

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

<b>JUDICIAL WATCH, INC.,</b>	)	
	)	
<b>Plaintiff,</b>	)	Civil Action
	)	No. 13-163
<b>v.</b>	)	
	)	February 23, 2015
<b>UNITED STATES DEPARTMENT OF</b>	)	10:00 a.m.
<b>STATE,</b>	)	
	)	Washington, D.C.
<b>Defendant.</b>	)	

***TRANSCRIPT OF MOTION HEARING PROCEEDINGS  
BEFORE THE HONORABLE EMMET G. SULLIVAN,  
UNITED STATES DISTRICT COURT JUDGE***

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1 MORNING SESSION, FEBRUARY 23, 2016

2 (10:09 a.m.)

3 THE COURTROOM CLERK: Your Honor, this is Civil Action  
4 13-1363, *Judicial Watch, Inc. versus U.S. Department of State*.  
5 Will parties please come forward to the lectern and introduce  
6 yourselves for the record.

7 MR. BEKESHA: Good morning, Your Honor. Michael Bekesha  
8 on behalf of Judicial Watch. Along with me is Paul Orfanedes and  
9 Tom Fitton, president of Judicial Watch.

10 THE COURT: All right. Gentlemen, good morning.

11 MR. MYERS: Good morning, Your Honor. I'm Steven Myers  
12 from the Department of Justice on behalf of the State Department,  
13 and I'm joined by my colleagues Marcia Berman and Peter Wexler.

14 THE COURT: All right. Good morning, everyone.

15 MR. MYERS: And also, Laura Berlin from the State  
16 Department.

17 THE COURT: All right. Good morning.

18 MR. MYERS: Good morning, Your Honor.

19 THE COURT: Let me ask you, Counsel, before we start: Did  
20 you argue the case before the circuit last month?

21 MR. MYERS: No, Your Honor.

22 THE COURT: You know which one I'm referring to?

23 MR. MYERS: Your Honor, I think perhaps you're referring  
24 to the *CEI* case?

25 THE COURT: Yes.

1 MR. MYERS: No, I did not.

2 THE COURT: Okay. All right. So we're here today on  
3 plaintiff's motion for discovery under Rule 56(d) that was filed  
4 in response to the government's motion for summary judgment. The  
5 plaintiff's FOIA request at issue in this case sought -- and I do  
6 this because it's always good to talk about how we got to this  
7 particular point where we are now, so I'll give a little  
8 historical background for the record.

9 The FOIA request that Judicial Watch filed sought any and  
10 all SF-50 Notification of Personnel Action forms for  
11 Ms. Huma Abedin; any and all contracts, including but not limited  
12 to personnel service contracts, between the Department of State  
13 and Ms. Abedin; and any and all records regarding, concerning or  
14 related to the authorization for Ms. Abedin to represent  
15 individual clients who are otherwise engaged in outside  
16 employment while employed by and/or engaged in a contractual  
17 relationship with the State Department.

18 That request was submitted to State on May 21st, 2013, and  
19 sought documents from January of 2010 to May 21st, 2013. The  
20 government [sic] identified the following offices and record  
21 systems as likely containing responsive records: The Bureau of  
22 Human Resources; the Office of the Executive Secretariat; the  
23 Office of the Legal Advisor; and the Central Foreign Policy  
24 Records. And all of this is set forth in the government's  
25 memorandum, supplemental memorandum filed.

1           The Department of State produced eight nonexempt records  
2 to Judicial Watch and the case was dismissed by, I believe,  
3 consent of the parties.

4           In June 2015, following -- and I need some more  
5 information about this -- I'll call it the revelation of the  
6 Clintonemail.com e-mail and server used by Mrs. Clinton and some  
7 of her staff. The parties agreed to reopen the case, and that's  
8 set forth in my minute order dated June 19th, 2015.

9           And that word "revelation" may not be appropriate, because  
10 one of the big questions is whether or not the government knew  
11 about this system for the former secretary to use a private  
12 e-mail address and server. And it's -- I'm hard-pressed to find  
13 that the government didn't know, so one of the big questions is:  
14 Why did it take until 2015 for the government to realize that  
15 there were additional agency records available that had not been  
16 previously produced to the plaintiff? In any event, in June --  
17 and the parties can elaborate on that.

18           In June 2015, following that -- I hate to use the word  
19 "revelation" because I don't think that's appropriate, but in  
20 June two thousand -- in June -- on June 19th, 2015, the Court  
21 issued an order allowing the case to be reopened, and the parties  
22 can pick up from there.

23           Why did it take two years for the parties to realize that  
24 there were additional materials and, indeed, additional offices  
25 to search?

1           The State Department requested, at the Court's request,  
2 collected, and searched potential agency records that were  
3 produced by Mrs. Clinton, Ms. Abedin and Ms. Mills. The State  
4 also researched the four offices it originally searched in the  
5 Office of the Under Secretary for Management, this time with  
6 search terms agreed upon by Judicial Watch and State. And maybe  
7 that's the reason those search terms have not been used in the  
8 past. I just don't know, but it's an interesting question I need  
9 to get an answer to.

10           State produced the following: 28 documents consisting of  
11 48 pages on September the 18th of last year; four documents  
12 consisting of 15 pages on October the 13th of last year; a  
13 re-release of three documents on November the 12th, 2015; and a  
14 release of two documents in full and re-released in part of one  
15 document previously withheld on November the 13th, 2015.

16           The State withheld two documents in full from its November  
17 13, 2015, release pursuant to FOIA exemption 3. Those documents  
18 are two OGE Form 450s. And the plaintiff, Judicial Watch,  
19 challenges the withholding of those documents, along with the  
20 adequacy of State's search.

21           So the purpose of this hearing is to hear -- is for the  
22 Court to get answers with respect to the only issue before the  
23 Court, and that is whether or not the motion for discovery should  
24 be granted or not. The previously filed motion for summary  
25 judgment by the government has been stayed by the Court, without

1 objections from the parties, by the way.

2           It's very interesting, also, the government some weeks  
3 ago, many weeks ago, filed its motion for summary judgment  
4 defending the adequacy of its search for responsive documents,  
5 yet filed a declaration yesterday disclosing that there had been  
6 additional searches that had not produced any responsive  
7 documents but certainly raises questions about the adequacy of  
8 the search that the government had defended some three or four  
9 weeks or so ago. I query for that reason whether the motion can  
10 be denied just outright, but we'll get to that.

11           The following question must be answered: Is there a  
12 genuine issue of material fact that can only be resolved through  
13 an evidentiary hearing in regard to whether the State Department  
14 conducted a search reasonably calculated to uncover all relevant  
15 records? And in answering that question, I, of course, will  
16 focus on D.C. Circuit authority and authority from this Court and  
17 maybe some of my own authority set forth in opinions I've issued  
18 in the past.

19           But with respect to what I just said, focusing on the  
20 genuine issue, the Court references *Asarco, Inc. versus U.S.*  
21 *Environmental Protection Agency*, 2009 WL 1138830, a District  
22 Court opinion, 2009, noting that discovery in FOIA cases is  
23 rare -- and I'll supply my own emphasis there -- rare and only  
24 permitted when there is a genuine issue of material fact that  
25 requires an evidentiary hearing to be resolved.

1           That's the big question: What is that genuine issue of  
2 material fact here?

3           The defending agency must show, quote, beyond any material  
4 doubt, end quote, that it conducted a search reasonably  
5 calculated to uncover all relevant documents. Again, relying  
6 upon *Asarco* and -- which quotes *Weisberg*, the 1983 decision from  
7 our circuit, *Weisberg versus Department of Justice*, 705 F.2d  
8 1344. The adequacy of an agency search for responsive records is  
9 measured by, quote, the reasonableness of the effort in light of  
10 the specific request, end quote. Again, relying upon authority  
11 from the District Court and the Circuit Court, *McKinley versus*  
12 *FDIC*, 807 F.Supp.2d 1, a District Court opinion issued in 2011  
13 which quotes *Larson versus Department of State*, 565 F.3d, 857, a  
14 D.C. Circuit 2009 opinion.

15           Discovery, as our circuit has said and my colleagues have  
16 said, discovery is the exception, not the rule, in FOIA cases.  
17 Again, relying on District Court authority, *Thomas v. FDA*, 587  
18 F.Supp.2d 114. And I have no doubt this is the wrong number, but  
19 I'm sorry to be rude, but I can't imagine anyone calling me.

20           The discovery, as I said, is the exception, not the rule,  
21 in FOIA cases, as set forth in another District Court opinion.  
22 And the reason why the District Court opinions are very  
23 important, probably especially so in the FOIA areas, is because  
24 oftentimes there's no appeal. So we guide each other through the  
25 labyrinth of these FOIA cases. That's the decision issued by one

1 of my colleagues, 582 F.Supp.2d 114. Quote, the major exception  
2 to this limited scope of discovery is when the plaintiff raises a  
3 sufficient question as to the agency's good faith in processing  
4 the documents; in such instances, discovery has been permitted.

5 And I have a series of asterisks because that's what I  
6 said some years ago in the case of *Citizens for Responsibility*  
7 *and Ethics in Washington versus Department of Justice*. There was  
8 no opinion -- there was no appeal in that case. It's a -- it's  
9 cited in WL 518964, the District Court Docket Number is  
10 05-cv-2078, and the Court allowed discovery where the government  
11 acted with extreme delay. That was the only issue before the  
12 Court.

13 One of my colleague's opinion -- another one of my  
14 colleague's opinion that's extremely informative, I think it was  
15 a Judge Lamberth opinion, *Landmark Legal Foundation versus EPA*,  
16 959 F.Supp.2d 175, wherein Judge Lamberth permitted discovery on  
17 the question of whether senior administrators used personal  
18 e-mails -- notice the voice inflection -- personal e-mails for  
19 official business and whether the EPA excluded key officials from  
20 their initial search.

21 Now, I have some questions for the plaintiff first, and  
22 then I'll have some questions for the defendant. I want defense  
23 counsel to pay careful attention to the questions I'm going to  
24 ask plaintiff's counsel because I want you to respond as well. I  
25 may not ask each and every question in the order in which I'm

1 asking plaintiff's counsel, but that does not mean that I don't  
2 want your input. I do.

3 Plaintiff's counsel states that the issue is whether State  
4 conducted a search reasonably calculated to uncover all relevant  
5 records, and that you need discovery in order to uncover  
6 admissible evidence about whether the State Department and the  
7 former secretary deliberately thwarted FOIA. You also seek  
8 discovery of the Clintonemail.com system to, quote, "determine  
9 possible methods for recovering whatever responsive records may  
10 exist." And that's Mr. Bekesha's declaration, counsel's  
11 declaration, at Docket Number 48-1.

12 I'll start with the later point first, Counsel. What  
13 authority exists for this Court to order a third party to produce  
14 the physical server to you for your own forensic inspection? And  
15 when I say "to you," to your client. And when I say "third  
16 party," it actually would not be the former secretary. My  
17 understanding is the -- from press reports, from no other  
18 knowledge, my understanding is that the server's in the  
19 possession or in control now of the FBI. But I don't know that  
20 to be a fact. That's just my understanding from media reports.  
21 But you don't really discuss this in your briefs, but it's set  
22 forth in your declarations, so what's your answer?

23 MR. BEKESHA: Thank you, Your Honor. First off, we're not  
24 asking for the third parties to turn the system of records over  
25 to my client, to Judicial Watch. We're asking that it be turned

1 over to the State Department so that the State Department can  
2 conduct the search it should have conducted originally.

3 THE COURT: All right. Turned over when? Whenever the --  
4 at what point in time?

5 MR. BEKESHA: When it's appropriate. Arguably it probably  
6 would require a court order, at which point, if -- if this Court  
7 determines that an adequate search was not conducted, we believe  
8 that the -- to the extent the system exists, or copies of the  
9 system or an archive of the system exists, it should be turned  
10 over to the State Department to conduct the searches.

11 But one of the reasons why we ask for discovery is to  
12 determine if the system does still exist and where that system  
13 is, where the records are at this time. To the extent it doesn't  
14 exist anymore, it may become a moot point.

15 THE COURT: We're talking about it. Just what is it?  
16 What are we talking about?

17 MR. BEKESHA: Unfortunately, we don't know physically what  
18 the "it" is. It would be the system of records, the  
19 Clintonemail.com system that was used by Mrs. Clinton and  
20 Ms. Abedin to conduct official government business for four  
21 years. It could be a physical server. It could be a thumb  
22 drive. At this point it could be a DVD that has the entire  
23 system on it.

24 THE COURT: It could be a telephone.

25 MR. BEKESHA: It could be anything, yes, Your Honor. We

1 don't know.

2 THE COURT: So what would the language in the order say?

3 MR. BEKESHA: Well, I think the first thing that would be  
4 helpful would be to conduct a limited discovery to find out how  
5 it exists, where it exists. That way the Court's order could be  
6 more precise. Without that discovery, I could imagine the Court  
7 could order the State Department to go collect, gather, seize,  
8 the system of records in whatever form it currently resides.

9 THE COURT: But hasn't the government done that? The  
10 government requested that Mrs. Clinton turn over all agency  
11 records to the government, and my understanding is that she did  
12 so, and she signed a declaration under penalty of perjury. Why  
13 isn't that sufficient?

14 MR. BEKESHA: Unfortunately, Mrs. Clinton didn't sign a  
15 declaration that stated she turned over all records. She stated  
16 that she directed all records to be returned, and it's her belief  
17 that all records have been returned. She doesn't actually say  
18 under oath that all records have been returned. And one of the  
19 arguments we make in our briefs is that it was improper for a  
20 nongovernment employee to self-select the records for the State  
21 Department to review. All the regulations, the statute, it  
22 envisions government employees to search their records or to  
23 review their records and determine whether or not those records  
24 are personal or if they're federal records. That didn't happen  
25 in this case. In this case --

1 THE COURT: Well, suppose the Court were to direct the  
2 government to issue a subpoena to her saying turn over all -- and  
3 I'll explain what the records are -- within five days, just turn  
4 them all over. Would that be -- why wouldn't that be adequate?

5 MR. BEKESHA: That could be, Your Honor. If it's to turn  
6 over the system of records that had Mrs. Clinton's -- because  
7 it's not only Mrs. Clinton's records, but also Ms. Abedin's  
8 records because both of them were conducting --

9 THE COURT: Right. What about subpoenas to both of them?

10 MR. BEKESHA: I think that would be completely  
11 appropriate, Your Honor, and I think that would --

12 THE COURT: In other words, direct the government to issue  
13 subpoenas to the former secretary and Ms. Abedin, essentially,  
14 saying by no later than, turn over all agency records in your  
15 possession and control.

16 MR. BEKESHA: I think the problem, and where the struggle  
17 is, by using the term "agency records," it requires those two  
18 individuals that are not government employees to decide what's a  
19 federal record and what's a personal record. The more  
20 appropriate --

21 THE COURT: The agency records don't lose their character  
22 as agency records just because an employee takes them home,  
23 though, do they?

24 MR. BEKESHA: They don't, Your Honor, but I think --

25 THE COURT: So let's talk about that for a second. So

1 let's assume that all the agency records were housed at the  
2 former secretary's home. They're still agency records under the  
3 constructive control of the government, are they not?

4 MR. BEKESHA: That's correct, Your Honor. I think --

5 THE COURT: Essentially the government would be saying,  
6 "Give us our records back."

7 MR. BEKESHA: That would be correct, Your Honor. But it's  
8 our belief and it's our argument that at that point, if that  
9 order was issued, that Mrs. Clinton and Ms. Abedin would have to  
10 turn over all the records from that system.

11 THE COURT: Well, why would they be treated any  
12 differently than, say, an employee? Let's assume that the former  
13 secretary is still the secretary and the FOIA request comes in --  
14 and maybe you can't answer this, but the government will have to  
15 answer it -- what's the process then for the current secretary to  
16 determine what records should be produced pursuant to a FOIA  
17 request?

18 I don't buy this notion that a secretary of any government  
19 office, Secretary of State, Defense, any other, is sitting at a  
20 computer screen determining this is an official record, this is  
21 not. I don't buy that. It's been suggested by the government.  
22 I don't buy that by any stretch of the imagination. That simply  
23 doesn't happen. I think there are probably FOIA compliance  
24 officers and IT specialists who probably have that  
25 responsibility, but I don't know for a fact. What do you know?

1 MR. BEKESHA: I believe that's correct as well. I agree  
2 with you, Your Honor, that most likely any secretary doesn't  
3 review his or her records to determine what's responsive to a  
4 FOIA request, what's personal.

5 THE COURT: Well, maybe at some point. Maybe at some  
6 point it goes on.

7 MR. BEKESHA: And at some point possibly, but, you know,  
8 if it's a mass bulk, if it's a master request, probably not. But  
9 what the important issue is, as you've said, is it's a FOIA  
10 specialist or an IT specialist that would conduct the search.  
11 It --

12 THE COURT: Pursuant to search words.

13 MR. BEKESHA: Pursuant to search words. It wouldn't be  
14 the personal attorney of the sitting secretary comes into the  
15 State Department and comes into the Defense Department and  
16 conducts the search. It would be somebody that is responsible  
17 and has obligations to the government.

18 You know, another way to look at this is, Mrs. Clinton  
19 returned approximately 55,000 pages of records, at which point  
20 the State Department and the National Archives reviewed all those  
21 records and determined that approximately 2,000 of those pages  
22 were personal and weren't agency records. We believe that's the  
23 appropriate route. All records should be returned from the  
24 system, and then archives in the State Department would review it  
25 to determine is this really personal, is this really an agency

1 record.

2 THE COURT: That case is not before me. I don't know what  
3 the circumstances were for the return of the 55,000 documents,  
4 but are you suggesting that that process was somewhat different  
5 than the process for the return of the very few documents here?

6 MR. BEKESHA: The documents that were returned here were  
7 part of the 55,000.

8 THE COURT: I see, right.

9 MR. BEKESHA: And so the State Department then conducted a  
10 search of the 55,000 pages.

11 THE COURT: Well, then arguably the process has already  
12 been completed then, all the documents have been turned over.

13 MR. BEKESHA: But self-selected by Mrs. Clinton's personal  
14 attorneys, not by the State Department or the National Archives.  
15 There was approximately 50,000 pages that were not returned to  
16 the State Department. It's our belief, it's our assertion, that  
17 the law is clear that those 50,000 pages should have been  
18 returned as well, and that the State Department and the National  
19 Archives should have reviewed those records and made the  
20 determinations. And the reason is, is because Mrs. Clinton is no  
21 longer Secretary of State. If she was Secretary of State  
22 currently, her advisors, IT people, FOIA specialists, would be  
23 able to search those records. Mrs. Clinton herself, as a sitting  
24 secretary and government employee, would be able to review the  
25 records herself and determine what's an agency record and what's

1 a personal record. But she's not a government employee anymore,  
2 so there's a difference.

3 You know, another example we discussed in our brief --

4 THE COURT: Wouldn't the employee have some discretion  
5 over at least looking at the compilation of e-mails, say, for  
6 instance, and determine that these are all personal, and have the  
7 authority to exclude those from the view of the IT specialist?

8 MR. BEKESHA: Yes, Your Honor, but that would take place  
9 when they're a government employee, not after they have --  
10 they're no longer a government employee.

11 For example, Ms. Abedin and Ms. Mills, in addition to  
12 using their nonstate.gov e-mail accounts, they also used  
13 state.gov e-mail accounts. So they used the government system as  
14 they were supposed to, and those records were a system of records  
15 that were searched in this case. And records were searched,  
16 reviewed, and produced to Judicial Watch.

17 Now, Ms. Mills -- it's our understanding that the State  
18 Department didn't pick up the phone and call Ms. Mills and  
19 Ms. Abedin, who are no longer State Department employees, and ask  
20 them, "Ms. Mills, could you come back to the State Department,  
21 review your e-mails and make a determination if they're federal  
22 records or if they're personal records?" It's our understanding  
23 they didn't do that. And it's our belief that they didn't do  
24 that because it's not appropriate because they are no longer  
25 government employees. They no longer have the right or

1 obligation to review their records and determine if they're  
2 federal records or personal records.

3           So Ms. Abedin and Mrs. Clinton, when they were in office,  
4 had the right to review their records, had the right to designate  
5 certain records as personal records, had the right to even delete  
6 those records. But that right is no longer theirs, and it no  
7 longer exists because they're no longer federal government  
8 employees. And because of that, the whole system of records, all  
9 the e-mails that were sent on this system, must be reviewed by  
10 either the State Department, the archives, or someone else that's  
11 in the Federal Government.

12           THE COURT: So, then, your suggestion to the Court would  
13 be: A subpoena may address the issue, but the subpoena should  
14 not just refer to all agency records, it should refer to all  
15 records maintained on --

16           MR. BEKESHA: All records maintained on the system for  
17 Ms. Abedin and Mrs. Clinton, to the extent --

18           THE COURT: And returned to the government.

19           MR. BEKESHA: And returned to the government to conduct  
20 the appropriate search and the appropriate review. And then  
21 those records would be search reviewed, go through the normal  
22 FOIA process. And once that's complete, the records, to the  
23 extent there are any, will be produced to Judicial Watch or will  
24 be withheld under any of the FOIA exemptions.

25           THE COURT: Now, is there any precise authority for that

1 request, for the issuance of a subpoena that would be that broad?

2 MR. BEKESHA: I think Judge Lamberth talked about it a  
3 little bit.

4 THE COURT: In the *Landmark* case?

5 MR. BEKESHA: In the *Judicial Watch versus Department of*  
6 *Commerce* case, which we cited. I would say it's probably not as  
7 broad as this request, but in that case the plaintiff, *Judicial*  
8 *Watch*, requestor, knew what record -- it was a limited set of  
9 records they were asking for. It was very tangible.

10 Unfortunately, in this case, because Mrs. Clinton and  
11 Ms. Abedin didn't take records with them, they took a system of  
12 records with them, it's a little bit different, but the same  
13 principles apply, Your Honor.

14 THE COURT: What about the Judge Boasberg opinion? Did  
15 you argue that case, the -- in the *Kerry* case?

16 MR. BEKESHA: I did not, Your Honor, but I'm familiar with  
17 it.

18 THE COURT: All right. And I'm referring to *Judicial*  
19 *Watch versus Kerry*, 15-785. Judge -- my colleague found that the  
20 State Department fulfilled its obligations under the Federal  
21 Records Act -- which is somewhat different -- by requesting the  
22 former secretary to return the records in her possession, which  
23 is what this Court did. That case is on appeal. I'm not sure if  
24 it's on -- what kind of track is it on?

25 MR. BEKESHA: The regular track, Your Honor.

1 THE COURT: The regular track. All right.

2 Why shouldn't this Court stay this matter until it gets  
3 some guidance from the circuit in that case?

4 MR. BEKESHA: I think that case is very different. In  
5 that case what's at issue, what Judicial Watch -- the relief  
6 sought was for the State Department to contact the National  
7 Archives and the Attorney General and ask them to initiate  
8 proceedings.

9 THE COURT: To retrieve the documents, correct?

10 MR. BEKESHA: Potentially, Your Honor. But, you know, the  
11 Federal Records Act is limited. So Judicial Watch, in order by  
12 the Court, could only require the State Department to discuss  
13 or -- with the Attorney General. The case itself would have no  
14 binding precedent, and it wouldn't be bound -- the Justice  
15 Department wouldn't be bound. The Justice Department, even  
16 though they were requested to proceed by the State Department,  
17 isn't required to take any additional steps. So, you know, that  
18 case is very limited in what the potential remedy is.

19 THE COURT: So in other words, the Court was limited --  
20 did the Court order or did the Court request the government to  
21 take steps to retrieve those records?

22 MR. BEKESHA: The Court decided in that case that the  
23 State Department -- based a lot on what your previous orders in  
24 this case were, that what the State Department did was  
25 sufficient. So it looked at the --

1 THE COURT: Did Judge Boasberg follow what this Court did?  
2 Did he mention that at all?

3 MR. BEKESHA: I'm not sure if he specifically mentioned  
4 what this Court did. But it talked about Mrs. Clinton's  
5 declaration, about the letters that were submitted in this case  
6 and were ordered with respect to Ms. Mills and Ms. Abedin and  
7 Mrs. Clinton. So I'm not sure if he used the language referring  
8 to this case, but following the opinion, it's clear that he  
9 believed that the State Department satisfied their obligation in  
10 the Federal Records Act case based a lot and primarily on what  
11 had transpired in this case.

12 THE COURT: So there's no doubt in your mind, in Judicial  
13 Watch's mind, that those agency records retained as character  
14 agency records, even though they were housed outside of the  
15 Department of State?

16 MR. BEKESHA: Absolutely, Your Honor. We believe that  
17 this was an off-grid system, but it was still a system part of --

18 THE COURT: I'm sorry, it was a what?

19 MR. BEKESHA: Off-grid. It was a parallel system to the  
20 state.gov system, but it was still a system being used by the  
21 head of the agency and at least one of her closest advisors.  
22 We --

23 THE COURT: Was that fairly unique? Was it limited --  
24 this type of system, was that limited to the former secretary and  
25 Mrs. Abedin, do you know?

1 MR. BEKESHA: We don't know specifically. This Court  
2 asked -- because the three individuals at issue in this case is  
3 Mrs. Clinton, Ms. Abedin, and Ms. Mills. This Court asked  
4 Mrs. Clinton to identify if Ms. Abedin and Ms. Mills used the  
5 system. Mrs. Clinton said that Ms. Abedin did, Ms. Mills didn't.  
6 But the Court, because it wasn't before, didn't ask the broader  
7 question of: Were any other State Department employees using the  
8 system? So Mrs. Clinton didn't answer that question. It wasn't  
9 asked of her, so we don't know. But we know her deputy chief of  
10 staff, Ms. Abedin, did use the system, based on another FOIA  
11 request we have from all of Ms. Abedin's records. We know  
12 there's approximately 28,000 pages that she returned to the State  
13 Department after the Court ordered it, so we know she used that  
14 system substantially as well.

15 THE COURT: Suppose the Court -- and the Court's inclined  
16 to do this, to direct the government to issue a subpoena to the  
17 three individuals.

18 Suppose the government does that and orders that the  
19 individuals return all records to the Department of State as soon  
20 as possible, and the three individuals say that they will as soon  
21 as they can. Is that sufficient?

22 MR. BEKESHA: Under that original order, yes. There may  
23 be some issues there about the subpoena jurisdiction this Court  
24 could have.

25 THE COURT: Such as? Tell me now before I get out on a

1 limb. What issues?

2 MR. BEKESHA: Well, I mean, we don't know how three  
3 parties are going to respond. You would hope that --

4 THE COURT: Well, they all have lawyers.

5 MR. BEKESHA: You would hope that the three lawyers, since  
6 they all three -- I believe at least two of them, Ms. Mills and  
7 Mrs. Clinton's a lawyer, Ms. Abedin may not be, but they would  
8 understand what a subpoena is and appropriately respond to it.

9 Mrs. Clinton still has a --

10 THE COURT: I've been wrestling with that. I just don't  
11 see --

12 MR. BEKESHA: Mrs. Clinton still has a --

13 THE COURT: Let me speak. I've been wrestling with that.  
14 I don't see what the impediment is. I'll hear from government  
15 counsel about just directing the government to issue a subpoena  
16 saying return our records. Return all the records so we can  
17 determine, under the circumstances, since we created this system  
18 for you -- and that's your allegation as well, correct?

19 MR. BEKESHA: Yes, Your Honor, and we believe --

20 THE COURT: The government created this system to enable  
21 an off-site server to house information. I'm not adding any  
22 adjectives. I'm not casting any aspersions at this point, but I  
23 think it's clear that the government -- in fact, the system was  
24 created before the former secretary was sworn in, correct?

25 MR. BEKESHA: It was created eight days before she was

1 sworn in the day that her confirmation hearing started.

2 THE COURT: So especially under a scenario where the  
3 former system -- the system at issue was created by the  
4 government -- and, again, I'm not casting aspersions. I'm not  
5 going to use words to accommodate or to thwart. I'm not using  
6 that. It was created, and it had the effect of enabling the, I  
7 guess, transmittal and receipt of agency records and other  
8 records to an off-site -- by virtue of an off-site server.  
9 Especially under that scenario, why shouldn't the government be  
10 required to say, return all the records that we allowed you to  
11 possess and control, jointly with us. Give us our records back.  
12 Give us everything back so we can determine what the public has a  
13 right to know. Is it as simple as that?

14 MR. BEKESHA: Yes, Your Honor, that would be entirely  
15 appropriate, and we believe the Court should enter such an order.

16 THE COURT: No error there?

17 MR. BEKESHA: No error there. We also believe at that  
18 point discovery, you know, although there's some issues about the  
19 processing, but --

20 THE COURT: That's all the court can do under the  
21 circumstances. I mean, let's assume that -- and, again, I'm just  
22 relying upon media reports like everyone else. Maybe the  
23 government knows more, I don't know. But we assume that there's  
24 some sort of investigation going on, correct?

25 MR. BEKESHA: We believe so, but --

1 THE COURT: But who knows.

2 MR. BEKESHA: -- we don't know exactly what the  
3 investigation is, how long it could happen.

4 THE COURT: There is an investigation. So at least a  
5 subpoena will have the effect of informing the Court and the  
6 public that we don't have the documents, that they don't have the  
7 documents, or we'll be happy to turn them over.

8 MR. BEKESHA: It's as simple as that, Your Honor, yes.

9 THE COURT: And you'd be satisfied with that, correct?

10 MR. BEKESHA: We would be, Your Honor, yes. I mean, at  
11 that point --

12 THE COURT: No additional request?

13 MR. BEKESHA: If all the records are turned -- if the  
14 entire system's turned over and --

15 THE COURT: When you say "system," what do you mean by  
16 that? That word is used a lot.

17 MR. BEKESHA: All of the records that were sent and  
18 received on the Clintonemail.com server for Ms. Abedin and  
19 Mrs. Clinton. What we're not looking for is for Mrs. Clinton and  
20 Ms. Abedin to self-select records to be returned. And that's why  
21 I just use "system" because it was a system of records, but it's  
22 all records that were sent and received on the Clintonemail.com  
23 server for the four years --

24 THE COURT: Well, suppose then, though, that the employees  
25 push back and say, "Look, we understand that we have an

1 obligation to turn over official records, and as far as we're  
2 concerned, each one says we turned over all the other records and  
3 all the official records and everything else is personal." Why  
4 isn't that sufficient? Because if the former secretary were the  
5 current secretary, I think she would have the right to do that,  
6 wouldn't she?

7 MR. BEKESHA: If she was the current secretary, she would  
8 have that right.

9 THE COURT: Well, why should she be treated differently,  
10 then?

11 MR. BEKESHA: Because she's not a government employee  
12 anymore. The regulations, the statutes, and the laws, they don't  
13 apply to her. She has no obligation to the government or to the  
14 American people to --

15 THE COURT: But she has an obligation to return government  
16 files to the government.

17 MR. BEKESHA: She does, but it's --

18 THE COURT: I don't care what -- you know, if she's a  
19 former employee or current employee, the government records  
20 don't -- I understand there's case law that says that, you know,  
21 records may be off-site if they aren't in the possession and  
22 control. I understand that. Nevertheless, they don't lose their  
23 character as government records. And there's also case law that  
24 talks about constructive control of an agency of records that are  
25 housed off premises.

1 MR. BEKESHA: Yes, Your Honor. And we just believe it's  
2 important in this case to have all of the records returned and  
3 let the State Department and National Archives determine what's  
4 federal records and what's personal records.

5 THE COURT: Right. You're not suggesting at all -- I know  
6 you'd like to pour over everything, but you're not suggesting  
7 that they be turned over to the plaintiff?

8 MR. BEKESHA: No, Your Honor.

9 THE COURT: Right.

10 MR. BEKESHA: I mean, what we would like is for all of the  
11 records, all of the e-mails sent and received by Ms. Abedin and  
12 Mrs. Mills on the Clintonemail.com system server, e-mail  
13 addresses for the four years, to be turned over to the State  
14 Department so that the State Department can process the records  
15 as though this is any normal, any other FOIA request.

16 THE COURT: Now, is that request driven by the  
17 circumstances surrounding the creation of the system or not? I  
18 mean, suppose the former secretary had just resigned and copied  
19 all the e-mails or whatever on a thumb drive and just taken that.  
20 Same request?

21 MR. BEKESHA: Well, it depends. Did she copy it over on  
22 the thumb drive, or did she take all of them, or did she leave a  
23 copy still residing at the State Department?

24 THE COURT: Well, she took everything because if there was  
25 a copy at the State Department we wouldn't be having this

1 discussion now, right?

2 MR. BEKESHA: I wasn't sure in your hypothetical, is what  
3 I was asking.

4 THE COURT: Yeah. I think in the hypothetical she  
5 resigns, and then she's turned the lights off. She copies  
6 everything to the thumb drive. There's no copy. She takes it  
7 home with her.

8 MR. BEKESHA: Okay. You know, that's not the case we have  
9 now. Because of the creation, the use --

10 THE COURT: All right. So everything goes back to the  
11 creation?

12 MR. BEKESHA: The creation and the use during -- and how  
13 she left with the records.

14 THE COURT: All right. Let's assume, though, that she --  
15 you know, she's turned the lights off. She copies them. She  
16 goes home. Nothing -- no questions raised about the creation of  
17 any system for housing e-mail or system off-site, why would the  
18 analysis be different, then?

19 MR. BEKESHA: In part of this -- because part of what  
20 she -- what Mrs. Clinton did when she removed the records. The  
21 State Department -- there's no information that the State  
22 Department reviewed what she was taking with her. They were  
23 supposed to conduct an inventory under their own regulations of  
24 the records. None of that took place. So you have this system  
25 that was created when she took office. She used the system.

1           You know, as you said earlier, the revelation, that was  
2 completely by Judicial Watch and the public. I think it's clear  
3 from all the e-mails we submitted to Your Honor that the State  
4 Department, throughout her four years, senior-level management  
5 individuals knew of the system, helped create, helped manage the  
6 system.

7           THE COURT: So what happened -- let me ask you. Let me  
8 stop you for a second.

9           What happened in -- when this case was closed? Was there  
10 a snafu there, or a breakdown in communications, or what?

11           MR. BEKESHA: There was no breakdown, Your Honor. What  
12 happened was the agency informed Judicial Watch by letter that it  
13 conducted a search. Judicial Watch, as we do in many cases  
14 before this Court, took the government at its word, that a  
15 sufficient search --

16           THE COURT: Well, everyone should be able to take the  
17 government at its word.

18           MR. BEKESHA: That's correct, Your Honor, and we thought  
19 at that time that was appropriate. Most of the time we do  
20 believe that's appropriate; however, we found out then by the *New*  
21 *York Times* article that there was this other record system, a  
22 parallel system for Mrs. Clinton and Ms. Abedin --

23           THE COURT: Did the government claim it was unaware of  
24 that parallel system?

25           MR. BEKESHA: They haven't answered that question. I

1 believe in their brief --

2 THE COURT: Is that a relevant question to be answered  
3 during discovery?

4 MR. BEKESHA: I believe that's important. I believe  
5 that's one of the questions we raise in our motion to be asked,  
6 because how the FOIA processing works based on the --

7 THE COURT: So but for the *New York Times* we would not be  
8 carrying on this discussion today?

9 MR. BEKESHA: That's correct, Your Honor. The government  
10 and Mrs. Clinton did a very good job of six years of concealing  
11 this system from the American public, and if it weren't for --

12 THE COURT: Well, that's your word. I'm not -- I'm not --  
13 I'm staying away from any adjectives or --

14 MR. BEKESHA: Sure. Yes, Your Honor, the *New York*  
15 *Times* --

16 THE COURT: -- adverbs or anything else, yeah.

17 MR. BEKESHA: The *New York Times* wrote a piece about --

18 THE COURT: It sounds like the *New York Times* did a good  
19 job, too, though, right?

20 MR. BEKESHA: It sounds like they did, Your Honor. We  
21 probably wouldn't be here if it weren't for them.

22 THE COURT: No. I want to be careful. I'm not casting  
23 any aspersions at all on the system that was created. I mean,  
24 it's a fact that there was a system created, and that's an issue  
25 that the Court will consider or may consider in determining

1 discovery and, indeed, the scope of discovery. But I don't think  
2 it's appropriate to consider -- actually, we'll talk about that  
3 in a few minutes because you used the word "thwart" --

4 MR. BEKESHA: Yes, Your Honor.

5 THE COURT: -- in your request.

6 Before I get to that, let me ask you this, though: Why  
7 shouldn't the Court -- it was a very interesting argument last  
8 month in the case of *Competitive Enterprise Institute Versus*  
9 *Office of Science and Technology*, and it's a FOIA case where the  
10 circuit's considering whether the District Court properly  
11 dismissed the case on a motion to dismiss. The plaintiffs allege  
12 that the director of the Office of Science and Technology used  
13 his personal e-mail for official government business.

14 It seems to me that the circuit will have something to say  
15 about the framework for considering when an agency has  
16 constructive control over an individual's personal e-mail system  
17 that is used for government purposes, whether the government has  
18 the power to search the e-mail or whether a request to the  
19 government employee to produce any potential agency records and  
20 their personal e-mail is sufficient.

21 Why wouldn't that case be relevant to this case? And if  
22 you think it is, why shouldn't the Court hold off? I mean, the  
23 argument was in mid-January. Why shouldn't the Court hold off  
24 for a while?

25 MR. BEKESHA: It's a very different case, Your Honor.

1 With respect to the *CEI* case and that one individual, he was  
2 using personal e-mail. He was using, I believe, it was through a  
3 university or something, so it wasn't G-mail or AOL or Yahoo!,  
4 but it was --

5 THE COURT: So wasn't the former secretary using a  
6 personal e-mail as well?

7 MR. BEKESHA: She was using a Clintonemail.com system, but  
8 she was using it -- the State Department, as we know through  
9 declarations, didn't provide her with an official e-mail address.  
10 They didn't provide her with a computer, a BlackBerry, a laptop,  
11 an iPad or iPhone to conduct her e-mail. They --

12 THE COURT: So the question is: Why isn't that a personal  
13 e-mail system, then?

14 MR. BEKESHA: Because the State Department was implicit in  
15 allowing her to use this system. In fact, we provided limited  
16 evidence that shows that State Department employees help manage,  
17 maintain, use the system. And there was the head of the agency.  
18 For all intents and purposes, the system was an agency system.  
19 It was just parallel to the normal course.

20 We understand that government employees, even secretaries,  
21 may use a personal e-mail address here, there, because they're on  
22 vacation, they're out-of-pocket, you know, there are difficulties  
23 getting connected to the government's system.

24 THE COURT: Was the government receiving copies of all  
25 e-mails to state.gov?

1 MR. BEKESHA: To the extent e-mails went to state.gov, the  
2 State Department would have those records, Your Honor.

3 THE COURT: Then why was there a need for the government  
4 to ask early on in '14 for the former secretary to return  
5 documents?

6 MR. BEKESHA: I think there are two reasons for that:  
7 One, based on some IG reports, the State Department isn't the  
8 best at maintaining their own system of records. And so, even if  
9 it was sent to a state.gov e-mail account, it may not have been  
10 captured and archived appropriately. But the second issue in --

11 THE COURT: But that was -- that would also be another  
12 reason that counsel's in favor of a subpoena, then, to make sure  
13 that all documents are returned.

14 MR. BEKESHA: Yes, Your Honor.

15 THE COURT: Did the government request the return of all  
16 documents or agency records or agency e-mails?

17 MR. BEKESHA: They -- I believe they asked for federal --  
18 what they believe -- what the individuals believed were federal  
19 records.

20 THE COURT: Right.

21 MR. BEKESHA: You know, the other reason why it's  
22 important and why the State Department may not have all records  
23 is because Mrs. Clinton also communicated with secretaries in  
24 other agencies, which would not be on the state.gov system. She  
25 communicated with foreign leaders. That wouldn't have a

1 state.gov e-mail account. We also know that there's  
2 approximately 18 pages, I believe it's approximately nine e-mails  
3 between her and President Obama, and those records would not be  
4 on the state.gov system.

5 So to the extent she was communicating with her  
6 assistants, with her staff, yes, a lot of those records may be on  
7 the State Department system if the State Department kept good  
8 archives, managed their records. But then there's also all of  
9 these different records that would not be captured by the  
10 state.gov system. And of, you know, even more relevant  
11 importance in this case is we know that Ms. Mills used a  
12 nonstate.gov e-mail account at certain times. We know that  
13 Ms. Abedin used an e-mail address on the Clintonemail.com system.  
14 So communications between Mrs. Clinton and Ms. Abedin where  
15 they're both using Clintonemail.com e-mail addresses, the State  
16 Department would not have those records in their possession.

17 THE COURT: Ms. Abedin has not signed a declaration that  
18 she has returned all --

19 MR. BEKESHA: That's correct. In response to your court  
20 order, her attorney sent a letter to the State Department.

21 THE COURT: Right. Well, it really wasn't an order to  
22 her.

23 MR. BEKESHA: It was an order to the State Department to  
24 ask.

25 THE COURT: All right.

1 MR. BEKESHA: That's correct, Your Honor.

2 THE COURT: So we have nothing -- we have no declaration  
3 from her?

4 MR. BEKESHA: That's correct.

5 THE COURT: Ms. Mills, would that serve any purpose to  
6 have a declaration from her?

7 MR. BEKESHA: You know, Ms. Mill's situation's a little  
8 bit different because she wasn't -- she didn't have an e-mail  
9 address on the Clintonemail.com server. We believe it's  
10 important to -- for the State Department to recover all the  
11 records from her, but it's a little bit different of an argument.  
12 In that case it's more like the *CEI* case, and less of what we  
13 have at issue with Mrs. Clinton and Ms. Abedin using this  
14 government -- you know, this parallel system of records.

15 THE COURT: So the theory is that there'd be no harm in  
16 asking if you have any federal records, return them to State.

17 MR. BEKESHA: That's correct. And with respect to  
18 Ms. Mills, because she was using -- and we don't know what her  
19 personal e-mail system she was using. I think it may have been  
20 G-mail but we're not sure. You know, because she was using that  
21 system, there isn't this -- it wouldn't be appropriate for the  
22 Court to order her to return all of her e-mails on her personal  
23 system for the State Department to review, only those she  
24 believes to be federal records; whereas, from the  
25 Clintonemail.com system, you know, all of those records are

1 potentially agency records because they were sent on this  
2 separate system that was created, used for the four years that  
3 managed, maintained for the four years as Mrs. Clinton and  
4 Ms. Abedin were in office. And so that's why I believe -- we  
5 believe that *CEI*, that case is a little bit different. It looks  
6 more like Ms. Mills and less like Mrs. Clinton and Ms. Abedin.  
7 And that's why we are really focusing here today and in our  
8 motion on the Clintonemail.com system that Mrs. Clinton and  
9 Ms. Abedin used and less of a focus on Ms. Mills's use of her  
10 G-mail account; because we really want to focus on what we  
11 believe should be in the agency's possession.

12 THE COURT: Let me ask you this: The use of the word  
13 "thwart," and, again, I want the record clear: This Court's not  
14 casting any aspersions at all on the manner in which the system  
15 was created. Suffice it to say the system was created. It was  
16 there, and that's all I'll say about it.

17 But you've used the word "thwart," and you say that you  
18 need discovery to explore whether Mrs. Clinton and the State  
19 Department sought to deliberately thwart FOIA through the  
20 establishment used in the concealment of Clintonemail.com.

21 Discovery on that issue can't stand alone, though, can it?

22 MR. BEKESHA: We believe it could, Your Honor. I mean,  
23 that --

24 THE COURT: Under what authority? What authority?

25 MR. BEKESHA: That would be the *Landmark* case.

1 THE COURT: Judge Lamberth's case?

2 MR. BEKESHA: Judge Lamberth. You know, Judge Lamberth  
3 looked at the evidence and said, you know, "They were using this  
4 other e-mail system, we're not sure -- I'm not sure, I don't want  
5 to -- I'm not sure why the system -- why they were using these  
6 other personal e-mail accounts. It could have been by accident  
7 or it could have been to prevent access to those e-mails under  
8 FOIA." And so he ordered discovery to try to figure out,  
9 essentially, why these agency officials were using the separate  
10 system, and --

11 THE COURT: Were you involved in that case?

12 MR. BEKESHA: I was not, Your Honor.

13 THE COURT: Was discovery planned? I just don't recall.

14 MR. BEKESHA: You know, I believe there was something  
15 limited. The question was limited in focus.

16 THE COURT: I believe in his opinion he did order  
17 discovery, but I'm just wondering -- I just haven't had a chance  
18 to determine whether or not there was a plan.

19 MR. BEKESHA: I'm not sure, Your Honor. I'd have to check  
20 that.

21 THE COURT: Yeah.

22 MR. BEKESHA: But, you know, so that's where, you know,  
23 our discussion of, you know, reasonable suspicion, you know, a  
24 lot of the evidence seems to suggest there's thwarting because of  
25 what's already public. But because it's a FOIA case, because

1 there hasn't been discovery, we have limited admissible evidence.  
2 And so part of our motion for discovery was to collect that  
3 information so that we could make an argument to this Court with  
4 admissible evidence and not just relying on newspaper articles,  
5 letters that were ran in other cases.

6 THE COURT: Let me ask you this: Based on everything that  
7 the Court knows, considering all the declarations -- and maybe  
8 the Court will order some more declarations to determine. For  
9 instance, in January there was a statement filed by government  
10 counsel that additional offices had to be searched, maybe more of  
11 a declaration to determine why wasn't that learned earlier, what  
12 happened. You know, in other words, crossing the T's and  
13 depositing the I's, what, where, when and why. The declaration  
14 that was submitted just basically said there were additional  
15 offices, we searched them, additional information, we searched,  
16 nothing relevant. But why didn't you find that additional  
17 information early?

18 MR. BEKESHA: That's correct, Your Honor.

19 THE COURT: Especially if a motion for summary judgment  
20 defending the adequacy of the search was filed a month or prior  
21 thereto.

22 MR. BEKESHA: That's correct.

23 THE COURT: And what else remains? I mean, this is a  
24 constant drip, a declaration drip. That's what we're having  
25 here, you know --

1 MR. BEKESHA: It is, Your Honor.

2 THE COURT: -- and it needs to stop.

3 MR. BEKESHA: And the other issue is going back to May of  
4 2013 when we filed the lawsuit, and then, you know, we received a  
5 letter saying they conducted an adequate search in January or  
6 February of 2014. You know, one of the offices -- and one of the  
7 offices that was searched was the Office of the Executive  
8 Secretariat, and that office is in charge of reviewing and  
9 searching -- searching and reviewing e-mails of the secretary,  
10 the secretary's chief of staff, the secretary's deputy chief of  
11 staff, so Mrs. Clinton, Ms. Abedin, Ms. Mills.

12 And so when we received this letter that they conducted a  
13 sufficient search, did the FOIA official know that those e-mails  
14 weren't in their possession and they didn't tell us? You know,  
15 there are questions there also on, you know, why did we have to  
16 wait a full almost two years for the *New York Times* to report  
17 that system?

18 So, you know, there are questions we have and that's why  
19 we've moved for discovery, but we've also provided enough -- we  
20 think enough admissible evidence that if the Court were to order  
21 the State Department to issue subpoenas, you know, it --

22 THE COURT: But you didn't ask me to issue a subpoena, did  
23 you?

24 MR. BEKESHA: We didn't at this point because --

25 THE COURT: Well, why not? Why didn't you?

1 MR. BEKESHA: Because we believed we needed additional  
2 information, and that's why we moved for discovery.

3 THE COURT: So it may be error, then, for the Court to  
4 order them to issue a subpoena, then?

5 MR. BEKESHA: We think we --

6 THE COURT: What personal information did you think you  
7 needed before you asked me for a subpoena?

8 MR. BEKESHA: I think we wanted to know more information  
9 about the processing of the request, the creation of the system,  
10 the use of the system.

11 THE COURT: So you aren't concerned about an error, are  
12 you? I'm concerned about creating an error.

13 MR. BEKESHA: Well, we believe --

14 THE COURT: And it's significant that you didn't ask for a  
15 subpoena.

16 MR. BEKESHA: We didn't ask because we thought it was  
17 important, as I said, to get as much admissible evidence as  
18 possible. However, as Your Honor said, a lot of declarations  
19 have been filed, a lot of letters by various attorneys have been  
20 filed. We've been before the Court. I think this is the fourth  
21 time. So you've heard from agency counsel quite a bit. So we  
22 think there's a good record.

23 But the question was whether or not we needed, you know,  
24 admissible evidence or just enough evidence that could justify  
25 such an order. So we were being cautious in that respect, but

1 the records there, you know, there are a lot of newspaper  
2 stories, you know, there's -- we've now provided a bunch of  
3 e-mails.

4 THE COURT: Can the Court credit the newspaper stories?

5 MR. BEKESHA: We were concerned about that, and that's why  
6 we're here today on the motion for discovery. We believe --

7 THE COURT: Well, under certain circumstances the Court  
8 can take judicial notice of news articles.

9 MR. BEKESHA: You could, Your Honor.

10 THE COURT: The Court has done that. In the *Budget*  
11 *Autonomy* case the Court did that.

12 MR. BEKESHA: It did, Your Honor. I believe Judicial  
13 Watch, we were being cautious. However, we do believe, you know,  
14 the e-mails we've submitted that were produced in response to  
15 various FOIA requests, I don't believe the State Department would  
16 object to the authenticity of those records; they wouldn't object  
17 to the authenticity of letters written by Mr. Kendall,  
18 Mrs. Clinton's personal attorney; personal attorneys of  
19 Ms. Mills. We've provided testimony by Ms. Mills that she gave  
20 to the Congress. She was under oath. You know, the State  
21 Department probably won't attest the authenticity to that.

22 But, you know, all of these records, they weren't all in  
23 this case, and so we were being cautious by asking for discovery  
24 so that we could make sure that we provided all the evidence that  
25 Your Honor needed to rule.

1 THE COURT: Right. But the subpoena at issue would  
2 obviate the need for discovery, and I think you've agreed with  
3 that.

4 MR. BEKESHA: Yeah. Yeah, it would, Your Honor. It would  
5 be, you know, if all the records from the system were asked for,  
6 for Mrs. Clinton and Ms. Mills and the records -- sorry -- and  
7 Ms. Abedin -- and the records were returned to the State  
8 Department and they were reviewed, and processed them, you know,  
9 then Judicial Watch would at that point receive what it's  
10 required to receive. You know, the State Department would  
11 satisfy its obligations under FOIA. So that's -- you're correct,  
12 Your Honor.

13 THE COURT: Let's assume -- let me back up for a second.  
14 Consider this scenario, that the Court considers  
15 everything that's been filed, all the declarations, I mean, the  
16 multiple declarations, and concludes that the search was  
17 adequate, especially given the declaration by the former  
18 secretary under penalty of perjury that she's turned over --  
19 well, I have to go back and take a look at that declaration.

20 MR. BEKESHA: Yeah, it doesn't say exactly that, Your  
21 Honor. The declaration says that she instructed or directed  
22 people to turn over all the records, and it's her belief that it  
23 was done because 55,000 pages were reviewed. So it didn't answer  
24 that question precisely.

25 THE COURT: All right.

1 MR. BEKESHA: But --

2 THE COURT: Well, let's assume that considering that  
3 declaration and the declarations of the declarants in this case,  
4 and especially with respect to the motion for summary judgment  
5 and the most recent declaration, the Court concludes  
6 hypothetically that the searches were adequate and has no  
7 problems with the adequacy of the search. I mean, at that point  
8 what difference does it make what the motivation was for the  
9 creation of the system? If the Court's convinced that the search  
10 is adequate, notwithstanding the fact that this system was  
11 created, what do you need discovery for?

12 MR. BEKESHA: If that were the case, Your Honor, we  
13 wouldn't need discovery. But it's our belief that on the  
14 information you have at this point, that such a ruling -- that we  
15 would --

16 THE COURT: You need discovery because it's impossible to  
17 file a response to the motion for summary judgment defending the  
18 adequacy of the search because of all these questions, right?

19 MR. BEKESHA: That's correct, Your Honor. So, however, if  
20 you reach that question or reach the answer to that question  
21 before discovery, discovery wouldn't be needed at that point. At  
22 that point, you know --

23 THE COURT: Well, you're not going to concede it wouldn't  
24 be needed. You still maintain that --

25 MR. BEKESHA: We --

1 THE COURT: Well, I don't want to make your argument.

2 MR. BEKESHA: Well, yes, Your Honor, we still would -- we  
3 would still need discovery, but I would be -- at that point it  
4 would be unclear on what grounds, if Your Honor had already  
5 ruled, on the adequacy of the search.

6 THE COURT: Right, right.

7 MR. BEKESHA: I mean, we --

8 THE COURT: You wouldn't agree with that necessarily, and  
9 I'm not -- you know, and that's fine. I'm inviting this  
10 conversation. But you would still -- your argument would still  
11 be that you are nonetheless not able to file an appropriate  
12 response of documents to the motion for summary judgment, even if  
13 questions had been raised?

14 MR. BEKESHA: That's correct, Your Honor.

15 THE COURT: All right.

16 MR. BEKESHA: That's correct.

17 THE COURT: And then, so you have discovery. So there's a  
18 genuine issue. Then what? Then what happens?

19 MR. BEKESHA: I think the next point would be if we -- if  
20 there's a genuine issue of whether or not the search was  
21 adequate --

22 THE COURT: Well, I have to determine that in order to  
23 enable you to have discovery, right?

24 MR. BEKESHA: No, Your Honor. We believe that the Court  
25 cannot make that determination until after discovery occurs.

1 THE COURT: All right.

2 MR. BEKESHA: So that's why the motion for summary  
3 judgment.

4 THE COURT: The answer to what's next has to wait until  
5 there's some discovery, I guess, right?

6 MR. BEKESHA: Yes, Your Honor. I mean, possibly, what we  
7 believe the evidence would show would be that there's a separate  
8 system of records, that the State Department knew about it, they  
9 authorized it, they authorized Mrs. Clinton leaving with the  
10 system of records. And therefore, for an adequate search to  
11 occur, State Department has to search those records on that  
12 system. And so if that's what the evidence shows and the Court  
13 ruled based on what we believe the evidence would reveal, then  
14 the next step would be probably to issue -- to order the State  
15 Department to issue subpoenas to get back those records so that  
16 they can conduct the search. That's how that would play out if a  
17 motion for discovery was granted, we conducted discovery, the  
18 evidence we believe is there, we find and were able to present to  
19 Your Honor, the next step would then be to issue an order asking  
20 for a subpoena -- you know, requiring the State Department to  
21 subpoena Mrs. Clinton to return all those records so that an  
22 adequate search could be conducted.

23 THE COURT: There's -- everyone -- I assume the parties  
24 are still awaiting another OIG report, correct?

25 MR. BEKESHA: Possibly. I mean, I believe there's

1 something outstanding. But, you know, the public's in the dark  
2 of exactly what's being investigated by the IG, when such report  
3 will come down the pipeline, if it will cover the precise issue,  
4 or if it's addressing a slightly different issue. We just don't  
5 know. The State Department may have a better sense, Your Honor,  
6 but we -- Judicial Watch does not know.

7 THE COURT: All right. What I'm going to do, let me give  
8 you a couple minutes, Counsel, if you want to add anything. I've  
9 asked a lot of questions. I'm going to take a short recess. If  
10 you would like to supplement your request by saying anything for  
11 the record, go right ahead.

12 MR. BEKESHA: Thank you, Your Honor. I thought after the  
13 time was up, I'm sorry.

14 THE COURT: Do you want to do it now?

15 MR. BEKESHA: If you don't mind, if I could collect my  
16 thoughts and when we come back.

17 THE COURT: Yeah, sure. Sure. That's fine.

18 Let me do this. It's 11:10. I want to give the  
19 government equal time. So I'll take a 15-minute recess, and  
20 we'll start again at 11:25.

21 MR. BEKESHA: Thank you, Your Honor.

22 (Thereupon, a break was had from 11:09 a.m. until  
23 11:37 a.m.)

24 THE COURT: Counsel, do you want to just take a couple of  
25 minutes?

1 MR. BEKESHA: Thank you, Your Honor. Just one quick  
2 point. I wanted to just come up and officially formally ask the  
3 Court so that it's before you, move that in -- based on the  
4 entire record, that orders be entered to the State Department to  
5 subpoena the PST files of Mrs. Clinton and Mrs. Abedin from the  
6 Clintonemail.com system.

7 THE COURT: All right. All right. Anything else?

8 MR. BEKESHA: That's it, Your Honor.

9 THE COURT: All right.

10 MR. BEKESHA: Thank you.

11 THE COURT: All right. I'm going to hear from the  
12 government in a few minutes. Let me just put a few things on the  
13 record first before I invite government counsel up.

14 The understanding I have is that there are sufficient  
15 facts to show that senior State Department staff knew of  
16 Clintonemail.com from the beginning of the former secretary's  
17 tenure as Secretary of State. For example, in the record there's  
18 a January 24, 2009, e-mail chain between Patrick Kennedy,  
19 Lewis Lukens, David Smith, Cheryl Mills, and some others  
20 regarding setting up a computer at State for Mrs. Clinton to  
21 check her e-mail off network.

22 The inference arises that this is knowledge of  
23 Clintonemail.com among State senior -- among senior State  
24 Department staff. There's a January 2016 OIG report that  
25 concludes there is evidence that dozens of staff communicated

1 with the secretary through personal accounts, yet have the OIG  
2 found no evidence that staff involved in responding to FOIA had  
3 knowledge of the secretary's personal e-mail server, and that's  
4 set forth at pages 14 and 15 of that report.

5 The e-mail communication between Abedin; Stephen Mull,  
6 who's a technology employee; Mills; Kennedy; and others  
7 discussing communication problems. At one point it's suggested  
8 by Mull that a State BlackBerry should be issued to Clinton. He  
9 notes that her identity would be protected with the State e-mail  
10 account, quote, would also be subject to FOIA requests, end  
11 quote. Abedin's response is, "Let's discuss the State  
12 Blackberry, doesn't make a whole lot of sense." And that's  
13 Docket Number 51-3. The interpretation that Judicial Watch  
14 assigns to this is somewhat generous and reflects Mull expressing  
15 concern that Clintonemail.com may not be managed in such a way to  
16 allow for appropriate responses to FOIA requests. It can also be  
17 read as the tech guy -- technology person flagging for the staff  
18 that would be subject to FOIA, so it could be interpreted either  
19 way. It's somewhat ambiguous.

20 How on earth can the Court conclude that there's not, at a  
21 minimum, a reasonable suspicion of bad faith regarding the State  
22 Department's response to this FOIA request? It appears that no  
23 one took any steps to ensure that agency records on  
24 Clintonemail.com were secured within the State Department's  
25 record systems so that FOIA requests received during the former

1 secretary's tenure would be responded to appropriately.

2 And am I missing something? Government counsel needs to  
3 tell me what I'm missing. How in the world could this happen?  
4 Which leads to the first question: Does the government -- does  
5 the State Department concede that senior staff knew about and  
6 condoned the use of Clintonemail.com?

7 And I'll invite counsel to the podium. Good morning,  
8 Counsel.

9 MR. MYERS: Good morning, Your Honor. I think, Your  
10 Honor --

11 THE COURT: Do you concede that?

12 MR. MYERS: I think it's undisputed that former  
13 Secretary Clinton was using the e-mail account to correspond with  
14 some people who were in senior positions at the State Department,  
15 and that they were necessarily aware of the address from which  
16 she was sending the e-mails.

17 THE COURT: Let me ask you this, about the subpoena:  
18 What's the government's position with respect to a directive that  
19 the State Department essentially issue a subpoena to the former  
20 secretary and Ms. Abedin requesting the return of all records?

21 MR. MYERS: Your Honor, our position is that such an order  
22 would be inappropriate for several reasons. The first is that  
23 following your directives in this case, the government has  
24 already reached out to former Secretary Clinton and Ms. Abedin  
25 and Ms. Mills, and requested the return of all federal records.

1 And as counsel for plaintiff indicated, Judge Boasberg looked at  
2 everything that had been done and said that that was sufficient,  
3 that State had taken significant corrective steps to get the  
4 records back, and, in fact, they were so sufficient that he  
5 dismissed the Federal Records Act case as moot.

6 Also, as a matter of practicality, the record in this case  
7 is perfectly clear that Mr. Kendall, Mr. Clinton's attorney, has  
8 turned over the federal records and then provided the thumb drive  
9 and the server to the FBI. So any subpoena to former Secretary  
10 Clinton or to her counsel would be futile because there's nothing  
11 left to provide.

12 THE COURT: Well, suppose the subpoena says, in the  
13 event -- in the event that you receive the former -- the thumb  
14 drive and other documents from the FBI, then turn them over,  
15 what's wrong with that? I mean, I can appreciate they may not be  
16 in her possession. I can appreciate that, although I don't know  
17 that for a fact, and nor does the State Department.

18 You don't know that for a fact, do you? Although there  
19 was a letter from the FBI confirming that there was an  
20 investigation ongoing, I believe, correct?

21 MR. MYERS: There was a letter from the FBI confirming  
22 that they're looking into those issues, and we filed that a week  
23 or two ago.

24 Your Honor has already directed State to reach out to the  
25 FBI, and we've requested -- the State has requested that the FBI

1 let it know of any records that it recovers. But I should also  
2 mention, Your Honor, that as a matter of basic legal doctrine,  
3 you know, Your Honor indicated earlier that you didn't want to do  
4 anything that would be error. Well, we would submit that as a  
5 matter of basis legal doctrine, *Kissinger* holds that there's no  
6 withholding in a failure to retrieve records that no longer  
7 belong to the agency. And the very concept of a subpoena would  
8 suggest that State is going out to get something it does not  
9 have, and *Kissinger* squarely holds that you can't withhold things  
10 you don't have. That leaves the holding out of withholding.

11 THE COURT: Well, is it the government's position that the  
12 government relinquished at least constructive possession of the  
13 documents, even though they were housed outside of the Department  
14 of State and control?

15 MR. MYERS: I think, Your Honor, it's important to look at  
16 the question of control, sort of through the lens of chronology.  
17 And so plaintiff's position in this case is that while former  
18 Secretary Clinton was Secretary of State, that during that period  
19 of time, as a result of the employer/employee relationship, there  
20 was a constructive control relationship.

21 We disagree, but Your Honor doesn't need to reach that  
22 issue. And the reason for that is that plaintiffs here have been  
23 perfectly clear that when Mrs. Clinton left office -- and I'm  
24 quoting -- she did not turn over Ms. Abedin and her e-mails.  
25 They were taken with them outside of the custody and control of

1 the State Department.

2 THE COURT: Right, but that's not binding on the Court,  
3 though.

4 MR. MYERS: Certainly not, Your Honor.

5 THE COURT: It seems to me almost nonsensical that -- let  
6 me back up. Say you have hypothetically an employee who takes an  
7 agency document home with him. Does the government lose control  
8 over that document?

9 MR. MYERS: Your Honor, if the government employee takes  
10 government documents home with him and then resigns from the  
11 agency, which is --

12 THE COURT: I didn't add that. Stick with my  
13 hypothetical.

14 And the government wants that document back, does the  
15 government lose control over that document?

16 MR. MYERS: Well, Your Honor, the question that Your Honor  
17 is asking is very similar to questions that were asked by the  
18 panel in the *CEI* case that was argued just a few weeks ago. And  
19 what the panel seemed to be indicating -- and obviously there  
20 hasn't been a ruling yet, but the panel seemed to suggest that  
21 perhaps in that case there would be an obligation for the agency  
22 to ask the employee to bring the documents back.

23 THE COURT: Is that what the panel said, just to merely  
24 ask?

25 MR. MYERS: That was certainly Judge Edwards' indication,

1 and as you know, you can't glean that much from arguments.

2 But the key point here is that the State Department has  
3 asked, at Your Honor's instructions.

4 THE COURT: But does that -- I mean, is that where we are  
5 now where the government has to ask an employee to return a  
6 document? The document retains -- the document doesn't lose its  
7 character as an official document just because the employee takes  
8 it home, correct?

9 MR. MYERS: Certainly not.

10 THE COURT: It's still an agency record.

11 MR. MYERS: Certainly --

12 THE COURT: Why can't the agency demand return? Why does  
13 the government have to say, "Would you please, when you find --  
14 deem it appropriate, return the document?" That's ridiculous.

15 MR. MYERS: Well, Your Honor, *Kissinger* makes clear that  
16 in addition to the document being an agency record, for there to  
17 be remedy under FOIA, there needs to also be a withholding. And  
18 so what *Kissinger* says is that you can assume it's an agency  
19 record and you can assume that it was wrongfully removed from the  
20 agency, but even if you assume that, FOIA still --

21 THE COURT: Well, the agency that -- the director takes it  
22 home -- and in this case we're not talking about director, we're  
23 talking about the agency. She was the agency.

24 MR. MYERS: She was the Secretary of State, Your Honor.

25 THE COURT: Yeah. I mean, she's the agency, isn't she?

1 MR. MYERS: She was the Secretary of State.

2 THE COURT: Right, right. And while we're on that  
3 subject, she's not sitting there. She wouldn't be required to  
4 sit at a computer screen determining what documents are official  
5 documents and what documents are personal in response to a FOIA  
6 request, would she?

7 MR. MYERS: No, Your Honor. But as we set out in our  
8 brief -- and perhaps this didn't come through as clearly as it  
9 could have -- it's not that the federal employee or the Secretary  
10 of State would be the person who decides what is or is not  
11 responsive to the request --

12 THE COURT: Right.

13 MR. MYERS: -- but on a day-to-day basis federal employees  
14 can manage their own e-mail accounts, and so if a record is a  
15 personal record, you know, if it's clearly not a federal record,  
16 the employee can simply delete that record. And so plaintiff's  
17 argument that former Secretary Clinton or her designee, as  
18 opposed to individuals, you know, in the National Archives, were  
19 making the determination of what's a federal record, is really  
20 not at all unusual. Individuals do that all the time.

21 Their only objection, the only point that they make here,  
22 is that former Secretary Clinton was no longer employed by the  
23 State Department when those determinations were made. We would  
24 submit that that's a distinction without a difference. And the  
25 reason for that is that, as Judge Rothstein said in the *CEI*

1 versus NASA case, the question isn't whether the agency  
2 searched all --

3 THE COURT: I'm sorry, which case is this?

4 MR. MYERS: That's *CEI versus NASA*, 989 F.Supp.2d 74,  
5 which we cited in our 56(d) opposition. She said the issue is  
6 not whether the agency searched all e-mails that ever existed,  
7 but rather simply whether the search was adequate.

8 And in terms of whether or not the search was adequate,  
9 again, I would point to Judge Boasberg's decision where he said  
10 that State had taken such significant corrective steps to get the  
11 records back that the Federal Records Act claim was moot. Now,  
12 if plaintiffs think that was wrong, and they think that State  
13 needed to do more to get these records back. As Your Honor  
14 noted, they've appealed. They can tell that to the D.C. Circuit.

15 That's before the D.C. Circuit, but we don't think it's  
16 relevant. You know, we don't think there's a basis here for  
17 finding that the State hasn't done enough to get the records  
18 back. Where State has complied with all of Your Honor's  
19 correctives in this case. State has reached out to all of the  
20 individuals. State has reached out to the FBI. State has really  
21 done everything that it can to get these records.

22 THE COURT: In the OIG report, page 15, footnote 64, the  
23 OIG notes that an attorney from the State's legal department  
24 informed the OIG of their belief that State did not respond to  
25 certain FOIA requests appropriately because they excluded the

1 secretary's personal e-mail account used to conduct official  
2 government business.

3 Do you know who, if anyone, formally approved the use of  
4 Clintonemail.com?

5 MR. MYERS: I do not know, Your Honor, no.

6 THE COURT: All right. And you're speaking on behalf --  
7 you're speaking -- well, who would know?

8 MR. MYERS: Your Honor, I don't know the answer to that  
9 question. I honestly -- ultimately, I don't think it's material  
10 for purposes of the relatively narrow FOIA dispute that's before  
11 Your Honor. And the reason for that is this question of, you  
12 know, who knew that former Secretary Clinton was using this  
13 server, and who approved it, seems to go to plaintiff's theory  
14 that there was an attempt to thwart FOIA here.

15 THE COURT: Well, all of this was put in place before the  
16 secretary was even sworn in, though, right?

17 MR. MYERS: Your Honor, plaintiffs have attached certain  
18 documents that goes to that theory. There isn't a full record on  
19 that, and again, we don't think it's relevant.

20 THE COURT: But you don't dispute the record that's -- I  
21 mean, I don't have it at my disposal right now, but there is a  
22 declaration, I believe, from an employee that a week or two prior  
23 to the secretary being sworn in, this system was in place.

24 MR. MYERS: Again, for purposes of today's motion, I'm not  
25 in a position to dispute that.

1 THE COURT: All right. Do you know how many staff at  
2 State raised concerns, if any, about this department's ability to  
3 complete a reasonable search in response to any FOIA request,  
4 absent all agency records contained on Clintonemail.com?

5 MR. MYERS: Again, Your Honor, I don't. I can say that I  
6 know that the Inspector General, as obviously Your Honor is  
7 aware, is looking into these issues. They've indicated that  
8 an --

9 THE COURT: Well, I don't know that to be a fact, but  
10 there again, that's a private inquiry. Why shouldn't at least  
11 these questions be the subject of discovery in a public lawsuit  
12 filed in a federal courthouse so that the public knows what the  
13 answers are?

14 MR. MYERS: Your Honor, they shouldn't be --

15 THE COURT: The public may never know what the answers are  
16 to the IG investigation or to this FBI investigation, if there is  
17 one ongoing.

18 MR. MYERS: Respectfully, Your Honor, that shouldn't be  
19 the subject of discovery in this lawsuit because Your Honor's  
20 jurisdiction extends simply to determining whether or not State  
21 has complied with its FOIA obligations.

22 THE COURT: Right, but how do I do that with all these  
23 questions raised about the circumstances surrounding even the  
24 creation of this totally atypical system of e-mails? And there's  
25 not a comparison case anywhere in the system of American juris

1 prudence that we've been able to find, is there?

2 MR. MYERS: Well, Your Honor, we would submit that  
3 *Kissinger* is directly on point. And, again, *Kissinger* says that  
4 you can assume agency records. You can assume wrongful removal.  
5 But absent a withholding, FOIA provides no remedy. And even if  
6 that --

7 THE COURT: Absent a withholding. But how do we know that  
8 everything has been turned over?

9 MR. MYERS: Respectfully, Your Honor, that's -- perhaps  
10 I'm not being clear. There are sort of two arguments that we're  
11 making. One is that State has complied with all of your  
12 directives and turned over all of the federal records that it's  
13 obtained. Separate and apart from that, it's also our argument  
14 that State can't have withheld, in violation of FOIA, records  
15 that it never had in the first place. And that's the *Kissinger*  
16 case.

17 THE COURT: Well, then, but you're assuming, though, that  
18 State relinquished control at some point of these documents.

19 MR. MYERS: Your Honor, plaintiffs have not articulated a  
20 basis to find or conclude that State had control or possession of  
21 these documents following former Secretary Clinton's resignation.  
22 And, indeed, they -- and I understand it's not binding, but they  
23 have admitted repeatedly that State lost possession and control.

24 THE COURT: But that's not binding on the Court. And in  
25 that regard, the D.C. Circuit has made it clear in *Bureau of*

1 *National Affairs, Inc. versus Department of Justice*, that, quote,  
2 the inquiry -- and that's the inquiry by the Court, not by a  
3 party. The inquiry necessarily must focus on a variety of  
4 factors surrounding the creation, possession, control, and use of  
5 the documents by the agency. And that's 742 F.2d at 1484.

6 The Court rejected rigid "control" or "use" frameworks  
7 developed in previous cases -- this is a 1984 decision -- and  
8 held that where a record is created by an employee of a FOIA  
9 agency, at least in part to enable him or her to conduct agency  
10 business, quote, it is necessary to consider both the agency's  
11 asserted interest in the document and the extent to which the  
12 document is used to conduct agency business, end quote.

13 MR. MYERS: Yes, Your Honor.

14 THE COURT: All right. To determine whether a document  
15 created by an agency employee is an agency record, the Court  
16 should consider: One, whether and to what extent that employee  
17 used the document to conduct agency business; two, whether the  
18 document is in the agency's control; 3, whether the document was  
19 generated within the agency; and 4, whether the document has been  
20 placed in the agency files.

21 Here, all of Clinton and Abedin's work e-mails on  
22 Clintonemail.com were used to conduct agency business. To the  
23 extent they were not physically at the State Department, the  
24 agency still had, it seems to me, constructive control over all  
25 agency records. Moreover, to the extent they were not generated

1 within the agency or placed in the agency's files is really due  
2 to the agency's apparent condoning of the former secretary's use  
3 of Clintonemail.com.

4 Now, I understand your *Kissinger* argument, but *Kissinger*  
5 does not reach as far as your argument requires. Judicial  
6 Watch's emphasis on footnote 9 -- and footnote 9 is the relevant  
7 topic of consideration in the argument that was just heard before  
8 the circuit -- is appropriate. *Kissinger* did not decide whether  
9 the, quote, withholding, end quote, standard must be measured  
10 from the time of FOIA request as received under circumstances  
11 where it is, quote, shown that an agency official purposely  
12 routed a document out of agency possession in order to circumvent  
13 a FOIA request, end quote.

14 So if the Court were to permit Judicial Watch to take  
15 discovery in order to answer some of the many outstanding  
16 questions regarding who approved the use of Clintonemail.com,  
17 et cetera, and the Court were to conclude that there's sufficient  
18 evidence to show that the State Department condoned the use of  
19 Clintonemail.com, isn't that enough to show that the State  
20 Department deliberately thwarted FOIA?

21 MR. MYERS: Your Honor, as we've set out in our brief, we  
22 read footnote 9 -- as do the cases interpreting it in this  
23 circuit and from other judges in this court -- as not raising the  
24 question of whether an agency sought to thwart FOIA as a general  
25 matter, but rather whether the agency sought to circumvent a

1 particular FOIA request.

2 So I point to Judge Lamberth's decision in the *Judicial*  
3 *Watch versus the Department of Commerce* case where he said if the  
4 documents were removed prior to the filing of the FOIA request,  
5 then FOIA does not provide remedy.

6 Your Honor read the quotation earlier on the agency  
7 records point about whether there's sufficient control to create  
8 agency records. Again, for purposes of today's motion -- and we  
9 wouldn't concede this generally, but for purposes of the motion  
10 today, Your Honor can assume that the e-mails on Clintonemail.com  
11 were agency records, but if they weren't withheld because the  
12 agency no longer had them, there's still no FOIA violation.

13 Ultimately, Your Honor, though, I want to come back to  
14 what State has already done to get the records back, because none  
15 of this really matters if there isn't a further way to actually  
16 get records that plaintiff is seeking. This is a FOIA case in  
17 which plaintiffs think they're entitled to records. And again  
18 here, following Your Honor's directive, State has reached out to  
19 all of these individuals. It's reached out to the FBI. And we  
20 just don't think there's more to do in this case. All the  
21 federal records have been turned over.

22 THE COURT: I'm not so sure how much comfort that would  
23 give the public, though, in knowing that the government allowed  
24 this system to be created and housed totally off-site of the  
25 Department of State, and the government now says all we can do is

1 make a request for return of federal documents. That's not going  
2 to give the public much comfort in this process at all, Counsel,  
3 and you can understand why.

4 MR. MYERS: Well, Your Honor, I think the response to that  
5 is that there are any number of federal statutes and federal  
6 regulations that deal with federal recordkeeping. Certainly the  
7 Federal Records Act, which has been litigated before  
8 Judge Boasberg, is a really key one. Here -- we're here before  
9 Your Honor on a FOIA dispute, and the question is whether FOIA  
10 provides remedy. And as the Supreme Court said in *Kissinger*,  
11 FOIA does not displace the statutory scheme embodied in the  
12 Federal Records Act, providing for administrative remedies to  
13 safeguard against wrongful removal of agency records as well as  
14 to retrieve wrongfully removed records.

15 THE COURT: This practice has been curtailed at the  
16 Department of State?

17 MR. MYERS: Forgive me, Your Honor?

18 THE COURT: This practice of allowing private e-mail  
19 service has been curtailed, has it?

20 MR. MYERS: Your Honor, my understanding is that, you  
21 know -- I'm trying to think of how to answer your question most  
22 accurately.

23 THE COURT: Well, is the --

24 MR. MYERS: I'm not certainly not aware. I have no reason  
25 to think that this, you know -- this is continuing. I don't want

1 to make representations generally, but I have no reason to think  
2 that this is still going on.

3 THE COURT: I mean, that's a question that the government  
4 should be able to answer, whether or not -- yes, go ahead. Do  
5 you have the answer?

6 MR. MYERS: Yes, and as my co-counsel's pointing out, the  
7 FRA has been amended on this point, you know, to provide further  
8 clarity, and it's certainly our understanding that State is  
9 complying with the FRA.

10 THE COURT: All right. So this practice is no longer  
11 condoned, then, as far --

12 MR. MYERS: This practice is not condoned consistent with  
13 the FRA.

14 THE COURT: -- as your colleague knows?

15 MR. MYERS: Yes, Your Honor.

16 THE COURT: All right. Thank you, Counsel.

17 You know, it's just troubling, though, when you focus on  
18 the request in this case pertaining to the -- let's just focus on  
19 Ms. Abedin. Here you have Mrs. Clinton and Abedin and their  
20 private counsel deciding, after neither Ms. Clinton or Ms. Abedin  
21 were government employees, what e-mails are federal records and  
22 what e-mails are not. It just boggles the mind that the State  
23 Department allowed this circumstance to arise in the first place.  
24 It's just very, very, very troubling. And I think that whatever  
25 opinion the Court writes, the first sentence will be: This is a

1 very troubling case, for a host of reasons.

2 MR. MYERS: Again, Your Honor --

3 THE COURT: And the resources that have been devoted to  
4 this case, financial and otherwise, are just staggering.

5 MR. MYERS: Your Honor, I understand that the  
6 circumstances surrounding Mrs. Clinton's e-mails have led to  
7 significant controversy and significant litigation, but we're  
8 here before you on a narrow FOIA dispute, and the question is  
9 whether FOIA provides remedy to these plaintiffs, and we submit  
10 that the answer to that is no.

11 THE COURT: Well, here it's even more narrow than that.  
12 It's whether or not discovery should be allowed to go forward.

13 MR. MYERS: Correct, Your Honor.

14 THE COURT: Let's talk for a second about how the FOIA  
15 search would have proceeded if the request had been received  
16 while Mrs. Clinton was Secretary of State, but let's assume that  
17 she and Ms. Abedin both used the state.gov e-mail for all  
18 official business. I understand the Foreign Affairs Manual  
19 designates the Office of Information Programs and Services, IPS,  
20 is responsible for the department's compliance with FOIA, and  
21 that's set forth in the OIG report.

22 IPS logs FOIA requests into the Freedom of Information  
23 Document Management System -- acronym FREEDOMS -- and determines  
24 which offices may have responsive records and then requests the  
25 offices to conduct the search. In 2010 the department provided

1 guidance to offices describing how searches should take place,  
2 stating in part that, quote, offices should conduct a search for  
3 records in any form, including paper records, e-mail, including  
4 e-mail and personal folders and attachments to e-mail and other  
5 electronic records on servers, on workstations or on department  
6 databases.

7 In your brief you basically argue that State would have  
8 only searched those e-mails that Secretary Clinton or a designee  
9 would have deemed federal records. Isn't the position that you  
10 take in your brief inconsistent with that 2010 guidance?

11 MR. MYERS: No, Your Honor. Our position is that had  
12 former Secretary Clinton and Ms. Abedin exclusively used a  
13 state.gov e-mail account, then on a day-to-day basis they would  
14 have saved some e-mails and deleted some e-mails that were not  
15 federal records. Then if in the future a FOIA request had come  
16 in, IPS would have worked, you know, with individuals in the  
17 secretary's office to find the records responsive to that  
18 request. But in the first instance, former Secretary Clinton  
19 would be responsible on a day-to-day basis for administering her  
20 own e-mail account.

21 THE COURT: You said "for administering," what does that  
22 mean, to use it that way: Administering her own e-mail accounts?

23 MR. MYERS: Simply that she has no obligation to save  
24 e-mails that are not federal records. And I certainly can't  
25 speak to any particular individual, but I would imagine that most

1 individuals, you know, delete e-mails that are no longer relevant  
2 to them and that there's no obligation to save.

3 THE COURT: Okay. So the guidance suggests that servers  
4 and workstations are searched. Is that correct or not, though?

5 MR. MYERS: That servers and workstations are searched?

6 THE COURT: Yeah, that's, right, the 2010 guidance.

7 MR. MYERS: I think State's practice is to search where  
8 there would be -- where there might reasonably likely be  
9 responsive documents.

10 THE COURT: Right. And that's where -- and that's why the  
11 directive to return that server has some relevance because if  
12 that server were returned or whatever the device is, then the  
13 former employee would be treated the same way as she would have  
14 been treated had she been an employee at the time the FOIA  
15 request came in, correct?

16 MR. MYERS: No, Your Honor. Let me be clearer. If  
17 former -- if a federal employee, any federal employee, saves some  
18 e-mail --

19 THE COURT: Well, we're not talking about any federal  
20 employee. We're talking about the Secretary of State.

21 MR. MYERS: Right, so the Secretary of State. If the  
22 Secretary of State, using state.gov, saves ten e-mails and  
23 deletes five e-mails, you know, such that her Outlook file has  
24 the saved e-mails but not the deleted e-mails, a standard  
25 adequate FOIA search will search within the e-mails that she

1 saved. It will not look on the server, you know, forensically to  
2 recover the deleted e-mails because those would not be reasonably  
3 likely to have responsive results because there are no federal  
4 records there. That is not State's practice to seek to recover  
5 deleted e-mails.

6 And so that dovetails with our point here that State has  
7 done enough. State is entitled to rely on former  
8 Secretary Clinton and her designee's judgment that they've turned  
9 over all federal records.

10 THE COURT: Let me stop you right there, though.

11 MR. MYERS: Yes.

12 THE COURT: But you would take it a step further, though,  
13 had she still been an employee at the time the FOIA request came  
14 in? You wouldn't be relegated to rely on her judgment, right?

15 MR. MYERS: No, we certainly would, Your Honor. We would.

16 THE COURT: So she's being treated the same as a former  
17 employee?

18 MR. MYERS: The only distinction here is that she made the  
19 judgment of what was personal and what was not following her  
20 resignation. But, again, let me be super clear on this.

21 THE COURT: All right. The FOIA request comes in. She's  
22 the Secretary of State. Then what?

23 MR. MYERS: Then at that point the search would be  
24 performed assuming -- assuming e-mails were potentially  
25 responsive in the first place, the search would be performed

1 within the e-mails that she had saved. The State would not seek  
2 to recover any deleted e-mails.

3 THE COURT: Putting aside the deleted e-mails --

4 MR. MYERS: Right.

5 THE COURT: -- the State would conduct an independent  
6 search, though, of her e-mail system, correct?

7 MR. MYERS: And that's what happened here. That's exactly  
8 what happened here where former Secretary Clinton turned over the  
9 approximately 55,000 pages, and then State --

10 THE COURT: But that's what she turned over, though.

11 MR. MYERS: But, again, if she had been -- there's always  
12 going to be a first cut of what's personal and what's federal  
13 performed by the employee.

14 THE COURT: Right.

15 MR. MYERS: That's standard practice, and that's precisely  
16 what happened here. Then once the federal records were  
17 segregated, State performed the independent search.

18 THE COURT: You mean to say that the Secretary of State --  
19 once the FOIA request comes in, the Secretary of State is going  
20 to be sitting at a computer screen determining in the first  
21 instance what's federal and what's personal before you -- before  
22 State conducts its independent search?

23 MR. MYERS: Not after the FOIA request comes in, Your  
24 Honor.

25 THE COURT: We're talking about FOIA request now, FOIA

1 request.

2 MR. MYERS: Right. So State's assumption is that a  
3 federal employee, on a day-to-day basis, saves some e-mails and  
4 deletes some e-mails, so that what you're left with --

5 THE COURT: All right. Tell me -- all right. Look,  
6 hypothetically, she's the Secretary of State, the FOIA -- this  
7 same FOIA request comes in, what does the agency do?

8 MR. MYERS: Is it assuming she's using state.gov in Your  
9 Honor's hypothetical?

10 THE COURT: Yes. She's using the government-accepted  
11 e-mail system, right.

12 MR. MYERS: Then State, again, assuming that the request  
13 calls for e-mails in the first place, would work to --

14 THE COURT: It's the same request that's here in this  
15 case.

16 MR. MYERS: Right.

17 THE COURT: Everything's the same, other than the  
18 secretary is not former, she's the current secretary.

19 MR. MYERS: Right. State would then work to search within  
20 the e-mails that she had saved.

21 THE COURT: All right. But what does that mean? You  
22 would conduct an independent search then, correct?

23 MR. MYERS: So here, Your Honor, State --

24 THE COURT: No, no, no. I need an answer to that.

25 MR. MYERS: Yeah, I'm trying to answer Your Honor's

1 question. Here plaintiff has asked for certain narrow records  
2 pertaining to Ms. Abedin, and so if former Secretary Clinton were  
3 still current Secretary Clinton and she used state.gov, State  
4 would do an independent search for those records within the --

5 THE COURT: That's what I --

6 MR. MYERS: Respectfully, Your Honor, within the e-mails  
7 that former Secretary Clinton saved and did not delete because  
8 they judged that they were federal records.

9 THE COURT: Right, so --

10 MR. MYERS: Here, that's precisely what happened.

11 THE COURT: So let me stop you there. But you would  
12 essentially start searching her system? Whether she agreed to it  
13 or not, you'd start searching her system using search words that  
14 the government -- the government and plaintiff agreed to or other  
15 search words, right?

16 MR. MYERS: Correct, as State -- and State performed those  
17 searches here on the federal records turned over by Mrs. Clinton.

18 THE COURT: Right, right, but it'd be an independent  
19 search, though.

20 MR. MYERS: Again, Your Honor, an independent search was  
21 performed here using negotiated search terms agreed to by  
22 plaintiff.

23 THE COURT: Right, but it's relegated to the documents she  
24 gave you to look at.

25 MR. MYERS: And, again, my point is that that would be

1 equally true if she were using a state.gov, because she would  
2 always have the authority to delete e-mails that were personal  
3 records, and State wouldn't be able to search within those. So  
4 in either case, she can stop the e-mails that she determines are  
5 personal records from being searched.

6 THE COURT: Well, let me ask you this: When the FOIA  
7 request comes in, do you say to the employee, "Take a look, start  
8 deleting, because we're going to start an independent search  
9 soon"? Do you do that?

10 MR. MYERS: No, Your Honor.

11 THE COURT: No, I know you don't do it.

12 MR. MYERS: But the --

13 THE COURT: Wait a minute. Because -- because the  
14 credibility of your search is on the line, right?

15 MR. MYERS: Your Honor, the reason --

16 THE COURT: Right?

17 MR. MYERS: Yes, the credibility --

18 THE COURT: Absolutely.

19 MR. MYERS: Of course, but --

20 THE COURT: You've got a FOIA officer --

21 MR. MYERS: But that's not the reason why we don't -- why  
22 State doesn't give that directive.

23 THE COURT: What's the reason?

24 MR. MYERS: The reason is that employees are deleting  
25 their e-mails on a day-to-day basis. It is standard and

1 expected.

2 THE COURT: They may or may not be.

3 MR. MYERS: Well, there's no obligation to either retain  
4 or search within personal e-mails.

5 THE COURT: No, but all I'm saying is this: A lot of  
6 people don't, and people get notices from IT that you need to  
7 start deleting stuff, right?

8 MR. MYERS: That's --

9 THE COURT: Yeah.

10 MR. MYERS: Certainly I'm sure that's true for some  
11 people, but --

12 THE COURT: It's true, right.

13 MR. MYERS: -- there's no obligation to save or search  
14 within personal records, so the fact that --

15 THE COURT: No. I'm just trying --

16 MR. MYERS: -- you know, some employees are blowing up  
17 their inboxes --

18 THE COURT: I'm just trying to make a point. The employee  
19 may not even know about the FOIA request when it hits your office  
20 or it hits the FOIA compliance desk.

21 MR. MYERS: I assume that's true, sure.

22 THE COURT: Right, right. And there are reasons for that,  
23 too. Because you don't want people deleting records, right?  
24 Right?

25 MR. MYERS: Your Honor, we don't want people deleting

1 federal records. They're entitled to delete personal e-mails.

2 THE COURT: That's right. So you get a FOIA request in,  
3 IT tech starts searching to find records. The employee doesn't  
4 even know about this. Here, the employee knows and says, "While  
5 I do not know what information may be responsive for purposes of  
6 this lawsuit, I've directed all my e-mails so-and-so-and-so that  
7 were in my custody be turned over."

8 MR. MYERS: And, if anything, Your Honor, the indication  
9 here is that former Secretary Clinton was overinclusive when she  
10 returned federal records to State.

11 THE COURT: Why, because there were some personal e-mails?

12 MR. MYERS: There were 1,500 pages of personal e-mails,  
13 and so it's not really consistent with the notion that she was  
14 refusing to turn over federal records. She said that she  
15 wanted -- that she directed all federal records and potential  
16 federal records to be turned over, and again, apparently she was  
17 so overinclusive --

18 THE COURT: Right, but that's the difference -- that's a  
19 significant difference, though, in how she's being treated and  
20 how she would be treated had she been -- had she been the  
21 secretary. She wouldn't know anything about it. You'd conduct  
22 your search. You would determine what federal records are,  
23 right? And questionable cases --

24 MR. MYERS: No, Your Honor, that's not correct.

25 THE COURT: Really?

1 MR. MYERS: Employees are entitled --

2 THE COURT: Well, what would be the purpose of the search,  
3 then?

4 MR. MYERS: Excuse me?

5 THE COURT: What would be the purpose of the search, then?

6 MR. MYERS: The purpose of the search is to find  
7 responsive documents.

8 THE COURT: Well, then you'd find responsive documents.

9 MR. MYERS: Well, State did here. That's the key point:  
10 State performed the search for the responsive documents.

11 THE COURT: All right. We're going -- we're going in  
12 circles here. But your search here, though, is based upon what  
13 she gave you, as opposed to what's on her machine at a given  
14 point in time when the employee would not even be aware that  
15 there's a FOIA request. And there are reasons why the employee  
16 is not made aware of the FOIA request, because the agency doesn't  
17 want people tampering with the documents, I assume, right?

18 MR. MYERS: Your Honor, Judge Boasberg noted in the *FRA*  
19 that plaintiffs can't sue to force the recovery of records that  
20 they hope or imagine might exist. And his point was that after  
21 State followed Your Honor's instructions in this case to get the  
22 records back, they've done enough, and pure speculation is not  
23 enough. You can't just speculate that there are more responsive  
24 records out there.

25 THE COURT: And all these circumstances surrounding

1 creation of this don't give rise to legitimate issues that  
2 discovery may indeed address?

3 MR. MYERS: Not where State has complied with all of Your  
4 Honor's directives to bring these records within State custody,  
5 and where State has searched these records.

6 So, again, Your Honor, our point I think is threefold.  
7 One is that we have complied with all of Your Honor's directives  
8 to get these records. We've performed an adequate search.

9 THE COURT: And I appreciate that. I, quite frankly -- I  
10 issued the directive. And, quite frankly, you know, I'm  
11 delighted that the government complied. I'm delighted that there  
12 was a response by the former secretary. The scope of it, you  
13 know, raises other issues but, you know, there have been efforts  
14 to comply and I appreciate that.

15 You know, the big question is whether or not there's a  
16 need for a subpoena that would produce more documents or a need  
17 for some discovery.

18 MR. MYERS: And if I may on that point, Your Honor?

19 THE COURT: Yes.

20 MR. MYERS: *Kissinger* squarely holds that an agency's  
21 failure to institute a retrieval action is not a withholding  
22 under FOIA, and so if you're --

23 THE COURT: Well, retrieval action would be more  
24 comprehensive than a subpoena. I mean, retrieval action is a  
25 very time-consuming -- file a lawsuit to recover, as opposed to

1 issuing a subpoena. It just basically says give us our documents  
2 back.

3 MR. MYERS: Well, Your Honor, in both cases it presumes  
4 that State has to go out and get something it does not have. And  
5 if State doesn't have it, it can't withhold it in violation of  
6 FOIA. And we think it would be error for this Court to direct  
7 State to get things it doesn't have as a matter of black letter  
8 Supreme Court law.

9 THE COURT: Right, right. Well, I know, and I raised this  
10 about the subpoena, and I note, you know, that the plaintiffs  
11 did -- and although the plaintiffs now ask that the Court issue a  
12 subpoena, and we'll see.

13 Would other employees at State have been accommodated the  
14 way that the former secretary was with respect to this private  
15 e-mail server system?

16 MR. MYERS: Your Honor, there's no indication in the  
17 record to that effect, and I really can't speculate about who  
18 would be treated how. Former Secretary Clinton here complied  
19 with Your Honor's directives.

20 THE COURT: Right. Can you very precisely tell me what  
21 the reason was for the accommodation to the former secretary for  
22 this private e-mail system?

23 MR. MYERS: Your Honor, I can say that the State OIG is  
24 looking into that issue, but I don't have more to say on that.

25 THE COURT: You may not, but does the agency have an

1 opinion?

2 MR. MYERS: With respect to?

3 THE COURT: To why, why this all happened?

4 MR. MYERS: Again, OIG is looking into that very issue.

5 THE COURT: I understand that. But does the agency have  
6 an opinion? I understand -- I understand OIG is looking into it.

7 Does the agency have an opinion as to why? Why did this  
8 all happen? That's what the public wants to know.

9 MR. MYERS: And, Your Honor, again, the issues of public  
10 knowledge and sort of broader reform and broader policy issues  
11 are being looked at by OIG, but we submit they're not a proper --

12 THE COURT: But this is a public forum.

13 MR. MYERS: It is, Your Honor, but we're here --

14 THE COURT: The plaintiffs have filed a public lawsuit  
15 asking a very public agency in the department of government to --  
16 the Department of State to produce documents that not only the  
17 plaintiff but the public has a right to see. Understand that.

18 MR. MYERS: Correct.

19 THE COURT: And what -- you know, the difficulty here is  
20 that the Court's being asked by the government to determine, as a  
21 matter of law, that the government has done everything it  
22 possibly could have done to conduct an adequate search for  
23 responsive -- for documents responsive to the FOIA request. But  
24 then the Court has to balance that against, well, how did we get  
25 to this point where there's now a search of documents that an

1 attorney and his client have determined are official, and then  
2 look at the circumstances under which the system was created to  
3 lead to that result.

4 In other words, questions have been raised about the  
5 reasons for the creation of that system. Was the system created  
6 to accommodate the former secretary? Was the system created to  
7 thwart FOIA compliance? And, again, that's not what the Court's  
8 saying. These are questions that have been raised.

9 It seems to me, though, that until those questions have  
10 been satisfactorily answered, how in the world can the Court  
11 determine, as a matter of law, that considering all the  
12 circumstances in this case, the government has, indeed, as a  
13 matter of law, conducted an adequate search to ensure compliance  
14 with the FOIA request? That's the troubling predicament that the  
15 Court finds itself in now, because this is the atypical case, and  
16 there's not a lot of -- there's not another case -- *Kissinger*  
17 only goes so far, and it doesn't go as far as the government  
18 would like it to go. So there's not another case out there, and  
19 hopefully there won't be another case like that because we're not  
20 talking about a director of an office or an employee of an  
21 agency. We're talking about a cabinet-level official who was  
22 accommodated by the government for reasons unknown to the public.  
23 And I think that's a fair statement: For reasons heretofore  
24 unknown to the public. And all the public can do is speculate.  
25 If the public knows why certain things happened, if the Court

1 knows why certain things happened, it may well be able to  
2 conclude sooner than later, the Court hopes, that, indeed, the  
3 search was adequate, considering all of the circumstances,  
4 including the circumstances surrounding why this happened at all.

5 I don't know. Is that clear? I know you don't agree with  
6 it. You want me to say it's done, but I can't do that right now.

7 MR. MYERS: Certainly I understand what Your Honor is  
8 saying.

9 THE COURT: Right.

10 MR. MYERS: And we disagree for the reasons I've  
11 articulated.

12 THE COURT: I know you do. I know you do.

13 MR. MYERS: We think it's not -- we think that the issues  
14 Your Honor has raised, while perhaps relevant to other  
15 proceedings or other --

16 THE COURT: What do you mean other proceedings?

17 MR. MYERS: To the IG process, I mean, or to the *FRA* case.  
18 It might be relevant to other things that are happening.

19 THE COURT: And the government -- but you recognize that  
20 these questions are probably relevant to the IGA -- the IG  
21 investigation?

22 MR. MYERS: The IG is looking into issues that overlap  
23 with a lot of Your Honor's questions.

24 THE COURT: Right. Okay. All right. Okay.

25 So they are relevant, then, but the IG report only goes so

1 far. There may be redactions -- well, there could be redactions  
2 in FOIA, I guess, if there's discovery in this case. But this is  
3 a public forum, though. This is about the public's right to  
4 know, as opposed to the Inspector General who himself or  
5 herself -- is that person an employee of State?

6 MR. MYERS: I think so, Your Honor. And that person's --  
7 that person's report -- you know, the most recent report was  
8 publicly released, and so that will be --

9 THE COURT: Well, there were a lot of redactions. I saw  
10 it. The one in January?

11 MR. MYERS: Yeah.

12 THE COURT: There were a lot redactions. But even if  
13 there's discovery, there could be redactions as well here.

14 MR. MYERS: Certainly true.

15 THE COURT: But the fact that the government recognizes  
16 the relevance of these issues with respect to a private  
17 inquiry -- and I'm not knocking it, I'm just being factual. It's  
18 a private inquiry. This is a public proceeding. This is all  
19 about the public's right to know.

20 MR. MYERS: Well, Your Honor, respectfully, this case is  
21 not about the public's right to know. It's about judicial --

22 THE COURT: It's not?

23 MR. MYERS: It's about judicial --

24 THE COURT: Oh, I've got the wrong file, then. I thought  
25 this was a FOIA case.

1 MR. MYERS: This is about Judicial Watch's request for  
2 certain documents, and it's about whether or not State has  
3 searched for and provided those documents.

4 I understand that the use of the Clintonemail.com server  
5 raises broader questions, but they're not before Your Honor.

6 THE COURT: Right. All right. Which questions are not  
7 before me?

8 MR. MYERS: The question, for example, of why the system  
9 was set up the way that it was is not relevant to --

10 THE COURT: And it doesn't dovetail into a legitimate FOIA  
11 inquiry?

12 MR. MYERS: It does not, Your Honor.

13 THE COURT: It don't help the Court determine, in the  
14 final analysis, whether the search was adequate?

15 MR. MYERS: It does not, Your Honor. It does not.

16 THE COURT: And why not?

17 MR. MYERS: Because the only questions here are whether  
18 State searched, you know, for the records adequately, and why the  
19 records where -- you know, were where they were, is not relevant  
20 to that question.

21 And, again, *Kissinger* says you can assume wrongful  
22 removal. You can assume they're agency records, but FOIA still  
23 does not provide relief.

24 THE COURT: All right. All right. Anything else you want  
25 to say, Counsel?

1 MR. MYERS: No, Your Honor. Thank you.

2 THE COURT: All right. Let me hear from plaintiff. Did  
3 you want to say anything else, Counsel?

4 Excuse me one second while you're doing that.

5 (Brief pause in proceedings.)

6 THE COURT: Don't feel obligated to say anything, Counsel.

7 MR. BEKESHA: Yeah. I think I just had two quick points  
8 going to the obligations and the deleting of records, the not  
9 deleting of records, when that happens.

10 Your Honor's correct, it happens on the day-to-day basis  
11 of the employee deciding what's personal and what's not. It  
12 doesn't happen two years after a FOIA request is submitted that  
13 somebody gets to go and delete records or not delete. We don't  
14 even know if Mrs. Clinton deleted records. All her  
15 declarations that --

16 THE COURT: And no one's insinuating that she did, you  
17 know.

18 MR. BEKESHA: There was talk about deletion, so we don't  
19 know if the records exist or not. We just know that it's in the  
20 general practice, Federal Government employees, you know, manage  
21 their e-mails and then the FOIA folks take over when a FOIA  
22 request comes in. As I mentioned earlier, former employees  
23 aren't invited back to the government to review their records  
24 after a FOIA request comes in.

25 And then this -- the other point was about control, and

1 you know, the government says that the State Department currently  
2 doesn't have control of the records. Patrick Kennedy, the  
3 undersecretary for management, in a letter to Mrs. Clinton -- I'm  
4 sorry, in a letter to Congress, indicates that State Department  
5 has some control over those records, and Mr. Kendall -- and these  
6 were submitted as Exhibit A and B to our reply in support of the  
7 motion. And Exhibit B is a letter from Mr. Kendall to Congress  
8 that said, "We can't return -- we can't provide you with any  
9 records in response to your subpoena until State Department gives  
10 us permission to do so." So, you know, the State Department and  
11 Mrs. Clinton believe that State Department still has control of  
12 those records.

13 You know, those are the only two points, if Your Honor  
14 doesn't have any other additional questions.

15 THE COURT: No. I think I've run out of questions,  
16 Counsel. Here's what I'm going to do. I'm going to grant  
17 discovery. I want the plaintiffs to submit to the Court and  
18 provide a copy to counsel of a proposed, narrowly-tailored  
19 discovery plan. And I'll ask counsel how much time you need to  
20 do that.

21 MR. BEKESHA: Between two and three weeks, Your Honor.

22 THE COURT: All right. Why don't I give you three weeks.

23 MR. BEKESHA: Okay.

24 THE COURT: And I'm looking -- and I do that because I  
25 know there are other cases pending in this Court and the Circuit

1 Court. Judge Lamberth, I think, also has a discovery issue  
2 before him, does he not? Are you involved in that case?

3 MR. BEKESHA: Judicial Watch is a party to that case. I'm  
4 not handling that case.

5 THE COURT: Are they having a hearing?

6 MR. BEKESHA: There has not been, and that's been pending,  
7 I think, since late August, early September.

8 THE COURT: I know Judge Lamberth is also sitting in  
9 another jurisdiction as well, helping a court with a judicial  
10 backlog.

11 All right. If you want -- do you need longer than that  
12 three weeks?

13 MR. BEKESHA: I think two to three weeks would be  
14 adequate, Your Honor.

15 THE COURT: All right. I'll give you three weeks to file  
16 a detailed discovery plan, narrowly-tailored, to address  
17 legitimate discovery issues that arise as a result of this case.

18 MR. BEKESHA: Yes, Your Honor.

19 THE COURT: And I'm going to give the government a fair  
20 opportunity to respond. And how much time do you need, Counsel?

21 MR. MYERS: May I confer, Your Honor?

22 THE COURT: Sure, absolutely.

23 (Brief pause in proceedings.)

24 MR. MYERS: Your Honor, if we could request three  
25 additional weeks?

1 THE COURT: Sure, that's fine. That's fine.

2 Let's get some dates certain here.

3 (Discussion had off the record.)

4 THE COURT: It'll be 15th of March for plaintiff's  
5 submission of detailed discovery plan, and -- oh, I'm sorry,  
6 April the 5th. April the 5th for the government's submission,  
7 and maybe I'll give you -- give the plaintiffs a week thereafter  
8 to -- ten days thereafter, April 15th, for any reply to the  
9 government's submission.

10 I'm not going to schedule another hearing at this point,  
11 and that's all I'm going to do today. I will issue an order, but  
12 I will allow discovery. I may issue an opinion in the meantime,  
13 but I want to see what a discovery plan, narrowly-tailored --  
14 I've said that at least three times, narrowly-tailored --  
15 discovery plans looks like.

16 I think there are some legitimate issues that arise  
17 because of this very atypical system that was created, and I  
18 think that answers to the questions may well inform the Court and  
19 put the Court in a better position to determine whether or not,  
20 as a matter of law -- and that's the big question: Whether or  
21 not, as a matter of law, the government has discharged its FOIA  
22 responsibilities and conducted an adequate search.

23 But first things first. Discovery, and then the Court  
24 will have to make a determination at some point that the  
25 plaintiffs are, indeed, in a position to file a response to the

1 motion for summary judgment. So that would be the next logical  
2 step. So we'll take it one step at a time, but there will be  
3 some narrowly-tailored -- and that's the fourth time,  
4 narrowly-tailored -- discovery, and I'll await -- anxiously await  
5 your submission, Counsel.

6 Anything further from government counsel?

7 MR. MYERS: No, Your Honor. Thank you.

8 THE COURT: All right. I know I mentioned issuing a  
9 subpoena. I'll give that some thought. It may well be that  
10 discovery should be accomplished, commenced, and concluded prior  
11 to the issuance of a subpoena or directive to issue to a  
12 subpoena. I think that that's a legitimate tool, but in the  
13 interim the Court will not direct the government at this time to  
14 issue a subpoena. But I think it's an issue that's worthy of  
15 further discussion at the appropriate time, and I appreciate the  
16 plaintiff's candor in that regard, too. It may well will be that  
17 there needs to be a more fully-developed record before a subpoena  
18 is issued, but I think it's a fair issue to discuss at the  
19 appropriate time. But I want to get past discovery at this time.

20 I want to thank everyone for their submissions, but I  
21 can't emphasize the drain on resources. I mean, it's a drain on  
22 my entire staff. It's a drain on the government's staff as well.  
23 And who -- you know, who knows how much money's been invested by  
24 everyone into these issues that, arguably, could have been  
25 avoided. But they weren't, and the issues are squarely before

1 the Court now, and the Court will resolve the issues at some  
2 point in time.

3 But let me thank government counsel as well. Thank you.  
4 Good to see everyone. Thank you and have a nice day. Okay. All  
5 right. Thank you.

6 Don't wait for an opinion to issue the discovery plan. I  
7 may well issue an opinion in the interim, but don't wait for one.  
8 All right. Thank you, Counsel. Have a nice day.

9 (Proceedings adjourned at 12:28 p.m.)

10  
11 **C E R T I F I C A T E**

12  
13 I, Scott L. Wallace, RDR-CRR, certify that  
14 the foregoing is a correct transcript from the record of  
proceedings in the above-entitled matter.

15 /s/ Scott L. Wallace

16 -----  
17 **Scott L. Wallace, RDR, CRR**  
18 **Official Court Reporter**

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19 **Date**