

# **Exhibit 2**

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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M. VICTORIA CUMMOCK,

Plaintiff,

v.

Civil Action No. 97-981 (CKK)

ALBERT GORE, JR., *et al.*,

Defendants.

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**FILED** ✓

JUN 23 2000

NANCY MAYER WHITTINGTON, CLERK  
U.S. DISTRICT COURT

MEMORANDUM ORDER

Pending before the Court is Plaintiff Victoria Cummock’s Motion to Compel Production of Copies of Segregated Documents. Specifically, Ms. Cummock seeks copies of ten (10) documents that Defendants segregated from the files of the White House Commission on Aviation Safety and Security, on which Ms. Cummock sat as Commissioner from August of 1996 through February of 1997. Because the Court finds that these documents bore no relationship to the work of the Commission, the Court shall deny Ms. Cummock’s motion.

The facts of this case have been amply documented, both in this Court’s Memorandum Opinion of June 15, 1998, and in *Cummock v. Gore*, 180 F.3d 282 (D.C. Cir. 1999), reversing the Court’s dismissal of Ms. Cummock’s claims and remanding the matter for further proceedings to the Court. Ms. Cummock’s original Complaint sought “all documents made available to or prepared by or for the Commission . . . .” Compl. at 27. The Court of Appeals clarified the parameters of information to which she is entitled, specifying that, “to the extent that Cummock seeks information that was made available to the Commission during the course of its deliberative process and without which her ability to fully and adequately participate in that

process was impaired, she is entitled to review such materials.” *Cummock*, 180 F.3d at 292. In accordance with the Court of Appeals’s holding, this Court issued a scheduling order directing the Defendants to “disclose to Plaintiff all non-classified records or documents of any kind created by, made available to, or relied upon by the Commission.” Scheduling Order filed Sept. 9, 1999.<sup>1</sup>

On September 16, 1999, the Court entered a Protective Order Governing Non-Classified Information mandating, in relevant part, that: “Defendants shall produce all of the non-classified Commission records or documents for Plaintiff’s inspection at the offices of the Department of Transportation. Plaintiff shall identify the records or documents she wants copied. Defendants shall then provide Plaintiff with copies of the documents requested.” Protective Order filed Sept. 16, 1999 ¶ 4. Plaintiff and her counsel then inspected various documents at the Department of Transportation on October 28, 1999. *See* Pl.’s Mot. Compel at 2. After determining that certain documents mixed in with Commission files did not constitute part of the Commission’s work,

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<sup>1</sup>The Court further ordered: “Defendants shall provide Plaintiff with copies of those records to the extent that she would have been entitled to retain copies of them following her service as a Commissioner, or to the extent they are subject to release under the Freedom of Information Act or other federal law.” *Id.* Her entitlement to such copies of the 10 remaining segregated documents is at issue in the motion before the Court. While she contends principally that these materials constitute information made available to individual staff members during the course of the Commission’s deliberative process, she argues in the alternative that her entitlement to these materials derives from the fact that they enjoy no protection under the FOIA, 5 U.S.C. § 552. *See* Pl.’s Response to Decls. Submitted by Defs. in Opp. to Pl.’s Mot. Compel at 3. This argument, as Defendants point out, has no merit, since the FOIA “requires agencies to comply with requests to make their records available to the public. . . ,” unless the records requested fall under one or more of nine specified exemptions. *Oglesby v. United States Dep’t of Army*, 79 F.3d 1172, 1176 (D.C. Cir. 1996). Ms. Cummock does not contend, nor could she, that these disputed materials constitute agency records.

however, the government segregated certain documents from those available to Ms. Cummock. The government subsequently afforded Ms. Cummock and her counsel the opportunity to review these documents as well, but decided not to release copies of these documents to Ms. Cummock. She therefore filed the motion before the Court to compel production of the withheld materials.

Culled from the twenty-three documents that Ms. Cummock initially sought, the remaining list of ten documents consists of various materials addressed directly to individual members of the Commission staff, each involving matters not apparently related to the work of the Commission.<sup>2</sup> Pursuant to the Court's instruction, delivered at the March 2, 2000 status hearing, the government has provided the Court and Ms. Cummock with declarations from four staff members regarding the nature of documents which the government segregated from the Commission's files. At that hearing, the Court also suggested that Ms. Cummock consider narrowing her request by eliminating those documents about which she was satisfied that they were unrelated to the Commission's work. After she narrowed her request to 11 documents, Defendants submitted declarations from Douglas Farbrother, Dorothy Lynn Gordon, Jean Logan, and Elaine Kamark identifying the documents. Ms. Cummock has since eliminated one additional document from her list.

The four declarations state, unequivocally, that the materials Ms. Cummock seeks bore no relationship whatsoever to the work of the Commission, that they were mistakenly filed with Commission documents, and that they each pertain to personal or professional matters

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<sup>2</sup>These materials currently remain under seal. The Court has had an opportunity to review the disputed documents, as have the parties.

implicating no more than one or two of the persons who served on the staff of the Commission. All four Declarants have described their dual function as members of the Commission staff and as members (one as Director) of the National Performance Review (NPR).<sup>3</sup> In addition, one Declarant, Ms. Elaine Kamark, was intimately involved in planning for the Democratic National Convention, held in August of 1996. *See* Kamark Decl. ¶ 3. The persons to whom the disputed materials belonged, then, each operated in at least two capacities while working with the Commission; hence they describe receiving or sending certain documents from the Commission's office which related solely to their extra-Commission functions.

For example, the Declarants describe certain of the disputed documents as relevant only in their individual capacities as members of NPR. Since several NPR staff members also worked with the Commission, certain documents relating to NPR business seem to have appeared in the Commission office, and ultimately to have been misfiled with Commission materials. *See, e.g.*, Farbrother Decl. ¶ 4. (“The [materials] were completely unrelated to the Commission. The Commission's name appeared on the facsimile cover sheet only because the documents were faxed from the Commission offices, where Ms. Lyons and I were both working at the time. I did not provide the letter and note to any member of the Commission or its staff, other than Ms. Lyons. Ms. Lyons and I dealt with this solely in our capacities as NPR staff members.”); Gordon Decl. ¶ 4 (“Although I understand that the memorandum was found in the Commission's files, it is not a Commission document. The memorandum was sent to me in my capacity as an NPR

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<sup>3</sup>This organization is now known as the National Partnership for Reinventing Government.


staff member. It has nothing to do with aviation safety or security and is completely unrelated to the Commission.”); Logan Decl. ¶ 3 (“I do not know how it got there , but it is not a Commission document and has nothing to do with aviation safety or security. The e-mail pertains solely to my environmental work for the NPR.”). Other documents pertained solely to the upcoming Democratic National Convention. *See* Kamark Decl. ¶ 5 (“I did not provide any of the convention-related documents to any of the Commissioners. They were evidently mis-filed as a result of the fact that I was working on the convention at the same time that I was working with the Vice President on Commission-related business.”)

In lieu of claiming that these materials were “created by, made available to, or relied upon by the Commission,” Ms. Cummock premises her putative entitlement to the documents on the fact that “each of the documents was created by or made available to *a Commission staff member* and was filed with Commission documents.” Pl.’s Response to Decls. at 2 (emphasis added). Ms. Cummock’s understanding of these materials, however, born of her review of each disputed document, exceeds the scope of her Complaint, the Court of Appeals’s directive, and this Court’s scheduling order. Only materials relevant to the Commission’s function, and on which the Commission relied in its deliberations, are available, by right, to Ms. Cummock in her capacity as Commissioner. *See Cummock*, 180 F. 3d at 292 (describing her entitlement specifically to materials without which “her ability to fully and adequately participate in [the Commission’s] process was impaired”). Documents relevant to an individual staff member in a function he or she held outside the Commission do not fall under this category. Accordingly, the Court finds that Ms. Cummock has no entitlement to these ten documents, none of which is encompassed by

*Cummock*, 180 F.3d at 282, or by the Court's Scheduling Order. It is therefore, this 23 day of June, 2000, hereby

**ORDERED** that Plaintiff's Motion to Compel Production of Copies of Segregated Documents [# 62] is DENIED.

**SO ORDERED.**

  
COLLEEN KOLLAR-KOTELLY  
United States District Judge

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