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

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| JUDICIAL WATCH, INC. | ) | |
| | ) | |
| *Plaintiff*, | ) | |
| | ) | |
| v. | ) | Civil Action No. 13-1559-EGS |
| | ) | |
| INTERNAL REVENUE SERVICE, | ) | |
| | ) | |
| *Defendant*. | ) | |
| | ) | |

**PLAINTIFF'S REPLY IN SUPPORT OF**
**MOTION FOR LIMITED DISCOVERY**

Plaintiff Judicial Watch, Inc. ("Judicial Watch"), by counsel, respectfully submits this reply in support of its motion for limited discovery. As grounds thereof, Judicial Watch states as follows.

**MEMORANDUM OF LAW**

Limited discovery is appropriate in this case because the declarations submitted by Defendant Internal Revenue Service ("IRS") fail to answer important questions about the missing emails of Exempt Organizations Director Lois Lerner and other key IRS officials. In addition, it has become apparent that the IRS did not undertake any significant efforts to obtain the emails from alternative sources following the discovery that the emails were missing. The emails are potentially responsive to Plaintiff's FOIA requests, and the IRS's failure to search for them in other recordkeeping systems raises material questions of fact about whether the agency has conducted a reasonable search. The limited discovery proposed by Plaintiff would help to answer these questions and is necessary to enable Judicial Watch and the Court to assess what constitutes a reasonable search under the extraordinary circumstances of this case.

**1. The extraordinary circumstances in this case require limited discovery.**

"'The adequacy of an agency's search is measured by a standard of reasonableness' and is 'dependent upon the circumstances of the case.'" *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983) (*quoting McGehee v. Central Intelligence Agency*, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983) and *Founding Church of Scientology v. National Security Agency*, 610 F.2d 824, 834 (D.C. Cir. 1979)). The agency "cannot limit its search to only one record system if there are others that are likely to turn up the information requested." *Nation Magazine v. U.S. Customs Serv*, 71 F.3d 885, 890 (D.C. Cir. 1995) (internal citations omitted).

It is apparent that the search conducted by the IRS in response to Plaintiff's FOIA requests relies on the same initial, data collection efforts undertaken by the agency in response to congressional investigations into the IRS's inappropriate targeting of "conservative" or "Tea Party" groups. Opp. at p. 2-3; 8/11/2014 Kane Decl., at ¶ 9; Def. Ex. M (9/17/2014 Koskinen Written Testimony); 7/10/2014 Status Conference Tr. at pp. 20-21. This initial data collection effort resulted in the creation of what the IRS has identified as the "Congressional database." *Id*. Importantly, data was collected for the "Congressional database" and searches of the database were completed by August 2013, long before the IRS even realized that Ms. Lerner's emails and emails of other key agency personnel were missing. *Id.* Although the IRS discovered in February 2014 that some of Ms. Lerner's emails were missing, it continued to rely on this same, incomplete database when it searched for records responsive to Plaintiff's FOIA requests. It has not searched for backup tapes for email servers or hard drives that may contain the missing emails. Nor has it searched disaster recovery tapes or government-wide backup systems. All the IRS appears to have done is search this same database for emails from persons who sent or received emails to or from Ms. Lerner. The IRS will not even definitively state

whether the emails of Ms. Lerner's assistant(s), who may have monitored or managed Ms. Lerner's email account for her, are included in the database. This remarkable fact alone is a sufficient basis to permit limited discovery on the adequacy of the agency's search efforts to date.

Limited discovery also is necessary because the IRS has refused to describe in its declarations how the missing emails – electronically stored information on custodians' hard drives and Blackberries – were backed up and preserved during the relevant time period before they were discarded. The IRS has detailed guidelines requiring the preservation of agency emails and electronically stored information. Mot. for Discovery at ¶ 9; *see infra* pp. 4, 7-8. Presumably, the IRS also had systems in place for ensuring that its employees followed these directives. The IRS has not demonstrated how the hard drives of Ms. Lerner and other key agency personnel were backed-up or how Ms. Lerner and the employees whose emails are missing complied with directives requiring that their email be stored and preserved. Nor has the IRS said whether Ms. Lerner and these employees printed out and stored their email in paper files or whether any such paper records were included in the "Congressional database." Again, this information is highly relevant to the Court's inquiry during the Status Conference and in its July 10, 2014 and August 14, 2014 orders. 7/10/2014 Status Conf. Tr. at pp. 25-26, 38. Without this information, neither Judicial Watch nor the Court is able to ascertain whether the agency's search efforts are reasonable under the circumstances. Mot. for Discovery at ¶ 7.

The IRS nonetheless chides Plaintiff for citing incomplete transcripts and hearsay statements and for alleged "misunderstandings" in its motion for discovery. Def. Opp.at pp. 7, 12, 15-17. Yet Plaintiff has no choice but to rely on the limited, public information available to it precisely because the IRS has failed to provide complete information. Rather than detracting

from Plaintiff's motion, the IRS's failure to provide complete information highlights the need for limited discovery. Neither Judicial Watch nor the Court should have to rely on incomplete transcripts, out-of-court conversations, or the other, limited information Judicial Watch's attorneys have been able to glean from congressional correspondence, media reports, and the internet to determine what system of records the IRS should reasonably search to recover the missing emails. As in all FOIA litigation, an "asymmetrical distribution of knowledge" exists between the IRS, on the one hand, and Judicial Watch and the Court, on the other. It is precisely because the IRS has refused to provide pertinent, complete information that limited discovery is necessary. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006).

Nor does the Office of Chief Counsel Notice, submitted as Exhibit N to the IRS's opposition, alleviate this asymmetric knowledge or explain how electronically stored information retained on individual hard drives was preserved to comply with the agency's Internal Revenue Manual ("IRM"). Def. Opp. at Ex. N; *see also* IRM §§ 1.10.3.2.3, 1.15.6.6.2.c, 1.15.6.8, and 1.15.6.9. The Notice also became effective September 13, 2012 – subsequent to the hard drive crashes of Ms. Lerner and IRS officials Julie Chen, Judy Kindell, Justin Lowe, and Rob Shoemaker. *See* 9/10/2014 Def. Notice at Ex. A, pp. 2-5. Limited discovery into how individual hard drives were backed up during the relevant time frame is essential to determine what record systems are reasonably available to be searched.

Defendant's argument that discovery cannot be authorized based on hearsay statements by members of Congress is also without merit. Def. Opp. at pp. 17. Defendant cites no authority, and Plaintiff is aware of none, supporting Defendant's argument that hearsay is inappropriate in a discovery motion. Hearsay may not be admissible at trial, but no such rule

bars hearsay from a discovery motion. Likewise, Defendant's argument that identifying the IRS officials whose emails are missing is "academic" because FOIA does not provide relief for an agency's failure to preserve documents entirely misses the point. Def. Opp. at pp. 18. Limited discovery is necessary to identify the universe of missing emails and where these missing emails may be located. Doing so is an essential part of assessing the sufficiency of the IRS's search. It is not an attempt to seek relief from the IRS for failing to comply with federal recordkeeping statutes and/or the IRS's own recordkeeping policies – if indeed such failures occurred.

In sum, material questions of fact exist regarding the missing emails and whether the missing emails may be retrieved from reasonably available, alternative sources. The IRS has failed or refused to answer these questions despite having multiple opportunities to do so, and, as a result, limited discovery is necessary. *Landmark Legal Found. v. Envtl. Prot. Agency*, 959 F. Supp. 2d 175 (D.D.C. 2013) (permitting limited discovery to determine adequacy of agency's search); *Public Citizen Health Research Group v. Food and Drug Admin.,* 997 F. Supp. 56, 72 (D.D.C. 1998) (permitting discovery for investigative scope of the agency search for responsive documents).

**2. Limited discovery is appropriate at this time.**

The Court has already determined that it is important to address the issues surrounding Ms. Lerner's missing emails and the missing emails of the other IRS personnel at this time. 7/10/2014 Order and 8/14/2014 Order. Defendant's attempt to delay resolution of these factual issues until some uncertain time in the future is an inefficient use of the Court's resources. It also ignores the substantial public interest in both the issues surrounding the missing emails and the IRS's targeting of "conservative" and "Tea Party" groups seeking 501(c)(4) tax exempt

status. Plaintiff has an obvious interest in having this litigation proceed in a timely and expeditious manner, and judicial economy dictates that limited discovery should be permitted now rather than at some unknown, indeterminate time in the future following the IRS's submission of more, unilateral declarations with a summary judgment motion.

While questions of fact pertaining to the adequacy of an agency's search may more commonly be the subject of discovery after the agency files declarations in support of a summary judgment motion, questions of fact plainly exist already and the IRS has already provided multiple declarations directed to these questions. In this regard, Defendant's reliance on *Murphy v. Federal Bureau of Investigation*, 490 F. Supp. 1134, 1135 (D.D.C. 1980) is misplaced. In *Murphy*, the Court held that discovery was appropriate in a FOIA lawsuit *after a factual dispute had arisen*. *Id.* (emphasis added). When Congressman Murphy filed his notice to depose the Director of the Federal Bureau of Investigation, the agency had not even had the chance to file an answer or responsive pleading to Plaintiff's FOIA complaint. *Id.* at 1136. Neither the congressman nor the Court yet knew whether the agency's response would suggest an inadequate search or raise a factual question about the agency's search. *Id*. That obviously is not the case here.

Unlike in *Murphy*, the IRS has already submitted a total of eight declarations.[1] These declarations raise multiple, material questions of fact about the adequacy of the IRS's search in light of the discovery of the missing emails. *See Ancient Coin Collectors Guild v. U.S. Dep't of State*, 641 F.3d 504, 514 (D.C. Cir. 2011) (finding that the agency failed to "demonstrate beyond *material doubt* that its search was 'reasonably calculated to uncover all relevant documents,'" when it failed to address whether it searched the archive emails of a former employee and

[1] An eighth declaration was submitted by IRS official Neguiel Hicks in another FOIA lawsuit against the IRS, *Judicial Watch, Inc. v. Internal Revenue Services*, Case No. 1:14-cv-01039 (RMC) (D. District of Columbia). The Hicks declaration is attached as Exhibit N to the IRS's opposition in this matter. (DKT. No. 35-9).

back-up tapes for those emails) (emphasis added) (*quoting Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999)). The Court plainly has the discretion to order limited discovery and should do so given the extraordinary circumstances of this case.

**3. Judicial Watch seeks limited discovery.**

Judicial Watch has clearly represented to agency counsel that the discovery it seeks is limited to issues surrounding the missing emails. While it is difficult to state precisely which tools of discovery are most appropriate until Judicial Watch is permitted to take initial discovery, at a minimum Judicial Watch seeks depositions of fact witnesses and corporate designees with knowledge about the agency's initial search and the agency's record keeping system for Ms. Lerner and the other relevant IRS officials. The subject matters for inquiry at depositions of fact witnesses or corporate designees include:

1. Records and information management system, programs, and personnel in Exempt Organizations and, in particular, in the office of the Director in 2010-2012, including:

    a. the Records Management Program implemented in the Director's office as per IRM § 1.15.7.1.2.V;

    b. the responsible Area Records Manager as per IRM § 1.15.1.7.3;

    c. the responsible Business Unit Information Resource Coordinator as per IRM § 1.15.1.7.4;

    d. the responsible Information Resource Coordinator as per IRM § 1.15.17.5;

    e. the specific recordkeeping systems in place in the Director's office, including electronic recordkeeping systems for email and other electronically stored information as per IRM §§ 1.15.6.2.J and 1.15.6.6 and all backup systems for electronically stored information;

f. whether recordkeeping systems for email in place in the Director's office included printing out and retaining hard copies as per IRM § 1.15.6.9.2; and

g. the governing Record Control Schedule/Retention Periods in place in the Director's office for correspondence, email, and any other types of communications.

2. Whether the IRS had undertaken any searches of Lois Lerner's email, electronically stored information, or recordkeeping systems before the search undertaken in response to the May 2013 congressional inquiries, whether the results of any such earlier searches were searched in response to the May 2012 congressional inquiries, and, if not, whether the results of any such searches are retrievable.

3. Procedures used by the IRS for gathering records for the "Congressional database" and the timing of when the records in the database were collected.

4. Details of when and how, in early 2014, the IRS discovered that Ms. Lerner's computer had malfunctioned and its hard drive had been affected.

5. Whether the IRS made any efforts to recover records stored on Ms. Lerner's hard drive other than by undertaking a search of the "Congressional database."

6. Whether any systems were in place in the Director's office for backing up hard drives in the office, whether hard drives were backed up, and whether any such backups were located and searched or are retrievable.

7. Whether the hard drive of Ms. Lerner's assistant(s) was captured in the creation of the "Congressional database," backed up in some fashion, or is otherwise identifiable.

8. Whether Ms. Lerner, her assistant(s), or others in the Director's office made use of any type of removable storage device and whether such devises were located and searched or are retrievable.

9. Whether any systems were in place in the Director's office for backing up Blackberries before they were discarded by the agency.

10. The 760 exchange server drives or tapes referenced by the House Committee on Oversight and Government Reform, including when and where the drives/tapes where located, what the drives/tapes are believed to contain, the present location of the drives/tapes, and whether they are retrievable and searchable.

11. The parameters of IRS's "Continuity of Operations" efforts regarding recordkeeping systems and backups for email and electronically stored information.

**4. Conclusion.**

For all of the foregoing reasons and the facts and arguments raised in Plaintiff's motion for discovery, limited discovery is necessary and appropriate at this time and the motion should be granted.

Dated: October 27, 2014

Respectfully submitted,

JUDICIAL WATCH, INC.

*/s/ Ramona R. Cotca*

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