

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

GREG MUTTITT,

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Plaintiff,

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v.

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Civil Action No. 1:10-cv-00202 (BAH)

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UNITED STATES CENTRAL
COMMAND, *et al.*,

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Defendants.

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**PLAINTIFF’S SUR-REPLY TO DEFENDANT UNITED STATES DEPARTMENT
OF STATE’S MOTION FOR SUMMARY JUDGMENT**

Defendant Department of State (“State”) has raised three factual allegations in its Reply (filed Aug. 26, 2011), which were not alleged in any of State’s previous filings and have not previously been brought to Plaintiff’s attention before the filing of that Reply. Accordingly, Plaintiff files this Sur-Reply to address these statements in the context of State’s Motion for Summary Judgment.

I. STATE’S ALLEGED PLACEMENT OF PLAINTIFF’S REQUESTS AT THE FRONT OF THE FOIA PROCESSING QUEUE DOES NOT RENDER PLAINTIFF’S EXPEDITED PROCESSING CLAIMS MOOT

In support of its position that Plaintiff’s expedited processing claims are moot, State originally rested its argument on the fact that State has completed the processing of Plaintiff’s five FOIA requests at issue in this case. (*See* Mem. P. & A. Supp. Dep’t of State’s Mot. Part. Summ. J. at 13 [hereinafter State’s Mem.]*.)* After Plaintiff refuted this argument, State attempted to introduce the idea in its Reply that even if its alleged completion of Plaintiff’s requests did not render his expedited processing claims moot, it had also provided Plaintiff with “the only benefit

afforded to a requester who is granted expedited processing” by “mov[ing] each of Plaintiff’s requests to the front of its processing queue.” (Reply Supp. Def.’s Part. Mot. Summ. J. at 6 [hereinafter State’s Reply].) However, this allegation appears nowhere in the Grafeld Declaration or its corresponding exhibits, and the factual basis for this claim is unclear. In fact, State appears to rely solely on the fact that it has allegedly completed processing Plaintiff’s requests to support this claim. (*See id.*) Even if true, this claim has no bearing on Plaintiff’s expedited processing claims.

State would have the Court accept without further examination the idea that just because it voluntarily agreed to a release schedule negotiated with Plaintiff, it effectively granted Plaintiff expedited processing. State, however, neglects to mention that it only agreed to this release schedule after Plaintiff filed a Motion seeking a Court order compelling State to begin releasing records on a rolling basis. (*See J. Stip.* (filed Sept. 2, 2009) (State agrees to release records according to Plaintiff’s requested schedule in return for Plaintiff’s withdrawal of his Motion).) Prior to the filing of this Motion (and the reason for its filing), State staunchly refused to make *any* interim releases or even commit to a firm release schedule. (*See Pl.’s Mem. P. & A. Supp. Pl.’s Mot. Prelim. Inj. or Altern., Part. Summ. J. at 2* (filed Aug. 26, 2010).)

Even if true, State’s allegation that it moved Plaintiff’s requests to the front of its processing queue is irrelevant to the questions at hand, namely, whether State legitimately denied Plaintiff expedited processing, and whether that denial was the result of an improper policy or practice. The fact that State has not moved any of Plaintiff’s *other* requests to the front of its processing queue, despite allegedly doing so for the five at issue in this case, stands as silent witness against the argument that State has absolved itself of any responsibility for its denials of expedited processing in this case and the underlying policies or practices leading to those denials.

II. STATE HAS NOT ADEQUATELY DESCRIBED ITS SEARCH FOR EMAILS AUTHORED BY MEGHAN O’SULLIVAN

When attempting to refute Plaintiff’s argument regarding the adequacy of its search for Meghan O’Sullivan’s emails, State included a records disposition schedule as an exhibit which stated, in pertinent part, that State personnel stationed in diplomatic posts abroad are directed “to retire records to the Records Services Center (“RSC”) at the end of the calendar year during which the employee leaves the agency . . . [and] [t]he records are subsequently transferred to the Washington National Records Center (“WNRC”).” (State’s Reply at 10 n.5.) When taken by itself, this information adds nothing new to the case, but in the full context of this case it calls the adequacy of the Grafeld Declaration and the search it describes into further question.

When describing its search through retired records for responsive emails, State describes that a FOIA researcher first “review[ed] the retired file manifests from Embassy Baghdad.” (Grafeld Decl. ¶ 61.) Then, not finding any mention of emails authored by Dr. O’Sullivan, the researcher “reviewed all of the retired paper records . . . by hand.” (*Id.*) However, after reading State’s Reply, Plaintiff’s counsel requested that State clarify *where* the researcher manually reviewed the retired paper records, asking if the search was done at the Embassy, at the RSC, or at the WNRC. (*See* Email from McClanahan to Leinwand of 8/27/11, attached as part of Ex. E.) State refused to answer, saying only, “[W]e believe our memorandum, declaration, and supporting exhibits speak for themselves.” (Email from Leinwand to McClanahan of 8/29/11, attached as part of Ex. E.)

Simply put, without some indication of *what* retired paper records were searched, the Grafeld Declaration is insufficient to support a finding for State on the adequacy of its search. If only the Embassy Baghdad files were searched, and the O’Sullivan emails had been moved to the

RSC or the WNRC, then the researcher would not find the records. If only the RSC files were searched, and the O'Sullivan emails had been moved to the WNRC, then the researcher would not find the records. In contrast, if only the WNRC files were searched, and the O'Sullivan emails were still at the RSC, then the researcher would still not find the records. Only by searching the retired paper records at all three locations would the researcher be certain of locating any responsive emails. To be fair to State, all three locations *may* have been searched, but there is no evidence of that in the Grafeld Declaration or its accompanying exhibits. Until State has sufficiently addressed this point, Summary Judgment is not appropriate.

III. STATE CANNOT BLANKETLY AUTHORIZE AN EMPLOYEE TO INDEPENDENTLY CLASSIFY INFORMATION WHICH IS SUBJECT TO A FOIA REQUEST

As discussed in greater length in Plaintiff's Opposition, an agency may classify information for which it has already received a FOIA request "only if such classification . . . is accomplished on a document-by-document basis with the personal participation or under the direction of the agency head, the deputy agency head, or the senior agency official designated under section 5.4 of [E.O. 13526]." E.O. 13526 § 1.7(d). After Judge Kennedy held that Ms. Grafeld did not have the independent authority to classify records which were subject to a FOIA request without the personal participation or under the direction of the Secretary, Deputy Secretary, or Under Secretary for Management in *Council for a Livable World v. Dep't of State*, No. 96-1807, 1998 U.S. Dist. LEXIS 23643, at *12-13 (D.D.C. Nov. 23, 1998), State attempted once again to circumvent the plain meaning of the Executive Order and issue a Notice blanketly authorizing Ms. Grafeld to do that which she could not do before. (*See State's Reply* at 13, citing 64 Fed. Reg. 7227 (Feb. 12, 1999).)

State cannot be allowed to reduce a specific provision designed to provide a higher level of accountability for classification decisions made *after* a FOIA request to mootness by simply publishing a single Notice in the *Federal Register* and then forgetting about it. The Executive Order is quite clear—the decision to classify a record already subject to a FOIA request must be made *on a document-by-document basis* by one of three agency officials or under their direction. As in, one of those officials must make such a determination or direct another to do so *each time* such classification is desired and *for each document*. An agency cannot circumvent this requirement simply by authorizing and directing someone else once to make the decision on a document-by-document basis any time he/she needs to in the future. Presumably *every* classification decision is made on a document-by-document basis. State’s construction of the Executive Order renders the heightened accountability language of § 1.7(d) “insignificant, if not wholly superfluous.” *Duncan v. Walker*, 533 U.S. 167, 167 (2001). Such a reading violates one of the central canons of statutory construction: “This Court's duty to give effect, where possible, to every word of a statute makes the Court reluctant to treat statutory terms as surplusage.” *Id.* (citing *United States v. Menasche*, 348 U.S. 528, 538-539 (1955)).¹

CONCLUSION

For the foregoing reasons and the reasons stated in Plaintiff’s Opposition, State’s Motion for Summary Judgment should be denied.

¹ In fact, under State’s interpretation of this provision, all it would need to do to render § 1.7(d) *completely* meaningless is have the Under Secretary for Management place a Notice in the *Federal Register* stating, “I hereby authorize and direct any agency official possessing Original Classification Authority to classify information on a document-by-document basis consistent with the circumstances and procedures described in section 1.7(d) of Executive Order 13526.” Then there would be no difference between classification decisions made before a FOIA request was filed and those made after one was filed.

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Respectfully submitted,

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