

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

**JUDICIAL WATCH, INC.,**

*Plaintiff,*

v.

**U.S. DEPARTMENT OF JUSTICE,**

*Defendant.*

Case No. 1:24-cv-00700-TJK  
(Consolidated Cases)

**HERITAGE FOUNDATION, et al.,**

*Plaintiffs,*

v.

**U.S. DEPARTMENT OF JUSTICE,**

*Defendant.*

**CABLE NEWS NETWORK, INC.,**

*Plaintiff,*

v.

**U.S. DEPARTMENT OF JUSTICE,**

*Defendant.*

**DEFENDANT'S OPPOSITION TO HERITAGE FOUNDATION'S  
EMERGENCY MOTION TO MODIFY BRIEFING SCHEDULE**

The U.S. Department of Justice (“Defendant” or “Department”) hereby respectfully submits this response in opposition to the Heritage Foundation’s emergency motion to modify briefing schedule, ECF No. 28, as follows:

**I. Background**

Before these cases were consolidated, the Department and Judicial Watch (the plaintiff in the first-filed case) proposed separate summary judgment briefing schedules, with the Department proposing briefing to close on August 12, 2024, and Judicial Watch proposing briefing to close on July 31, 2024. ECF No. 12. The Heritage Foundation and Mike Howell (collectively “Heritage”) filed a notice concerning that schedule, asking the Court to set a briefing schedule of 14 days, 14 days, 14 days, and 7 days. ECF No. 13. The Court then consolidated these cases and asked CNN (at the time, the only plaintiff in the case originally filed at docket number 24-cv-961) for its position regarding a briefing schedule. May 3, 2024 Minute Order. CNN informed the Court that it would accept either the briefing schedule proposed by Judicial Watch or Heritage. ECF No. 20. On May 6, 2024, the Court set a briefing schedule that was between the schedules proposed by Heritage and Judicial Watch, with the Department’s opening brief due on May 31, 2024, and briefing to close on July 29, 2024. *See* May 6, 204 Minute Order. Four days ago (May 15), after the briefing schedule was set, CNN amended its complaint to add twelve additional plaintiffs. ECF No. 26.

This case involves a FOIA request for an audio recording of an interview of President Biden. The audio recording is also the subject of a congressional subpoena. *See* Heritage Compl., ECF No. 25-1, ¶ 10. Three days ago (May 16), President Biden formally asserted executive privilege over the audio recording. *See* ECF Nos. 29-1, 29-2. The next day (May 17), Heritage filed an “emergency” motion to shorten the briefing schedule in this case, citing the president’s invocation of executive privilege. ECF No. 28, at 2-3. Heritage asks the Court to modify the schedule so that the Department’s opening motion would be due on May 27, a federal holiday that is ten days from the date of Heritage’s motion. Heritage also seeks to shorten the remaining schedule to 14 days, 14 days, and 7 days, *i.e.*, effectively the same schedule that Heritage previously proposed and the Court declined.

## **II. Heritage's Second Request for an Emergency Briefing Schedule Remains Unwarranted**

Heritage's motion is essentially a motion for reconsideration, seeking what amounts to the same briefing schedule that Heritage had previously requested, and the Court rejected. Heritage's motion is grounded on its speculation that since the president has recently invoked executive privilege over the audio recording, that "the Department d[oes] not need the time to prepare a position and declarations it twice told the Court it did." ECF No. 28, at 3. Heritage twice accuses the government of "misleading" the Court and participating in "clear gamesmanship." *Id.* at 2, 3, 5.

Heritage's accusations are baseless and they are wrong. The presidential assertion of executive privilege occurred in the context of an accommodation process between the Department and two congressional committees over congressional subpoenas. More specifically, the assertion was made in connection with congressional proceedings that were noticed on May 13 to take place on May 16. These events were entirely exogenous to this FOIA matter and its preexisting schedule.

These events do not reduce the Department's litigation obligations. The Department still must prepare a summary judgment motion explaining why the Department can properly withhold the materials consistent with the FOIA. In doing so, the Department must develop numerous legal arguments and must support its factual assertions with an appropriate declaration or declarations. Indeed, it will now need to do so accounting for the presidential assertion of privilege. This arguably would militate for more time, not less, although the Department is not seeking that. The Department merely seeks to preserve the existing briefing schedule, as set by the Court after hearing from all parties, and as currently staffed and resourced across the Department's multiple other FOIA briefing schedules (including numerous involving Heritage).

Heritage is not correct that briefing should take less time because the Attorney General's letter analyzes why executive privilege applies to the audio recording. For one, as noted above, that letter, and the subsequent presidential assertion of executive privilege, occurred outside of the FOIA context and the Department must now account for these events in the FOIA context. Second, the Department anticipates it will argue the record is exempt under FOIA for additional reasons. The

Department previously stated that it had withheld the record under Exemptions 6 and 7(C) and that it may assert additional FOIA exemptions during summary judgment briefing. ECF No. 12 at 1 & n.1. The Department is still assessing what exemptions and arguments it may raise. Rushing that analysis is unwarranted—again, particularly because of the recent events, not despite them. An agency “must assert all [FOIA] exemptions at the same time,” or it otherwise loses its ability to raise them. *Maydak v. U.S. Dep’t of Justice*, 218 F.3d 760, 764 (D.C. Cir. 2000). The Department therefore should be allowed a reasonable amount of time to determine all viable FOIA exemptions to assert over the audio recording and to fairly present them to this Court.

Likewise, the Court should not compress the schedule for other briefs in this matter. The operative schedule is already a substantially expedited briefing schedule for a FOIA case: the Department answered Heritage’s complaint this past week, ECF No. 25, and the Department’s motion for summary judgment is due in less than two weeks. This schedule provides less time for the Department to prepare its briefing materials than what the Department had requested. *See* ECF No. 12, at 2; May 6, 2024 Minute Order. And then the Department will need to respond to arguments from three sets of briefs brought by three different sets of plaintiffs. This will be a significant undertaking. The Department anticipates it will need all the time on the existing schedule to accomplish it. Further, counsel for the Department has other personal and litigation obligations during this period. *Cf.* ECF No. 28, at 5 n.1 (Judicial Watch stating that its counsel “has several conflicts that will make it extremely difficult for it to comply with Heritage Plaintiffs’ proposed schedule, especially the proposed deadline for the reply brief”).

At the time when the Court set the briefing schedule in this case, the Court knew that the Department would rely at least on Exemption 6 and 7(C) but might assert additional bases for withholding. The nature of the records at issue—and the significance Heritage places on them—was also already factored in. On that record, the Court set a briefing schedule that closed at the end of July. Heritage provides no reasonable basis for the Court to compress this expedited schedule even more, and Heritage’s attempt for a second bite at the apple should be denied.

DATED: May 19, 2024

Respectfully submitted,

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