe for unauthorized disclosure of information, misleading investigators,

¹ *See* email from Justin Sandberg to Anne Weismann, Dec. 6, 2019 (attached as Ex. A).

² *See* email from Anne Weismann to Justin Sandberg, Nov. 25, 2019 (attached as part of Ex. A).

Washington Post (Apr. 13, 2018), <https://wapo.st/36n7Uu0>. Their roles in the events leading to Mr. McCabe’s termination already are well known. Numerous public documents refer to OIG interviews with Ms. Page and Mr. Kortan, including the OIG report itself, which references interviews conducted of the female “then-Special Counsel,” Office of the Inspector General, Report of Investigation of Certain Allegations Relating to Former FBI Deputy Director Andrew McCabe, at 1, 8, 20 (Feb. 2018), <https://bit.ly/2E2gstV>, a role Ms. Page occupied, and Mr. McCabe’s complaint in his civil suit against DOJ, which claims that the transcript of the OIG’s interview of Mr. Kortan “proved to be favorable to Plaintiff,” Comp. ¶ 120, *McCabe v. Barr*, No. 1:19-cv-02399 (D.D.C. Aug. 8, 2019).

Mr. McCabe’s abrupt termination, and the roles of Ms. Page and Mr. Kortan, were and continue to be the subject of widespread media attention and public interest. *See, e.g.*, Adam Goldman, Prosecutors Face Pressure to Make Decision in McCabe Case, *New York Times* (Oct. 1, 2019), <https://nyti.ms/35aBbHV>.

ARGUMENT

1. **Releasing the Page and Kortan Interview Transcripts and Notes First Is in the Public Interest.**

When Congress enacted the FOIA, it specifically acknowledged that particularly urgent information should be released more quickly than less urgent information. *See* 5 U.S.C. § 522 (a)(6)(E); 6 C.F.R. 5.5(E)(1); *see also Payne Enterprises, Inc. v. United States*, 837 F.2d 486, 494 (“stale information is of little value”). This is common sense, and the government “must use some measure of ‘common sense’” when responding to FOIA requests. *Pinson v. Dep’t of Justice*, 69 F. Supp. 3d 125, 133 (D.D.C. 2014) (citing *Dale v. IRS*, 238 F. Supp. 2d 99, 105 (D.D.C. 2002)).

Toward that end, prioritizing makes particular sense with large volume FOIA requests, as it ensures the records of greatest public interest will be disclosed as promptly as possible, and at least before they become stale and lose their public value. Here, CREW has requested that the OIG first process interview transcripts and notes for two key witnesses—Mr. Kortan and Ms. Page—each of whom reportedly offered exculpatory evidence that the OIG omitted from its report. Quite obviously these documents have the greatest potential to assist the public in evaluating the merits of former Attorney General Jeff Session’s hastily made decision to terminate Mr. McCabe on the eve of his planned retirement, which he justified with the OIG report and its conclusions. Without this prioritization, this evidence may come too late for the public to effectively factor it into an assessment of DOJ, its leadership, and the administration at large.

Moreover, CREW should not be punished for filing a single FOIA request rather than multiple requests for individual documents, a factor courts have taken into consideration. For example, in *Seavey v. Dep’t of Justice*, 266 F. Supp. 3d 241 (D.D.C. 2017), the court considered the processing schedule for a particularly large FOIA request. The FBI asked that it be permitted to process 500 pages per month, which would complete production in “just shy of 17 years.” *Id.* at 246. In rejecting this proposal, the court admonished the FBI for being so slow to respond and went on to point out a logical flaw in the FBI’s argument: that the requestor could have made multiple, distinct FOIA requests each with a 500-page processing rate that would have ensured faster processing, and therefore should not be punished for making a single comprehensive request. *See id.* at 248 n.2. In ordering a faster processing rate the court also relied on the nature of the request, which concerned “a project of substantial substance in terms of shedding light on

serious gaps in the public’s understanding of the role” the agency and the U.S. Government played. *Id.* at 248.

Although the instant case presents different circumstances, the logic of *Seavey* applies. CREW could have filed—and still could file—a FOIA request or requests specifically for Page and Kortan interview transcripts and notes. Expedition would be warranted given that Ms. Page and Mr. Kortan are at the center of the McCabe story, their testimony is critical to understanding what happened, and would fill in the “serious gaps in the public’s understanding” of the complete story behind the OIG report. *See id.* Further, it appears from information already in the public domain that their testimony could exonerate Mr. McCabe. Filing a separate FOIA request, however, would be an inefficient use of resources, an irrational requirement, and frustrating for all parties. Prioritizing as CREW has proposed is simply common sense.

2. The Court Has Authority to Order DOJ to Release the Page And Kortan Interview Transcripts First.

Courts have “broad equitable power to fashion FOIA relief.” *Citizens for Resp. and Ethics in Washington v. Dep’t of Justice*, 846 F.3d 1235, 1244 (D.C. Cir. 2017). Because of the importance of public accountability, they should exercise that power “to scrutinize closely agency delay,” *Electronic Privacy Information Center v. Dep’t of Justice*, 416 F. Supp. 2d 30, 38 (D.D.C. Feb. 16, 2006); *see also Oglesby v. Dep’t of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990), and ensure that agencies have made a “good faith effort” to respond to FOIA requests. *Id.* Particularly in considering the reasons behind government delay, “FOIA imposes no limits on courts’ equitable powers in enforcing its terms.” *Payne*, 837 F.2d at 494 (citing *Renegotiation Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1, 19–20 (1974)). Although courts often use their equitable authority to set a production schedule or to order an agency to produce improperly withheld documents, it can be used in other ways, including ordering prospective relief, to

enforce the FOIA's terms. *CREW*, 846 F.3d at 1241–42 (discussing the breadth of the district court's equitable authority, which includes ordering prospective relief).

Here, Plaintiff requested the Page and Kortan interview transcripts and notes be processed first because they are especially urgent. DOJ offers no persuasive reasons for denying that request, beyond suggesting this would compromise unidentified privacy concerns. To the extent DOJ seeks to keep secret the fact that both Ms. Page and Mr. Kortan provided information to the OIG during its investigation of Mr. McCabe, that fact already is well known, and public reporting suggests their exculpatory evidence contradicts the findings of the OIG. *See, e.g., Goldman, New York Times*, Oct. 1, 2019.

Prioritizing these two subjects also presents no obstacles to “an efficient use of agency resources,” and DOJ does not explain otherwise how it would. DOJ can readily access these documents, and processing them first does not require resources or expertise that would not otherwise be brought to bear. Nor does the “need to satisfy the court’s order” justify denying the requested prioritization. The Court’s order was an accommodation of the resources available to OIG to process the request on the one hand and the importance of getting the requested information to the public as soon as possible on the other hand. Providing the public with the quickest access to the most potentially revelatory documents advances, not thwarts, the interests underlying the Court’s order.

The lack of any sound reasoning behind DOJ’s excuses for not acceding to the priorities *CREW* has requested suggests something more troubling may be going on: an effort to stall production of documents that would cast DOJ and high-level DOJ officials in a poor light. Exculpatory evidence proffered to the OIG by Mr. Kortan and Ms. Page would raise a serious question about why it was not even included in the OIG report and why, in the face of that

evidence, DOJ has insisted on keeping open its criminal investigation of Mr. McCabe. Under these circumstances, the Court should exercise its authority to order DOJ to prioritize any transcripts and notes pertaining to Mr. Kortan or Ms. Page.

CONCLUSION

For the foregoing reasons, plaintiff respectfully asks this Court to order DOJ to release interview transcripts and notes starting with former Special Counsel Lisa Page, and former FBI Assistant Director for Public Affairs, Michael Kortan.

Pursuant to Local Rule 7(m) counsel for CREW consulted with counsel for DOJ concerning this motion. DOJ counsel advised that DOJ opposes and will be filing a brief.

Respectfully submitted,

/s/ Anne L. Weismann

Anne L. Weismann
(D.C. Bar No. 298190)
Adam J. Rappaport
(D.C. Bar No. 479866)

Citizens for Responsibility and Ethics
in Washington

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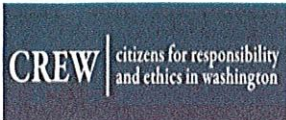
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aweismann@citizensforethics.org

Dated: December 16, 2019

Attorneys for Plaintiff

EXHIBIT A



Anne Weismann <aweismann@citizensforethics.org>

Processing Order

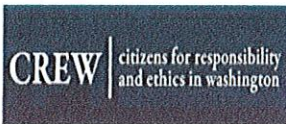
1 message

Sandberg, Justin (CIV) <Justin.Sandberg@usdoj.gov>
To: Anne Weismann <aweismann@citizensforethics.org>

Fri, Dec 6, 2019 at 4:05 PM

Anne: Good afternoon. The agency has not reconsidered its position. It offered to try to prioritize the processing of records by categories to the extent it could consistent with resource limitations and the need to comply with the court's order. You expressed a general preference for interview transcripts and notes. With the caveats noted above, the agency is endeavoring to prioritize those categories. But your request for the agency to prioritize transcripts and notes by witness name based on suggestions offered on a monthly basis is not compatible with the an efficient use of agency resources and the need to satisfy the court's order. And if done, it might undermine privacy redactions which, if claimed, would otherwise protect the identities of witnesses. Finally, the agency is aware of no legal obligation to prioritize the processing of records in the manner sought by the requester. If you have authority to the contrary, I'd be to review it.
Thanks. Justin

Sent from my iPhone



Anne Weismann <aweismann@citizensforethics.org>

CREW (McCabe OPR File FOIA): categories

11 messages

Sandberg, Justin (CIV) <Justin.Sandberg@usdoj.gov>
To: Anne Weismann <aweismann@citizensforethics.org>

Fri, Nov 22, 2019 at 2:07 PM

Good afternoon, Anne. I'm writing regarding the categories. With respect to documents referred to OIG by FBI, we provided you with a categorization of those documents in the context of selecting a sample. With respect to documents sent to OIG on a consult basis, we don't have a breakdown by category, and we think it would not be the best use of limited processing resources to go through and categorize the documents. The bulk of the documents at issue in this case (something like 60-75ish percent) are referred docs. That said, if you want to provide your preferences for processing order, based on the categories you've previously been provided, please let me know what those preferences are by COB Monday November 25, 2019, and OIG will attempt to accommodate you. To be clear, though, we may not be able to do so consistent with resource limitations and the need to process 200 pages a month. Have a nice weekend. – Justin

Anne Weismann <aweismann@citizensforethics.org>
To: "Sandberg, Justin (CIV)" <Justin.Sandberg@usdoj.gov>

Fri, Nov 22, 2019 at 2:22 PM

Thanks Justin, you too

[Quoted text hidden]

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Anne L. Weismann
Chief FOIA Counsel
CREW/Citizens for Responsibility and Ethics in Washington
aweismann@citizensforethics.org
202-408-5565

Anne Weismann <aweismann@citizensforethics.org>
To: "Sandberg, Justin (CIV)" <Justin.Sandberg@usdoj.gov>

Mon, Nov 25, 2019 at 9:03 AM

Good morning Justin. Our first priority is interview transcripts and notes, starting with FBI Assistant Director for Public Affairs Michael Kortan and Lisa Page. Once we have those documents we can discuss next steps.

On another front, we will be moving to unseal the sealed portions of hearing transcripts from the July 9, September 9, and September 30, 2019 status conferences. What is your position on this?

Thanks,

Anne

On Fri, Nov 22, 2019 at 2:07 PM Sandberg, Justin (CIV) <Justin.Sandberg@usdoj.gov> wrote:

Good afternoon, Anne. I'm writing regarding the categories. With respect to documents referred to OIG by FBI, we provided you with a categorization of those documents in the context of selecting a sample. With respect to documents sent to OIG on a consult basis, we don't have a breakdown by category, and we think it would not be the best use of limited processing resources to go through and categorize the documents. The bulk of the documents at issue in this case (something like 60-75ish percent) are referred docs. That said, if you want to provide your preferences for processing order, based on the categories you've previously been provided, please let me know what those preferences are by COB Monday November 25, 2019, and OIG will attempt to accommodate you. To be clear, though, we may not be able to do so consistent with resource limitations and the need to process 200 pages a month. Have a nice weekend. – Justin