UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,	)	
	)	
Plaintiff,	)	Civil Action No. 13-CV-1363 (EGS)
	)	
v.	)	
	)	
UNITED STATES DEPARTMENT OF STATE,	)	
	)	
	)	
Defendant.	)	
	)	

DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO PLAINTIFF'S MOTION FOR DISCOVERY
PURSUANT TO RULE 56(D) OF THE FEDERAL RULES OF CIVIL PROCEUDRE

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INTRODUCTION

This Freedom of Information Act ("FOIA") case was reopened in June 2015 so that the State Department ("State") could search for records responsive to Plaintiff's FOIA request in approximately 55,000 pages of work-related emails that former Secretary of State Hillary Clinton had recently provided to State from her personal email server, clintonemail.com ("the Clinton e-mails"). State searched those emails, and non-state.gov emails provided by certain other former State Department officials, and it has now produced all retrieved non-exempt records that were responsive to Plaintiff's narrow FOIA request (which concerns the employment status of former State Department employee Huma Abedin). State voluntarily agreed to search the approximately 55,000 pages of emails even though (1) Plaintiff itself has repeatedly conceded that State lacked possession or control of these emails at the time Plaintiff submitted its FOIA request, *see, e.g.*, Pl.'s Mot. at 19, 25, and (2) Supreme Court precedent squarely holds that an agency does not withhold in violation of FOIA records that it did not possess or control at the time the request was submitted. *See Kissinger v. Reporters Comm. for Freedom of the Press,* 445 U.S. 136, 150-51 (1980) ("Congress did not mean that an agency improperly withholds a document which has been removed from the possession of the agency prior to the filing of the FOIA request," because "[i]n such a case, the agency has neither the custody or control necessary to enable it to withhold.").

By searching records that it did not control or possess at the time the request was submitted, State has already gone above and beyond the requirements of FOIA. Plaintiff has nevertheless filed a motion under Rule 56(d), contending that Plaintiff needs to conduct broad and burdensome discovery regarding matters that have no bearing on this narrow FOIA dispute. The Court should deny Plaintiff's motion for multiple reasons. Most fundamentally, Plaintiff's argument that it needs discovery to determine whether State conducted an adequate search when

it did not search clintonemail.com itself is mistaken: State searched the *records* from clintonemail.com that are reasonably likely to contain information responsive to Plaintiff's FOIA request — *i.e.*, the emails from clintonemail.com that former Secretary Clinton and Ms. Abedin, who also had an account on clintonemail.com, determined were federal records or potential federal records and provided to State. Nothing in FOIA or any other federal statute suggests that State's search was legally inadequate. Plaintiff's complaint that the e-mails were "self-selected" by former Secretary Clinton and Ms. Abedin ignores the fact that federal employees routinely manage their email and "self-select" their work-related messages when they, quite permissibly, designate and delete personal emails from their government email accounts.

The ultimate relief that Plaintiff apparently seeks — an order compelling third parties to produce additional documents, *see* Pl.'s Mot. at 6 — also exceeds the bounds of FOIA and therefore cannot justify discovery in this FOIA case. Plaintiff in essence seeks to convert this discrete suit about whether State adequately searched for records regarding Ms. Abedin's employment status into a far-ranging inquiry about whether the agency complied with its obligations under the Federal Records Act (FRA). But even putting aside the question of whether a private party would ever be entitled to such discovery, Plaintiff's efforts are misplaced because there is no FRA claim in this case. Plaintiff has sued State under the FRA, but in a separate case pending before Judge Boasberg. *See Judicial Watch, Inc. v. Kerry*, No. 15-0785-JEB (D.D.C). There is no legal basis or practical justification for it to seek FRA relief (or discovery focused on FRA issues) here.

Beyond these issues, the legal theory upon which Plaintiff grounds its request for discovery is baseless. Plaintiff states that "Mrs. Clinton took the 'clintonemail.com' system with her when she left the State Department," Pl.'s Mot. at 19, which occurred more than three

months before Plaintiff submitted its FOIA request. Thus, putting aside the question of whether State ever had possession or control over the clintonemail.com system in the first place, the agency unequivocally did not possess or control it when Plaintiff's FOIA request was submitted. Under *Kissinger*, the agency cannot have violated FOIA by "withholding" documents that it did not possess or control.

Plaintiff relies on *Kissinger*'s footnote nine to contend that it needs discovery to determine if the agency sought to "thwart FOIA" as a general matter, such that *Kissinger*'s holding might not apply. *See, e.g.*, Pl.'s Mot. at 6. This footnote, however, simply states that the Court "need not decide" and would "express no opinion" as to whether the Court's holding would apply where "it was shown that an agency official purposefully routed a document out of agency possession in order to circumvent a FOIA request" or where "documents . . . have been wrongfully removed by an individual after a request is filed." *Kissinger*, 445 U.S. at 155 n.9. The footnote leaves a question open; it provides no affirmative support for Plaintiff.

In summary, the discovery that Plaintiff proposes is not relevant to the issues remaining in this case and is not supported by the legal theory that Plaintiff advances. The Court should deny Plaintiff's Rule 56(d) motion.

BACKGROUND

Judicial Watch submitted a FOIA request to State on May 21, 2013, seeking certain personnel records concerning Ms. Abedin. Specifically, Judicial Watch requested any SF-50 (Notification of Personnel Action) forms for Ms. Abedin; any contracts (including, but not limited to, personal service contracts) between State and Ms. Abedin; and any records regarding or related to the authorization for Ms. Abedin to represent individual clients or otherwise engage in outside employment while employed by or engaged in a contractual arrangement with State. *See* Complaint (ECF No. 1) ¶ 5. State searched for responsive records and released all

responsive, non-exempt records that it located. On March 14, 2014, Judicial Watch dismissed the case with prejudice. ECF No. 12.

In November 2014, State wrote to the representative of former Secretary Clinton, as well as to representatives of other former Secretaries of State, and asked them pursuant to the Federal Records Act to assist State in complying with guidance from the National Archives and Record Administration's (NARA), Bulletin 2013-03, which "post-dated [their] service" at State and "clarified records management responsibilities regarding the use of personal email accounts for official government business." ECF No. 18-1. Specifically, State asked that should former Secretary Clinton be aware of a federal record, such as an email sent or received on a personal email account while serving as Secretary of State, that a copy of the record be provided to State, if there is reason to believe that it may not otherwise be preserved in State's recordkeeping system. *Id.* In response to this request, in December 2014, former Secretary Clinton provided State with approximately 55,000 pages of emails sent or received by her while she was Secretary of State. Hackett Decl. ¶ 9 (ECF No. 14-1). Former Secretary Clinton subsequently stated in a sworn declaration that she directed that all her emails on clintonemail.com in her custody that were or potentially were federal records be provided to State and that, on information and belief, this had been done. Clinton Declaration (Aug. 8, 2015) (ECF No. 22-1). In March 2015, State wrote to Ms. Abedin and Ms. Mills and made the same request of them pursuant to the FRA. ECF No. 18-1. From June to September 2015, Ms. Abedin and Ms. Mills provided emails from their non-state.gov email accounts to State on a rolling basis. *See* ECF Nos. 18-1, 20, 37 at 4. (Ms. Abedin, but not Ms. Mills, had an account on clintonemail.com. *See* Aug. 7, 2015 Status Report Ex. F (ECF No. 20-1 at 20).)

After news of the Clinton emails broke in March 2015, Judicial Watch sought to reopen this case, and State agreed. ECF No. 14. Since the case was reopened, State has performed a number of additional searches and provided detailed information to Judicial Watch. State voluntarily agreed to search the emails provided by former Secretary Clinton, Ms. Abedin, and Ms. Mills; re-searched the offices and agency records systems it had originally searched; and searched the Office of the Under Secretary for Management. Def.'s Oct. 5, 2015 Status Report (ECF No. 40) at 1; Third Hackett Decl. (ECF No. 47-2) ¶ 10.

State produced all responsive, non-exempt records it located to Judicial Watch, releasing 28 documents (consisting of 48 pages) on September 18, 2015, and four documents (consisting of 15 pages) on October 13, 2015. *See* Sept. 21, 2015 Status Report (ECF No. 37) at 4; Third Hackett Decl. ¶¶ 10-11. In addition, on November 12, 2015, State re-released three documents with certain redactions removed, in order to release additional information. Third Hackett Decl. ¶ 12. On November 13, 2015, State released two documents in full and released one document in part that had previously been withheld. *Id.* ¶ 13. State withheld two documents in full, pursuant to FOIA's Exemption 3 — two OGE Form 450s. *Id.* ¶ 48. No responsive documents were located within the Clinton emails.

On November 13, 2015, State moved for summary judgment, contending that it had made legally sufficient searches and productions of all documents within its custody or control. *See* ECF No. 47 ("Def.'s Mot.").[1] In lieu of responding to this motion on the merits, Plaintiff has filed a motion for discovery under Rule 56(d). There are multiple steps to Plaintiff's theory as to

[1] After State filed its motion for summary judgment in this case, State located additional sources of documents that originated within the Office of the Secretary that are reasonably likely to contain records responsive to Plaintiff's request. State has informed Plaintiff that it intends to search these locations, produce non-exempt portions of any responsive records, and file a supplemental declaration in support of its motion for summary judgment (which is presently stayed).

why it needs discovery in order to oppose the Government's motion. Plaintiff claims that State failed to search a relevant record system by failing to search clintonemail.com. Recognizing that State did not possess or control clintonemail.com when Plaintiff submitted its FOIA request, Plaintiff seeks to rely on a footnote in *Kissinger*, footnote nine, in which the Court stated that it need not decide whether its holding — *i.e.*, that an agency can only withhold for purposes of a FOIA request records in its possession or control at the time of the request — would apply if an agency official "purposefully routed a document out of agency possession in order to circumvent a FOIA request." 445 U.S. at 155 n.9. Plaintiff argues it needs discovery to determine whether this case fits within footnote nine. *See, e.g.*, Pl.'s Mot. at 3, 6, 18-19, 22.

STANDARD OF REVIEW

A court may issue relief pursuant to Rule 56(d) "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition." Fed. R. Civ. P. 56(d). To prevail, a Rule 56(d) movant must establish a reasonable basis to believe that discovery would reveal triable issues of fact, *see Messina v. Krakower*, 439 F.3d 755, 762 (D.C. Cir. 2006), and must "submit an affidavit which states with sufficient particularity why additional discovery is necessary." *U.S. ex rel. Folliard*, 764 F.3d 19, 26 (D.C. Cir. 2014) (quoting *Convertino v. U.S. Dep't of Justice*, 684 F.3d 93, 99 (D.C. Cir. 2012)).

Speculation and conjecture are not sufficient to obtain discovery under Rule 56(d). *See, e.g., Messina*, 439 F.3d at 762 (affirming denial of request for Rule 56(d) discovery "where the requesting party has offered only a conclusory assertion without any supporting facts to justify the proposition that the discovery sought will produce the evidence required" (citation omitted)). Discovery is not permissible in a FOIA case when it "would only . . . afford[] [the plaintiff] an opportunity to pursue a 'bare hope of falling upon something that might impugn the [agency's] affidavits.'" *Military Audit Project v. Casey*, 656 F.2d 724, 751-52 (D.C. Cir. 1981) (quoting

Founding Church of Scientology v. NSA, 610 F.2d 824, 836-37 n.101 (D.C. Cir. 1979)); *see also, e.g., Kay v. FCC*, 976 F. Supp. 23, 34 n.35 (D.D.C. 1997) (denying a plaintiff's request for discovery in a FOIA case where the plaintiff "impermissibly [sought] discovery as a means to discredit the [agency's] declarations"), *aff'd*, 172 F.3d 919 (D.C. Cir. 1998) (per curiam).[2]

Under Rule 56(d) and otherwise, as the D.C. Circuit has repeatedly recognized, "[d]iscovery in FOIA is rare and should be denied where an agency's declarations are reasonably detailed, submitted in good faith and the court is satisfied that no factual dispute remains." *Baker & Hostetler, LLP v. Dep't of Commerce*, 473 F.3d 312, 318 (D.C. Cir. 2006) (quotation omitted); *see also, e.g., Military Audit Project*, 656 F.2d at 751-52; *Thomas v. Dep't of Health & Human Servs.*, 587 F. Supp. 2d 114, 115 n.2 (D.D.C. 2008); *Canning v. DOJ*, No. 11-cv-1295, 2013 WL 1333422, at *1 (D.D.C. Apr. 2, 2013); *Asarco, Inc. v. EPA*, No. 08-cv-1332, 2009 WL 1138830, at *1 (D.D.C. Apr. 28, 2009) (citing "the consistent holding in case after case that discovery is not favored in . . . [FOIA] cases and only allowed under rare circumstances.").

ARGUMENT

I. Plaintiff Has Not Demonstrated That It Needs Discovery To Challenge The Reasonableness Of State's Search For Responsive Documents.

In seeking discovery under Rule 56(d), Plaintiff states that the sole issue in dispute is the adequacy of State's search for records responsive to its FOIA request, *i.e.*, records concerning the employment status of Ms. Abedin. *See* Declaration of Michael Bekesha in Support of Plaintiff's Motion for Discovery ("Bekesha Decl.") (ECF No. 48-1) ¶ 5 ("What remains at issue in this case is whether Defendant has conducted a search reasonably calculated to uncover all

[2] *See also, e.g., Exxon Corp. v. FTC*, 663 F.2d 120, 128 (D.C. Cir. 1980) (upholding denial of FOIA Plaintiff's request for discovery under former Rule 56(f) because "[i]t is not the intent of Rule 56 to preserve purely speculative issues of fact"); Wright & Miller, 10B Fed. Prac. & Proc. Civ. § 2741 (3d ed.) ("[T]he 'hope' or 'hunch' that evidence creating an issue of fact will emerge . . . is insufficient.").

relevant records."). The standard for determining the adequacy of State's search is "whether the search was reasonably calculated to discover the requested documents, not whether it actually uncovered every document extant." *Safecard Servs., Inc. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991); *accord, e.g., Morley v. CIA*, 508 F.3d 1108, 1114 (D.C. Cir. 2007). As detailed in State's summary judgment motion, State has taken reasonable steps to respond to Plaintiff's FOIA request, including searching the emails former Secretary Clinton and Ms. Abedin provided as the entirety of their federal records or potential federal records from clintonemail.com.[3] As a result, not searching clintonemail.com itself, even if State had possession or control of it or if possession or control were not required, was manifestly reasonable.

As an initial matter, Plaintiff does not claim to need any discovery to challenge the legal sufficiency of State's search of the records that it actually has; it is only to challenge State's failure to search clintonemail.com, which State does not have. But even if State *did* have possession or control of clintonemail.com, or if possession or control were not required (the ultimate question to which Plaintiff's discovery seems to be directed), it still would have been reasonable for State to limit its search of emails to those that the former Secretary (or her designee) determined were federal records appropriate for retention. Federal employees are responsible for determining whether their own emails are federal or personal records. Agency

[3] State also conducted a revised search of its records systems, using search terms and a date range agreed upon by the parties. *See* Def's Oct. 5, 2015 Status Report (ECF No. 40) at 1. State re-searched the four offices and agency records systems it had originally searched (the Bureau of Human Resources, the Office of the Executive Secretariat, the Office of the Legal Adviser, and the Central Foreign Policy Records), and also searched the Office of the Under Secretary for Management. Third Hackett Decl. ¶ 10. State also provided information about any servers, accounts, hard drives, or other devices that may contain records responsive to the FOIA request. ECF No. 26-1; ECF No. 29-1 (Declaration of Joseph E. Macmanus). State also sent two letters to the FBI (the first one pursuant to Court order) requesting, among other things, that the FBI inform State about any recovered federal records that correspond with Secretary Clinton's tenure at State and preserve any recoverable media and content.

employees, including FOIA personnel, then typically conduct searches of employees' self-selected federal records, or potential federal records, for records responsive to a particular FOIA request (*see* Pl.'s Mot. at 8-10) — precisely what happened here.

Under policies issued both by NARA and the State Department, individual officers and employees are expected to exercise judgment to determine what constitutes a federal record, including when it comes to managing their email. *See* NARA Bulletin 2014-06 ¶ 4 (Sept. 15, 2014), *available at* http://www.archives.gov/records-mgmt/bulletins/2014/2014-06.html ("[I]n many agencies, employees manage their own email accounts and apply their own understanding of Federal records management. This means that all employees are required to review each message, identify its value, and either delete it or move it to a recordkeeping system."); Dep't of State Foreign Affairs Manual, 5 FAM 443.2(b), *available at* https://fam.state.gov/FAM/05FAM/05FAM0440.html ("The intention of this guidance is not to require the preservation of every E-mail message."). "Personal files," defined as "documentary materials belonging to an individual that are not used to conduct agency business," are by regulation excluded from the definition of Federal records and are "not owned by the Government." 36 C.F.R. § 1220.18. Accordingly, "[e]-mail message creators and recipients must decide" — applying "the same judgment they use when determining whether to retain and file paper records" — "whether a particular message is appropriate for preservation." Dep't of State Foreign Affairs Manual, *supra*, 5 FAM 443.2(b). In so doing, they facilitate the preservation of those messages that contain information that is necessary to ensure that "departmental policies, programs, and activities are adequately documented," *id.*, while making sure that personal files are not unnecessarily and wastefully retained.

Consistent with these government-wide policies and practices, if former Secretary Clinton had used a state.gov email account, it would have been reasonable for State, when searching for documents responsive to Plaintiff's FOIA request, to search only those emails that former Secretary Clinton (or her designee) considered federal records or potential federal records (and thus did not delete). State would have no reason to believe that emails responsive to Ms. Abedin's State Department employment status — the subject of Plaintiff's FOIA request — would be located in emails former Secretary Clinton deleted as personal, whether those emails were from clintonemail.com or state.gov. And the agency would not be required to recover or search those deleted emails, as they would not be "likely to turn up the information requested." *Oglesby v. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990).

The fact that Secretary Clinton received assistance with the task of identifying those emails that are federal records or potential federal records does not affect the reasonableness of State's search. She might have (and, given her position, likely would have) received similar assistance if she had used a state.gov email account. Nor does it matter for purposes of this FOIA case (and Plaintiff's discovery motion) that Mrs. Clinton or her designees reviewed the clintonemail.com emails and identified federal records or potential federal records after Mrs. Clinton had left office. It remained reasonable for State to rely on former Secretary Clinton to make the determination as to which of her own emails were or potentially were federal records.

In sum, that State only searched the e-mails that former Secretary Clinton determined were federal records does not suggest a need for extraordinary remedies under FOIA. *See Competitive Enter. Inst. v. NASA*, 989 F. Supp. 2d 74, 94 (D.D.C. 2013) ("CEI argues that the search was unreasonable because NASA did not explain how Dr. Schmidt preserves his emails. . . . However, the issue is whether NASA adequately searched for emails in existence, not

whether it searched all emails that ever existed."); *id.* at 95 (no FOIA violation even though "Dr. Schmidt's search [for responsive emails] was not reviewed or observed by an agency official").

II. Plaintiff Should Not Be Allowed To Convert This FOIA Suit Into An Action Under The Federal Records Act.

In seeking discovery, Plaintiff is not actually contending that the State Department has withheld documents that it possessed or controlled when Plaintiff submitted its FOIA request, or even that the search State conducted of the later-acquired e-mails was unreasonable. Plaintiff instead focuses on the contention that the State Department allowed former Secretary Clinton to use her personal email server in the first place, and then to take records with her when she resigned as Secretary of State. *See, e.g.*, Pl.'s Mot. at 2 ("[T]he State Department appears to have allowed Mrs. Clinton to leave the agency without providing an inventory of the records on the system or ensuring access to all federal records on the system."); *id.* at 18 (similar); *id.* at 19 (similar). Plaintiff suggests that "a compelling need exists to restore the integrity of the FOIA process at the State Department," Pl.'s Mot. at 3; asserts a need to develop facts to determine whether State and former Secretary Clinton deliberately thwarted FOIA; and seeks to conduct comprehensive, wide-ranging discovery into numerous topics, including how and why the clintonemail.com system was created, how it was used, the disposition of the system when former Secretary Clinton departed from State, and the management and preservation of the system after former Secretary Clinton left State. Pl.'s Mot. at 23-30.

This case, and FOIA generally, are the wrong vehicles to explore and address any such concerns. The ultimate substantive relief to which such discovery would appear to be directed would be an order "compel[ling] production of illegally withheld records from . . . nonparties to which the agency transferred the records." Pl.'s Mot. at 6. But that remedy is not available under FOIA. It is the Federal Records Act, not FOIA, that "governs the creation, management,

and disposal of federal records." *Armstrong v. Bush*, 924 F.2d 282, 284 (D.C. Cir. 1991); *see also Kissinger*, 445 U.S. at 154 ("It is . . . clear that Congress never intended when it enacted the FOIA, to displace the statutory scheme embodied in the Federal Records Act and the Federal Records Disposal Act providing for administrative remedies to safeguard against wrongful removal of agency records as well as to retrieve wrongfully removed records."). And it is the Federal Records Act, not FOIA, that authorizes "the Archivist [to] initiate action through the Attorney General for the recovery of records the head of the Federal agency knows or has reason to believe have been unlawfully removed from that agency." 44 U.S.C. § 3106(a).

The D.C. Circuit has recognized a cause of action under the Administrative Procedure Act to challenge certain agency actions or inactions related to responsibilities under the Federal Records Act, and Plaintiff has filed such an action challenging the sufficiency of State's actions to retrieve former Secretary Clinton's emails. *See Judicial Watch, Inc. v. Kerry*, No. 15-0785-JEB (D.D.C). If Plaintiff believes that further steps need to be taken to recover those records, it may make those arguments to Judge Boasberg in that case. They are not relevant here, and thus cannot serve as the basis for discovery. *Cf., e.g., Competitive Enter. Inst. v. Office of Sci. & Tech. Pol'y*, 82 F. Supp. 3d 228, 234 (D.D.C. 2015) (explaining that the plaintiff's "worries that if government employees' personal email accounts are not subject to FOIA, agency officials will escape FOIA coverage altogether by conducting government business with their personal accounts" was baseless because the Federal Records Act, not FOIA, is the relevant statute).

As for Plaintiff's desire to "restore the integrity of the FOIA process at the State Department," Pl.'s Mot. at 3, it is doubtful that any litigation is the appropriate mechanism for seeking such reforms. Article III courts exist to resolve concrete "cases" and "controversies," U.S. Const. art. III, sec. 2, a limitation "founded in concern about the proper — and properly

limited — role of the courts in a democratic society." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). In contrast, the State Department Office of Inspector General ("OIG") is tasked by statute with conducting "the systematic review and evaluation of the administration of activities and operations of Foreign Service posts and bureaus and other operating units of the Department of State," 22 U.S.C. § 3929(b), including "whether the administration of activities and operations meets the requirements of applicable laws and regulations." *Id.* § 3929(b)(3).

As Defendant has previously explained, the Inspector General is currently reviewing State's policies and procedures concerning the use by prior Secretaries and their immediate staffs of non-departmental hardware and software to conduct official business, including efforts undertaken by State to ensure that: (i) communications were and are conducted securely; (ii) government records were and are properly identified and preserved; and (iii) government records were and are properly processed pursuant to the FOIA. *See generally* Def.'s Sept. 21, 2015 Status Report (ECF No. 37) at 3. In June 2015, OIG and the Intelligence Community Inspector General ("ICIG") also conducted a review of the process that State was using to release former Secretary Clinton's emails under the FOIA. And on January 7, 2016, OIG issued a report making additional recommendations with respect to State's FOIA processes. *See* Office of Evaluation and Special Projects: Evaluation of Department of State's FOIA Processes for Requests Involving the Office of the Secretary (Jan. 2016), https://oig.state.gov/system/files/esp-16-01.pdf. This report further notes that OIG plans to report separately "on issues associated with the use of non-Departmental systems to conduct official business and records preservation requirements." *Id.* at 1. In light of the participation of the Inspector General, Plaintiff's suggestion that discovery is needed in order to "restore the integrity of the FOIA process at the State Department," Pl.'s Mot. at 3, falls flat.

III. Plaintiff's Proposed Discovery Is Irrelevant Because Plaintiff Concedes The State Department Lacked Custody Or Control Of Former Secretary Clinton's Emails When Plaintiff Submitted Its FOIA Request.

Kissinger squarely holds that "*even if a document requested under the FOIA is wrongfully in the possession of a party not an 'agency,'* the agency which received the request does not 'improperly withhold' those materials by its refusal to institute a retrieval action." *Kissinger*, 445 U.S. at 139 (emphasis added). "Congress did not mean that an agency improperly withholds a document which has been removed from the possession of the agency prior to the filing of the FOIA request," because "[i]n such a case, the agency has neither the custody or control necessary to enable it to withhold." *Kissinger*, 445 U.S. at 150-51. Rather, withholding "presupposes the actor's possession or control of the item withheld," and "refusal to resort to legal remedies to obtain possession is simply not conduct subsumed by the verb 'withhold.'" *Id.* at 151.

Plaintiff's concession that the State Department did not possess former Secretary Clinton's emails at the time Plaintiff submitted its FOIA request, more than three months after she left the State Department, should be dispositive. *See* Pl.'s Mot at 25 ("We know Mrs. Clinton left with the 'clintonemail.com' system and all records located on it at the end of her tenure."). Plaintiff seeks to distinguish *Kissinger* by relying upon the decision's footnote nine, which provides as follows:

> There is no question that a "withholding" must here be gauged by the time at which the request is made since there is no FOIA obligation to retain records prior to that request. This temporal factor has always governed requests under the subpoena power, *Jurney v. MacCracken,* 294 U.S. 125 (1935), as well as under other access statutes. See Fed. Rules Civ. Proc. 34, 45. *We need not decide whether this standard might be displaced in the event that it was shown that an agency official purposefully routed a document out of agency possession in order to circumvent a FOIA request.* No such issue is presented here. We also express no opinion as to whether an agency withholds documents which have been wrongfully removed by an individual after a request is filed.

445 U.S. at 155 n.9 (emphasis added). Plaintiff seizes on this language to argue that "[b]efore the Court can determine whether the State Department's belated search of only a self-selected portion of the records from Mrs. Clinton's 'off-grid' system satisfied FOIA, it first must decide whether Mrs. Clinton and the State Department deliberately thwarted FOIA by creating, using, and concealing the system." Pl.'s Mot. at 5.

Plaintiff's argument is misplaced. As a threshold matter, the footnote does not itself create any exception to the possession-or-control requirement of *Kissinger*, but simply reserves issues not presented in that case — including the proper disposition of a FOIA suit in which an agency official engaged in "purposeful[] . . . circumvent[ion]" of a FOIA request. Furthermore, that unresolved scenario is not presented in this case, as Plaintiff's FOIA request did not exist at the time clintonemail.com was, according to Plaintiff's theory, routed out of agency possession when former Secretary Clinton resigned and allegedly took it with her. Plaintiff errs in relying on footnote nine to read FOIA as effectively imposing a requirement that federal agencies retain any and all records that might conceivably be responsive to some future, not yet filed, FOIA request. Rather, as described in Section II, *supra*, the Federal Records Act comprehensively governs agencies' management, retention, and disposal of their records. As *Kissinger* recognized, FOIA "does not obligate agencies to create or retain documents; it only obligates them to provide access [in response to a FOIA request] to those which it in fact has created and retained." *Kissinger*, 445 U.S. at 152; *accord, e.g.*, *Vaughn v. Danzig*, 18 F. App'x. 122, 125 (4th Cir. 2001) (destruction of record before FOIA request filed did not violate the law, "as agencies are not required to retain records on the possibility that a FOIA or Privacy Act request may be submitted." (citing *Kissinger*, 445 U.S. at 155 n.9)). FOIA is triggered by the submission of a request for records; imposes no relevant obligations before the submission of such a request;

and does not give a requestor any right to relief (or discovery) regarding matters that pre-date the request's submission.

Indeed, in *Kissinger*, the Court found that FOIA provided no remedy notwithstanding evidence suggesting that Secretary Kissinger had routed his telephone notes out of agency possession to avoid public disclosure, including his deeding the notes to the Library of Congress with significant restrictions on public access. *See* 445 U.S. at 141-42. And *Kissinger* in fact declined to adopt the argument, raised by the plaintiffs in that case, that an exception to the possession or control requirement needs to be made when an agency seeks to circumvent FOIA in general. *See, e.g.*, *Kissinger*, Brief for Respondents and Cross-Petitioners Reporters Committee for Freedom of the Press, 1979 WL 199434, at *81 (1979) (charging that government's reading "would create a dangerous mechanism for circumventing the broad disclosure obligations that the FOIA creates."); *id.* at *86 ("The FOIA's objective of full disclosure of government information could be easily evaded if the Act ceased to apply once records owned by the agency were removed from its physical custody. Agency employees could simply take home or store with friends documents that they considered politically sensitive or personally embarrassing . . . . The practical effect of condoning such stratagems would be to create an additional exemption from the Act for documents that government officials and their superiors, for personal or political reasons, do not wish to disclose."). Although Justices Brennan and Stevens would have adopted that argument in some form, they recognized that the Court itself did not. *See, e.g.*, *Kissinger*, 445 U.S. at 159 (Brennan, J., concurring in part and dissenting in part) (disagreeing with "minimal rule" of footnote nine: "an agency would be improperly withholding documents if it failed to take steps to recover papers removed from its custody deliberately to evade a FOIA request"); *id.* at 161 (Stevens, J., concurring in part and

dissenting in part) (charging that Court's decision "creates an incentive for outgoing agency officials to remove potentially embarrassing documents from their files in order to frustrate future FOIA requests").

Nor does Plaintiff's broad reading of FOIA find support in post-*Kissinger* case law. No case, including any case located by Plaintiff, stands for the proposition that an agency withholds a document it does not possess whenever the agency was seeking, as a general matter, to avoid public disclosure. Indeed, one of the primary cases upon which Plaintiff relies — and to which it was a party — is directly to the contrary. *See Judicial Watch, Inc. v. Dep't of Commerce*, 34 F. Supp. 2d 28, 44 (D.D.C. 1998) ("The clear implication [from *Kissinger*] is that the status of a particular document at the time the FOIA request is submitted determines whether the unreasonable failure to produce that document is an unlawful withholding. If the document is removed before filing of the request, then failure to produce it is not an improper withholding. In contrast, if the document is removed after the filing of the request, failure to produce it is an improper withholding.").[4] Plaintiff's other cases are to the same effect. *See, e.g.*, *DiBacco v. U.S. Army*, 795 F.3d 178, 192 (D.C. Cir. 2015) ("The general rule is that an agency may not avoid a FOIA request by intentionally ridding itself of a *requested* document." (emphasis

[4] In *Judicial Watch*, the court determined that after the Commerce Department received the FOIA requests at issue, "[d]ocuments were destroyed, discarded, and given away, sometimes without being searched to determine if they were responsive, other times with full knowledge that they were responsive." 34 F. Supp. 2d at 45. The court granted plaintiff's request for further discovery, allowing plaintiff "to inquire into any discoverable information related to the destruction or removal of documents after its first FOIA request was filed." *Id.* at 46. Here, Plaintiff submitted the FOIA request more than three months after former Secretary Clinton's final day as Secretary of State. As a consequence, Plaintiff's allegations cannot amount to bad faith by State with respect to the processing of its FOIA request. *See CareToLive v. FDA*, 631 F.3d 336, 346 (6th Cir. 2011) (denying discovery; "Accepting Dr. Pazdur's uncontroverted declaration that he destroyed his copies of these documents within one month of receiving them, there is simply no evidence that the documents were destroyed in an attempt to keep them from CareToLive when CareToLive did not file its request until more than two and a half months after Dr. Pazdur claims to have destroyed them.").

added)); *Chambers v. U.S. Dep't of the Interior*, 568 F.3d 998, 1004 (D.C. Cir. 2009) ("[A]n agency is not shielded from liability if it intentionally transfers or destroys a document *after it has been requested under FOIA* or the Privacy Act." (emphasis added)); *Nat'l Sec. Archive v. Archivist of the U.S.*, 909 F.2d 541, 546 (D.C. Cir. 1990) (denying relief under FOIA and refusing to consider the consequences of "purposefully rout[ing] a document out of agency possession in order to circumvent *a FOIA request*" because plaintiff had not submitted a proper FOIA request (emphasis added)); *SafeCard Servs.*, 926 F.2d at 1201 (affirming district court's denial of discovery and noting that "[if] the agency is no longer in possession of the document, for a reason that is not itself suspect, then the agency is not improperly withholding that document and the court will not order the agency to take further action in order to produce it.").

The case on which Plaintiff relies most heavily, *Landmark Legal Foundation v. EPA*, 959 F. Supp. 2d 175 (D.D.C. 2013); *see also* 82 F. Supp. 3d 211 (D.D.C. 2015), presents a distinct question from that presented in this case. In *Landmark Legal Foundation*, the agency did not search the personal emails of certain individuals who were employed at the agency at the time the FOIA request was submitted. *See* Pl.'s Opp. to Def.'s Mot. for Summ. J., *Landmark Legal Found. v. EPA*, No. 12-1726, ECF No. 31 (D.D.C. June 4, 2013) (noting that "Landmark's request was submitted four months prior to Ms. Jackson's departure"). Thus, even if *Landmark Legal Foundation* were correct that an agency has custody or control over its current employees' personal email accounts,[5] Plaintiff itself says that "Mrs. Clinton took the 'clintonemail.com'

[5] Other authority properly holds that an agency does not possess the personal email accounts of its employees, *see Competitive Enter. Inst. v. Office of Sci. & Tech. Pol'y*, 82 F. Supp. 3d 228 (D.D.C. 2015), appeal pending, and the issue is now before the D.C. Circuit. *See* D.C. Cir. No. 15-5128. Unlike *Landmark Legal Foundation*, which does not acknowledge or discuss the Supreme Court's *Kissinger* decision, *Competitive Enterprise Institute* is properly informed by this binding precedent. In any event, there is no reason for this Court to reach out to decide an issue that is not present in this case and is currently before the D.C. Circuit.

system with her when she left the State Department," Pl.'s Mot. at 19, some three months before Plaintiff submitted its request. *Landmark Legal Foundation* simply does not apply to the facts of this case.

Finally, the Court should deny Plaintiff's discovery motion because, as a practical matter, there is little substantive relief for the Court to order, given everything that has gone on in this case to date and the limited nature of relief available in a FOIA case. The Court has already taken significant steps to ensure that all federal records that could potentially be responsive to Plaintiff's FOIA request were turned over to State, to preserve any additional emails that might be recoverable by the FBI on clintonemail.com, and to request that the FBI inform State about any recovered information that is potentially relevant to Plaintiff's FOIA request.

CONCLUSION

Defendant respectfully requests that the Court deny Plaintiff's Rule 56(d) motion.

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Respectfully submitted,

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