



APPEARANCES: (Cont.)

On behalf of the  
Defendants:

**Carmen M. Banerjee, Esq.**  
U.S. DEPARTMENT OF JUSTICE  
Tax Division - Civil Trial Section  
555 Fourth Street, NW  
Suite 6810  
Washington, DC 20001  
(202) 307-6423  
Email: Carmen.m.banerjee@usdoj.gov

Court Reporter:

**Scott L. Wallace, RDR, CRR**  
Official Court Reporter  
Room 6503, U.S. Courthouse  
Washington, D.C. 20001  
202.354.3196  
scottlyn01@aol.com

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1 MORNING SESSION, JULY 10, 2014

2 (11:10 a.m.)

3 THE COURTROOM CLERK: Your Honor, this is Civil Action  
4 13-1559, *Judicial Watch, Inc. versus Internal Revenue Service*.  
5 Will all parties please come forward and identify yourselves for  
6 the record, please.

7 MS. COTCA: Good morning, Your Honor, Ramona Cotca for  
8 Judicial Watch, and Paul Orfanedes, also at counsel table.

9 THE COURT: Good morning to you both.

10 MR. KLIMAS: Good morning, Your Honor, Jeff Klimas for the  
11 defendant Internal Revenue Service. With me at counsel table is  
12 Carmen Banerjee, also with the Department of Justice, Tax  
13 Division.

14 THE COURT: Good morning to you both. Let me hear from  
15 plaintiff's counsel. You asked for a status hearing, so tell me  
16 why you wanted it.

17 MS. COTCA: Certainly, Your Honor. The reason that we  
18 submitted this motion is because we were alarmed in the recent  
19 weeks to find out -- this is a FOIA litigation, as you know -- to  
20 find out that a substantial number of the records that were  
21 requested as part of this lawsuit have apparently gone missing.  
22 We were alarmed.

23 THE COURT: Your request was for records from what,  
24 January 1, 2010 to the present; is that right?

25 MS. COTCA: Correct, correct, Your Honor. We were alarmed

1 to learn that -- Our request covered a three-year span of  
2 records, and, apparently, almost two years of those records have  
3 gone missing. That's a substantial --

4 THE COURT: How did you learn that?

5 MS. COTCA: We learned it through the news, Your Honor.  
6 We didn't learn it from defense counsel, and that's the second  
7 part of this issue and the reason we requested this status  
8 conference, is because we have conferred, per the Court's order  
9 in January. I have been engaging in conversations with defense  
10 counsel during the course of this litigation and never has the  
11 IRS, the defendant here, disclosed that they're missing a large  
12 chunk of these e-mails.

13 THE COURT: Was the government under a legal obligation to  
14 make that disclosure?

15 MS. COTCA: Well, Your Honor, it is. It's a substantial  
16 number of the records that have -- that were requested and --

17 THE COURT: Let me rephrase that.

18 MS. COTCA: Okay.

19 THE COURT: At some point, of course the government is  
20 under an obligation, but during the requisite timeframe we're  
21 talking about, the last six months or so -- what's the timeframe  
22 that you've described as being the relevant timeframe for the  
23 government's obligations to disclose the fact that e-mails were  
24 missing?

25 MS. COTCA: When the government found out about it, and

1 the news reports and the testimony that the IRS commissioner has  
2 provided before Congress is that the government, the IRS, knew  
3 about this in February.

4 THE COURT: February of this year?

5 MS. COTCA: February of this year.

6 THE COURT: Right.

7 MS. COTCA: That's the same time that the IRS had  
8 initially started to produce documents in our case here. That is  
9 -- Two months later, in April, the government had produced a  
10 status report to this Court with respect to the progress of the  
11 search and the production in this case.

12 THE COURT: All right. So in either February or April,  
13 was the government under some legal obligation to say to the  
14 plaintiff, we just discovered that some e-mails are missing? And  
15 if so, what does that legal obligation come from?

16 MS. COTCA: Well, the legal obligation, Your Honor, comes  
17 from the fact that they have to conduct a search that is  
18 reasonably calculated to discover and uncover all relevant  
19 information.

20 THE COURT: I got that, I have that, but I'm saying,  
21 what's the legal obligation? At what point does this legal  
22 obligation, and I'm interested in where this obligation springs  
23 from, at what point does that require the government to say, lo  
24 and behold, we just learned that some e-mails are missing?  
25 What's the precedent for that?

1 MS. COTCA: Well, they're material questions of fact here  
2 with respect to the search that's being conducted, and that's the  
3 legal precedent here, because we don't have any confidence that a  
4 proper search is being conducted.

5 THE COURT: I understand what you're saying, but I'm  
6 concerned about what the legal authority is that would have  
7 required the government, as a matter of law, to have told you in  
8 either February or January or some day prior to today's date that  
9 there are e-mails that the government can't find? Where is that  
10 legal -- at what point does the legal obligation to make that  
11 disclosure kick in?

12 MS. COTCA: Well, our position is that one of the places  
13 where that legal obligation comes from is from the Court's order  
14 that the government has to provide disclosure with respect to the  
15 status of its search, and the fact that the IRS, the defendant  
16 here, has not disclosed that, raises serious questions that the  
17 search that they're doing is inadequate.

18 THE COURT: Aside from my order, though, are you aware of  
19 any precedent or authority, any Circuit authority, or District  
20 Court authority or Supreme Court authority that would have  
21 required the government, as a matter of law, to say we just found  
22 out that e-mails are missing?

23 MS. COTCA: Your Honor, I think we would stand by the  
24 Court's order that I think --

25 THE COURT: -- so the Court's order --

1 MS. COTCA: -- that the obligation --

2 THE COURT: I stand on my orders also. Is there any other  
3 authority other than my order? I'm not minimizing my order  
4 either, now, all right.

5 MS. COTCA: I understand, Your Honor, I understand.

6 THE COURT: But you raise an interesting issue. I mean,  
7 there are a lot of moving pieces here. As I understand it, and I  
8 don't know everything about what's going on on Capitol Hill, but  
9 there is a Congressional inquiry going on; is that correct?

10 MS. COTCA: Correct, Your Honor.

11 THE COURT: And I don't know what representations the  
12 government has made to the inquiring committee about lost  
13 e-mails. That's an ongoing -- is that an ongoing --

14 MS. COTCA: -- from our understanding --

15 THE COURT: -- process?

16 MS. COTCA: The information that we have that I gather  
17 from the press from listening to the news is that this is an  
18 ongoing investigation. There was a TIGTA report that had come  
19 out in May of 2013 with respect to the IRS treatment to tea  
20 party's applications -- tea party organizations' applications to  
21 the IRS, and that is what prompted and that's the reason that we  
22 submitted our FOIA request requesting Ms. Lois Lerner's e-mails  
23 for this timeframe, and since then there has been a number of  
24 investigations and hearings that have been conducted on the Hill  
25 with respect to the IRS and to Lois Lerner's involvement with

1 respect to the tea party --

2 THE COURT: Should the Court just wait until those --  
3 until that investigation has been completed, the Congressional  
4 inquiry, since that started some time ago, I think, didn't it?

5 MS. COTCA: I don't believe -- Well, our position is no,  
6 the Court should not wait until --

7 THE COURT: Because FOIA is separate and apart from  
8 whatever may be proceeding on Capitol Hill.

9 MS. COTCA: Absolutely.

10 THE COURT: When you found out from news reports that the  
11 government had represented to Congressional investigators that  
12 e-mails were missing, did you pick the phone up and call your  
13 opposing counsel and say, Why didn't you tell us this?

14 MS. COTCA: Well, first what I did, what I personally did  
15 is I got online and I conducted a significant research to  
16 understand what the news reports were all about.

17 THE COURT: Did you find those e-mails?

18 MS. COTCA: No, Your Honor, they're -- I didn't find them.

19 THE COURT: All right. You did some research. Did you  
20 reach out to opposing counsel, though?

21 MS. COTCA: Yes, we did, we did.

22 THE COURT: Good, good.

23 MS. COTCA: And opposing counsel in this case had  
24 absolutely no information, and this is the reason we stress why  
25 we believe there's an inadequate search being done. They weren't

1 even able to identify the individuals whose computers had been  
2 crashed. They were unable to provide absolutely anything, other  
3 than what the testimony was provided by the IRS commissioner to  
4 Congress. That shows to us, Your Honor, that they have done  
5 nothing, they have not looked to see who else may have been  
6 monitoring Ms. Lerner's e-mails, if indeed these e-mails are  
7 missing, so, perhaps, we can look somewhere else. They didn't  
8 have any of those questions answered when we spoke with them, and  
9 that was very troubling.

10 THE COURT: Well, what is it that you're asking the Court  
11 to do? I want the record to be clear, there's not a -- there's  
12 no motion pending before the Court for any related -- it's a  
13 status hearing, and I read it and I thought it was appropriate to  
14 grant a status hearing to give the plaintiff an opportunity to be  
15 heard and give the government a chance to respond.

16 MS. COTCA: Right, and that was our first step, and we  
17 thought this was prudent. This is material information with  
18 respect to this case, and that's why we thought it was  
19 appropriate to bring it before the Court for a status hearing.  
20 Because of -- and we would like to hear from the IRS and from the  
21 defendant what happened, what is the status.

22 But past that, this raises a number of questions, material  
23 questions of fact with respect to the search, so we would ask the  
24 Court to conduct some form of investigation or permit some very  
25 limited discovery with respect to what happened, who knows about

1 it, where -- are there other sources that defendant can look at  
2 to retrieve these e-mails, when did the government know about  
3 this? Because again, that's pertinent with respect to their  
4 disclosure to the Court and to Judicial Watch, so it would be  
5 very limited, but we would ask for some form of investigation or  
6 discovery.

7 THE COURT: All right. I just became aware the day before  
8 yesterday that one of my colleagues, Judge Walton, has a similar  
9 case. I'm not going to say it's related within the meaning of  
10 the rules because I don't know that much about that case at all,  
11 but I just raise the question. First of all, are you familiar  
12 with that case?

13 MS. COTCA: I know of it, yes, Your Honor.

14 THE COURT: All right. Is it an analogous case?

15 MS. COTCA: Well, Your Honor, it has to do with the True  
16 the Vote case against the IRS, if it's the case that I'm thinking  
17 of that's before Judge Walton tomorrow, but they have a direct  
18 cause of action with respect to True the Vote's application, so  
19 it's a little bit different because at that point they're at the  
20 juncture of a motion, a motion to dismiss.

21 THE COURT: They asked for preliminary injunctive relief.

22 MS. COTCA: Correct, correct. We are in the process, and  
23 the reason this case is different -- it's a FOIA litigation, but  
24 we're already in the process of the government producing  
25 documents.

1 THE COURT: And the government is producing documents.

2 MS. COTCA: And the government is producing documents, and  
3 the government is conducting its search of the records, but we  
4 have serious questions as to the adequacy and reasonableness of  
5 that search.

6 THE COURT: Right. Well, the point I was getting at is  
7 whether or not under our local rules the two cases should be  
8 consolidated before one judge as related. And again, I don't  
9 know enough about Judge Walton's case to have an informed opinion  
10 about that.

11 MS. COTCA: Um, I don't think it would be appropriate.

12 THE COURT: We do try to preserve judicial resources, if  
13 he's pursuing the same issues, according to whether or not one  
14 judge should devote that judge's limited resources to the issue.

15 MS. COTCA: Right. And again, it's the juncture of the  
16 cases that's different, and at this point the government and if  
17 the -- and if the Court would permit some limited discovery with  
18 the search, there's definitely no question being raised whether  
19 it's appropriate at this time for that limited discovery to take  
20 place. There may be -- and I believe there may be a question on  
21 this issue in the other case that's before Judge Walton, so it  
22 may slow down our case.

23 THE COURT: So the answer is no, the cases aren't related  
24 then within the meaning of the local rules? Is that what --

25 MS. COTCA: That's what I think. I think it would slow

1 down our case, and I don't think it would be appropriate to  
2 consolidate.

3 THE COURT: Should two judges be devoting significant  
4 limited resources to resolve the same issue?

5 MS. COTCA: I know some of the case, I don't know --

6 THE COURT: I don't know either.

7 MS. COTCA: -- the details of it.

8 THE COURT: Maybe I'll direct the parties to address that  
9 in writing, because one thing we certainly would want to avoid is  
10 a contradictory ruling on issues that may be relevant to both  
11 cases.

12 MS. COTCA: Sure.

13 THE COURT: All right. Thank you. All right. I'll hear  
14 from government counsel. Good morning.

15 MR. KLIMAS: Good morning, Your Honor. May it please the  
16 Court.

17 THE COURT: Yes. Let me ask you this: Was the government  
18 under an obligation at the time that it learned that e-mails were  
19 missing, e-mails that were arguably the subject of or within the  
20 scope of this FOIA request, to say something to either the Court  
21 or to plaintiff?

22 MR. KLIMAS: The Internal Revenue Service's position is  
23 no, and it's kind of a two-part answer. Judicial Watch has  
24 accused the government of a material omission to the Court, and  
25 we would make two arguments, first of all, that this was not

1 material to the case, that it was not material in that we had an  
2 affirmative obligation to disclose it; and then, secondarily, it  
3 was not an omission on the part of myself or my predecessor  
4 attorney on this case because we did not actually know about it,  
5 and I'll talk a little bit about those prongs if the Court would  
6 like.

7 THE COURT: Well, at what point -- does it boil down to  
8 when the attorney assigned to a case became aware that the  
9 e-mails were missing or the principles that the attorney  
10 represents? What's the triggering event there?

11 MR. KLIMAS: Sure. Starting with whether or not this is  
12 material at all, the hard drive crash, Lois Lerner, occurred in  
13 2011, two years before Judicial Watch made its FOIA request.  
14 Under Supreme Court, D.C. Circuit, and D.C. District Court  
15 precedent, the IRS's obligation to preserve documents and to  
16 produce documents commences at the time that a perfected FOIA  
17 request is submitted. That's May 2013. And to the extent that  
18 these documents were lost, damaged, not preserved two years  
19 earlier, does not create any remedy under the FOIA and it's  
20 irrelevant under FOIA.

21 THE COURT: What case are you relying on for that?

22 MR. KLIMAS: Yes, Your Honor. Specifically the Supreme  
23 Court in *Department of Justice versus Tax Analysts* indicated that  
24 for documents to be agency records subject to the FOIA, quote,  
25 The agency must be in control of the requested material at the

1 time the FOIA request is made."

2 Similarly, in the Supreme Court case *Kissinger versus*  
3 *Reporters Committee For Freedom of the Press*, the Supreme Court  
4 held that, "An agency's obligation under FOIA commenced upon  
5 receipt of a FOIA request, end quote. "There is no FOIA  
6 obligation to retain records prior to that request."

7 In addition, that is consistent with the holding of the  
8 D.C. Circuit in the case of *Wilbur versus CIA*, 2004 D.C. Circuit  
9 case. It's consistent with the D.C. Circuit case *Weisberg versus*  
10 *Department of Justice*, a D.C. Circuit case from 1983. It's  
11 consistent with the holdings of numerous judges within this Court  
12 at the District Court level.

13 For example, the late Judge Oberdorfer in the case *Budwar*  
14 *versus Department of Air Force* indicated that FOIA, quote, does  
15 not authorize the reconstruction of documents or sanctions for  
16 failure to preserve them, end quote. He then said that in that  
17 case he believed the agency had been lax in failing to meet its  
18 obligations to preserve records that it was required by law to  
19 reserve. However, he indicated further that, to the extent that  
20 was the case, that would, quote, be a matter for the Inspector  
21 General, the Comptroller General, and Congressional oversight  
22 committees, end quote, not a matter for a court adjudicating a  
23 FOIA case.

24 THE COURT: So -- all right. So the short answer is the  
25 crash occurred before the FOIA request, and the government was

1 under no obligation to, I guess, retain e-mails that were the --  
2 that crashed; is that right?

3 MR. KLIMAS: Correct. There was a crash in 2011 that  
4 resulted in a loss of information, and because that information  
5 did not exist in 2013 when the request was made --

6 THE COURT: These are just the representations of counsel.  
7 Would discovery be appropriate at this point to get the sworn  
8 testimony of some individual about these allegations of lost  
9 e-mails?

10 MR. KLIMAS: Your Honor, there's -- if we're talking about  
11 preservation and the IRS's obligation to preserve documents,  
12 obviously the IRS is under an obligation to preserve documents  
13 that are potentially responsive to Judicial Watch's FOIA request.  
14 If you would like, I can talk you through the steps that the IRS  
15 has taken to make sure that its obligations are fulfilled.

16 THE COURT: Just answer my question first. What about  
17 discovery?

18 MR. KLIMAS: There -- We think that discovery would be  
19 premature and specifically inappropriate in this instance,  
20 premature insofar as that as an initial matter discovery is a  
21 rare exception in FOIA cases. It's rarely allowed in --

22 THE COURT: Why isn't this the rare FOIA case where the  
23 government doesn't dispute that there are relevant -- Well, do  
24 you dispute that there are relevant e-mails that have been lost  
25 in the context of this FOIA case?

1 MR. KLIMAS: We don't think that they would be agency  
2 records that the IRS would be obligated to or could produce  
3 because they were destroyed two years -- to the extent they were  
4 destroyed --

5 THE COURT: But that's what you say. There's no sworn  
6 declaration by anyone in this record. Those are just  
7 representations of counsel. So why isn't this the rare case  
8 where discovery would be appropriate?

9 MR. KLIMAS: In cases where courts have found that  
10 discovery is appropriate in FOIA cases, its almost -- in almost  
11 all those cases it's after the government has moved for summary  
12 judgment and then there's an issue.

13 THE COURT: Why should I wait, though? You don't dispute  
14 that there are lost e-mails, do you?

15 MR. KLIMAS: Correct, we certainly admit that Lois  
16 Lerner's hard drive crashed in --

17 THE COURT: So why should we go through this process of  
18 the government producing everything that it wants to produce or  
19 can produce and then asking to file a motion for summary judgment  
20 and then tee up a Rule 56(f) a year from now when the Court could  
21 order appropriate limited discovery now in an effort to determine  
22 what was lost, how was it lost, and what efforts were being made  
23 to retrieve, et cetera, the relevant questions? Why do we have  
24 to wait a year into that?

25 MR. KLIMAS: Well, Your Honor, specifically in this case,

1 the reason why we believe it would be inappropriate -- and  
2 certainly I spoke to Ms. Cotca -- Ms. Cotca for the first time on  
3 Tuesday about this issue, and I understand that there were a  
4 number of questions that she wanted answers to that I was unable  
5 to provide on Tuesday, and I'm probably not in a better position  
6 to provide answers to those explanations today, but I can give a  
7 better explanation as to why I cannot provide those answers. I  
8 can certainly ask the IRS questions about the loss of Lois  
9 Lerner's hard drive, what happened, details about that.

10 THE COURT: Are we just talking about one hard drive or  
11 are we talking about multiple employees' hard drives or do we  
12 know? And because we don't know or may not know, doesn't that  
13 also give rise to the propriety of discovery at this juncture?

14 MR. KLIMAS: There's Lois Lerner's hard drive, and the  
15 commissioner of the Internal Revenue has testified that there are  
16 six other hard drives.

17 THE COURT: And they all crashed as well?

18 MR. KLIMAS: That is his testimony, correct. Now, I  
19 certainly --

20 THE COURT: At the same time?

21 MR. KLIMAS: That's an answer that I cannot give, and I  
22 would like to explain why I cannot give an answer. It's  
23 certainly a question that I asked the Internal Revenue Service.

24 THE COURT: It's a relevant question.

25 MR. KLIMAS: It's certainly a question I would like to

1 have an answer to today.

2 THE COURT: Well, the plaintiffs would like to have an  
3 answer to that, too, and probably the Court, as well, probably.

4 Go ahead.

5 MR. KLIMAS: When I spoke to the IRS and asked that  
6 question, when did these hard drives crash, whose hard drives,  
7 was it after the IRS took steps to preserve the information from  
8 those individuals? What I was told is that the Inspector  
9 General, who investigates tax matters for the IRS, the Treasury  
10 Inspector General for Tax Administration or TIGTA has commenced  
11 an investigation into this issue about the potential loss of  
12 information from hard drive malfunctions.

13 THE COURT: When did the Attorney General commence that  
14 investigation?

15 MR. KLIMAS: Not the Attorney General, the Inspector  
16 General.

17 THE COURT: I'm sorry, the Inspector General.

18 MR. KLIMAS: Correct. I know it was ongoing at least as  
19 of June of this year.

20 THE COURT: Could the IRS not tell you when it started?

21 MR. KLIMAS: I did not specifically ask when the  
22 investigation started. I know that the IRS was informed that the  
23 investigation had started in June of this year.

24 THE COURT: All right.

25 MR. KLIMAS: I --

1 THE COURT: And does the Inspector General plan to file a  
2 public report?

3 MR. KLIMAS: The Inspector General is not in a position at  
4 this juncture to say whether the final report would be public or  
5 not. It depends on how the --

6 THE COURT: Is that pursuant to a congressional directive?

7 MR. KLIMAS: I don't believe Congress directed the  
8 Inspector General to initiate this investigation, but I do not  
9 know that for a fact.

10 THE COURT: All right.

11 MR. KLIMAS: I spoke to the IRS and I said, Okay, there's  
12 this investigation going on, what does that mean in terms of your  
13 ability to answer my questions, and what the IRS said is that the  
14 Inspector General directed the IRS not to contact potential  
15 witnesses about the subject matter of the investigation and not  
16 to try to obtain documents that were relevant to the subject  
17 matter of that investigation because the Inspector General had  
18 indicated that that could interfere with his ability to conduct  
19 the investigation.

20 Not only did I talk to the IRS about that, I have reached  
21 out to TIGTA and the investigator working on the case. TIGTA has  
22 confirmed that there's ongoing investigation into this exact  
23 issue. TIGTA has confirmed it instructed the IRS not to contact  
24 those witnesses or potential witnesses or individuals, and it has  
25 further instructed the IRS not to try to collect documents that

1 are relevant to the TIGTA investigation.

2 THE COURT: And that would arguably include FOIA  
3 documents, correct?

4 MR. KLIMAS: The documents that the IRS has segregated,  
5 preserved and taken appropriate steps to preserve are documents  
6 that have already been collected, already been segregated, and  
7 there are already steps that have been taken to preserve them, so  
8 the IRS does not have to go out and get those documents at this  
9 juncture, the IRS has already collected those documents.

10 THE COURT: So, am I correct in saying that the documents  
11 that are the subject of this plaintiff's FOIA request have all  
12 been collected?

13 MR. KLIMAS: I -- the IRS has represented that they issued  
14 preservation letters in May and June of 2013 and then proceeded  
15 over the course of the next several months to collect any  
16 potential responsive documents, so I believe that the answer is  
17 that any potentially responsive documents have been collected, to  
18 the extent that a reasonable search would capture those  
19 documents. Obviously, an agency can never say that it's  
20 collected every single potentially responsive document from an  
21 agency with 90,000 employees and the FOIA doesn't require that,  
22 it requires a reasonable search. The IRS has collected the  
23 documents that it believes would constitute a reasonable search.

24 THE COURT: All right. To be more precise, pursuant to  
25 the IRS's obligations under FOIA precedent, is your answer yes,

1 that the IRS has completed its search for relevant e-mail  
2 documents in this case? Is your answer yes?

3 MR. KLIMAS: It depends on what you mean by search. If  
4 you mean collecting the universe of potentially responsive  
5 documents --

6 THE COURT: I didn't limit it, I said pursuant to its  
7 obligation to FOIA -- to its obligations under relevant FOIA  
8 precedent, has the IRS completed its search for documents that  
9 are the subject of this FOIA request by this plaintiff?

10 MR. KLIMAS: Sure. I think that it's a two-step answer.  
11 So, in terms of collecting the universe of potentially responsive  
12 documents, of conducting a reasonable search to create that  
13 universe of potentially responsive documents, I believe that the  
14 IRS has completed that search.

15 Now, that is an overbroad universe of documents. There  
16 are documents that are not responsive, there are documents that  
17 would be exempt from disclosure, and the IRS is in the process of  
18 conducting a review of that universe of documents that have been  
19 gathered and preserved, and that has not --

20 THE COURT: So I'm just breaking it down. So, the  
21 government has thrown out a broad net, the IRS has thrown out a  
22 broad net to capture documents that are arguably produceable, but  
23 there may otherwise be privileged exceptions or other exceptions,  
24 national security, whatever, that preclude production to the  
25 plaintiff. So the broad universal search has been completed,

1 then.

2 MR. KLIMAS: That's correct, Your Honor.

3 THE COURT: All right.

4 MR. KLIMAS: That's my understanding.

5 THE COURT: And the government is producing documents, the  
6 IRS is producing documents to this plaintiff? I'm just concerned  
7 about this case right now.

8 MR. KLIMAS: Correct, the IRS has been producing documents  
9 since February. It's produced over 3800 pages of documents and  
10 produced documents as recently as, I believe, June 30th of this  
11 year.

12 THE COURT: All right. All right. With respect to the  
13 documents that have been captured, that have been located, when  
14 is the -- when do you envision that the further documentation  
15 review, categorization or whatever, will be complete?

16 MR. KLIMAS: Correct, Your Honor. That is a question that  
17 I asked the IRS as well. There are four separate FOIA requests  
18 that are at issue in this lawsuit.

19 THE COURT: Right.

20 MR. KLIMAS: The first FOIA request deals with  
21 communications to or from Lois Lerner broadly. That is  
22 essentially what is being sought. And the IRS has indicated that  
23 they believe that they are roughly halfway through the review and  
24 production of those documents to Judicial Watch.

25 The second FOIA request specifically deals with the number

1 of 501(c)(4) applications that were submitted to the Internal  
2 Revenue Service. My predecessor on this case conferred with  
3 Ms. Cotca about that particular request, and there was agreement  
4 that instead of producing all documents related to the number of  
5 applicants, that instead the IRS would produce -- would provide a  
6 number to Ms. Cotca. We believe that that will be done by the  
7 end of the month, and potentially sooner than the end of the  
8 month. There are two additional FOIA requests. One that broadly  
9 deals with communications between the IRS and Congress or  
10 agencies. The IRS is in the process of taking that broad  
11 universe of documents that we talked about and doing what is  
12 referred to as batching, so taking that broad universe of  
13 documents, searching to limit it to a more probably number of  
14 potentially responsive documents, and then having people -- and  
15 then having IRS employees review those documents for  
16 responsiveness and for exemptions.

17 And then with respect to the fourth FOIA request, the IRS  
18 has already batched, already broken into manageable segments the  
19 potentially responsive documents, and those documents are  
20 currently being reviewed by IRS employees for responsiveness and  
21 exemptions.

22 As far as a concrete answer as to when that process will  
23 be done, I asked that question and I was told that the IRS is  
24 hopeful to have an answer by the next status report in August,  
25 but they were unable to provide me a target end date this week

1 when I spoke to them.

2 THE COURT: All right. You mentioned that the Inspector  
3 General was involved in conducting an investigation. By the way,  
4 who is the investigating attorney? Do we have a name?

5 MR. KLIMAS: I have a name. I haven't personally spoken  
6 with him. He requested that I not mention his name in open court  
7 just because he would prefer to work on his expedited  
8 investigation rather than deal with phone calls from the press  
9 for the next several days.

10 THE COURT: But does the public have a right to know the  
11 name of this person?

12 MR. KLIMAS: This is a request that I received from him.  
13 Obviously, if the Court would like me to provide his name, I'm  
14 not going to disobey an order from the Court to provide it or  
15 provide it in-camera, if necessary, but that's the request that I  
16 received from him.

17 THE COURT: All right. Do we know whether or not that  
18 person has ordered a forensic examination?

19 MR. KLIMAS: I can't tell you the status of the  
20 investigation as far as what steps he has taken or what facts he  
21 has found.

22 THE COURT: What I mean by that is there an examination of  
23 the computers, the relevant computers.

24 MR. KLIMAS: I can -- what I can represent is that that  
25 would be part of what TIGTA is doing, not only to interview

1 people, not only to find out factually what happened, but also to  
2 examine the particular equipment and to take steps to restore  
3 information, to the extent that it was lost. That would be also  
4 part of what TIGTA is trying to accomplish with this  
5 investigation.

6 THE COURT: All right. Do we know whether or not the  
7 Department of Justice has requested the FBI to conduct an  
8 investigation?

9 MR. KLIMAS: I do not know whether the Department of  
10 Justice has requested the FBI to conduct an investigation.

11 THE COURT: Have you asked that question?

12 MR. KLIMAS: I have not asked that question.

13 THE COURT: All right. And no one's volunteered that  
14 information to you that the FBI may be investigating this as  
15 well?

16 MR. KLIMAS: Correct. I don't -- I know there's been  
17 Congressional testimony about whether the FBI is investigating or  
18 what the FBI is investigating. I can't say whether the FBI is  
19 investigating this particular issue or not, I don't know.

20 THE COURT: All right. Let's get back to the question of  
21 discovery. Why not discovery now, then? Why wait? Because the  
22 scenario you allude to is one in which the government would say  
23 at some point to the Court, we've completed our search for  
24 relevant documents, we've produced documents, we've invoked  
25 privilege with respect to certain documents, we would like an

1 opportunity to file a motion for summary judgment, which is the  
2 normal course, right?

3 MR. KLIMAS: Yes.

4 THE COURT: Which would probably trigger -- Well, Judge --  
5 from the plaintiffs -- three months ago or a year ago or three  
6 years ago, the government said that there were -- or we found out  
7 that there were, arguably, lost documents, we don't know whether  
8 they fall within a relevant timeframe. Arguably, they could be  
9 within a relevant timeframe, but we'd like some limited discovery  
10 at that point and they file a 56(f) affidavit saying we can't  
11 really -- we're not in a position to oppose summary judgment  
12 because we need some discovery, and your argument a few minutes  
13 ago was that it would be more appropriate at that juncture to  
14 consider discovery, right?

15 MR. KLIMAS: Correct, Your Honor.

16 THE COURT: Is that still your answer?

17 MR. KLIMAS: That is still our answer, in addition to the  
18 concerns that we have about the TIGTA investigation which is  
19 ongoing. At a minimum, we think that the -- the Department  
20 thinks that it would be more appropriate for that investigation  
21 to --

22 THE COURT: More appropriate for whom, though, for the  
23 Department or for the public? I mean, this is an action filed by  
24 an organization that seeks documents under the theory that the  
25 public likes to know what its government is doing, so more

1 appropriate for whom? How would delaying discovery assist this  
2 plaintiff and assist the public in learning what happened here?

3 MR. KLIMAS: I would submit that letting the Inspector  
4 General conclude his investigation serves the public interest.  
5 The Inspector General is --

6 THE COURT: First of all, we don't know who this Inspector  
7 General is; secondly, we don't know whether his or her report is  
8 going to be public, right, right?

9 MR. KLIMAS: That's correct.

10 THE COURT: So what's -- so let's just stop there. Whose  
11 interest does that benefit, other than the IRS and not the  
12 public?

13 MR. KLIMAS: I would note that the Inspector General is  
14 independent of the IRS, that the Inspector General is the same  
15 Inspector General who issued the report regarding 501(c)(4)  
16 issues that launched the Congressional investigations that are  
17 ongoing. The Inspector General is the same one who commenced  
18 this particular investigation. I think it's clear that this  
19 Inspector General has the interest, the authority, and the  
20 resources to conduct a more thorough review than what we could do  
21 with discovery, even extensive discovery, but certainly better  
22 than what we could do with limited discovery in this action. I  
23 can't imagine that limited discovery would -- this is the first  
24 time I've heard that this is something that the plaintiff sought.  
25 It's not something that we discussed earlier this week when we

1 spoke, but I certainly don't think that the limited discovery  
2 that Ms. Cotca was proposing involved forensic examination of  
3 computer hard drives. I don't think it would be as extensive or  
4 as successful in terms of getting to the bottom of this issue.

5 THE COURT: What about a question that the Court raised  
6 with plaintiff's counsel a few minutes ago about whether or not  
7 this case should be consolidated or transferred to my colleague  
8 Judge Walton under our related case rules?

9 And again, I don't know enough about his case to know  
10 whether or not they're, indeed, related under the meaning of our  
11 local rules, but I just raise the question for your response.

12 MR. KLIMAS: Sure. I have some familiarity with the True  
13 the Vote case. There are Department of Justice Tax Division  
14 attorneys who are assigned to that case, and I'm not one of those  
15 attorneys, but it's my understanding that the True the Vote case  
16 is not a FOIA action, it's a case in which there would -- if the  
17 motion to dismiss filed by the government is denied, then there  
18 would potentially be a discovery schedule and discovery which  
19 would be unique and different from --

20 THE COURT: There's a pending motion to dismiss in that  
21 case; is that correct?

22 MR. KLIMAS: I believe that's correct, Your Honor.

23 THE COURT: But you're not involved in that?

24 MR. KLIMAS: Correct.

25 THE COURT: And that's not a FOIA case, that's an action

1 for damages, is it, or a declaratory injunctive relief and  
2 damages also, if I recall? I briefly read the pleadings. It's  
3 an action for a declaratory and injunctive relief and I believe a  
4 collateral request for damages, I think, but not FOIA.

5 MR. KLIMAS: I believe that's correct, there is not a FOIA  
6 claim in that lawsuit. So certainly there would be some  
7 synergies in having one judge who is familiar with these issues.  
8 I certainly don't think it's a related case in the way that that  
9 term is used in this Court's rules, but I see there would be some  
10 efficiencies in having one --

11 THE COURT: But you would not be precluded from a transfer  
12 by consent to one of the two judges. Are there any other actions  
13 in this Court?

14 MR. KLIMAS: Any other actions?

15 THE COURT: Similar or arguably related lawsuits in this  
16 Court pending before other colleagues?

17 MR. KLIMAS: In terms of FOIA cases --

18 THE COURT: No, no, I know that. We're inundated with  
19 FOIA cases. In terms of this e-mail issue, anyone else will  
20 filed anything?

21 MR. KLIMAS: I don't specifically know if the e-mail issue  
22 is germane to any of the other pending lawsuits in this Court. I  
23 know that there are other pending lawsuits in this court that  
24 relate to 501(c)(4) lawsuits. Many of those are FOIA lawsuits,  
25 but I don't know if the issues are germane to those cases or not.

1 THE COURT: All right. Thank you.

2 MR. KLIMAS: Thank you, Your Honor.

3 THE COURT: Anything further?

4 MS. COTCA: Thank you, Your Honor.

5 THE COURT: Why shouldn't you wait? Why shouldn't this  
6 wait until the government says, We've finished our process, we've  
7 produced everything, and we want to file a motion for summary  
8 judgment at that point and then give you an opportunity to file  
9 your 56(f), if that's appropriate, and you can persuade the Court  
10 if there's a need for discovery? That's the normal course, isn't  
11 it?

12 MS. COTCA: Right, and that's the normal course because  
13 that's when this sort of information becomes available. This  
14 case is different from that because this information became  
15 available through public resources and the news with respect to  
16 what the plaintiff believes is an issue with --

17 THE COURT: The media is getting some high marks from you  
18 today, huh?

19 MS. COTCA: Well, that's where we got this information,  
20 Your Honor.

21 THE COURT: The Congressional investigation is a public  
22 proceeding; is that correct?

23 MS. COTCA: Correct. So that's why we think this is  
24 distinguishable from the other cases. And that's right, when --  
25 in the normal course of a FOIA litigation, you have the summary

1 judgment motions and you have the declarations, and that's when  
2 an objection is raised or a challenge is raised to the search  
3 because that's when the evidence or the record becomes clear. We  
4 already have this information. It doesn't make sense to wait.

5 First of all, who knows what's going to still be available  
6 two years down the line. We don't have a timeline yet of when  
7 this will be over. It could be three years from now, it could be  
8 three months, we don't know. We don't have much confidence that  
9 it will be three months from now, but -- and so that's why we  
10 think it would be appropriate at this time to have the limited  
11 discovery. With respect to --

12 THE COURT: Suppose -- would you be satisfied if someone  
13 filed a declaration in the FOIA case under oath in an effort to  
14 persuade the Court and the plaintiff that these documents that  
15 you're seeking in the course of this litigation aren't even  
16 within the scope of the documents that are missing?

17 MS. COTCA: Well --

18 THE COURT: Would that be enough?

19 MS. COTCA: No, Your Honor, because -- and this is the  
20 point. The Lois Lerner e-mails -- First of all, Your Honor  
21 correctly pointed out that we don't actually have any declaration  
22 or any statement actually made by the IRS, the defendant in this  
23 case, whether, indeed, these e-mails are missing or not.

24 THE COURT: You learned through the publicly available  
25 media that there are e-mails that are missing. You don't know

1 what timeframe they cover or not, do you?

2 MS. COTCA: We don't know what timeframe.

3 THE COURT: You don't know what timeframe the missing  
4 e-mails are --

5 MS. COTCA: The timeframe for the e-mails?

6 THE COURT: Yea, for the e-mails that are arguably  
7 missing, right?

8 MS. COTCA: What's been disclosed is e-mails from 2010 to  
9 2012. That's what I believe the information is with respect to  
10 the missing e-mails, which covers the specific period of time  
11 that we requested for the e-mails.

12 THE COURT: Right, but that's what you believe.

13 MS. COTCA: That's what the testimony that the IRS  
14 Commissioner or that's the information the IRS provided to  
15 Congress and that's where we got the information from. But going  
16 back to the issue here, this information is becoming available  
17 now. We don't have a set timeline of when the IRS will complete  
18 its production so we can move on to the briefing phase of the  
19 litigation, and we don't know what will be available and what  
20 will not be available at that point. So it doesn't make sense  
21 for us to wait.

22 And with respect to -- and at this point, we do know  
23 there's this issue with respect to these e-mails, and we still  
24 don't know what the IRS has done, what the defendant has done to  
25 try to see were there other potential sources where these e-mails

1 can be retrieved because they do have the burden to conduct a  
2 search that's reasonably calculated to reach -- to uncover the  
3 requested records.

4 One particular e-mail that the IRS has produced in this  
5 case at this point is from Ms. Lerner herself from 2012 where she  
6 identifies and asks actually the TIGTA officer -- the TIGTA  
7 investigator to copy someone in her office because she monitors  
8 her e-mails. One obvious question is, Well, has the IRS gone  
9 back to see if this individual's computers and this individual's  
10 records have been searched so we can retrieve the records that we  
11 requested in this case by that mechanism and through those means,  
12 and that's reasonable. That's plaintiff's position in this case.

13 THE COURT: What about the government's statement that  
14 discovery would be, arguably, duplicitous now of what this IGA  
15 attorney is doing?

16 MS. COTCA: Well, we don't know what the IG attorney is  
17 doing, we don't know who the IG attorney is, and this is the  
18 first time we've heard of this, and Judicial -- we would have, we  
19 would suggest, a very limited and only specific -- not with  
20 respect so much with respect to the obligations and whatnot  
21 that's going on in Congress of maintaining and keeping these  
22 records, but with respect to what are the reasonable mechanisms  
23 that the IRS has to try to get these e-mails that we're  
24 requesting in this litigation. That's much more narrow than the  
25 investigation in the way that I understand what this

1 investigation would cover.

2 THE COURT: All right. I'm going to take about a  
3 ten-minute recess.

4 UNIDENTIFIED SPEAKER: Your Honor, may I be heard on one  
5 question that Your Honor posed in another case?

6 THE COURT: I'm sorry?

7 UNIDENTIFIED SPEAKER: I'm not counsel in this matter.

8 THE COURT: No, no. Thank you very much, though. At some  
9 point -- you're certainly welcome to speak with counsel during  
10 the recess, but thank you very much. I'm going to take a  
11 ten-minute recess. All right. Thank you.

12 (Thereupon, a recess in the proceedings occurred from  
13 11:52 a.m. until 12:06 p.m.)

14 THE COURT: All right. Anything further from counsel,  
15 either side?

16 MR. KLIMAS: Your Honor, may I be heard briefly?

17 THE COURT: Yeah, sure.

18 MR. KLIMAS: I just wanted to briefly address -- Ms. Cotca  
19 indicated that she didn't know what efforts the IRS has taken to  
20 either recover Ms. Lerner's hard drive or to obtain the  
21 information, the lost e-mails from other sources within the IRS.  
22 I would indicate that, in fact, Judicial Watch attached to their  
23 motion a statement -- a statement from the IRS that details the  
24 fact that the IRS had, in fact, taken those steps; that after  
25 Ms. Lerner's hard drive crashed, the IT department attempted to

1 restore the information and was unsuccessful. It was then sent  
2 to the IRS criminal division, which attempted to restore the  
3 information. It was unsuccessful. Furthermore, the IRS has  
4 obtained over 20,000 e-mails of which Ms. Lerner was not the  
5 custodian by going to other IRS employees and obtaining the  
6 e-mails from those sources. That is attached as an exhibit to  
7 their motions.

8 THE COURT: Have those e-mails been produced to plaintiff?

9 MR. KLIMAS: I don't know -- the answer to that question  
10 is no, and the reason why is because the IRS is producing Lois  
11 Lerner's e-mails and reviewing them in reverse chronological  
12 order. So the IRS started with e-mails from 2013, the most  
13 recent, and is working backwards. The IRS had not even gotten to  
14 2011, the point at which there would have been any recognition on  
15 the part of the IRS FOIA processing team that there was an issue.  
16 That's a large part of the reason why I was not made aware of  
17 this issue, because the IRS employees processing the FOIA  
18 requests had not even gotten to a point where they could have  
19 realized potentially that there was an issue.

20 THE COURT: All right. Thank you. In response?

21 MS. COTCA: Just very briefly, Your Honor, with respect to  
22 the efforts that opposing counsel is just referring to. Those  
23 are the efforts that the IRS had gone through to try to retrieve  
24 the hard drive and/or maybe, perhaps, backup tapes. That was  
25 back in 2011. I'm talking about what efforts have been done now

1 in this litigation to identify other sources that potentially  
2 could have these lost e-mails, so that -- there's a difference,  
3 and I'm highlighting --

4 THE COURT: Isn't this normally the subject of a meet and  
5 confer, though, in cases among counsel, for counsel to meet and  
6 talk about this? All right, there's a problem with Lois Lerner's  
7 e-mails, so how can we get this information, what other sources,  
8 what about her cc list or bcc list or whatever? Have you had any  
9 discussions like that in an effort to find out how you can get  
10 this information from other sources?

11 MS. COTCA: We have, Your Honor. That was actually this  
12 week on Tuesday, and those questions haven't --

13 THE COURT: Just Tuesday, though?

14 MS. COTCA: On Tuesday specifically we --

15 THE COURT: That's just a telephone conversation, right?

16 MS. COTCA: That was a telephone conversation, yes.

17 THE COURT: All right.

18 MS. COTCA: Just -- and going back very briefly to related  
19 cases, Judicial Watch actually has another pending FOIA  
20 litigation that relates to records with respect to personal  
21 audits, audits of personal -- of individuals that were referred  
22 because of information that was in Tea Party's applications.  
23 That's actually case number, I believe, 13-1759.

24 At this point -- It's also before this Court. So  
25 that's -- that may -- this issue may be related or may come up in

1 that case, but I just wanted -- I missed it and I just wanted to  
2 make the Court aware.

3 THE COURT: All right. Thank you. Thank you, both. I  
4 thank the four of you. Let me just say this: First of all, the  
5 Court would be loathed to grant an oral motion for discovery. It  
6 may well be, as plaintiff counsel indicated, this is one of the  
7 rare cases that, because of developments, counsel's in favor of  
8 some limited discovery. It's premature at this point to know  
9 that.

10 I think that how this case should proceed is as follows:  
11 The government is going to be required to file a declaration  
12 signed by the appropriate IRS official, under oath, under  
13 penalties, addressing the Lois Lerner e-mail/computer issues, and  
14 I'll just leave it as broad as that right now because, you know,  
15 I have no idea what the relevant timeframe is insofar as this  
16 FOIA request.

17 Counsel has indicated that there may be e-mails that  
18 predate the crash that are somehow impacted by -- I don't know  
19 that to be a fact or not, so that's why I'm saying, and I'll put  
20 this in writing in a minute order, a declaration signed by the  
21 appropriate official under oath addressing the Lois Lerner  
22 issues. That's about as broad as I can make it at this point.

23 The fact that there's an IT investigation ongoing is  
24 important, it's significant. I don't think it's relevant at all  
25 who's conducting the investigation. I think it's probably in

1 everyone's best interest that the investigation commence, it has  
2 commenced, according to government counsel, and can conclude as  
3 soon as possible, and hopefully at some point there's a public  
4 report voluntarily produced by the Inspector General, and I'll  
5 just leave it at that, that would address the relevant issues in  
6 this litigation. I want to be very careful. I'm just focusing  
7 on this FOIA case and the production of documents that this  
8 plaintiff has requested in this litigation and nothing else. I  
9 think that once the declaration -- the declaration should also  
10 include information that may assist the parties in recovering the  
11 subject matter of the lost e-mails from other sources. I think  
12 that's highly relevant. So there will be two main parts, A and  
13 B. A will be the Lois Lerner part, and B will be, how do we get  
14 this information that's been lost from other sources, and that's  
15 going to be highly relevant as well, and that's also going to  
16 inform the Court whether there's a need for limited discovery.

17 Now, I don't think this declaration should be filed at the  
18 conclusion of discovery. The declaration shall be filed, and I'm  
19 not going to extend the time. I'll be a little generous in  
20 setting forth an appropriate timeframe recognizing this is  
21 mid-July, people have plans to go on vacation, I don't want  
22 anyone's spouses, significant others, or kids mad at me because  
23 he or she has to cancel vacation. There are limits to my  
24 judicial authority, and I don't want any phone calls from family  
25 members, so it's going to be 30 days from today's date. Today is

1 the 10th, so August 10th, and I'm not going to extend it. I want  
2 that declaration filed and signed by the appropriate official  
3 under oath, all right, and I've said that at least three or four  
4 times. Then that's going to inform the Court and plaintiff as  
5 well as to whether or not there is a need for any discovery,  
6 limited discovery.

7 So at that time, if plaintiff wishes to pursue discovery,  
8 then plaintiff can file a request for discovery addressing any  
9 inadequacies in the declaration and its entitlement, if it has  
10 an entitlement, as a matter of law, to discovery at this very  
11 interesting juncture where discovery is still ongoing, it's not  
12 been concluded, we're not at the 56(f) stage, but by the same  
13 token I think it's appropriate to give plaintiff a chance to  
14 address whether or not there's a need for discovery.

15 Now, having said that, I'm going to direct that the  
16 parties meet and confer with respect to the B part of that  
17 declaration, how does the government obtain this information from  
18 other sources, and I'm going to ask my colleague Judge Facciola  
19 to preside over discussions, meet and confer discussions about  
20 how that objective is obtained; that is, how are the lost  
21 documents otherwise retrievable, if at all, from other sources,  
22 so you're not going to be able to file a motion for discovery  
23 immediately on August the 11th. I don't know Judge Facciola's  
24 calendar. In fact, I didn't even think about assigning or asking  
25 him to help me do anything until a few minutes ago, but I think

1 that the parties' best interests, best respective interests would  
2 be served by having a disinterested third party judicial officer  
3 assist you, and because he's an expert in this area of  
4 E-discovery, et cetera, assist the parties in obtaining -- in  
5 accomplishing that objective, how do you get that information  
6 from other sources. I don't know how much time that's going to  
7 take. Again, I don't know his schedule. Hopefully, he'll be on  
8 some nice beach August 11th and for the rest of the summer.

9 So what I'll do is I'll say until September 10th or so  
10 I'll refer the matter to Judge Facciola -- that will be a month  
11 after the government's filing of its declaration -- and the  
12 parties can meet and confer with him in an effort to determine  
13 how this information can otherwise be recoverable or  
14 discoverable, and I think that's all that the Court needs to do  
15 at this point, and I'll issue an appropriate order that addresses  
16 that, and I'll probably issue that today or tomorrow.

17 The third part shall be the IT investigation. If the  
18 government contends that discovery would somehow or another  
19 compromise or impact adversely the IG investigation, then the  
20 government needs to provide that information again under oath in  
21 a declaration. So there are three sections there. If I think of  
22 a fourth section, I'll put it in the minute order, but those are  
23 the three sections that I want the government to address, and  
24 that's -- I'm not going to schedule another status hearing now.  
25 Again, I don't know the availability of Judge Facciola. It may

