

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

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JUDICIAL WATCH, INC.)	
)	
	Plaintiff,)	
)	
v.)	No. 1:15-cv-01740-RBW
)	
NATIONAL ARCHIVES AND RECORDS ADMINISTRATION,)	
)	
	Defendant.)	
<hr/>)	

DEFENDANT’S MOTION FOR SUMMARY JUDGMENT

Defendant, the National Archives and Records Administration, hereby moves for summary judgment pursuant to Fed. R. Civ. P. 56(a). The grounds for this motion are set forth in the memorandum submitted herewith.

Respectfully submitted,

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Dated: February 2, 2016

CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2016, I served the within motion, the memorandum in support of the motion, the proposed order, the exhibit to the motion, and the statement pursuant to LCvR 7(h)(1) on all counsel of record by filing them with the Court by means of its ECF system.

s/ David M. Glass _____

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**MEMORANDUM IN SUPPORT OF DEFENDANT’S MOTION
FOR SUMMARY JUDGMENT**

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PRELIMINARY STATEMENT

“[T]he appointment of an ‘independent counsel’ to investigate and, if appropriate, prosecute certain high-ranking Government officials for violation of federal criminal laws” was “allow[ed] for” by Title VI of the Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1867. *Morrison v. Olson*, 487 U.S. 654, 660 (1988). Title VI expired by its terms on June 30, 1999. *See* 28 U.S.C. § 599.¹

Defendant, the National Archives and Records Administration (NARA), maintains custody of the records of the independent counsels who served under Title VI. Decl. of Martha Wagner Murphy (Murphy Decl.), Ex. A hereto, ¶ 15. The records maintained by NARA include the records of Kenneth W. Starr and his successors. *Id.* ¶ 18. Mr. Starr served as an independent counsel under Title VI from 1994 until 1999; his successors served until 2004. *Id.* Included among the records of Mr. Starr and his successors are drafts of a proposed indictment of Hillary Rodham Clinton. *Id.* ¶ 23.

Plaintiff, Judicial Watch, seeks an order under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, directing NARA to produce the drafts of the proposed indictment. *See* Compl., ECF No. 1, ¶ 11 & Prayer. Instead of issuing such an order, the Court should award NARA summary judgment. NARA is entitled to summary judgment because it has searched appropriately for drafts of the proposed indictment. NARA is also entitled to summary judgment because the drafts of the proposed indictment are protected from disclosure by FOIA Exemption 3 and Fed. R. Crim. P. 6(e) and, separately, by FOIA Exemptions 7(C) and (6). The drafts are protected from disclosure by Exemption 3 and Rule 6(e) because their disclosure would tend to

¹ Section 599 provides with certain exceptions that “[t]his chapter shall cease to be effective five years after the date of the enactment of the Independent Counsel Restoration Act of 1994.” The Independent Counsel Restoration Act of 1994, Pub. L. No. 103-270, 108 Stat. 732, was enacted on June 30, 1994.

reveal the secret workings of the grand jury. The drafts are also protected from disclosure by Exemptions 7(C) and 6 because the drafts involve a significant privacy interest that is not outweighed by any public interest in disclosure that plaintiff has articulated.²

FACTUAL BACKGROUND

A. THE UNIVERSE OF RECORDS AND THE INDEX

The records of Mr. Starr and his successors fill approximately 3149 cubic feet of space at NARA. Murphy Decl. ¶ 19. An index to those records was prepared by the second and last of Mr. Starr's successors and her staff in connection with the transfer of the records to NARA.³ *Id.* A copy of that index was provided to plaintiff by NARA in May 2015. *Id.* ¶ 19 n.7.

B. THE FOIA REQUEST AND THE SEARCH

By letter dated March 9, 2015, plaintiff submitted a FOIA request to NARA for the following records:

All versions of indictments against Hillary Rodham Clinton, including, but not limited to, Versions 1, 2, and 3 in box 2250 of the Hickman Ewing Attorney Files, the "HRC/___Draft Indictment" in box 2256 of the Hickman Ewing Attorney Files, as well as any all versions written by Deputy Independent Counsel Hickman Ewing, Jr. prior to September of 1996.

Murphy Decl. ¶ 6. Hickman Ewing was a lawyer who worked as Kenneth Starr's deputy in Little Rock. *Id.* ¶ 6 n.2. Plaintiff said in its request that "[t]he records in question are located in the material submitted to [NARA] by the Office of Independent Counsel In Re: Madison Guaranty Savings & Loan Association, also known as 'the records of IC Starr.'" *Id.* ¶ 6.

² FOIA "directs the district courts to 'determine the matter de novo'" where, as here, a requester challenges an agency's withholding of records. *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 755 (1989) (quoting 5 U.S.C. § 552(a)(4)(B)). For that reason, NARA is not limited in this action by its reliance at the administrative stage exclusively on Exemption 7(C).

³ An independent counsel was required by Title VI to "transfer to the Archivist of the United States all records which ha[d] been created or received" by the counsel's office upon termination of that office. 28 U.S.C. § 594(k)(1). NARA is administered "under the supervision and direction of the Archivist." 44 U.S.C. § 2102.

NARA responded to plaintiff's request by locating the two boxes in the records of Mr. Starr and his successors to which the request referred, Boxes 2250 and 2256. Murphy Decl. ¶¶ 20-21. Both boxes bear the name, "Hickman Ewing Attorney Work Product"; both boxes bear the heading "HRC," the initials of Hillary Rodham Clinton; and both boxes state on their face that their contents include "material subject to Rule 6(e) of the Federal Rules of Criminal Procedure."⁴ *Id.* ¶ 20. Box 2250 contains a folder labeled "Draft Indictment." *Id.* Box 2256 contains a folder labelled "Hillary Rodham Clinton/Webster L. Hubbell Draft Indictment." *Id.* Multiple drafts of the proposed indictment of Mrs. Clinton were located by NARA within these folders. *See id.* ¶ 21 & Ex. A.

NARA also responded to plaintiff's FOIA request by "search[ing] the 'Box Contents' and 'Subject' fields [of the index to the records of Mr. Starr and his successors] to identify any other folders that could contain 'Indictment' and 'Hillary Rodham Clinton' or 'Hillary Clinton' or 'HRC.'" Murphy Decl. ¶ 21. This search "did not locate any other responsive folders." *Id.*

Each of the drafts of the proposed indictment that NARA located is marked on its face as a draft; is denominated as a draft in accompanying cover memos; or shows through its incompleteness that it is a draft. Murphy Decl. ¶ 23. Some of the drafts contain marginalia or annotations; some are identical duplicates of each other; some are non-identical duplicates; some are accompanied by cover memos; some are accompanied by handwritten notes on separate pieces of paper; and some are accompanied by fax cover sheets. *Id.* One of the drafts consists merely of "scraps of a draft indictment." *Id.* NARA is withholding each of the drafts in full pursuant to FOIA Exemption 3 and Rule 6(e), *id.* ¶ 25, and, separately, pursuant to FOIA

⁴ Before transferring records to the Archivist of the United States, an independent counsel was required by Title VI to "clearly identify" which of the records was "subject to Rule 6(e) of the Federal Rules of Criminal Procedure as grand jury materials." 28 U.S.C. § 594(k)(1).

Exemptions 7(C) and 6. *Id.* ¶ 35. No indictment of Mrs. Clinton was ever issued, *id.* ¶ 34, and no charges against her were ever brought. *Id.* ¶ 35.

C. THE ADMINISTRATIVE APPEAL AND THIS ACTION

By letter dated March 19, 2015, NARA advised plaintiff that it had “examined the folders from Hickman Ewing’s attorney files that you requested” and was withholding the following records “in full” pursuant to FOIA Exemption 7(C): “From box 2250 the folder ‘Draft Indictment’ (38 pages) . . . From box 2256 the folder ‘Hillary Rodham Clinton/Webster L. Hubbell Draft [Indictment] (approximately 200 pages).” Murphy Decl. ¶ 8. The records to which NARA referred in its letter included records other than drafts of the proposed indictment. *See id.* ¶ 22.

By letter dated May 14, 2015, plaintiff appealed administratively the withholding of the above records. Murphy Decl. ¶ 9. By letter dated October 16, 2015, NARA advised plaintiff that its administrative appeal had been placed into the processing queue. *Id.* ¶ 10. On October 20, 2015, plaintiff commenced this action. *Id.* ¶ 11. NARA’s FOIA regulations provide that “NARA will cease processing an appeal if a requester files a FOIA lawsuit.” 36 C.F.R. § 1250.74(a)(2). In accordance with § 1250.74(a)(2), plaintiff’s commencement of this action caused NARA to close plaintiff’s administrative appeal. Murphy Decl. ¶ 12.

ARGUMENT

NARA IS ENTITLED TO SUMMARY JUDGMENT.

“Upon request, FOIA mandates disclosure of records held by a federal agency, *see* 5 U.S.C. § 552, unless the documents fall within enumerated exemptions, *see* § 552(b).” *Dep’t of the Interior v. Klamath Water Users Prot. Ass’n*, 532 U.S. 1, 7 (2001). “FOIA cases typically and appropriately are decided on motions for summary judgment.” *Abdeljabbar v. Bur. of*

Alcohol, Tobacco & Firearms, 74 F. Supp. 3d 158, 167 (D.D.C. 2014) (Walton, J.) (quoting *ViroPharma Inc. v. Dep't of HHS*, 839 F. Supp. 2d 184, 189 (D.D.C. 2012)). “To prevail on summary judgment, the defending ‘agency must show beyond material doubt [] that it has conducted a search reasonably calculated to uncover all relevant documents.” *Morley v. CIA*, 508 F.3d 1108, 1114 (D.C. Cir. 2007) (quoting *Weisberg v. Dep't of Justice (DOJ)*, 705 F.2d 1344, 1351 (D.C. Cir. 1983)). In addition, the agency must show that the “withheld or redacted documents are not required to be disclosed under § 552(a) or are exempt from disclosure under § 552(b).” *Prison Legal News v. Samuels*, 787 F.3d 1142, 1146 (D.C. Cir. 2015). In this case, NARA meets both of those requirements because it has conducted a reasonable search for drafts of the proposed indictment and because the drafts it has located are protected from disclosure by FOIA Exemption 3 and Fed. R. Crim. P. 6(e) and, separately, by FOIA Exemptions 7(C) and 6. NARA is therefore entitled to summary judgment.

I. NARA HAS CONDUCTED A REASONABLE SEARCH FOR DRAFTS OF THE PROPOSED INDICTMENT.

The duty of an agency under FOIA is limited to “conduct[ing] a search reasonably calculated to uncover all relevant documents.” *Kowalczyk v. DOJ*, 73 F.3d 386, 389 (D.C. Cir. 1996) (quoting *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990)). “[A]utomated searches” consisting of “electronic key-word searches” are permissible. *Freedom Watch v. NSA*, 783 F.3d 1340, 1343, 1345 (D.C. Cir. 2015). “The agency is not required to speculate about potential leads . . . [or] to look beyond the four corners of the request for leads to the location of responsive documents.” *Kowalczyk*, 73 F.3d at 389. Neither is the agency required to subject itself to “undue burden” in searching for responsive records. *Valencia-Lucena v. Coast Guard*, 180 F.3d 321, 327 (D.C. Cir. 1999). The adequacy of a search does not depend on “whether there might be any further documents.” *Kowalczyk*, 73 F.3d at 388.

In this case, plaintiff submitted a FOIA request to NARA for “[a]ll versions of indictments of Hillary Rodham Clinton,” including those contained in “box 2250” and “box 2256” of the “Hickman Ewing Attorney Files” in the “records of IC Starr.” Murphy Decl. ¶ 6. NARA responded to plaintiff’s request by “examin[ing] the folders from Hickman Ewing’s attorney files” to which the request referred and by drawing from those folders the drafts of the proposed indictment that the folders contained. *Id.* ¶¶ 8, 20-21. To try to find other drafts of the proposed indictment, NARA searched the index to the records of Mr. Starr and his successors for “any other folders that might contain ‘Indictment’ and ‘Hillary Rodham Clinton’ or ‘Hillary Clinton’ or ‘HRC’” but “did not locate any other responsive folders.” *Id.* ¶ 21. Plaintiff has been given a copy of the above index, *id.* ¶ 19 n.7, but does not allege in its complaint that NARA ought to have searched any additional folders. NARA had no obligation to search the records of Mr. Starr and his successors on a document-by-document basis because the above records fill approximately 3149 cubic feet of space at NARA, *id.* ¶ 19, and because a document-by-document search of the above records would have subjected NARA to “undue burden.” *See Valencia-Lucena*, 180 F.3d at 327. NARA therefore “conducted a search reasonably calculated to uncover all [drafts of the proposed indictment],” *see Kowalczyk*, 73 F.3d at 389 (quoting *Truitt*, 897 F.2d at 542), and therefore conducted a search for the drafts that meets the requirements of FOIA.

II. THE DRAFTS OF THE PROPOSED INDICTMENT ARE PROTECTED FROM DISCLOSURE BY FOIA EXEMPTION 3 AND FED. R. CRIM. P. 6(e) BECAUSE DISCLOSURE OF THE DRAFTS WOULD TEND TO REVEAL THE SECRET WORKINGS OF THE GRAND JURY.

FOIA Exemption 3 “permits an agency to withhold records that are ‘specifically exempted from disclosure by statute.’” *Murphy v. Exec. Office for U.S. Att’ys*, 789 F.3d 204, 206 (D.C. Cir. 2015) (quoting 5 U.S.C. § 552(b)(3)). “Exemption 3 differs from other FOIA

exemptions in that its applicability depends less on the detailed factual contents of specific documents” and depends instead on “the existence of a relevant statute and the inclusion of withheld material within the statute’s coverage.” *Morley*, 508 F.3d at 1126 (quoting *Ass’n of Retired R.R. Workers v. R.R. Retirement Bd.*, 830 F.2d 331, 336 (D.C. Cir. 1987)).

“[R]equests for documents related to grand jury investigations implicate [Exemption 3], because Rule 6(e) of the Federal Rules of Criminal Procedure prohibits government attorneys and others from ‘disclos[ing] a matter occurring before the grand jury.’” *Lopez v. DOJ*, 393 F.3d 1345, 1349 (D.C. Cir. 2005) (quoting Rule 6(e)(2)(B)). Though part of the federal criminal rules, Rule 6(e) is treated as a statute for purposes of Exemption 3 “because the Congress has enacted it into positive law.” *Murphy*, 789 F.3d at 206. The “grand jury secrecy” that Rule 6(e) protects “encompasses not only the direct revelation of grand jury transcripts but also the disclosure of information which would reveal ‘the identities of witnesses or jurors, the substance of testimony, the strategy or direction of the investigation, the deliberations or questions of the jurors, and the like.’” *Fund for Const. Gov’t v. Nat’l Archives & Records Serv.*, 656 F.2d 856, 869 (D.C. Cir. 1981) (quoting *SEC v. Dresser Indus.*, 628 F.2d 1368, 1382 (D.C. Cir. 1980) (en banc)). For that reason, the “relevant inquiry” in cases where records are withheld pursuant to Exemption 3 and Rule 6(e) is whether the disclosure of the records “would ‘tend to reveal some secret aspect of the grand jury’s investigation.’” *Lopez*, 393 F.3d at 1349 (quoting *Senate of P.R. v. DOJ*, 823 F.2d 574, 582 (D.C. Cir. 1987)). “[T]he basis for invoking [E]xemption 3 need only be ‘logical or plausible.’” *Murphy*, 789 F.3d at 211 (quoting *Larson v. Dep’t of State*, 565 F.3d 857, 862 (D.C. Cir. 2009)). For that reason, Rule 6(e) is “properly invoked” as a justification for withholding under Exemption 3 “if ‘the disclosed material would *tend* to reveal some secret aspect of the grand jury’s investigation, including the identities of witnesses.’” *Id.* at 209-10

(quoting *Hodge v. FBI*, 703 F.3d 575, 580 (D.C. Cir. 2013)). “A tendency need only make a result more likely.” *Id.*

In this case, the drafts of the proposed indictment of Mrs. Clinton are housed at NARA in boxes stating on their face that their contents include material “subject to Rule 6(e) of the Federal Rules of Criminal Procedure.” Murphy Decl. ¶ 20. The material in the boxes to which Rule 6(e) applies includes the drafts of the proposed indictment because the drafts are “directly related to the Independent Counsel’s consideration of presenting an indictment to a grand jury.” *Id.* ¶ 25. Collectively, the drafts “reflect[] names and identifying information of individuals subpoenaed – or intended to be subpoenaed – to testify before the grand jury, as well as information identifying specific records subpoenaed during the grand jury process.” *Id.* In addition, the drafts “reflect and quote grand jury testimony, and reveal the inner workings and direction of the grand jury.” *Id.* The disclosure of the drafts would therefore “violate the secrecy of the grand jury proceedings” in contravention of Rule 6(e) “by disclosing the inner workings of the federal grand jury tasked with considering these matters.” *Id.*

In *Boehm v. FBI*, 948 F. Supp. 2d 9 (D.D.C. 2013), the withholding of a “draft of a grand jury indictment” was held permissible under Exemption 3 and Rule 6(e) because the disclosure of the draft “would tend to reveal the secret workings of the grand jury.” 948 F. Supp. 2d at 27. The same rationale applies with equal force to the drafts of the proposed indictment at issue here. The drafts are therefore protected from disclosure by Exemption 3 and Rule 6(e).

III. THE DRAFTS OF THE PROPOSED INDICTMENT ARE PROTECTED FROM DISCLOSURE BY FOIA EXEMPTIONS 7(C) AND 6 BECAUSE THE DRAFTS INVOLVE A SIGNIFICANT PRIVACY INTEREST THAT IS NOT OUTWEIGHED BY ANY PUBLIC INTEREST IN DISCLOSURE THAT PLAINTIFF HAS ARTICULATED.

A. THE DRAFTS OF THE PROPOSED INDICTMENT ARE PROTECTED FROM DISCLOSURE BY EXEMPTION 7(C).

“Exemption 7(C) authorizes the Government to withhold law enforcement records that ‘could reasonably be expected to constitute an unwarranted invasion of personal privacy.’” *Blackwell v. FBI*, 646 F.3d 37, 40 (D.C. Cir. 2011) (quoting 5 U.S.C. § 552(b)(7)(C)). Two questions must be answered in cases where Exemption 7(C) is invoked as a basis for withholding. *See NARA v. Favish*, 541 U.S. 147, 164 (2004). The first is whether the withheld records or information were “‘compiled for law enforcement purposes’ as that phrase is used in Exemption 7(C).” *Id.* The second is whether disclosure of the withheld records or information “‘could reasonably be expected to constitute an unwarranted invasion of personal privacy.’” *Id.* In this case, the drafts of the proposed indictment of Mrs. Clinton are protected from disclosure by Exemption 7(C) because the drafts were compiled for law enforcement purposes and because their disclosure can reasonably be expected to constitute an unwarranted invasion of personal privacy.

1. THE DRAFTS OF THE PROPOSED INDICTMENT WERE COMPILED FOR LAW ENFORCEMENT PURPOSES.

“To show that [records] were ‘compiled for law enforcement purposes,’ [an agency] need only ‘establish a rational nexus between [an] investigation and one of the agency’s law enforcement duties and a connection between an individual or incident and a possible security risk or violation of federal law.’” *Blackwell*, 646 F.3d at 40 (quoting *Campbell v. DOJ*, 164 F.3d 20, 32 (D.C. Cir. 1998)). Records generated “in the course of investigating and prosecuting [an

individual] on [criminal] charges” are records that meet this standard. *Id.* In this case, the drafts of the proposed indictment of Mrs. Clinton were compiled “for criminal law enforcement purposes during the course of the Independent Counsel’s performance of [his] statutorily-imposed law enforcement mission: to investigate and, if appropriate, prosecute certain high-ranking Government officials for violation of federal criminal laws.” Murphy Decl. ¶ 27. For that reason, the drafts meet the threshold requirement of Exemption 7(C).

2. DISCLOSURE OF THE DRAFTS OF THE PROPOSED INDICTMENT CAN REASONABLY BE EXPECTED TO CONSTITUTE AN UNWARRANTED INVASION OF PERSONAL PRIVACY.

A claim that records or information may be withheld under Exemption 7(C) requires the court to determine as a threshold matter whether any person has a “personal privacy interest” in avoiding disclosure of the records or information to which the claim applies. *See Favish*, 541 U.S. at 165. If such an interest is found to exist, the court must then determine whether the disclosure of the records or information “‘could reasonably be expected to constitute an unwarranted invasion’ of the [person’s] personal privacy.” *Id.* at 171. In making that determination, “[t]he term ‘unwarranted’ requires [the court] to balance the [person’s] privacy interest against the public interest in disclosure.” *Id.*

In this case, Mrs. Clinton has a significant personal privacy interest in avoiding disclosure of the drafts of the proposed indictment. Because that interest is not overcome by any public interest in disclosure that plaintiff has articulated, the drafts are protected from disclosure by Exemption 7(C).

a. Mrs. Clinton Has a Significant Personal Privacy Interest in Avoiding Disclosure of the Drafts of the Proposed Indictment.

“[I]ndividuals have a strong interest in not being associated unwarrantedly with alleged criminal activity,” *Stern v. FBI*, 737 F.2d 84, 91-92 (D.C. Cir. 1984), and thus have “‘an obvious

privacy interest cognizable under Exemption 7(C) in keeping secret the fact that they were subjects of a law enforcement investigation.” *Citizens for Resp. & Ethics in Wash. (CREW) v. DOJ*, 746 F.3d 1082, 1091 (D.C. Cir. 2014) (quoting *Nation Mag. v. Customs Serv.*, 71 F.3d 885, 894 (D.C. Cir. 1995)). The above interest is particularly great in the case of “individuals who have been investigated but never publicly charged at all.” *ACLU v. DOJ*, 655 F.3d 1, 7 (D.C. Cir. 2011). That interest is not vitiated in cases where “the individuals are public figures [or] high level government or corporate officials,” *Fund for Const. Gov’t*, 656 F.2d at 864, or in cases where the investigations attracted “national attention.” *Id.* at 865. To the contrary, “[t]he degree of intrusion” caused by “revelation of the fact that an individual has been investigated for suspected criminal activity” is “potentially augmented by the fact that the individual is a well[-] known figure and the investigation one which attracts . . . much national attention” because “[t]he disclosure of that information would produce the unwarranted result of placing the [individual] in the position of having to defend [his or her] conduct in the public forum outside of the procedural protections normally afforded the accused in criminal proceedings.” *Id.*

In this case, the drafts of the proposed indictment of Mrs. Clinton are drafts of an indictment that was never issued. Murphy Decl. ¶ 34. No less than anyone else, Mrs. Clinton has “a strong interest in not being associated unwarrantedly with alleged criminal activity.” *See Stern*, 737 F.2d at 91-92. That interest persists even though the existence of the drafts is publicly known because the content of the drafts has not been disclosed. Mrs. Clinton thus has a significant personal privacy interest in avoiding disclosure of the drafts.

b. The Interest of Mrs. Clinton in Avoiding Disclosure of the Drafts Is Not Overcome by Any Public Interest in Disclosure that Plaintiff Has Articulated.

“Where the privacy concerns addressed by Exemption 7(C) are present, the exemption requires the person requesting the information to establish a sufficient reason for the disclosure.” *Favish*, 541 U.S. at 172. “First, the citizen must show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake.” *Id.* “Second, the citizen must show the information is likely to advance that interest.” *Id.*

In this case, plaintiff has given two reasons why the drafts of the proposed indictment should be disclosed. Neither of those reasons articulates a public interest in disclosure of the drafts that overcomes the personal privacy interest of Mrs. Clinton in avoiding their disclosure.

First, plaintiff contends that “the justification most likely to satisfy Exemption 7(C)’s public interest requirement is that the information is necessary to show that the investigative agency or other responsible officials acted negligently or otherwise improperly in the performance of their duties.” Murphy Decl. ¶ 9. “Allegations of government misconduct are ‘easy to allege,’” however, “‘and hard to disprove.’” *Favish*, 541 U.S. at 175 (quoting *Crawford-El v. Britton*, 523 U.S. 574, 585 (1998)). “[A] presumption of legitimacy” is thus “accorded to the Government’s official conduct.” *Id.* at 174. For that reason, a FOIA requester “must establish more than a bare suspicion in order to obtain disclosure” in any case in which “a privacy interest [is] protected by Exemption 7(C) and the public interest being asserted is to show that the responsible officials acted negligently or otherwise improperly in the performance of their duties.” *Id.* Because this standard requires the requester to produce “evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred,” *id.*, the “‘public interest [in disclosure] is insubstantial’” in any case in which

“governmental misconduct is alleged as the justification for disclosure . . . unless the requester puts forward compelling evidence that the agency . . . engaged in illegal activity and shows that the information is necessary in order to confirm or refute that evidence.” *Computer Professionals for Soc. Resp. v. Secret Serv.*, 72 F.3d 897, 905 (D.C. Cir. 1996) (quoting *Davis v. DOJ*, 968 F.2d 1276, 1282 (D.C. Cir. 1992)).

In this case, plaintiff does not allege that Mr. Starr or any member of his staff “acted negligently or otherwise improperly in the performance of [his or her] duties.” *See Favish*, 541 U.S. at 174. Those duties, as noted above, were completed more than a decade ago. Much less does plaintiff “produce evidence that would warrant a belief by a reasonable person” that any such allegation would have any merit. *See id.* Still less does plaintiff produce any evidence that disclosure of the drafts of the proposed indictment would be likely to provide any information substantiating any such allegation. For those reasons, plaintiff cannot rely on any allegation of official impropriety to overcome the personal privacy interest in avoiding disclosure of the drafts that Mrs. Clinton possesses.

Second, plaintiff alleges that Mrs. Clinton “is a highly public figure who has exercised vast political power throughout her career” and that, accordingly, “[t]he public interest in records concerning possible unlawful activity on her part far outweighs the privacy interest of [Exemption 7(C)].” Murphy Decl. ¶ 9. This allegation is unpersuasive because “the only relevant interest in the FOIA balancing analysis [is] the extent to which disclosure of the information sought would ‘she[d] light on an agency’s performance of its statutory duties’ or otherwise let citizens know ‘what their government is up to.’” *Dep’t of Def. v. Fed. Labor Rel. Auth.*, 510 U.S. 487, 497 (1994) (quoting *Reporters Comm.*, 489 U.S. at 773). In this case, any information contained in the drafts of the proposed indictment is information about Mrs. Clinton

or other individuals, not information that would “‘she[d] light on an agency’s performance of its statutory duties’ or otherwise let citizens know ‘what their government is up to.’” *See id.*

In addition, “[t]he presumption of innocence stands as one of the most fundamental principles of our system of criminal justice: defendants are considered innocent unless and until the prosecution proves their guilt beyond a reasonable doubt.” *ACLU v. DOJ*, 750 F.3d 927, 933 (D.C. Cir. 2014). In view of that presumption, “individuals who have been charged with but never convicted of a crime” have a “fundamental interest” in “preventing the repeated disclosure” of the fact of their involvement in the criminal process. *Id.* at 935. Information about an individual’s involvement in the criminal process is thus protected from disclosure by Exemption 7(C) because disclosure of that involvement “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” *Id.*

In this case, Mrs. Clinton was never indicted, Murphy Decl. ¶ 34, or otherwise charged with a crime. *Id.* ¶ 35. She thus has an even stronger interest in avoiding disclosure of the drafts of the proposed indictment than a person who has been indicted but acquitted or a person against whom charges were brought but later dropped. Her interest in avoiding disclosure of the drafts is not diminished by the fact that she is a former public official who is running for President. The drafts of the proposed indictment are therefore protected from disclosure by Exemption 7(C).

B. THE DRAFTS OF THE PROPOSED INDICTMENT ARE PROTECTED FROM DISCLOSURE BY EXEMPTION 6.

Exemption 6 “shields from disclosure ‘personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.’” *Prison Legal News*, 787 F.3d at 1146 (quoting 5 U.S.C. § 552(b)(6)). Exemption 6 applies to “‘detailed Government records on an individual which can be identified as applying to that individual.’” *Id.* at 1147 (quoting *Judicial Watch v. DOJ*, 365 F.3d 1108, 1124 (D.C. Cir. 2004)).

Exemption 6 thus covers “not just files, but also bits of personal information, such as names and addresses, the release of which would create a palpable threat to privacy.” *Id.* (quoting *Judicial Watch v. FDA*, 449 F.3d 141, 152 (D.C. Cir. 2006)).

As is the case when records are withheld pursuant to Exemption 7(C), the withholding of records pursuant to Exemption 6 requires the court to “balance the privacy interests that would be compromised by disclosure against the public interest in release of the requested information.” *Beck v. DOJ*, 997 F.2d 1489, 1491 (D.C. Cir. 1993) (quoting *Davis*, 968 F.2d at 1281). “The protection available” under the two exemptions “is not the same,” however. *Id.*

Noting the use of the adverb “clearly” in Exemption 6 and its requirement that disclosure constitute an actual rather than a likely invasion of privacy, the Supreme Court has held that “the standard for evaluating a threatened invasion of privacy interests . . . is somewhat broader” under Exemption 7(C) than under Exemption 6.

Id. (quoting *Reporters Comm.*, 489 U.S. at 756).

For the reasons set forth in Point III(A)(1), *supra*, the drafts of the proposed indictment of Mrs. Clinton were compiled for law enforcement purposes and are therefore protected from disclosure by Exemption 7(C). Even assuming, *arguendo*, that the drafts were compiled for a different purpose, they are “detailed Government records on [Mrs. Clinton] which can be identified as applying to [Mrs. Clinton].” *See Prison Legal News*, 787 F.3d at 1147 (quoting *Judicial Watch*, 365 F.3d at 1124). For the reasons set forth in Point III(A)(2)(b), *supra*, the interest of Mrs. Clinton in avoiding disclosure of the drafts is not overcome by any public interest in disclosure that plaintiff has articulated. For that reason, the drafts are protected from disclosure as much by Exemption 6 as they are by Exemption 7(C).

CONCLUSION

For the foregoing reasons, NARA’s motion for summary judgment should be granted.

Respectfully submitted,

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Dated: February 2, 2016

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

<hr/>)	
JUDICIAL WATCH, INC.)	
)	
	Plaintiff,)	
)	
v.)	No. 1:15-cv-01740-RBW
)	
NATIONAL ARCHIVES AND)	
RECORDS ADMINISTRATION,)	
)	
	Defendant.)	
<hr/>)	

DEFENDANT’S STATEMENT UNDER LCvR 7(h)(1)

Defendant, the National Archives and Records Administration (NARA), hereby states pursuant to LCvR 7(h)(1) that no genuine issue exists as to the following material facts:

1. NARA maintains custody of the records of the independent counsels who served under Title VI of the Ethics in Government Act of 1978. Decl. of Martha Wagner Murphy ¶ 15.
2. The records maintained by NARA include the records of Kenneth W. Starr and his successors. *Id.* ¶ 18.
3. Mr. Starr served as an independent counsel under Title VI from 1994 until 1999; his successors served until 2004. *Id.*
4. Included among the records of Mr. Starr and his successors are drafts of a proposed indictment of Hillary Rodham Clinton. *Id.* ¶ 23.
5. The records of Mr. Starr and his successors fill approximately 3149 cubic feet of space at NARA. *Id.* ¶ 19.
6. An index to those records was prepared by the second and last of Mr. Starr’s successors and her staff in connection with the transfer of the records to NARA. *Id.*

7. A copy of that index was provided to plaintiff, Judicial Watch, by NARA in May 2015. *Id.* ¶ 19 n.7.

8. By letter dated March 9, 2015, plaintiff submitted a request to NARA under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, for the following records:

All versions of indictments against Hillary Rodham Clinton, including, but not limited to, Versions 1, 2, and 3 in box 2250 of the Hickman Ewing Attorney Files, the “HRC/___Draft Indictment” in box 2256 of the Hickman Ewing Attorney Files, as well as any all versions written by Deputy Independent Counsel Hickman Ewing, Jr. prior to September of 1996.

Id. ¶ 6.

9. Hickman Ewing was a lawyer who worked as Kenneth Starr’s deputy in Little Rock.

Id. ¶ 6 n.2.

10. Plaintiff said in its request that “[t]he records in question are located in the material submitted to [NARA] by the Office of Independent Counsel In Re: Madison Guaranty Savings & Loan Association, also known as ‘the records of IC Starr.’” *Id.* ¶ 6.

11. NARA responded to plaintiff’s request by locating the two boxes in the records of Mr. Starr and his successors to which the request referred, Boxes 2250 and 2256. *Id.* ¶¶ 20-21.

12. Both boxes bear the name, “Hickman Ewing Attorney Work Product”; both boxes bear the heading “HRC,” the initials of Hillary Rodham Clinton; and both boxes state on their face that their contents include “material subject to Rule 6(e) of the Federal Rules of Criminal Procedure.” *Id.* ¶ 20.

13. Box 2250 contains a folder labeled “Draft Indictment.” *Id.*

14. Box 2256 contains a folder labelled “Hillary Rodham Clinton/Webster L. Hubbell Draft Indictment.” *Id.*

15. Multiple drafts of the proposed indictment of Mrs. Clinton were located by NARA within these folders. *See id.* ¶ 21 & Ex. A.

16. NARA also responded to plaintiff's FOIA request by "search[ing] the 'Box Contents' and 'Subject' fields [of the index to the records of Mr. Starr and his successors] to identify any other folders that could contain 'Indictment' and 'Hillary Rodham Clinton' or 'Hillary Clinton' or 'HRC.'" *Id.* ¶ 21.

17. This search "did not locate any other responsive folders." *Id.*

18. Each of the drafts of the proposed indictment that NARA located is marked on its face as a draft; is denominated as a draft in accompanying cover memos; or shows through its incompleteness that it is a draft. *Id.* ¶ 23.

19. Some of the drafts contain marginalia or annotations; some are identical duplicates of each other; some are non-identical duplicates; some are accompanied by cover memos; some are accompanied by handwritten notes on separate pieces of paper; and some are accompanied by fax cover sheets. *Id.*

20. One of the drafts consists merely of "scraps of a draft indictment." *Id.*

21. NARA is withholding each of the drafts in full pursuant to FOIA Exemption 3 and Rule 6(e), *id.* ¶ 25, and, separately, pursuant to FOIA Exemptions 7(C) and 6. *Id.* ¶ 35.

22. No indictment of Mrs. Clinton was ever issued, *id.* ¶ 34, and no charges against her were ever brought. *Id.* ¶ 35.

23. By letter dated March 19, 2015, NARA advised plaintiff that it had "examined the folders from Hickman Ewing's attorney files that you requested" and was withholding the following records "in full" pursuant to FOIA Exemption 7(C): "From box 2250 the folder 'Draft

Indictment’ (38 pages) . . . From box 2256 the folder ‘Hillary Rodham Clinton/Webster L. Hubbell Draft [Indictment] (approximately 200 pages).’ *Id.* ¶ 8.

24. The records to which NARA referred in its letter included records other than drafts of the proposed indictment. *See id.* ¶ 22.

25. By letter dated May 14, 2015, plaintiff appealed administratively the withholding of the above records. *Id.* ¶ 9.

26. By letter dated October 16, 2015, NARA advised plaintiff that its administrative appeal had been placed into the processing queue. *Id.* ¶ 10.

27. On October 20, 2015, plaintiff commenced this action. *Id.* ¶ 11.

28. Plaintiff’s commencement of this action caused NARA to close plaintiff’s administrative appeal. *Id.* ¶ 12.

Respectfully submitted,

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Dated: February 2, 2016

*Judicial Watch v. Nat'l Archives & Records
Admin.*

No. 1:15-cv-01740-RBW

Def. Mot. Summ. J.

Ex. A

3. Due to the nature of my official duties, I am familiar with the procedures followed by NARA in responding to requests for material from its archival collection pursuant to the provisions of the FOIA, 5 U.S.C. § 552. I am also specifically aware of the handling of plaintiff Judicial Watch's March 9, 2015 FOIA request to NARA for "[a]ll versions of indictments against Hillary Rodham Clinton, including, but not limited to, Versions 1, 2, and 3 in box 2250 of the Hickman Ewing Attorney Files, the "HRC/ __ Draft Indictment" in box 2256 of the Hickman Ewing Attorney Files, as well as any all versions written by Deputy Independent Counsel Hickman Ewing, Jr. prior to September of 1996."

4. In accordance with Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), I provide this declaration in support of NARA's motion for summary judgment and to provide justifications for the withholding of information in full from the total of 451 pages of documents¹ identified as responsive to plaintiff's request and further described in detail in **Exhibit A** attached hereto, pursuant to FOIA Exemptions 3, 6 and 7(C), 5 U.S.C. §§ 552 (b)(3), (b)(6) and (b)(7)(C).

5. The statements contained in this declaration are based upon my personal knowledge, upon information provided to me in my official capacity, and upon conclusions and determinations reached and made in accordance therewith.

Procedural History of Judicial Watch's FOIA Request

6. By letter dated March 9, 2015, Judicial Watch submitted a FOIA request to NARA for:

All versions of indictments against Hillary Rodham Clinton, including, but not limited to, Versions 1, 2, and 3 in box 2250 of the Hickman Ewing² Attorney Files, the "HRC/ __ Draft Indictment" in box 2256 of the

¹ The discrepancy in the total number of pages is attributable to the fact that at the administrative stage we did not include identical duplicates in our page count.

² Hickman Ewing was a lawyer who worked as Kenneth Starr's deputy in Little Rock.

Hickman Ewing Attorney Files, as well as any and all versions written by Deputy Independent Counsel Hickman Ewing, Jr. prior to September of 1996.

The records in question are located in the material submitted to the National Archives and Records Administration by the Office of Independent Counsel In Re: Madison Guaranty Savings & Loan Association, also known as “the records of IC Starr.”³

See Exhibit B.

7. My staff assigned the request FOIA No. 46068.
8. By letter dated March 19, 2015, we informed Judicial Watch that “[w]e have examined the folders from Hickman Ewing’s attorney files that you requested. From box 2250 the folder “Draft Indictment” (38 pages) is denied in full under Exemption (b)(7)(C). From box 2256 the folder “Hillary Rodham Clinton/Webster L. Hubbell Draft Indictment” (sic) (approximately 200 pages) is denied in full under Exemption (b)(7)(C).” (*See Exhibit C*). Our March 19, 2015 letter also provided Judicial Watch with administrative appeal rights.
9. By letter dated May 14, 2015, Judicial Watch appealed NARA’s denial under Exemption (b)(7)(C). In relevant part, Judicial Watch asserted that:

[NARA’s] response amounts to no more than a barren assertion that the responsive records are being withheld pursuant to FOIA Exemption (b)(7)(C)...it clearly has not met its burden under FOIA [to]...provide sufficient identifying information with respect to each of the records that it withheld to enable Judicial Watch to assess the propriety of the claimed exemption...[and] has failed to demonstrate that all non-exempt information has been segregated...[t]he Supreme Court has suggested that the justification most likely to satisfy Exemption 7(C)’s public interest requirement is that the information is necessary to show that the investigative agency or other responsible officials acted negligently or otherwise improperly in the performance of their duties...Hillary Clinton is a highly public figure who has exercised political power throughout her career. The public interest in records concerning possible unlawful activity on her part far outweighs the privacy interest of (b)(7)(C).

³ Plaintiff included a fee waiver request in its March 9, 2015 letter, but NARA did not address the request since it withheld all documents in full. Plaintiff does not raise the fee waiver issue in its Complaint.

10. By letter dated October 16, 2015, NARA acknowledged receipt of the appeal, apologized for the delay in the acknowledgment, advised Judicial Watch that the request had been assigned FOIA Appeal No. NGC15-071A, and provided information on how Judicial Watch might obtain an update on the status of the appeal. *See Exhibit D.*

11. On October 22, 2015, plaintiff filed the instant lawsuit.

12. In accordance with 36 C.F.R. § 1250.74(a)(2), by letter dated December 4, 2015, NARA advised Judicial Watch it had administratively closed the appeal due to the filing of the lawsuit. *See Exhibit E.*

National Archives and Records Administration and its Holdings

13. The National Archives was established in 1934 by President Franklin Roosevelt to preserve and care for the records of the U.S. Government, but its major holdings date back to 1775. They capture the sweep of the past: slave ship manifests and the Emancipation Proclamation; captured German records and the Japanese surrender documents from World War II; journals of polar expeditions and photographs of Dust Bowl farmers; Indian treaties making transitory promises; and a richly bound document bearing the bold signature “Bonaparte” — the Louisiana Purchase Treaty that doubled the territory of the young republic.

14. In 1985, the National Archives became an independent executive agency, and it now has over 40 facilities nationwide including field archives, Federal Records Centers, Presidential Libraries, the Federal Register, and the National Historical Publications and Records Commission. NARA keeps only those Federal records that are judged to have continuing value — about two to five percent of those generated in any given year. By now, they add up to a formidable number, diverse in form as well as in content. There are approximately 10 billion pages of textual records; 12 million maps, charts, and architectural and engineering drawings; 25

million still photographs and graphics; 24 million aerial photographs; 300,000 reels of motion picture film; 400,000 video and sound recordings; and 133 terabytes of electronic data. All of these materials are preserved because they are important to the workings of Government, have long-term research worth, or provide information of value to citizens.⁴

15. Among its many holdings, NARA maintains custody of the records of independent counsels who have completed their investigations.⁵ Title VI of the Ethics in Government Act of 1978, Pub. L. No. 97-521, 92 Stat. 1867, “allow[ed] for the appointment of an ‘independent counsel’ to investigate and, if appropriate, prosecute certain high-ranking Government officials for violation of federal criminal laws.” Enacted originally for a period of five years, the statutory authority was renewed several times thereafter, ultimately terminating in 1999.

16. An independent counsel was required by Title VI to “transfer to the Archivist of the United States all records which ha[d] been created or received” by the independent counsel’s office upon termination of that office. 28 U.S.C. § 594(k)(1). Access to records transferred to the Archivist under Title VI was to be “governed by [FOIA],” except in the case of certain records provided to an independent counsel by a committee of Congress. *Id.* § 594(k)(3)(A).

17. Before transferring its records to the Archivist, an independent counsel was required by Title VI to “clearly identify” which of the records was “subject to Rule 6(e) of the Federal Rules of Criminal Procedure as grand jury materials.” 28 U.S.C. § 594(k)(1). “Rule 6(e) provides, in pertinent part, that the parties and witnesses to a grand jury proceeding may not ‘disclose a matter occurring before the grand jury.’” *See* Rule 6(e)(2)(B)).

⁴ *See* <http://www.archives.gov/publications/general-info-leaflets/1-about-archives.html>.

⁵ *See* <http://www.archives.gov/research/investigations/special-prosecutors-indept-counsels.html>.

Records of Independent Counsel Kenneth Starr

18. In August 1994, Kenneth W. Starr was named the independent counsel to lead the investigation into the so-called Whitewater Affair. In 1999, Independent Counsel (IC) Starr resigned. He was replaced by Robert W. Ray who resigned in March 2002. The Whitewater investigation was then left for Ray's deputy to wrap up. The office officially ended operations in 2004,⁶ and the records were transferred to NARA under Title VI in connection with the cessation of operations.

19. As a result, the records of Former IC Starr and his successors are now part of NARA's holdings ("IC Starr records"). The IC Starr records, which consist of approximately 3149 cubic feet of records, have been in NARA's custody since March 2004. A finding aid reference to the Starr records has been available to the public, in redacted form, since approximately June 2015 ("Index").⁷ The Index consists of two manifests – a Little Rock Office File Manifest and a District of Columbia Office File Manifest – that together list over 3300 boxes of material, with specific box numbers, as well as many thousands of folder titles noted in the "Box Contents" field.

Search Conducted in Response to Judicial Watch's FOIA Request

20. Both boxes identified by plaintiff in its request, Boxes 2250 and 2256, have the same name, "Hickman Ewing Attorney Work Product." The boxes also have the same subject heading, "HRC [Hillary Rodham Clinton]." Each box, on its face, has a note indicating that the contents include material subject to Rule 6(e) of the Federal Rules of Criminal Procedure.

⁶ CNN.com/Inside Politics, *Whitewater Independent Counsel Robert Ray Resigns* (Mar. 12, 2002), <http://edition.cnn.com/2002/ALLPOLITICS/03/12/indy.counsel.resigns/index.html> (accessed Nov. 16, 2015); UPI News Track, *Whitewater Counsel Closes Doors* (Mar. 23, 2004).

⁷ By letter dated June 11, 2014, plaintiff Judicial Watch filed a FOIA request with NARA seeking access to the Index. NARA released the Index to Judicial Watch on May 4, 2015.

Within Box 2250 is a folder labeled “Draft Indictment,” and within Box 2256 is a folder labeled “Hillary Rodham Clinton/Webster L. Hubbell Draft Indictment.”

21. My staff also searched the “Box Contents” and “Subject” fields of the Index to identify any other folders that might contain “Indictment” and “Hillary Rodham Clinton” or “Hillary Clinton” or “HRC.” Other than the folder in box 2256, we did not locate any other responsive folders.

22. At the time NARA responded to the FOIA request, all the material in the “Draft Indictment” folder in Box 2250, and the material in the “Hillary Rodham Clinton/Webster Hubell Draft Indictment” folder in Box 2256, were considered responsive. For the purposes of the instant lawsuit, and in accordance with the specific wording of the FOIA request for “[a]ll versions of indictments against Hillary Rodham Clinton,” only draft indictments are considered responsive.

23. Each of the responsive documents is a draft and is either clearly marked as such on the draft or on an accompanying cover memo, or is an obviously incomplete draft. Some of these drafts contain marginalia or annotations, Doc. Nos. 6, 10, 15, 17, 19; some are identical duplicates of each other, Doc. Nos. 1 – 4, 7 – 9, 12 - 13; some are non-identical duplicates, Doc. Nos. 5 – 6; some are accompanied by cover memos, Doc. Nos. 1 – 4, 5, 6, 10, 16; some are accompanied by handwritten notes on separate pieces of paper, Doc. No. 14; and some are accompanied by cover fax sheets, Doc. Nos. 5, 6. One draft consists merely of “[s]craps of a draft indictment,” Doc. No. 11. The responsive documents are described in further detail in the attached index. *See Exhibit A.*

FOIA Exemptions Applicable to the Responsive Documents

Exemption 3

24. FOIA Exemption 3, 5 U.S.C. § 552(b)(3), exempts from disclosure information which is:

specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

One commonly recognized (b)(3) statute is Rule 6(e) of the Federal Rules of Criminal Procedure, which prohibits the disclosure of matters occurring before a Grand Jury. My office routinely screens all responsive records for (b)(3) matters, including records that would reveal the workings of a grand jury

25. All the responsive documents are directly related to the Independent Counsel's consideration of presenting an indictment to a grand jury. The material collectively reflects names and identifying information of individuals subpoenaed – or intended to be subpoenaed – to testify before the grand jury, as well as information identifying specific records subpoenaed during the grand jury process. They reflect and quote grand jury testimony, and reveal the inner workings and direction of the grand jury. Disclosure would violate the secrecy of the grand jury proceedings by disclosing the inner workings of the federal grand jury that was tasked with considering these matters. Similarly, the consideration of possible witnesses before the Grand Jury, and internal memoranda and notes about the strategy and considerations regarding possible indictments reveal the direction of the grand jury investigation. Accordingly, all the documents have been properly withheld in full pursuant to Exemption (b)(3). *See Exhibit A.*

Exemption 7 Threshold

26. Exemption 7 of the FOIA protects from mandatory disclosure records or information compiled for law enforcement purposes, but only to the extent that disclosure could reasonably be expected to cause one of the harms enumerated in the subparts of the exemption. *See* 5 U.S.C. § 552(b)(7). In this case, the harm that could reasonably be expected to result from disclosure concerns invasion of personal privacy.

27. Before an agency can invoke any of the harms enumerated in Exemption 7, it must first demonstrate that the records or information at issue were compiled for law enforcement purposes. The records at issue in this case were compiled for criminal law enforcement purposes during the course of the Independent Counsel's performance of its statutorily-imposed law enforcement mission: to investigate and, if appropriate, prosecute certain high-ranking Government officials for violation of federal criminal laws. Given the function of an Independent Counsel and the nature of the particular documents at issue, there is little doubt that these materials were compiled for a law enforcement purpose. Since the records clearly meet the Exemption 7 threshold, the remaining inquiry for Exemption 7 purposes is whether their disclosure would invade personal privacy.

Exemptions (b)(6) and (b)(7)(C)
Clearly Unwarranted and Unwarranted Invasion of Personal Privacy

28. 5 U.S.C. § 552 (b)(6) exempts from disclosure:

personnel and medical files and similar files when the disclosure of such information would constitute a clearly unwarranted invasion of personal privacy.

29. 5 U.S.C. § 552 (b)(7)(C) exempts from disclosure:

records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy.

30. Exemption 6 of the FOIA protects from mandatory disclosure personnel and medical files records when disclosure would constitute a clearly unwarranted invasion of personal privacy. For purposes of this case, NARA is asserting Exemption 6 in conjunction with Exemption 7(C) to protect the responsive documents at issue here. Because the analysis and balancing required by exemptions 6 and 7 is sufficiently similar to warrant a consolidated discussion, both exemptions are discussed directly below.

31. The balancing test for Exemption 6 is whether disclosure “would constitute a clearly unwarranted invasion of personal privacy,” whereas the test for Exemption 7(C) is the lower standard of whether disclosure “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” Nevertheless, under the analysis of both exemptions, the privacy interests are balanced against the public’s interest in disclosure under the analysis of both exemptions.

32. When withholding information pursuant to these privacy exemptions, an agency is required to balance the privacy interests of the individuals mentioned in these records against any public interest in disclosure. In asserting these exemptions, information is examined to determine the nature and strength of the privacy interest of every individual whose names and/or identifying information appears in the documents at issue. In making this analysis, the public interest in disclosure of this information is determined by assessing whether the information in question would shed light on the Independent Counsel’s statutorily-imposed law enforcement mission to investigate and, if appropriate, prosecute individuals for violation of federal criminal laws. In each instance where information was withheld, it was determined that individual privacy rights outweighed the public interest. The only recognized public interest is that which sheds light on the operations and activities of the Independent Counsel. In asserting Exemptions

6 and 7(C), we have determined that the individuals' privacy interests, and in particular, the interests of Hillary Rodham Clinton, are not outweighed by any public interest in disclosure.

33. With respect to the potential invasion of personal privacy, all individuals are entitled to a presumption of innocence. When, in the context of a criminal investigation, an Independent Counsel determines not to bring an indictment, the subject of the investigation has a significant privacy interest in not being associated with any underlying criminal activity.

NARA's policy is not to release records from investigations if the records clearly identify people who, although they may have been investigated, never faced criminal charges.

34. In this case, all the responsive documents relate to the Independent Counsel's consideration of whether to proceed with an indictment of Hillary Rodham Clinton as well as other individuals. The documents reflect numerous drafts and internal discussions as to how to they might proceed; ultimately, however, an indictment against Mrs. Clinton was never issued. Despite the role that Mrs. Clinton occupied as the First Lady during President Clinton's administration, Mrs. Clinton maintains a strong privacy interest in not having information about her from the files of the Independent Counsel disclosed. As an uncharged person Hillary Rodham Clinton retains a significant interest in her personal privacy despite any status as a public figure.

35. In its administrative appeal, plaintiff argued that these "privacy concerns are overwhelmed by the public interest in such records," and that the "public interest in records considering possible unlawful activity on [Hillary Rodham Clinton's] part far outweighs the privacy interest of (b)(7)(C)." While there may be a scintilla of public interest in these documents since Mrs. Clinton is presently a Democratic presidential candidate, that fact alone is not a cognizable public interest under FOIA, as disclosure of the draft indictments would not

shed light on what the government is up to. Moreover, the fact remains that the responsive records were compiled for law enforcement purposes and no charges were brought. The release of the responsive records could reasonably be expected to constitute a clearly unwarranted and an unwarranted invasion of personal privacy, while revealing little or nothing about the workings of the government. As a result, FOIA Exemptions 6 and 7(C) are fully applicable to the documents at issue here.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct, and that Exhibits A through F are true and correct copies.

Executed this 1st day of February, 2016.



MARTHA WAGNER MURPHY
Chief, Special Access and FOIA Branch
Research Services Division
National Archives and Records Administration
College Park, Maryland

RG 449, Records of Independent Counsel Kenneth Starr/Robert Ray/Julie Thomas

Document #	Description of Document	Total # of Pages	Applicable FOIA Exemptions	Withheld in Full/ Released in Part/ Released in Full
1 - 4	One-page memorandum with attached draft indictment; (Four identical copies)	92 (23 pages each)	(b)(3), (b)(6), (b)(7)(C)	Withheld in Full
5	One-page memorandum and one-page cover fax sheet with attached draft indictment)	24 pages	(b)(3), (b)(6), (b)(7)(C)	Withheld in Full
6	One-page memorandum and one-page cover fax sheet with attached draft indictment (with marginalia)	24 pages	(b)(3), (b)(6), (b)(7)(C)	Withheld in Full
7-9	Draft indictment; (Three identical copies)	45 pages (15 pages each)	(b)(3), (b)(6), (b)(7)(C)	Withheld in Full
10	One-page memorandum with attached draft indictment; contains some annotations on indictment and handwritten notes on the back of last page of draft indictment	23 pages	(b)(3), (b)(6), (b)(7)(C)	Withheld in Full
11	Scraps of a draft indictment with no caption	4 pages	(b)(3), (b)(6), (b)(7)(C)	Withheld in Full
12-13	Draft indictment without a caption, listing overt acts. (Two identical copies)	6 pages (3 pages each)	(b)(3), (b)(6), (b)(7)(C)	Withheld in Full
14	Draft indictment with two pages of handwritten notes	24 pages	(b)(3), (b)(6), (b)(7)(C)	Withheld in Full
15	Draft indictment; contains some annotations	22 pages	(b)(3), (b)(6), (b)(7)(C)	Withheld in Full
16	One-page memorandum with attached draft indictment	37 pages	(b)(3), (b)(6), (b)(7)(C)	Withheld in Full
17	Draft indictment; contains some annotations	37 pages	(b)(3), (b)(6), (b)(7)(C)	Withheld in Full
18	Draft indictment	36 pages	(b)(3), (b)(6), (b)(7)(C)	Withheld in Full
19	Draft indictment; contains some annotations	40 pages	(b)(3), (b)(6), (b)(7)(C)	Withheld in Full
20	Draft indictment	37 pages	(b)(3), (b)(6), (b)(7)(C)	Withheld in Full

TOTAL = 451 pages

**Exhibit A to Declaration of Martha Wagner Murphy,
Judicial Watch, Inc. v. NARA, Civ. A. No. 15-CV-1740 (RBW)**



**Judicial
Watch**
*Because no one
is above the law!*

March 9, 2015

VIA CERTIFIED MAIL & EMAIL

National Archives and Records Administration
Special Access and FOIA Staff (NWCTF)
8601 Adelphi Road, Room 6350
College Park, MD 20740

Re: Freedom of Information Act Request

Dear Freedom of Information Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, Judicial Watch, Inc. hereby requests that the National Archives and Records Administration produce the following within twenty (20) business days:

All versions of indictments against Hillary Rodham Clinton, including, but not limited to, Versions 1, 2, and 3 in box 2250 of the Hickman Ewing Attorney Files, the "HRC/ ___ Draft Indictment" in box 2256 of the Hickman Ewing Attorney Files, as well as any and all versions written by Deputy Independent Counsel Hickman Ewing, Jr. prior to September of 1996.

The records in question are located in the material submitted to the National Archives and Records Administration by the Office of Independent Counsel In Re: Madison Guaranty Savings & Loan Association, also known as "the records of IC Starr."

We call your attention to President Obama's January 21, 2009 Memorandum concerning the Freedom of Information Act, in which he states:

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA... The presumption of disclosure should be applied to all decisions involving

National Archives and Records Administration
March 9, 2015
Page 2 of 4

FOIA.¹

The memo further provides that “The Freedom of Information Act should be administered with a clear presumption: In the case of doubt, openness prevails.”

Nevertheless, if any responsive record or portion thereof is claimed to be exempt from production under FOIA, please provide sufficient identifying information with respect to each allegedly exempt record or portion thereof to allow us to assess the propriety of the claimed exemption. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). In addition, any reasonably segregable portion of a responsive record must be provided, after redaction of any allegedly exempt material. 5 U.S.C. § 552(b).

For purposes of this request, the term “record” shall mean: (1) any written, printed, or typed material of any kind, including without limitation all correspondence, memoranda, notes, messages, letters, cards, facsimiles, papers, forms, telephone messages, diaries, schedules, calendars, chronological data, minutes, books, reports, charts, lists, ledgers, invoices, worksheets, receipts, returns, computer printouts, printed matter, prospectuses, statements, checks, statistics, surveys, affidavits, contracts, agreements, transcripts, magazine or newspaper articles, or press releases; (2) any electronically, magnetically, or mechanically stored material of any kind, including without limitation all electronic mail or e-mail; (3) any audio, aural, visual, or video records, recordings, or representations of any kind; (4) any graphic materials and data compilations from which information can be obtained; and (5) any materials using other means of preserving thought or expression.

Judicial Watch also hereby requests a waiver of both search and duplication fees pursuant to 5 U.S.C. §§ 552(a)(4)(A)(ii)(II) and (a)(4)(A)(iii). Judicial Watch is entitled to a waiver of search fees under 5 U.S.C. § 552(a)(4)(A)(ii)(II) because it is a member of the news media. *Cf. National Security Archive v. Department of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (defining news media within FOIA context). Judicial Watch has also been recognized as a member of the news media in other FOIA litigation. *See, e.g., Judicial Watch, Inc. v. U.S. Department of Justice*, 133 F. Supp.2d 52 (D.D.C. 2000); and, *Judicial Watch, Inc. v. Department of Defense*, 2006 U.S. Dist. LEXIS 44003, *1 (D.D.C. June 28, 2006). Judicial Watch regularly obtains information about the operations and activities of government through FOIA and other means, uses its editorial skills to turn this information into distinct works, and publishes and disseminates these works to the public. It intends to do likewise with the records it receives in response to this request.

Judicial Watch also is entitled to a complete waiver of both search fees and duplication fees pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). Under this provision, records:

¹ Freedom of Information Act. Pres. Mem. of January 21, 2009, 74 Fed. Reg. 4683.

National Archives and Records Administration

March 9, 2015

Page 3 of 4

shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester.

5 U.S.C. § 552(a)(4)(A)(iii).

In addition, if records are not produced within twenty (20) business days, Judicial Watch is entitled to a complete waiver of search and duplication fees under Section 6(b) of the OPEN Government Act of 2007, which amended FOIA at 5 U.S.C. § (a)(4)(A)(viii).

Judicial Watch is a 501(c)(3), not-for-profit, educational organization, and, by definition, it has no commercial purpose. Judicial Watch exists to educate the public about the operations and activities of government, as well as to increase public understanding about the importance of ethics and the rule of law in government. The particular records requested herein are sought as part of Judicial Watch's ongoing efforts to document the operations and activities of the federal government and to educate the public about these operations and activities. Once Judicial Watch obtains the requested records, it intends to analyze them and disseminate the results of its analysis, as well as the records themselves, as a special written report. Judicial Watch will also educate the public via radio programs, Judicial Watch's website, and/or newsletter, among other outlets. It also will make the records available to other members of the media or researchers upon request. Judicial Watch has a proven ability to disseminate information obtained through FOIA to the public, as demonstrated by its long-standing and continuing public outreach efforts.

Given these circumstances, Judicial Watch is entitled to a public interest fee waiver of both search costs and duplication costs. Nonetheless, in the event our request for a waiver of search and/or duplication costs is denied, Judicial Watch is willing to pay up to \$350.00 in search and/or duplication costs. Judicial Watch requests that it be contacted before any such costs are incurred, in order to prioritize search and duplication efforts.

In an effort to facilitate record production within the statutory time limit, Judicial Watch is willing to accept documents in electronic format (e.g. e-mail, .pdfs). When necessary, Judicial Watch will also accept the "rolling production" of documents.

If you do not understand this request or any portion thereof, or if you feel you require clarification of this request or any portion thereof, please contact us immediately at 202-646-5172 or kbailey@judicialwatch.org. We look forward to receiving the

National Archives and Records Administration

March 9, 2015

Page 4 of 4

requested documents and a waiver of both search and duplication costs within twenty (20) business days. Thank you for your cooperation.

Sincerely,

A handwritten signature in black ink, appearing to read "Kate Bailey". The signature is written in a cursive, slightly slanted style.

Kate Bailey
Judicial Watch

NATIONAL ARCHIVES and RECORDS ADMINISTRATION
8601 ADELPHI ROAD COLLEGE PARK, MD 20740-6001
www.archives.gov



March 19, 2015

Kate Bailey
Judicial Watch
425 Third Street, SW, Suite 800
Washington, DC 20024

Dear Ms. Bailey,

This is in response to your Freedom of Information Act request of March 17, 2015 for records in the custody of the National Archives and Records Administration. Your request was received in this office on March 17, 2015 and assigned FOIA case number 46068. You requested Independent Counsel Kenneth Starr records related to several versions of indictments of Hillary Clinton.

We have examined the folders from Hickman Ewing's attorney files that you requested. From box 2250 the folder "Draft Indictment" (38 pages) is denied in full under Exemption (b)(7)(C). From box 2256 the folder "Hillary Rodham Clinton/Webster L. Hubbell Draft Indictment" (approximately 200 pages) is denied in full under Exemption (b)(7)(C).

You requested a waiver for reproduction fees ordinarily charged to researchers, however, records transferred to the custody of the National Archives are exempted from the fee and fee waiver provisions of the Freedom of Information Act because there was a fee schedule in place prior to enactment of the FOIA. The applicable section states that "nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records" (5 U.S.C. 552 (a)(4)(A)(vi)). The relevant fee statute authorizes the National Archives "to charge a fee for making or authenticating copies or reproductions of materials transferred to the Archivist's custody." (44 U.S.C. 2116(c)).

The inability to grant the requested fee waiver does not constitute a denial under the terms of the Freedom of Information Act. However, if you consider this response to be a denial of your request, or if you wish to appeal the document denials, you may appeal my decision within 60 calendar days from the date of this letter. Appeals must be submitted in writing and addressed to the Deputy Archivist of the United States, National Archives and Records Administration, 8601 Adelphi Road, Room 4200, College Park, MD 20740. In your letter, please cite your case number and clearly label both the letter and envelope as a FOIA Appeal. As an alternative, you may e-mail your appeal to foia@nara.gov. If you choose this option, please use the words "FOIA appeal" in the subject line and also cite your case number.

This concludes the processing of your request. If you have any question about the way we handled your request, or about our FOIA regulations or procedures, please contact David Paynter at david.paynter@nara.gov or (301) 837-2041.

Sincerely,



MARTHA WAGNER MURPHY
Chief
Special Access and FOIA Staff



NATIONAL
ARCHIVES

October 16, 2015

VIA FIRST CLASS MAIL

Ms. Kate Bailey
Judicial Watch
425 Third Street, SW, Suite 800
Washington, DC 20024

Re: NARA Case No. RD 46086; NARA Appeal No. NGC15-071A

Dear Ms. Bailey:

This is to advise you that your administrative appeal, dated May 14, 2015, from the initial decision of the Special Access and FOIA Staff, was received by this office on behalf of the Deputy Archivist of the United States on May 14, 2015. Your appeal has been assigned number NGC15-071A. We apologize for our delay in acknowledging your administrative appeal.

The Deputy Archivist of the United States has the responsibility to adjudicate such appeals. We regret any delay in responding to your appeal. In an attempt to afford each appellant equal and impartial treatment, we have adopted a general practice of assigning appeals in the approximate order of receipt. As stated above, your appeal has been assigned number NGC15-071A. Please provide this number in any future correspondence to this office regarding this matter. Please note, if you provide an e-mail address or another electronic means of communication with your appeal, this office may respond to you electronically even if you submitted your appeal via regular U.S. Postal Service.

We will notify you of the decision on your appeal as soon as we can. If you have any questions about the status of your appeal, you may contact me at the number and/or email below. If you have submitted your appeal through the *FOIAonline* electronic portal, you may also obtain an update on the status of your appeal by logging into your *FOIAonline* account.

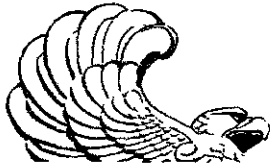
Sincerely,

JOSEPH A. SCANLON
FOIA Officer
Office of General Counsel
(301) 837-0583
joseph.scanlon@nara.gov

NATIONAL ARCHIVES and
RECORDS ADMINISTRATION

8601 ADELPHI ROAD
COLLEGE PARK, MD 20740-6001

www.archives.gov



NATIONAL
ARCHIVES

December 4, 2015

Ms. Kate Bailey
Judicial Watch
425 Third Street, SW, Suite 800
Washington, DC 20024

Re: Freedom of Information Act Appeal NGC15-071A

Dear Ms. Bailey:

This is in response to your Freedom of Information Act (FOIA) letter in which you appeal the initial decision of the Special Access and FOIA Staff regarding your FOIA request, RD 46068, which asked for access to accessioned records within the holdings of the National Archives and Records Administration (NARA).

I have been informed that you filed a lawsuit in the United States District Court for the District of Columbia concerning NARA's initial decision in this matter. As a result, and in accordance with 36 C.F.R. § 1250.74(a)(2), I am closing your appeal file now that your request is the subject of a FOIA lawsuit.

Sincerely

A handwritten signature in black ink that reads "Debra Steidel Wall".

DEBRA STEIDEL WALL
Deputy Archivist of the United States

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

<hr/>)	
JUDICIAL WATCH, INC.)	
)	
	Plaintiff,)	
)	
v.)	No. 1:15-cv-01740-RBW
)	
NATIONAL ARCHIVES AND RECORDS ADMINISTRATION,)	
)	
	Defendant.)	
<hr/>)	

[PROPOSED] ORDER

Upon the motion for summary judgment of defendant, the National Archives and Records Administration (NARA), the materials submitted in support of that motion and in opposition thereto, and good cause having been shown, it is hereby ordered as follows:

1. The motion of NARA is granted.
2. Summary judgment is issued in favor of NARA.

Dated: _____

UNITED STATES DISTRICT JUDGE