

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

JUDICIAL WATCH, INC.

Plaintiff,

v.

U.S. DEPARTMENT OF STATE,

Defendant.

Civil Action No. 15-cv-692 (APM)

STATUS REPORT

Plaintiff Judicial Watch, Inc. and Defendant United States Department of State (“State”) submit this status report, pursuant to the Court’s minute order of October 9, 2015, which adopted the parties’ proposed schedule and ordered the parties to file a status report to “(i) propose to the court a production schedule for the non-exempt portions of emails provided to State by former Secretary Clinton that are responsive to FOIA Request 1,^[1] and, if the parties remain unable to reach an agreement as to the production schedule, each shall provide their own proposed schedule; and (ii) provide a further update to the court on their efforts to resolve Judicial Watch's concerns regarding the scope of State's search and efforts to preserve responsive federal records in connection with FOIA Request 1.” On October 22, 2015, State reported that it had found 242 potentially responsive emails to or from former Secretary Clinton. Def.’s Status Report (ECF No. 19). The parties have conferred regarding a production schedule for these documents and have not reached agreement. The parties therefore each present their respective positions below.

¹ FOIA Request 1 seeks “[a]ny and all emails of former Secretary of State Hillary Rodham Clinton concerning, regarding, or relating to the September 11, 2012 attack on the U.S. Consulate in Benghazi, Libya.” The time frame of FOIA Request 1 is September 11, 2012 to January 31, 2013.

JUDICIAL WATCH'S STATEMENT

1. Subject to Defendant's Status Report filed on October 22, 2015, 155 emails to or from Secretary Clinton dated on or before December 31, 2012 remain to be searched in response to Plaintiff's FOIA Request 1. Plaintiff objects to Defendant's proposal to further delay search and review of these records in response to Plaintiff's FOIA Request 1.

2. Defendant represented in its Status Report filed on July 15, 2015 that it had searched and produced to Plaintiff all responsive emails to or from Secretary Clinton through December 31, 2012 via the URL provided on the agency's FOIA website on June 29, 2015. *See* Def. Status Rpt., 7/15/2015, at ¶ 4 (ECF No. 10). It turns out, Defendant was wrong and that it had not reviewed 155 emails to or from Secretary Clinton through December 31, 2012 that are potentially responsive to Plaintiff's FOIA Request 1. *See* Def. Status Rpt., 10/22/2015, at p. 1 (ECF No. 19). For example, some of the emails from before December 31, 2012 discussed during the hearing held by the Congressional Benghazi Select Committee with Secretary Clinton on October 22, 2015 are responsive to Plaintiff's FOIA Request 1 that have not yet been produced. They include an 11:12 p.m. email from Secretary Clinton to her daughter on September 11, 2012 about the Benghazi attacks. *See* <http://insider.foxnews.com/2015/10/23/hillary-clinton-emails-chelsea-during-benghazi-attack-blames-al-qaeda>. All potentially responsive records from the 155 set of Clinton emails on or before December 31, 2012 have already been produced to Congress and should have already been produced to Plaintiff on June 29, 2015, to the extent they are responsive to FOIA Request 1 and consistent with Defendant's representation in its July 15, 2015 Status Report. Plaintiff requests that Defendant search the 155 emails without further delay and produce all responsive records from

this set of emails with its next document production already ordered in this case for November 12, 2015. *See* Minute Order, 10/9/2015.

3. Also pursuant to Defendant's Status Report filed on October 22, 2015, 87 emails to or from Secretary Clinton between January 1, 2013 and January 31, 2013 are potentially responsive to Plaintiff's FOIA Request 1. Plaintiff objects to Defendant's proposal to search these records pursuant to a production schedule set in an unrelated FOIA lawsuit, captioned *Leopold v. U.S. Dep't of State*, that concerns a much broader FOIA request than the one Plaintiff seeks in this case. Plaintiff requests that Defendant search the 87 emails and produce all responsive records from this set of records by Defendant's second production deadline already set for December 23, 2015. *Id.*

4. Plaintiff also does not understand Defendant's proposal for searching records received from Huma Abedin, Cheryl Mills, and Jacob Sullivan. Defendant appears to deny any obligation to search these records in response to Plaintiff's FOIA 1, although it has "agreed" to search them. *See* Joint Status Rpt., July 29, 2015, p. 7, n. 3. The fact that the parties proposed that Defendant submit the volume of records potentially responsive from these individuals does not in any way clarify Defendant's position as to whether it believes it is obligated to search and review these records under FOIA. If Defendant has no obligation, then Defendant fails to describe the basis for the Court's authority to order schedules for voluntary searching and production of these records, much less the basis for the Court's authority to adjudicate about voluntary searches and the withholding of any records identified as a result. If Defendant believes it is obligated to search these records to remedy its deficient and unlawful records management of Secretary Clinton's emails, it should say so. Plaintiff seeks no less and no more than what FOIA requires. *See* Minute Order, 10/22/2015 in *Judicial Watch, Inc. v. U.S. Dep't of*

State, Case No. 14-1511 (ABJ) (the Court reading Defendant’s submission that it is “willing to search” the records it has received from Huma Abedin, Cheryl Mills and Jacob Sullivan, as waiving any objection to being ordered to search those records, and further ordered Defendant to process those materials as part of this action since the records are now in Defendant’s possession, Defendant’s admission that they may contain records responsive to Plaintiff’s FOIA request and “given the purposes underlying the broad disclosure requirements contained in the Freedom of Information Act – which may not favor the conduct of government business through private email accounts”). Voluntary searches should not delay adjudication of the lawfulness of Defendant’s response to Plaintiff’s request. If Defendant believes it has no obligation to search these records, it should clearly state so.

5. Plaintiff respectfully requests a status conference so that the parties and the Court can address this matter more thoroughly.

STATE’S STATEMENT

6. The records sought here by Judicial Watch—emails of former Secretary Clinton about the Benghazi attacks—are a subset of records responsive to requests at issue in other FOIA cases, including at least one case involving Judicial Watch. *See* Complaint ¶ 5, *Judicial Watch v. U.S. Dep’t of State*, No. 15-cv-687 (ECF No. 1) (D.D.C. May 6, 2015) (FOIA request seeking “[a]ny and all emails sent or received by former Secretary of State Hillary Rodham Clinton in her official capacity as Secretary of State during her tenure as Secretary of State”). State proposes to use the ongoing effort to produce those records to allow it to respond to many FOIA requests, including FOIA Request 1, with as little duplication of effort as possible. In December 2014, former Secretary of State Hillary Rodham Clinton provided to the Department paper copies of approximately 30,000 e-mails, comprising approximately 55,000 pages (the “Clinton

emails”). The Department is currently working to produce, consistent with the FOIA, the complete collection of Clinton emails and to make the non-exempt portions of those documents available to the public by posting them on a Department website, pursuant to Judge Contreras’s order in *Leopold v. State*. See Civ. No. 15-123-RC (ECF No. 13) (Contreras, J.). The scheduling order in *Leopold* calls for monthly productions of the Clinton emails, with productions remaining on October 30, 2015; November 30, 2015; December 31, 2015; and January 29, 2016. Order, *Leopold* (ECF No. 17).

7. State proposes that, on November 2, 2015, it release the non-exempt portions of seven emails for which the review is nearly complete, including the 11:12 p.m. email from Secretary Clinton on September 11, 2012 mentioned by Judicial Watch above. State further proposes that, within two weeks after each production of Clinton emails in *Leopold*, it provide to Judicial Watch a list of documents posted in that production that are responsive to FOIA Request 1. Thus, under the schedule set forth in the *Leopold* scheduling order, the final production would occur by February 12, 2015.

8. Under this schedule, State will be working steadily to fulfill the two FOIA requests at issue here. Under the parties’ agreed-to schedule for production of records responsive to FOIA Request 2, State will review 890 to 1,000 documents potentially responsive to FOIA Request 2 and make productions on November 12, 2015; December 23, 2015; and February 3, 2015. Concurrently with that effort, State will be completing its review of the entire Clinton email collection and providing timely notification to Judicial Watch when records responsive to FOIA Request 1 are posted. Moreover, the completion of the productions for both FOIA requests within 9 days of each other will allow subsequent proceedings, such as summary

judgment briefing if necessary, to proceed in a coordinated fashion without undue delay after the completion of production of records responsive to either FOIA request.

9. This steady effort is a fair balance between the interests of Judicial Watch and State's tremendous workload of FOIA cases and associated court-imposed deadlines. During the last Fiscal Year, which ended September 30, 2015, State received approximately 18,476 new requests and is currently engaged in 93 FOIA litigation cases, many of which involve court-ordered document production schedules. Because of this heavy workload, State should be permitted to take advantage of the ongoing production effort in *Leopold* in producing records responsive to FOIA Request 1, so that it can allocate its FOIA-processing resources across the various proceedings to allow it to meet its obligations to the Court and other FOIA plaintiffs. Given State's workload in numerous cases, the schedule proposed—which involves State's continuing effort to produce records responsive to both FOIA requests at issue here as well as numerous others of Judicial Watch's FOIA requests currently in litigation—is equitable.

10. Nor does the fact that State discovered that it needed to supplement its original search for responsive Clinton emails justify a shortened schedule that would not allow for adequate review of sensitive documents. In its Status Report of July 15, 2015, State informed the Court that it had performed a search reasonably calculated to uncover documents responsive to FOIA Request 1 that were created on or before December 31, 2012. Def.'s Status Report ¶ 4 (ECF No. 10). State searched a set of 296 of the Clinton Emails which State had previously provided in February 2015 to the House Select Committee on Benghazi. On September 25, 2015, State supplemented its production to the Committee. In light of that supplement, State decided that an additional search of the Clinton emails was necessary to determine if there are additional responsive documents. State completed that search on October 22, 2015, as agreed by

the parties. The need to supplement a search while production is still underway, more than three months before the parties' agreed-to final production date for the other FOIA request at issue in this case, does not justify the schedule Judicial Watch seeks.

11. Further, it is likely that many of the records responsive to FOIA Request 1 have already entered the review pipeline in the *Leopold* production process; some may have already been referred to other agencies for consultation. It will be more efficient to let that process continue than to either interrupt it to bump records responsive to FOIA Request 1 up in the queue, which could disrupt the carefully planned sequence for processing the Clinton emails, or to duplicate the review process for the 242 documents responsive to FOIA Request 1, wasting State's scarce FOIA-processing resources.

12. Judicial Watch's objection to State's "proposal for searching records received from Huma Abedin, Cheryl Mills, and Jacob Sullivan" is curious, to say the least, because it was originally Judicial Watch's proposal. While conferring per this Court's order, after the Answer was filed, counsel for Judicial Watch asked counsel for State if State would be willing to search documents it had recently received from several former officials for documents responsive to FOIA Request 1. State agreed to conduct such searches in the interest of limiting the issues that must be litigated. *See* Joint Status Report of July 29, 2015 ¶ 7 (ECF No. 11) (Plaintiff noting in its statement that "The parties agree that Defendant will search the remaining emails from . . . the records received by the Defendant from Cheryl Mills, Jacob Sullivan and Huma Abedin. . ."). The parties later jointly informed the Court that "State has, in order to possibly reduce the issues that must be litigated, offered to conduct a search of the records received by State from Cheryl Mills, Jacob Sullivan, and Huma Abedin through September 2015 . . . for documents responsive to FOIA Request 1." Joint Status Report of Oct. 8, 2015 ¶ 5 (ECF No. 18). The parties then

jointly proposed that State would, on November 13, 2015, inform Judicial Watch of the number of such documents potentially responsive to FOIA Request 1, at which point the parties would meet and confer about a production schedule. *Id.* The Court adopted the parties' proposal in its Minute Order of October 9, 2015. Now Judicial Watch appears to want not only an agreement to search those records, but an admission from State that it is legally obligated to do so. State makes no such admission, and if Judicial Watch does not wish State to conduct these searches absent such an admission, State readily agrees not to conduct the searches. If, on the other hand, Judicial Watch does wish State to conduct such searches, State will do so, according to the schedule already agreed to by Judicial Watch and endorsed by this Court. In neither event is a status conference required.²

² Judicial Watch cites a recent minute order issued by Judge Amy Berman Jackson of this Court. That minute order was issued in response to the same argument Judicial Watch raises here. That order implicitly rejected Judicial Watch's request for a status conference and adopted State's proposed schedule with respect to documents recently provided by Ms. Abedin, Ms. Mills, and Mr. Sullivan.

Date: October 29, 2015

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