IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,	)	
Plaintiff,	)	
v.	)	Civil Action No. 13-cv-1363 (EGS)
U.S. DEPARTMENT OF STATE,	)	
Defendant.	)	

PLAINTIFF JUDICIAL WATCH'S REPLY IN SUPPORT OF ITS MOTION FOR DISCOVERY

Plaintiff Judicial Watch, Inc., by counsel, respectfully submits this reply in support of its motion for time to take discovery pursuant to Rule 56(d) of the Federal Rules of Civil Procedure. As grounds thereof, Plaintiff states as follows:

I. Introduction.

In its initial brief, Plaintiff demonstrated that undisputed facts and limited, admissible evidence show that there is at least a "reasonable suspicion" that the State Department and Mrs. Clinton deliberately thwarted FOIA by creating, using, and concealing the "clintonemail.com" record system during Mrs. Clinton's entire four years as Secretary and for the two years subsequent. The State Department not only fails to address the "reasonable suspicion" but also fails to refute it. Nor could it. There is no other reason why an agency and the agency head would create, use, and conceal an entire record system used by the agency head and at least one of her closest aides if they did not intend to make it more difficult – if not impossible – for FOIA requesters to gain access to the records on that system. The State Department has no legitimate explanation.

The State Department makes three superficial arguments. First, it argues that discovery is irrelevant because Plaintiff submitted its FOIA request after Mrs. Clinton removed the records from the State Department. The State Department misses the forest for the trees with this assertion. The creation of the record system was part of the plan to circumvent FOIA. Another part of the plan included Mrs. Clinton taking the record system with her when she left office. Therefore, the date of the FOIA request is irrelevant and the case law confirms it. Second, the State Department argues that it searched the relevant records because policies allow for government employees to determine what are federal records appropriate for retention. However, no government employee determined what was a federal record on the "clintonemail.com" record system. To the extent any determination was made, it occurred after Mrs. Clinton and Ms. Abedin left office. They were not government employees when they undertook the task. In addition, they did not personally review the records. Only Mrs. Clinton's and Ms. Abedin's personal attorneys – accountable only to them, not to the State Department – made the determinations. Such a process does not comply with the State Department's own regulations. The State Department cannot rely on it. Third, the State Department argues that this case is not the appropriate vehicle to gain access to records responsive to Plaintiff's FOIA request. Such an argument borders on the absurd. If a FOIA requester cannot challenge the adequacy of the agency's search for responsive records, FOIA litigation, if not FOIA itself, becomes meaningless. Plaintiff solely seeks information related to the processing of Plaintiff's FOIA request.

Plaintiff's motion for discovery will allow it to uncover and present admissible evidence to the Court about whether the State Department and Mrs. Clinton deliberately thwarted FOIA. It will also allow for discovery of the system itself to determine possible methods for recovering

whatever responsive records may still exist and have not already been searched and reviewed. The Court therefore should grant Plaintiff's motion for time to conduct discovery.

II. The Date of the FOIA Request Is Irrelevant to the Critical Issue.

The critical issue before this Court is whether the State Department and Mrs. Clinton deliberately thwarted FOIA by creating, using, and concealing the "clintonemail.com" record system. It is not whether Mrs. Clinton removed the record system before or after Plaintiff submitted its FOIA request. Because it appears that the purpose for creating and removing the record system was to deliberately thwart FOIA, the date of the FOIA request is irrelevant to the resolution of this case.

The State Department argues that the case law does not support Plaintiff's position because none of the cases cited by Plaintiff concern the particular situation currently before the Court. Plaintiff does not dispute that no court has had to rule on a case in which an agency and the agency head created, used, and concealed an entire record system for six years. Plaintiff also does not dispute that no court has had to adjudicate a case in which an agency for six years successfully shielded a specific record system from being searched in response to FOIA requests.[1] Just because no court has had to resolve an issue involving an agency as brazen as the State Department does not mean that this Court cannot and should not decide the issue before it.

As the Supreme Court stated in *Kissinger v. Reporters Committee for Freedom of Press*:

> 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

[1] The FOIA request at issue in this case is not the only request submitted by Plaintiff that concerns emails of Mrs. Clinton and her closest advisors. In fact, another FOIA request submitted by Plaintiff while Mrs. Clinton was still in office seeks all communications between the Office of the Secretary of State and the White House/Executive Office of the President concerning, regarding, or relating to the photographs of Osama bin Laden from on or about May 2, 2011. *See Judicial Watch, Inc. v. U.S. Department of State*, Case No. 15-01128-EGS (D.D.C.).

> to that request. This temporal factor has always governed requests under the subpoena power as well as under other access statutes. 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. 136, 155 (1980). *Kissinger* simply is not dispositive. Because the Supreme Court did not find that Secretary Kissinger transferred the summaries and transcripts to circumvent FOIA, it did not resolve the issue currently before this Court: whether the deliberate attempt by an agency and the agency head to thwart FOIA displaces the general rule. *Kissinger* suggests that it does, and so does its progeny.

In *Chambers v. U.S. Department of Interior*, 568 F.3d 998 (D.C. Cir. 2009), the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") succinctly summarized how courts of this Circuit have construed *Kissinger*. The D.C. Circuit stated:

> Generally, "an agency has no duty to retrieve and release documents it once possessed but that it ***legitimately*** disposed of ***prior*** to the date a FOIA request was received." *McGehee v. Central Intelligence Agency*, 697 F.2d 1095, 1103 (D.C. Cir. 1983) (construing *Kissinger*, 445 U.S. at 155 (1980); *see also SafeCard Services, Inc. v. Securities and Exchange Commission*, 926 F.2d 1197, 1201 (D.C. Cir. 1991) ("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."). Nonetheless, as the italicized language suggests – and as the Government acknowledged at oral argument – an 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. *See Forsham v. Califano*, 587 F.2d 1128, 1136 (D.C. Cir. 1978) ("We do not suggest that mere physical possession of records by a government agency is the sole criterion for determining whether they fall within the scope of FOIA. Obviously a government agency cannot circumvent FOIA by transferring physical possession of its records to a warehouse or like bailee."), *aff'd, Forsham v. Harris*, 445 U.S. 169 (1980); *cf. Kissinger*, 445 U.S. at 155 ("There is no question that a [FOIA] '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. . . . 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."); *see, e.g., Judicial Watch, Inc. v. U.S.*

> *Department of Commerce*, 34 F. Supp. 2d 28, 41 (D.D.C. 1998) (directing magistrate judge to preside over discovery "designed to explore the extent to which [Department of Commerce] . . . illegally destroyed and discarded responsive information, and possible methods for recovering whatever responsive information still exists outside of the DOC's possession"); *Landmark Legal Found. v. EPA*, 272 F. Supp. 2d 59, 62 (D.D.C. 2003) (noting that earlier in litigation court had held U.S. Environmental Protection Agency in contempt and ordered it to pay plaintiff's costs and fees "caused by EPA's contumacious conduct," namely, destroying "potentially responsive material contained on hard drives and email backup tapes").

Chambers, 568 F.3d at 1004 (D.C. Cir. 2009) (emphasis in original). The D.C. Circuit re-examined the issue just last year. In *DiBacco v. U.S. Army*, after the agency received the FOIA request, it transferred the responsive records to the National Archives pursuant to the Disclosure Act. 795 F.3d 178, 192 (D.C. Cir. 2015). Since the Army's transfer of the records was proper, the D.C. Circuit concluded that the "transfer thus bears no colorable resemblance to FOIA-evasion cases, where an agency tries to thwart disclosure by intentionally moving or destroying responsive documents." *Id*. at 193. To reach that conclusion, the D.C. Circuit identified the critical issue "in a dispute over a document that an agency no longer has" as "the agency's motivation for disposing of or transferring that document." *Id*. at 192. Because the Army was simply following the law, the D.C. Circuit ruled in the agency's favor.

The analysis, however, does not depend on whether the records transfer occurred before or after the FOIA request was submitted. When the critical issue is motivation, the distinction is without a difference. Had the Army transferred the records to the National Archives before the FOIA request was received, the D.C. Circuit would have still undertaken the same analysis and reached the same conclusion. Had the Army transferred the records to evade FOIA, the D.C. Circuit would have also looked to the motivation of the agency, regardless of whether the transfer occurred before or after the FOIA request was received. If an agency could simply

transfer its records out of its possession before a FOIA request was submitted to avoid its FOIA obligations, FOIA would become meaningless. Defendant's position is not the law.

In addition, Mrs. Clinton's removal of the "clintonemail.com" record system when she left office and the State Department's allowing her to do so was wrongful and in violation of federal law and State Department regulations. *See, e.g.*, 18 U.S.C. § 2071(b); 44 U.S.C. § 3314, *et seq.*; 36 C.F.R. §§ 1220.10(b), 1220.30, 1220.32(e), 1220.34, 1222.20(b), 1222.24(a)(6), 1230.10, and 1230.12. Even though the unlawful removal occurred before Plaintiff submitted its FOIA request, Plaintiff does not concede that the State Department does not continue to retain some control over the records on the "clintonemail.com" record system. In fact, the State Department has asserted, and Mrs. Clinton has acknowledged, that departmental authorization was required before Mrs. Clinton could release any of the records stored on the server – a clear and unambiguous demonstration of the State Department's "control" over the records. *See* Letter from Undersecretary Patrick F. Kennedy to David E. Kendall (March 23, 2015), attached as Exhibit A; *see also* Letter from David E. Kendall to the Hon. Trey Gowdy (March 27, 2015), attached as Exhibit B at 2 ("Secretary Clinton is not in a position to produce any of those emails to the Committee in response to the subpoena without approval from the State Department."). The simple fact that Mrs. Clinton continues to have access to the "clintonemail.com" record system suggests that a constructive trust exists and that the State Department can access and search the entire system for records responsive to Plaintiff's FOIA request. *See Federal Trade Commission v. Capital City Mortgage Corporation*, 321 F. Supp. 2d 16, 19 (D.D.C. 2004).

III. Government Employees Did Not Determine Which Records on the "Clintonemail.com" System Were Federal Records Appropriate for Retention.

Besides not resolving the discrete issue before this Court, *Kissinger* is distinguishable from the instant matter with respect to who determined whether a record was a personal record or

a federal record appropriate for retention and when that determination took place. At issue in *Kissinger* were summaries and transcripts of telephone conversations. 445 U.S. at 140. During his tenure as Secretary of State, "Kissinger's secretaries generally monitored his telephone conversations and recorded their contents either by shorthand or on tape. The stenographic notes or tapes were used to prepare detailed summaries, and sometimes verbatim transcripts, of Kissinger's conversations." *Id*. The summaries and transcripts included conversations of official government business as well as personal matters. *Id*. Once complete, the summaries and transcripts "were stored in [Kissinger's] office at the State Department in personal files." *Id*.

Towards the end of his term, Kissinger sought to remove the summaries and transcripts from the State Department. *Id*. Before doing so, he obtained an opinion from the State Department advising him that the records "were not agency records but were his personal papers which he would be free to take when he left office." *Id*. at 140-141. The State Department's conclusion was based on its regulation "that a retiring official may retain papers 'explicitly designated or filed as personal at the time of origin or receipt.'" *Id*. at 141 (*quoting* 5 FAM § 417.1 (a) (1974)). Kissinger subsequently removed the summaries and transcripts from his "personal files" in his office.

Kissinger determined that the summaries and transcripts were personal records and not federal records appropriate for retention. He first made such a determination when the records were placed in his "personal files." He made a subsequent determination after receiving advice from the State Department. In both instances, he was Secretary of State, an indisputable government employee.

Mrs. Clinton, on the other hand, never made such a determination while she was Secretary of State. Neither she nor any other State Department employee reviewed the emails on

the "clintonemail.com" record system and determined which records on the system were personal records or federal records appropriate for retention. Even though no government employee undertook such a review or made the necessary determination, the State Department argues that it is "reasonable for [it] to limit its search of emails to those that the former Secretary (or her designee) determined were federal records appropriate for retention." Def's Mem. at 8. The State Department supports its position with two assertions. First, it states, "Federal employees are responsible for determining whether their own emails are federal or personal records." *Id.* Second, the State Department explains that "given her position" as secretary, Mrs. Clinton would have had assistance reviewing records "had she used a state.gov email account." *Id*. at 10. Plaintiff does not dispute either assertion. In fact, both assertions are entirely consistent with and support Plaintiff's request for discovery.

Determining whether a record is a federal record appropriate for retention is a governmental function entrusted to government officials, not a task left to unaccountable, private individuals. As the State Department acknowledges, "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." *Id*. at 9 (emphasis added) (citing NARA Bulletin 2014-06). In addition, Mrs. Clinton has acknowledged that "the regulations implementing the Federal Records Act provide that '***agencies*** must distinguish between records and nonrecord materials by applying the definition of records . . . to any agency documentary materials in all formats and media.'" *See* Exhibit B at 4 (*quoting* 26 C.F.R. § 1222.12(a)) (emphasis added)). She also has acknowledged that "the regulations further recognize that determining which materials are '[a]ppropriate for preservation,' as evidence of agency activity – and therefore within the definition of a federal

record – is a matter entrusted to the '***judgement of the agency***.'" *Id.* (*quoting* 26 C.F.R. § 1222.10(b)(6)) (emphasis added). She acknowledged further that responsibility for exercising this agency judgment lies with "individual officials and employees." *Id.* There simply is no dispute that government employees, not former employees and definitely not personal attorneys of former employees, are required to determine what records are federal records appropriate for retention.

As Plaintiff demonstrated in its opening brief, the State Department did not search the "clintonemail.com" record system. Nor did it provide guidance on how the system should have been searched. With respect to Mrs. Clinton's emails, Mrs. Clinton's personal attorneys reviewed her emails as well as established the review process to determine whether they were federal records. There is no evidence whatsoever that the State Department consulted with or advised Mrs. Clinton's personal attorneys about the review process or the parameters for the review process either before or after it occurred. There also is no evidence that the State Department authorized or approved the review process. The State Department only appears to know that a self-selected portion of Mrs. Clinton's emails from her tenure at the State Department have been made available. The same is true for Ms. Abedin and her emails.

As the State Department makes clear, Mrs. Clinton and Ms. Abedin had not only the opportunity but also the right during their employment to determine which of their emails were federal records appropriate for retention. They did not do so. They forfeited their opportunity when they left their employment at the State Department. The State Department also lost the opportunity to review a self-selected subset of potentially responsive records. Because no determination was made during their employment, the State Department cannot ask non-government employees to determine what is a personal record or a federal record. Had the State

Department retained possession of the entire "clintonemail.com" record system or had Mrs. Clinton used a "state.gov" email account to conduct official government business, the State Department would not have asked Mrs. Clinton and Ms. Abedin to return to the State Department and review their emails.[2] The State Department would have had a current, government employee review the records for not only responsiveness to Plaintiff's FOIA request but also as to whether the records were in fact federal records. In fact, the State Department employed such a review process to review the records returned by Mrs. Clinton. *See* Third Hackett Declaration, submitted in support of Defendant's Motion for Summary Judgment, at p. 4, fn. 2 ("Former Secretary Clinton provided 53,988 pages, of which approximately 1,533 were identified, in consultation with the National Archives and Records Administration, as entirely personal correspondence, that is, documents that are not federal records, leaving approximately 52,455 pages."). Instead of following their own rules and regulations, the State Department allowed Mrs. Clinton and Ms. Abedin, non-government employees, to decide what records should be searched for responsiveness to a FOIA request.

The State Department has never reviewed the records on the "clintonemail.com" system to determine whether they are federal records and whether they are potentially responsive to Judicial Watch's FOIA request. Nor has it reviewed the "PST" files of Mrs. Clinton and Ms. Abedin to make these determinations. The State Department cannot say whether it has all federal records from the "clintonemail.com" system. Because former government employees and their personal attorneys reviewed all records on the "clintonemail.com" system and determined which records were federal records, the State Department cannot rely upon those

[2] To Plaintiff's knowledge, the State Department did not ask Ms. Mills or Ms. Abedin to return to the State Department and review the emails contained in their "state.gov" email accounts for records potentially responsive to Plaintiff's FOIA request.

determinations or conclude that all federal records were returned. The State Department is obligated to search the entire "clintonemail.com" record system to determine which records are responsive to Plaintiff's FOIA request.

As Plaintiff demonstrated in its initial brief, questions still remain as to Mrs. Clinton's departure from the State Department with the system, Mrs. Clinton's management and preservation of the system after she left the State Department, and the State Department's request for the return of records from the system. Questions also remain as to how Mrs. Clinton's and Ms. Abedin's determined which records to return to the State Department. Therefore, before the State Department can sufficiently search the entire "clintonemail.com" record system, Plaintiff requires discovery to uncover and present admissible evidence necessary to determine possible methods for recovering whatever responsive records may still exist.

IV. This Lawsuit is the Appropriate Vehicle to Gain Access to the Records Responsive to Plaintiff's FOIA request.

From the beginning, the State Department's processing of and response to Plaintiff's FOIA request has been fraught with problems. First, although the State Department represented in February 2014 that it had completed searches of the Office of the Executive Secretariat, among other offices, it did not inform Plaintiff that it had not searched the record system containing the emails of at least Mrs. Clinton and Ms. Abedin. Second, after this case was reopened, the State Department conducted supplemental searches of the record systems it searched in 2014 and located additional, responsive records. To date, the State Department has not explained why its original search did not yield the same results. Third, after the State Department moved for summary judgment, it "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."[3] Def's Mem. at 5.

The State Department has not explained what these records are and why the source of records was not located until almost three years after Plaintiff's FOIA request was sent. Had Plaintiff not sued, reopened the case, and continued to challenge the State Department's search, it may have never learned that yet again another record system was not searched for responsive records. Plaintiff also still does not know whether the system contains any records responsive to Plaintiff's FOIA request. All that it has been able to cobble together from various filings by the State Department in different cases is that the system is:

- "a collection of electronic files which resided in the Office of the Executive" Defendant's Motion To Stay Production Deadline, *Judicial Watch, Inc. v. U.S. Department of State*, Case No. 15-00689-RDM, ECF No. 12 (D.D.C. Jan. 1, 2016); and

- "office files that were available to employees within the Office of the Secretary during former Secretary Clinton's tenure as well as individual files belonging to Jake Sullivan and Cheryl Mills" Defendant's Motion to Stay Briefing Schedule, *Judicial Watch, Inc. v. U.S. Department of State*, Case No. 15-00688-RC, ECF No. 21 (D.D.C. Jan. 14, 2016).

The State Department simply has been less than forthcoming about how it has handled and responded to Plaintiff's FOIA request. Discovery therefore would allow Plaintiff the opportunity to uncover and present admissible evidence as to how the State Department has handled and responded to Plaintiff's FOIA request, including whether the "clintonemail.com" record system and other record systems were not searched because the State Department did not have the ability to search them or because the State Department determined that those systems would not likely contain responsive records.

In this regard, Plaintiff's motion and this lawsuit generally are the appropriate vehicles

[3] The discovery of this new source of records does not affect Plaintiff's Motion for Discovery. The new source does not contain emails. It is Plaintiff's understanding that it contains electronic files such as Word documents and PDFs.

for Plaintiff to gain access to the records responsive to its FOIA request. The State Department asserts otherwise. It argues that an Administrative Procedure Act challenge – specifically Judicial Watch's lawsuit against Secretary Kerry – is more appropriate. *See* Def's Mem. at 11-13. However, the specific relief sought in that case, *Judicial Watch, Inc. v. Kerry*, Case No. 15-00785-JEB (D.D.C.), is a court order requiring Secretary Kerry to "initiate action through the Attorney General for the recovery of records." Complaint, ECF No. 1, at ¶ 16 (*quoting* 44 U.S. C. § 3314)). Judicial Watch, in that case, is seeking for Secretary Kerry to notify the Attorney General about the unlawful removal of records, nothing more. That case does not seek to resolve whether the State Department has conducted a search reasonable to uncover all records responsive to Plaintiff's FOIA request. This case does. Plaintiff's motion allows for the discovery of admissible evidence as to whether the State Department and Mrs. Clinton deliberately thwarted Plaintiff's FOIA request by creating, using, and concealing the "clintonemail.com" record system during Mrs. Clinton's entire four years as Secretary and for the two years subsequent.

Although Plaintiff has not yet conducted discovery, at least some of the relevant facts cannot reasonably be disputed. Those facts show that there is at least a "reasonable suspicion" that the State Department and Mrs. Clinton deliberatively thwarted FOIA. If discovery reveals that the State Department and Mrs. Clinton deliberatively thwarted FOIA, FOIA would compel the State Department to take further action. *See Chambers*, 568 F.3d at 1004-1006; *see also SafeCard Services, Inc.*, 926 F.2d at 1201 and *Judicial Watch, Inc.*, 34 F. Supp. 2d at 44. Such action may include recovering records from nonparties to which the State Department transferred the records – or, allowed for the transfer of records to take place – in an attempt to circumvent FOIA. *Id*.

V. Additional Evidence that the Knowledge of the "Clintonemail.com" Record System Was Widespread throughout the State Department.

On January 15, 2016, the State Department released to another FOIA requester in an unrelated lawsuit an August 30, 2011 email[4] from Stephen D. Mull, then-Executive Secretary of the State Department[5], to Cheryl Mills, Ms. Abedin, Under Secretary of State for Management Patrick F. Kennedy, and Monica Hanley discussing ways in which the State Department could resolve issues Mrs. Clinton was having with communications, specifically email. The email, in part, states:

> Separately, we are working to provide the Secretary per her request a Department issued Blackberry to replace her personal unit which is malfunctioning (possibly because of her personal email server is down). We will prepare two versions for her to use – one with an operating State Department email account (which would mask her identity, but which would also be subject to FOIA requests), and another which would just have phone and internet capability.

Exhibit C at 2. This record unequivocally shows that senior management at the State Department was well aware that Mrs. Clinton was using a "non-state.gov" system to conduct official government business. The email also suggests that senior management was concerned that records on the "clintonemail.com" system were not being managed in a way that would allow for the State Department to search those records in response to FOIA requests. This newly discovered record again demonstrates that there is at least a "reasonable suspicion" that the State Department and Mrs. Clinton deliberately thwarted FOIA by creating, using, and concealing the "clintonemail.com" record system for six years. Discovery therefore is necessary to allow Plaintiff the opportunity to uncover and present admissible evidence about how and why Mrs.

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[4] The entire email string is attached as Exhibit C.

[5] Mr. Mull "served from 2010 to 2012 as Executive Secretary of the State Department, coordinating responses to a wide range of crises and managing the Department's support for the Secretary of State." Remarks, U.S. Department of State (Sept. 17, 2015, available at http://www.state.gov/secretary/remarks/2015/09/247006.htm).

Clinton and other State Department employees kept the use of the system secret from the public even though the State Department received and responded to dozens – if not hundreds – of FOIA requests for Mrs. Clinton's records.

VI. Conclusion.

For the reasons set forth in Plaintiff's initial brief and the additional reasons stated above, Plaintiff's motion for discovery should be granted.

Dated: January 22, 2016

Respectfully submitted,

/s/ Michael Bekesha
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Counsel for Plaintiff Judicial Watch, Inc.

Exhibit A

UNDER SECRETARY OF STATE
FOR MANAGEMENT
WASHINGTON

MAR 2 3 2015

Dear Mr. Kendall,

I am writing in reference to the approximately 55,000 pages of electronic mail that were identified as potential federal records and produced on behalf of former Secretary Clinton to the Department of State on December 5, 2014 in response to its request for assistance under the Federal Records Act.

We understand that Secretary Clinton would like to continue to retain copies of the documents to assist her in responding to congressional and related inquiries regarding the documents and her tenure as head of the Department. The Department has consulted with the National Archives and Records Administration (NARA) and believes that permitting Secretary Clinton continued access to the documents is in the public interest as it will help promote informed discussion. Accordingly, Secretary Clinton may retain copies of the documents provided that: access is limited to Secretary Clinton and those directly assisting her in responding to such inquiries; steps are taken to safeguard the documents against loss or unauthorized access; the documents are not released without written authorization by the Department; and there is agreement to return the documents to the Department upon request. Additionally, following NARA's counsel, we ask that, to the extent the documents are stored electronically, they continue to be preserved in their electronic format. In the event that State Department reviewers determine that any document or documents is/are classified, additional steps will be required to safeguard and protect the information. Please note that if Secretary Clinton wishes to release any document or portion thereof, the Department must approve such release and first review the document for information that may be protected from disclosure for privilege, privacy or other reasons.

Mr. David E. Kendall, Esq.,
Williams & Connolly LLP,
725 12th Street, NW,
Washington, DC 20005.

I would appreciate it if the Secretary or her designee would confirm agreement to the conditions described above in writing as soon as possible.

Very truly yours,

Patrick F. Kennedy

Exhibit B

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March 27, 2015

BY FIRST-CLASS SURFACE AND ELECTRONIC MAIL

The Honorable Trey Gowdy
United States House of Representatives
Select Committee on Benghazi
Washington, DC 20515

Dear Mr. Chairman:

This letter will respond to (1) the subpoena duces tecum issued by the Benghazi Select Committee to the Hon. Hillary R. Clinton and served by agreement on March 4, 2015; and (2) your March 19, 2015 letter requesting that former Secretary of State Clinton make her e-mail server available for third-party inspection and review.

Response to the Subpoena

As you know, the subpoena calls for the following documents, for the period January 1, 2011 through December 31, 2012, referring or relating to:

(a) Libya (including but not limited to Benghazi and Tripoli);

(b) weapons located or found in, imported or brought into, and/or exported or removed from Libya;

(c) the attacks on U.S. facilities in Benghazi, Libya on September 11, 2012 and September 12, 2012; or

(d) statements pertaining to the attacks on U.S. facilities in Benghazi, Libya on September 11, 2012 and September 12, 2012.

The subpoena requests production of any documents sent from or received by the e-mail addresses "hdr22@clintonemail.com" or "hrod17@clintonemail.com." As explained in my March 4, 2015 e-mail to your Staff Director and certain others, "hrod17@clintonemail.com" is not an address that existed during Secretary Clinton's

tenure as Secretary of State.[1] With respect to any e-mails from Secretary Clinton's "hdr22@clintonemail.com" account, I respond by stating that, for the reasons set forth below, the Department of State—which has already produced approximately 300 documents in response to an earlier request seeking documents on essentially the same subject matters—is uniquely positioned to make available any documents responsive to your requests.

On December 5, 2014, in response to an October 28, 2014 letter request from the Department of State for assistance in ensuring its records were as complete as possible, personal attorneys for Secretary Clinton delivered to the Honorable Patrick F. Kennedy, the Under Secretary of State for Management, all e-mails from the hdr22@clintonemail.com e-mail account that were related or potentially related to Secretary Clinton's work as Secretary of State. The Secretary's personal attorneys had reviewed every sent and received (whether as "to," "cc," or "bcc") e-mail from the hdr22@clintonemail.com account during her tenure as Secretary (62,320 e-mails in total) and identified all work-related and potentially work-related e-mails (30,490 e-mails, approximately 55,000 pages)—which were provided to the State Department on December 5, 2014. The Department of State is therefore in possession of all of Secretary Clinton's work-related e-mails from the hdr22@clintonemail.com account.

Secretary Clinton has asked for release of all of those e-mails to the public. While she is eager for the release to happen as soon as possible, the State Department needs to review the 30,490 e-mails prior to their release to determine whether any action is necessary to protect sensitive diplomatic efforts of the United States or the safety or privacy of any individuals identified in the e-mails. The State Department has that process underway.

Secretary Clinton is not in a position to produce any of those e-mails to the Committee in response to the subpoena without approval from the State Department, which could come only following a review process. On March 23, 2015, I received a letter from the Under Secretary of State for Management (attached hereto) confirming direction from the National Archives & Records Administration ("NARA") that while Secretary Clinton and her counsel are permitted to retain a copy of her work-related e-

[1] *See* e-mail from me to P. Kiko, S. Grooms, H. Sawyer, and D. Chipman (Mar. 4, 2015) ("I hope the following is helpful: Secretary Clinton used one email account when corresponding with anyone, from Department officials to friends to family. A month after she left the Department, Gawker published her email address and so she changed the address on her account. At the time the emails were provided to the Department last year this new address appeared on the copies as the 'sender,' and not the address she used as Secretary. This address on the account did not exist until March 2013, after her tenure as Secretary.").

mails, those e-mails should not be released to any third parties without authorization by the State Department. The letter further makes clear that any permission to release documents to third parties must be preceded by a review by the State Department for "privilege, privacy or other reasons." Thus, while Secretary Clinton has maintained and preserved copies of the e-mails provided to the State Department, she is not in a position to make any production that may be called for by the subpoena.

I should note that the subpoena overlaps in time frame and subject matter with a prior request you sent me. While the present subpoena includes two additional categories of documents that were not specified in the previous request—any and all documents related to "(c) the attacks on U.S. facilities in Benghazi, Libya on September 11, 2012 and September 12, 2012; or (d) statements pertaining to the attacks on U.S. facilities in Benghazi, Libya on September 11, 2012 and September 12, 2012"—those two categories appear to be encompassed by category (a) of the prior request, which broadly sought all documents "authored by, sent to, or received by" hdr22@clintonemail.com referring or relating to Libya generally, including Benghazi. Thus, I do not view the subpoena to be broader in subject matter or time frame than the December 2, 2014 letter request.

As you know, in my December 29, 2014 response letter, I referred that request to the State Department for production of any responsive e-mails from the set of 30,490 work-related and potentially work-related e-mails from the hdr22@clintonemail.com account that were provided to the State Department on December 5, 2014. On February 13, 2015, the State Department produced to the Committee approximately 300 e-mails (STATE-SCB0045000–STATE-SCB0045895) in response to the Committee's requests from their records, which include the set of the 30,490 hdr22@clintonemail.com e-mails that had been provided to the Department.

Finally, I observe that the subpoena calls for "any and all documents" during the requested time period related to the identified topics. In the event that we subsequently identify any other responsive documents, I will update this response promptly.

Response to Letter Request Regarding Server

In your March 19, 2015 letter, you requested that Secretary Clinton "make her server available to a neutral, detached and independent third-party for immediate inspection and review." March 19 Letter at 1. I respectfully note that the March 19 letter does not offer legal authority or precedent for this request and instead relies on the various "interests" claimed to be at stake.

Each of these interests purportedly relates to various rights of access to federal records. Those interests have already been addressed by the step of ensuring that the State Department's records are as complete as possible, through providing a copy of all of Secretary Clinton's work-related and potentially work-related e-mails—the majority of

which was contemporaneously captured on the state.gov system—to the State Department in December 2014. Thus, the State Department has all of Secretary Clinton's work-related and potentially work-related e-mails, regardless of whether they qualify as federal records.

The March 19 letter takes issue with Secretary Clinton's role, through her legal representatives, as the "sole arbiter of what she considers private" and what she considers work-related. *See* March 19 Letter at 3. That procedure, however,—whereby individual officials are responsible for separating what is work-related (and potentially a federal record) from what is personal—is the very procedure that NARA and individual agencies rely upon to meet their obligations under the Federal Records Act every day. Indeed, NARA's guidance and the State Department's policies make clear that the reliance on individual officials to make decisions as to what e-mails must be preserved as federal records is not an "arrangement" that is "unprecedented" or "unique," but instead the normal procedure carried out by tens of thousands of agency officials and employees in the ordinary course.

Specifically, the regulations implementing the Federal Records Act provide that "agencies must distinguish between records and nonrecord materials by applying the definition of records . . . to agency documentary materials in all formats and media." 36 C.F.R. § 1222.12(a) (2014). The regulations further recognize that determining which materials are "[a]ppropriate for preservation" as evidence of agency activities—and therefore within the definition of a federal record—is a matter entrusted to the "judgment of the agency," *id.* § 1222.10(b)(6) (2014). Both NARA guidance and State Department policies place the responsibility of exercising agency judgment to identify federal records on individual officials and employees. As NARA recently recognized with regard to the role of agency officials and employees in e-mail management, "[c]urrently, in 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." NARA Bulletin 2014-06, ¶ 4 (Sept. 15, 2014) (emphasis added).

Like other agencies, the State Department places the obligation of determining what is and is not appropriate for preservation on individual officials and employees. The Foreign Affairs Manual, which sets forth the Department's policies with regard to e-mail management, provides that "[e]-mail message creators and recipients must decide whether a particular message is appropriate for preservation. In making these decisions, all personnel should exercise the same judgment they use when determining whether to retain and file paper records." *See* 5 FAM 443.2(b). The Manual supplies guidance, drawn from the language of the Federal Records Act, to assist individuals in their exercise of judgment. *See* 5 FAM 443.2(a). The Manual also notes "[t]he intention of this guidance is not to require the preservation of every E-mail message. Its purpose is to direct the preservation of those messages that contain information that is necessary to

ensure that departmental policies, programs, and activities are adequately documented." 5 FAM 443.2(b); *see also* 36 C.F.R. § 1222.16(b)(3) (2014) (stating that "[n]onrecord materials should be purged when no longer needed for reference. NARA's approval is not required to destroy such materials.").

Thus, by design, individual officials and employees indeed do serve as arbiters of what constitutes a federal record, and therefore as individual implementers of the Federal Records Act. The Committee implicitly recognized this fact when, in its December 2, 2014 letter request for documents related to Libya and weapons related to Libya, it asked Secretary Clinton to undertake a review of the hdr22@clintonemail.com account to determine whether any such documents existed on that account. The manner in which Secretary Clinton assisted the State Department in fulfilling its responsibilities under the Act here is consistent with the obligations of every federal employee.

The March 19 letter also expresses concern that Secretary Clinton's "arrangement apparently also allowed her to delete those emails she alone determined to be personal in nature." March 19 Letter at 3. This statement is at odds with your recognition of Secretary Clinton's personal privacy and that "the Committee has not sought, is not seeking, and will not seek to possess, review, inspect or retain any document or email that is purely personal in nature," as such materials are "none of the Committee's business, and would not assist the Committee in discharging its responsibilities." *Id.* at 5; *see also* letter from you to me (Dec. 2, 2014) at 1 ("To be clear, the Committee has no interest in any emails, documents or other tangible things not related to Benghazi."). It is also at odds with federal regulations implementing the Federal Records Act, which provide that "personal files"—defined as "documentary materials belonging to an individual that are not used to conduct agency business"—are "*excluded from the definition of Federal records and are not owned by the Government.*" 36 C.F.R. § 1220.18 (2014) (emphasis added).

Finally, the March 19 letter expresses concern that the review process for identifying potential federal records—a process that NARA and the State Department require to be undertaken by individual officials—was potentially inadequate. The only specific concerns cited are that search terms may have been relied upon as a proxy for a document-by-document review, or that the process would have excluded from the set produced to the State Department any hybrid e-mails that contained both work-related and personal materials. These concerns, however, are addressed by the fact that the Secretary's personal attorneys reviewed her email (search terms were employed as an aid to, not as a proxy for, that review), and that any work-related *and* potentially work-related (hybrid) e-mails were provided to the Department.

There is no basis to support the proposed third-party review of the server that hosted the hdr22@clintonemail.com account. During the fall of 2014, Secretary Clinton's legal representatives reviewed her hdr22@clintonemail.com account for the

time period from January 21, 2009 through February 1, 2013. After the review was completed to identify and provide to the Department of State all of the Secretary's work-related and potentially work-related emails, the Secretary chose not to keep her non-record personal e-mails and asked that her account (which was no longer in active use) be set to retain only the most recent 60 days of e-mail. To avoid prolonging a discussion that would be academic, I have confirmed with the Secretary's IT support that no e-mails from hdr22@clintonemail.com for the time period January 21, 2009 through February 1, 2013 reside on the server or on any back-up systems associated with the server. Thus, there are no hdr22@clintonemail.com e-mails from Secretary Clinton's tenure as Secretary of State on the server for any review, even if such review were appropriate or legally authorized.

As set forth above, all of Secretary Clinton's work-related and potentially work-related e-mails were provided to the State Department on December 5, 2014. Secretary Clinton has asked the Department to release these e-mails to the public as soon as possible. We understand that the State Department is working on completing procedures necessary for the release of those e-mails, and the Committee—and the public—will have access to them when that process is complete.

Sincerely,

David E. Kendall

cc: The Honorable Elijah Cummings
Dana K. Chipman, Esq.
Heather Sawyer, Esq.
The Honorable Patrick F. Kennedy

Exhibit C

From: Abedin, Huma
To: Mull, Stephen D
Subject: Re: S Communications
Date: Tuesday, August 30, 2011 5:34:07 PM

Its pretty silly and she knows it.

From: Mull, Stephen D
Sent: Tuesday, August 30, 2011 05:18 PM
To: Abedin, Huma
Subject: RE: S Communications

Thanks for reminding all of this very helpful context!!! ☺

From: Abedin, Huma
Sent: Tuesday, August 30, 2011 17:17 PM
To: Mull, Stephen D; Mills, Cheryl D
Cc: Kennedy, Patrick F; Hanley, Monica R
Subject: Re: S Communications

Steve - let's discuss the state blackberry, doesn't make a whole lot of sense.
As for the equipment, the commo team was limited in some capacity because we did not have authorization from owners of residence to install equipment. We did it regardless. Additionally, as S knows, the team didn't have access to the property until a couple of hours before S arrived.
Finally, as even the white house attested, this was a pretty wide spread problem, not just affecting us. So we should bear that in mind.

From: Mull, Stephen D
Sent: Tuesday, August 30, 2011 01:39 PM
To: Mills, Cheryl D
Cc: Abedin, Huma; Kennedy, Patrick F; Hanley, Monica R
Subject: S Communications

Cheryl,

Thanks again for alerting me to the communications issues the Secretary has been having. Here's a status report:

- On the immediate problem of the Secretary's not being able to have her calls transferred, [redacted] B7(E)

[redacted]

The technicians are onsite now [redacted]

[redacted]

- On the more long term issue, I've asked our team to develop an enhanced

package of capabilities and equipment that we would propose deploying with the Secretary to be as closely co-located as possible with her when she is on travel away from her usual residences. The package will include things that anticipate the normally unexpected such as hurricanes, power outages, earthquakes, locusts, etc, such as generators, uninterrupted power supplies, supplementary satellite capabilities, including satellite phones for when local infrastructure fails (as it did in NY over the weekend).

Separately, we are working to provide the Secretary per her request a Department issued Blackberry to replace her personal unit which is malfunctioning (possibly because of her personal email server is down). We will prepare two versions for her to use – one with an operating State Department email account (which would mask her identity, but which would also be subject to FOIA requests), and another which would just have phone and internet capability. We're working with Monica to hammer out the details of what will best meet the Secretary's needs.

Please let me know if you need anything more for now, and I'll be in touch with the above longer term options soon.

Thanks,

Steve