IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,	)	
Plaintiff,	)	
v.	)	Civ. No. 1:15-cv-00646 (CKK)
U.S. DEPARTMENT OF STATE,	)	
Defendant	)	

DEFENDANT'S COMBINED REPLY IN SUPPORT OF ITS RENEWED MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiff Judicial Watch's primary argument in opposition to the Department of State's ("State") Motion for Summary Judgment, as well as the basis for its Cross-Motion, is that State's assertion of the deliberative process privilege over information in 13 documents responsive to its Freedom of Information Act ("FOIA") request should be disallowed because the redactions shield government misconduct. Plaintiff's attempt in a FOIA case to invoke this rare exception to the deliberative process privilege under Exemption 5 is entirely meritless. Plaintiff has failed to demonstrate the type of extreme government wrongdoing the courts have found necessary to invoke this exception, as its allegations are based on mischaracterizations of the emails at issue here.

Plaintiff also requests that this Court order a supplemental search of documents newly discovered by the FBI in October 2016 even though those documents are not yet in State's possession. This request should be rejected. State is not legally obligated to search documents over which it does not currently have possession and control, and in any event there is little

reason to believe that a search of the FBI documents would result in any documents responsive to Plaintiff's requests. This case is ripe for decision, and the court should enter summary judgment on State's behalf.

ARGUMENT

STATE IS ENTITLED TO SUMMARY JUDGMENT

In its opposition brief, plaintiff concedes the correctness of all exemptions claimed in the produced documents, with the exception of information in 13 documents withheld under FOIA's Exemption 5. *See* Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment and In Support of Plaintiff's Cross-Motion for Summary Judgment ("Pl.'s Opp.") at 5-8 and n. 2. Additionally, plaintiff does not challenge the adequacy of the searches conducted, but instead requests that this Court order State to conduct a supplemental search of documents that State does not possess and cannot search. Pl.'s Opp. at 9-10. This Court should deny plaintiff's requests and grant summary judgment to State.

I. Plaintiff Has Not Made a Showing Sufficient to Invoke the Government-Misconduct Exception to the Deliberative Process Privilege

Plaintiff makes a single argument in opposition to State's assertion of the deliberative process prong of Exemption 5 -- that the exemption is negated by the "government-misconduct exception." Plaintiff does not contest that the withheld material is predecisional and deliberative, and would otherwise meet the requirements of the Exemption 5 and the deliberative process privilege. Pl.'s Opp. at 5-8. Rather, plaintiff's opposition and cross-motion rely entirely on its unsupported assertion that because the emails in question relate to mobile devices, they must relate to misconduct and the deliberative process privilege does not apply. Plaintiff's argument fails on multiple levels. First, the government-misconduct exception, to the extent it even applies to FOIA, is exceptionally rare and reserved for conduct bearing no resemblance to the

information contained in the documents here. Second, as the *Vaughn* index in the case amply demonstrates, there is no evidence that the emails at issue relate to misconduct. Rather, the information withheld from the thirteen (13) documents at issue involves core deliberative discussions regarding the secure use of mobile devices and the viability of using mobile devices within the Secretary's secure suite of offices.

"Under the government-misconduct exception to the deliberative-process privilege, 'where there is reason to believe the documents sought may shed light on government misconduct, the privilege is routinely denied, on the grounds that shielding internal government deliberations in this context does not serve the public's interest in honest, effective government.'" *National Whistleblower Ctr. v. HHS*, 903 F. Supp. 2d 59, 66 (D.D.C. 2012) (quoting *In re Sealed Case*, 121 F.3d 729, 738 (D.C. Cir. 1997)). Although the D.C. Circuit has never recognized a misconduct exception to Exemption 5, certain courts in this district have found that FOIA plaintiffs may, in rare instances, invoke the government-misconduct exception to overcome Exemption 5. *See e.g., id.* at 66-68 (summarizing district court cases); *ICM Registry, LLC v. U.S. Dep't of Commerce*, 538 F. Supp. 2d 130, 133 (D.D.C. 2008); *see also Hall & Associates v. United States Envtl. Prot. Agency*, 14 F. Supp. 3d 1, 9 (D.D.C. 2014) (noting that "other courts have not been entirely consistent in applying the government-misconduct exception to FOIA cases" and declining to do so because "Plaintiff's argument would not succeed even if the exception did apply"). But in doing so, each of these district courts has emphasized the narrowness of that exception, both in the FOIA and discovery contexts, limiting the exception to "extreme government wrongdoing." *Nat'l Whistleblower Ctr.*, 903 F. Supp. 2d at 68 (quoting *ICM Registry,* 538 F. Supp. 2d at 133); *Thompson v. DOJ*, 146 F. Supp. 3d 72, 87 (D.D.C. 2015) (government-misconduct exception applies "only in cases of extreme government wrongdoing").

Courts must apply the exception narrowly, otherwise "the exception would swallow the rule." *Nat'l Whistleblower Ctr.*, 903 F. Supp. 2d at 69. For this reason, Courts have applied the exception only in "rare cases" where the discussions for which protection was sought "were so out of bounds that merely discussing them was evidence of a serious breach of the responsibilities of representative government." *ICM Registry*, 538 F. Supp. 2d at 133 (declining to apply misconduct exception where plaintiff alleged that agency's deliberations concerned a policy outside the scope of the agency's responsibility). Thus, it is only when "[t]he very discussion . . . was an act of government misconduct" that "the deliberative process privilege disappeared." *Id.*[1]

Other courts have used the word "nefarious" to describe the kind of conduct giving rise to the exception. *Id.* (citing *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 145 F.3d at 1422, 1425, n.2 (D.C, Cir. 1998); *Enviro Tech Int'l, Inc. v. U.S. E.P.A.*, 371 F.3d 370, 376 (7th Cir. 2004) (refusing to apply misconduct exception to a case where the EPA was debating a worker exposure standard for a harmful chemical that was properly a matter for OSHA)). Indeed, even a showing that the government has violated a statute does not rise, on its own, to the level of "misconduct" necessary to create an exception. *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 145 F.3d at 1425, n.2 ("misconduct" does not apply where an agency allegedly violated a statute where proving violation requires a showing of intent but not a showing of bad faith). Absent a showing that mere *consideration* of

[1] The court in *ICM Registry*, cited two cases to explain what falls within "extreme government wrongdoing:" *Alexander v. FBI*, 186 F.R.D. 154, 164 (D.D.C. 1999), in which the court held the deliberative process privilege did not protect a document that suggested a cover-up regarding alleged misuse of a government personnel file; and *Tax Reform Research Group v. IRS*, 419 F. Supp. 415, 426 (D.D.C. 1976), where the court held the privilege did not apply to documents concerning government recommendations to improperly use the powers of the IRS against "enemies" of the Nixon administration.

the policy at issue was outside an agency's purview, or that an agency had "nefarious purposes," the action is not misconduct within the meaning of the exception to the deliberative process privilege. *ICM Registry*, 538 F. Supp. 2d at 133.

Plaintiff has the burden to provide a "discrete factual basis" for believing that information withheld under the deliberative process privilege could shed light on government misconduct. *Judicial Watch of Florida, Inc. v. U.S. Dep't of Justice*, 102 F. Supp. 2d 6, 16 (D.D.C. 2000). Plaintiff must show more than evidence of a "disagreement within the governmental entity at some point in the decisionmaking process" to invoke the misconduct exception. *Hinckley v. United States*, 140 F.3d 277, 285 (D.C. Cir. 1998) (finding that a review board's overruling of a unanimous decision by a patient's treatment team did not evince "improper motivations"); *see also Convertino v. U.S. Dep't of Justice*, 674 F. Supp. 2d 97, 105 (D.D.C. 2009) ("Plaintiff must provide enough reason to believe misconduct took place."). In fact, the deliberative process privilege exists precisely to permit the type of debate and inevitable disagreement that is crucial to ensuring informed decision making. *See Schell v. HHS*, 843 F.2d 933, 941 (6th Cir. 1988) ("It is the free flow of advice, rather than the value of any particular piece of information, that Exemption 5 seeks to protect.").

Plaintiff's assertion of misconduct woefully fails to meet this standard. Plaintiff contends that the "misconduct" consisted of use of unsecure and unauthorized mobile devices by Secretary Clinton for her email" and that "[s]imply by virtue of the subject matter discussed in the records – the use of mobile devices for Secretary Clinton's official, State Department, email communications during her tenure at the State Department – a connection exists and the exception to the privilege should apply." Pl.'s Opp. at 7. However, as explained above, the government-misconduct exception is very narrowly applied and agency discussions regarding

what electronic devices may be used by the Secretary of State and her staff, including various options and security issues associated with those options, is not "so far out of bounds" that merely discussing these options is itself misconduct. *See ICM Registry*, 538 F. Supp. 2d at 133 (misconduct exception applies only when "[t]he very discussion . . . was an act of government misconduct."). Plaintiff has provided no evidence that demonstrates that the redactions were related to discussions about violations of the law as opposed to general discussions about secure use of mobile devices.

Nor does Plaintiff identify any "nefarious" conduct. Instead, plaintiff takes bits and pieces of several documents (some are dated two years apart) and weaves them together in a futile attempt to demonstrate "a clear connection between the withheld material and the Secretary's use of unsecure and unauthorized mobile devices for her official State Department business." Pl.'s Opp. at 8. However, the mere fact that there were discussions regarding possible use of mobile devices does not by itself demonstrate the level of misconduct necessary to negate the deliberative process privilege. As the *Vaughn* index makes clear, the emails plaintiff specifically identifies involve discussions regarding the use of blackberries and other mobile technology in the Secretary's Suite and relays advice provided to the Secretary and her staff regarding what is possible and what is advisable regarding the use of such devices. Nothing in the produced documents indicates that the discussions concern intent to, or advice on how to, violate any laws concerning use of mobile devices, but only a back and forth of what can be done and what should be done and why or why not. *See e.g.*, C05838724 (attached as Ex. 6 to Pl.'s Opp.) (email discussing "distinction between what can be done and what is, or is not, recommended to be done differ;" and providing options based on the professional expertise of its staff).

Plaintiff's reference to the FBI's investigation, Pl.'s Opp. at 4, misses the point. The records at issue here have no bearing on the Secretary's use of a private server. Rather, they address the former Secretary's staff's questions about whether or not they were able to use portable devices—of any kind—inside the secure suite. . As opposed to nefarious misconduct, these discussions represent core deliberations regarding precisely what ought to be occurring within an agency – frank discussions intended to give decision-makers the best advice possible about why these portable devices could not be used inside the secure suite, and whether feasible options existed to enable secure mobile communications.[2] Plaintiff points to no evidence whatsoever that the former Secretary and her staff ever used portable devices inside secure areas, and, as the *Vaughn* index in the case demonstrates, these documents provide no such evidence.

Finally, in one sentence in the introduction, plaintiff suggests that, "[a]t a minimum, the Court should order an *in camera* review of the withheld information so that the Court may determine the appropriateness of the privilege," *see* Pl.'s Opp. at 1. However, the opposition brief provides no basis for the request and it therefore should be summarily rejected. "*In camera, ex parte* review, though permitted under FOIA and sometimes necessary, is generally disfavored . . . ," and "should be invoked only when the issue at hand could not be otherwise resolved." *Schiller v. N.L.R.B.*, 964 F.2d 1205, 1209 (D.C. Cir. 1992).). Here, plaintiff has not

[2] To the extent the FBI's investigation is relevant at all, it undermines plaintiff's argument. The FBI concluded that it would not recommend prosecution because "in looking back at our investigations into mishandling or removal of classified information, we cannot find a case that would support bringing criminal charges on these facts. All the cases prosecuted involved some combination of: clearly intentional and willful mishandling of classified information; or vast quantities of materials exposed in such a way as to support an inference of intentional misconduct; or indications of disloyalty to the United States; or efforts to obstruct justice. *We do not see those things here.*" *See* Pl.'s Opp. Ex. 2 (emphasis added). In the end, the FBI found "evidence that [Secretary Clinton or her colleagues] were extremely careless in their handling of very sensitive, highly classified information." *Id.* (emphasis added). Being careless, however, is a far cry from the type of misconduct that must be shown to overcome Exemption 5 and the deliberative process privilege.

challenged the sufficiency of the detailed *Vaughn* index, which provides as much detail about the content of the withheld information as possible, without revealing the protected information itself. Plaintiff has not shown that the descriptions are insufficient to justify the claimed exemptions without *in camera* review. *See Ctr. for Auto Safety*, 731 F.2d at 21-22. Accordingly, *in camera* review is unjustified.

II. There Is No Basis For Plaintiff's Request For A Supplemental Search Of Documents Not in State's Possession

Although plaintiff is not challenging the adequacy of the searches that have been performed to date, plaintiff objects to State's refusal to conduct a supplemental search of documents that the FBI obtained as part of an investigation of a third party, but which the FBI has not provided to State. Pl.'s Opp. at 9-10. This Court should deny plaintiff's request, as these emails are not yet in State's possession, nor is there any indication when they will be. *See Judicial Watch v. FHA*, 646 F.3d 924, 926 (D.C. Cir. 2011) ("The Supreme Court has held that FOIA reaches only records the agency controls at the time of the request.")) (citing *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989)); *McClanahan v. U.S. Dep't of Justice*, --- F.Supp. 3d ---, Civ. No. 14-483 (BAH), 2016 WL 4574630, at *9 (D.D.C. Sept. 1, 2016) (collecting cases and concluding that a date-of-search cut-off has been "implicitly sanctioned" by the D.C. Circuit, even if subsequent searches are later conducted).

These precedents fully apply here. Neither plaintiff nor State knows anything about the content of the newly discovered emails, including how many, if any, are unique records not already in State's possession and subject to search for responsive records. Given that there were no new responsive documents when State searched the first set of FBI documents that were

provided to State, and that State found only 42 total documents[3] responsive to the FOIA requests at issue, there is little reason to believe the new FBI documents are relevant to Plaintiff's requests here. Plaintiff asks this Court essentially to stay this case indefinitely while State waits for documents to be given to it by another agency at some point in the future, where there is no reason to believe new responsive documents would be discovered. The Court should reject this request, and rule on the pending motions for summary judgment.[4]

CONCLUSION

For all the foregoing reasons, as well as the reasons set forth in its Motion for Summary Judgment, State respectfully requests that summary judgment be entered in its favor.

Dated: February 6, 2017

Respectfully submitted,

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[3] Plaintiff disputes the number of documents State indicates it located as responsive to the FOIA request. Plaintiff's Response to Defendant's Statement of Material Facts Not in Dispute (ECF No. 28) ¶ 21. However, plaintiff has failed to take into account the footnote in the declaration of Eric Stein which explained the disparity in the numbers by clarifying that a number of documents initially located as responsive and sent to other agencies for consultation were later determined not to be responsive. *See* Stein Declaration at n.1 (EFC No. 21-1).

[4] Plaintiff would not be prejudiced by the court's denial of a stay. Plaintiff is free to file another FOIA request once the newly discovered emails are actually in State's possession and control. *See Edmonds Inst. v. U.S. Dep't of Interior*, 383 F. Supp. 2d 105, 111 (D.D.C. 2005) (citing the "relative ease" with which plaintiff could file a second FOIA request in support of its approval of the date-of-search cut-off approach).

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DEFENDANT'S RESPONSE TO PLAINTIFF'S STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

Pursuant to LCvR 7(h), Defendant, the United States Department of State ("State"), submits its Response to Plaintiff's Statement of Undisputed Material Facts in Support of Cross-Motion for Summary Judgment.

1. Defendant disputes that this paragraph contains material facts.
2. Defendant lacks knowledge to dispute or not dispute the fact in sentence one of this paragraph. Sentences two and three are undisputed.
3. Paragraph three is undisputed.
4. Defendant disputes that this paragraph contains material facts.
5. Defendant disputes that this paragraph contains material facts.
6. Defendant disputes that this paragraph contains material facts.
7. Defendant disputes plaintiff's characterization of the information in the referenced FBI report and further disputes that this is a material fact. The court is referred to the FBI report for a fair and accurate reading of the report.

8. Defendant disputes plaintiff's characterization of the information in the referenced FBI report and further disputes that this is a material fact. The court is referred to the FBI report for a fair and accurate reading of the report.
9. Defendant does not dispute that the referenced document was produced and contains the quoted language and further disputes that it is a material fact. Defendant refers the Court to the referenced document for a fair and accurate reading of its contents.
10. Defendant does not dispute that these facts were contained in the FBI report and refers the court to the report for a full and fair reading of its contents.
11. Defendant does not dispute that these facts were contained in the FBI report and refers the court to the report for a full and fair reading of its contents. Defendant disputes that this is a material fact.
12. Defendant does not dispute those quotes are contained in Director Comey's public statement and refers the court to the document for a fair and accurate reading of its contents. Defendant further disputes that any of these facts are material to this case.
13. Defendant does not dispute that Director Comey's public statement discussed whether classified information was transmitted and contains the referenced quote. Defendant refers the court to the referenced document for a fair and accurate reading of the document and disputes that any facts contained in this paragraph are material.
14. Defendant does not dispute that the referenced document was produced and refers the court to the referenced document for a fair and accurate reading of the document.
15. Defendant does not dispute that the referenced document was produced and refers the court to the referenced document for a fair and accurate reading of the document.

16. Defendant does not dispute that the referenced document was produced and refers the court to the referenced document for a fair and accurate reading of the document. Defendant does not dispute that it withheld portions of the document under Exemption 5.

17. Defendant does not dispute this paragraph but notes the referenced document is at ECF No. 21-1.

18. Defendant disputes that this paragraph contains material facts.

19. Defendant does not dispute that searches were made as described in the referenced exhibit.

20. Defendant disputes that this paragraph contains material facts.

21. Defendant disputes that this paragraph contains material facts.

Dated: February 6, 2017

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

ELIZABETH J. SHAPIRO
Deputy Branch Director

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