

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH

Plaintiff,

v.

U.S. Department of State,

Defendant.

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No. 1:14-cv-01242-RCL

DECLARATION OF JOHN F. HACKETT
REGARDING EXEMPTIONS TAKEN IN RESPONSIVE DOCUMENTS

Pursuant to 28 U.S.C. § 1746, I, John F. Hackett, declare and state as follows:

1. I am the Director of the Office of Information Programs and Services (“IPS”) of the United States Department of State (the “Department”). In this capacity, I am the Department official immediately responsible for responding to requests for records under the Freedom of Information Act (the “FOIA”), 5 U.S.C. § 552, the Privacy Act of 1974, 5 U.S.C. § 552a, and other applicable records access provisions. I have been employed by the Department in this capacity since June 2015. Prior to assuming this role, I served as the Acting Director of IPS since April 2014 and Deputy Director since April 2013. As the IPS Director, I am authorized to classify and declassify national security information. I make the following statements based upon my personal knowledge, which in turn is based on a personal review of the records in the case file established for processing the subject request and upon information furnished to me in the course of my official duties. I am familiar with the efforts of Department personnel to process the subject request, and I am in charge of coordinating the agency’s search and recovery efforts with respect to that request.

2. The core responsibilities of IPS include: (1) responding to records access requests made by the public (including under the FOIA, the Privacy Act, and the mandatory declassification review requirements of the Executive Order governing classified national security information), by members of Congress, by other government agencies, and those made pursuant to judicial process such as subpoenas, court orders and discovery requests; (2) records management; (3) privacy protection; (4) national security classification management and declassification review; (5) corporate records archives management; (6) research; (7) operation and management of the Department's library; and (8) technology applications that support these activities.

3. This declaration explains the Department's search for records responsive to the FOIA request at issue in this litigation.

**I. ADMINISTRATIVE PROCESSING OF PLAINTIFF'S
REQUEST AND THE SEARCH FOR RESPONSIVE DOCUMENTS**

4. By letter dated May 13, 2014, Judicial Watch ("Plaintiff") submitted a FOIA request to the Department requesting that "the Office of the Secretary produce the following within twenty (20) business days:

1) Copies of any updates and/or talking points given to Ambassador Rice by the White House or any federal agency concerning, regarding, or related to the September 11 2012 attack on the U.S. consulate in Benghazi, Libya.

2) Any and all records or communications concerning, regarding, or relating to talking points or updates on the Benghazi attack given to Ambassador Rice by the White House or any federal agency.

See Ex. A (Plaintiff's FOIA request, F-2014-08848).¹

5. In correspondence with counsel for the Department, Plaintiff further clarified that its request does not seek all records relating to the attacks of September 11, 2012 in Benghazi, but rather only "talking points and updates to those talking points, not general intelligence updates about the Benghazi attacks (unless those updates were sent in furtherance of developing or updating talking points)." See Ex. B (Email from Ramona Cotca, Sep. 4, 2014) (confirming scope of request).

6. When the Department receives a FOIA request, IPS evaluates the request to determine which offices, overseas posts, or other records systems within the Department may reasonably be expected to contain the records requested. This determination is based on the description of the records requested and requires a familiarity with the holdings of the Department's records systems, applicable records disposition schedules, and the substantive and functional mandates of numerous Department offices and Foreign Service posts and missions. Factors such as the nature, scope, and complexity of the request itself are also relevant.

7. Each office within the Department, as well as each Foreign Service post and mission, maintains files concerning foreign policy and other functional matters related to the daily operations of that office, post, or mission. These files consist generally of working copies of documents, information copies of documents maintained in the Central Foreign Policy

¹ This request was identically worded to a request previously made by the Plaintiff and directed toward the United States Mission to the United Nations ("USUN/W"). This previous request was the subject of related litigation, 1:13-cv-00951, which the parties settled after the Department produced 98 documents totaling 1,439 pages responsive to that request. See Ex. C at 1 (*Judicial Watch v. State*, (D.D.C. 13-951), FOIA Request Letter (Dkt No. 8-1)).

Records collection, and other documents prepared by or furnished to the office in connection with the performance of its official duties, as well as electronic copies of documents and e-mail messages.

8. Plaintiff's request specified that it sought records only from the Office of the Secretary. Therefore, the Department tasked only the Executive Secretariat to search for agency records responsive to Plaintiff's avowed construction of its request that were generated between September 11, 2012, and September 23, 2014, the day that the search was conducted.²

The Executive Secretariat ("S/ES")

9. The Office of the Executive Secretariat Staff ("S/ES-S") is responsible for coordination of the work of the Department internally, serving as the liaison between the Department's bureaus and the offices of the Secretary, the Deputy Secretary, and the Under Secretaries. It is responsible for coordinating search responses for the Office of the Secretary of State ("S"), the Office of the Deputy Secretary of State ("D"), the Office of Policy Planning ("S/P"), the Office of the Under Secretary for Political Affairs ("P"), and the Counselor of the Department ("C").

10. On September 9, 2014, a Management Analyst who was knowledgeable of both the request and S/ES-S records systems conducted a search of S/ES-S electronic records systems reasonably likely to contain responsive records. These systems include the Secretariat Tracking

² The immediate Office of the Secretary is comprised of the Secretary's Chief of Staff, the Counselor of the Department, Deputy Chief of Staff, the Secretary's secretary, the Executive Assistant, special assistants, the Secretary's scheduler, staff assistant, and personal assistants. This staff handles all of the day-to-day matters of the Secretary, including meetings at the Department, functions in Washington and throughout the country, and travel around the world.

and Retrieval System (“STARS”),³ the Secretariat Telegram Processing System (“STePS”),⁴ the Cable Archiving Retrieval System (“CARS”),⁵ and the Top Secret files (“TS”). These systems’ search capabilities are wildcard-based, meaning that common variations of the keywords being searched would be retrieved (*e.g.*, a search for “directive” would produce “directive’s”).

11. On September 23, in furtherance of this process, S/ES-S also searched the state.gov email accounts of three individuals—Cheryl Mills (Counselor and Chief of Staff to former Secretary Clinton), Jacob Sullivan (Deputy Chief of Staff for Policy to former Secretary Clinton), and Huma Abedin (Deputy Chief of Staff for Operations to former Secretary Clinton)—within the Office of the Secretary. These individuals were selected by members of the Office of the Secretary based on their understanding of which staff members within the Office of the Secretary during former Secretary Clinton’s tenure worked on issues related to the Benghazi attacks and whose records may therefore reasonably be expected to contain responsive records.

12. For both the databases and the email records, S/ES used the search terms “Ambassador” or “Rice” or “USUN/W” or “September 11, 2012” or “attack” or “Benghazi” or “Libya” or “talking points” or “TPs” or “updates.”

³ STARS is an automated system used to track, control, and record documents containing substantive foreign policy information passing to, from, and through the offices of the Secretary of State, the Deputy Secretary of State, and other Department principal officers. Original documents are indexed, scanned, and stored as images in STARS. Information in STARS covers the period 1988 to the present.

⁴ STePS is designed to distribute cables among the Department’s principals.

⁵ CARS is designed to provide access to a contemporary portion of the Department’s telegram archive deemed to be of general interest.

13. During searches of the email records, as well as the STePs and CARS databases, the search terms were applied to each document, as well as attachments that contain searchable text. During the search of STARS, the search terms were applied to a descriptive abstract attached to each document. Each STARS abstract was created by a Technical Information Specialist when the document was added to the database; this abstract is designed to capture the subject matter of the related document. For documents from the time period relevant to the FOIA request, the abstracts are the only portions of the STARS database whose text may be searched. Similarly, during the TS search, the search terms were applied to an index of TS files. Each TS index entry, along with key words and a topic description, was added by a Management Analyst into the index. This index, rather than the full text of the TS files themselves, can be searched.

14. The use of "or" between the search terms indicates that this was a disjunctive search; the terms listed would have retrieved any documents that contain (for email, STePS, CARS records), or whose abstracts or indexes contain (for STARS and TS records), the word "Ambassador," for example, even if the document, abstract, or index contained none of the other search terms. These searches were completed on September 23, 2014, and returned a number of records, which were then reviewed for responsiveness.

15. In addition, to guard against the possibility that a particular document was overlooked, the Management Analyst also reviewed each of the documents that were produced to Plaintiff from USUN/W, rather than the Office of the Secretary, in the related litigation described in footnote 1 above. The Management Analyst examined each sender or recipient of each

document produced in that litigation; documents with a recipient or sender who was in the Office of the Secretary at the time the email was sent were treated as responsive.

16. As a result of the searches of email records, database records, and records produced in the prior related litigation as described in this paragraph, the Management Analyst found four documents responsive to Plaintiff's FOIA request, all of which had been previously produced to Plaintiff in the related litigation described in footnote 1. By letter dated November 11, 2014, the Department released one document in full and three documents in part. *See* Ex. D (Letter of Nov. 12, 2014).

17. After the searches in this case had been completed and the four responsive documents delivered to the Plaintiff, the Department received approximately 55,000 pages of hard copy emails and attachments to emails, arranged in chronological order, from former Secretary Clinton.⁶ These records were provided by her in response to an earlier request from the Department of State that, if former Secretaries or their representatives were "aware or [were to] become aware in the future of a federal record, such as an email sent or received on a personal email account while serving as Secretary of State, that a copy of this record be made available to the Department." *See* Ex. E (Text of Letter to Former Secretaries of State Concerning the Federal Records Act of 1950). The Deputy Directory of S/ES-S applied the same search terms described above, *see* ¶ 12, to two PDFs containing scanned images of a subset of these documents, specifically, the documents that were sent or received on or after September

⁶ Former Secretary Clinton did not use a state.gov email account.

11, 2012, through the end of former Secretary Clinton's tenure on January 31, 2013. For each PDF, the Deputy Director entered a search term individually into the Find command in Adobe Reader and navigated to each occurrence of the search term in the PDF. The Deputy Director reviewed for responsiveness each individual document that contained an occurrence of the search term. This process was repeated for each search term listed above in Paragraph 12. No responsive records were found.

18. Earlier this year, the Department sent letters to Ms. Mills, Mr. Sullivan, and Ms. Abedin, whose state.gov accounts were searched in response to this FOIA request. In those letters, the Department asked those individuals to make available to the Department any federal records that they may have in their possession, such as emails concerning official government business sent or received on a personal email account while serving in their official capacities with the Department, if there is any reason to believe that those records may not otherwise be preserved in the Department's recordkeeping system.

19. All three individuals have responded to those letters, through counsel, to inform the Department that they have begun the process of searching for and providing the Department documents in their possession that may potentially be federal records. That process is ongoing.

20. On June 26, 2015, counsel for Ms. Mills and counsel for Mr. Sullivan provided the Department with a number of documents in response to the letters. An attorney in the Department's Office of the Legal Adviser has reviewed these newly received documents and discovered one responsive document among those that had been provided by Mr. Sullivan, a two-message email chain that mentioned the talking points in the course of a larger discussion,

which it has determined should be withheld in full pursuant to FOIA Exemption 5. *See* ¶¶ 25-27, *infra*.

21. The earlier message in that email chain is a forward of an email that was sent to, among other people, former Secretary Clinton. A Department attorney has determined that it was among the 55,000 pages provided to the Department by former Secretary Clinton. This earlier message had been reviewed by Staff in the Office of the Secretary during the process described above in Paragraph 17 but deemed unresponsive because the references to “talking points” contained therein appeared to be about a separate set of talking points being developed within the Office of the Secretary for future use. It was not clear from the face of the earlier message that one of the references to “talking points” was to those that had been given to Ambassador Rice. A Department attorney has determined that the copy of the earlier message included in the document received from Mr. Sullivan is identical to the copy received from former Secretary Clinton. However, the later message in the email chain, which was not sent to former Secretary Clinton, made it clear that one portion of the earlier message had, indeed, been discussing the talking points given to Ambassador Rice.

II. EXEMPTIONS CLAIMED

FOIA Exemption 5—Deliberative Process Privilege

22. 5 U.S.C. § 552(b)(5) states that the FOIA does not apply to:

inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency....

23. Exemption 5, 5 U.S.C. § 552(b)(5), protects from disclosure information that is normally privileged in the civil discovery context, including information that is protected by the

deliberative process. The deliberative process privilege protects the confidentiality of candid views and advice of U.S. Government officials in their pre-decisional deliberations related to policy formulation and administrative direction.

24. For example, certain information withheld in this case reflects drafts of materials being prepared for senior Department officials, together with suggested revisions being offered by Department employees.⁷ Disclosure of material containing such deliberations or material on which such deliberations are based could reasonably be expected to chill the open and frank exchange of ideas and recommendations in which Department officials are involved. It would severely hamper the ability of responsible Department officials to formulate and carry out executive branch programs. Information in one document in this case, as detailed below, has been withheld on the basis of this exemption. Disclosure of this information, which is pre-decisional and deliberative, and contains selected factual material intertwined with opinion, would inhibit candid internal discussion and the expression of recommendations and judgments regarding current problems and preferred courses of action by Department personnel with respect to materials being prepared for senior Department officials. The withheld information is, accordingly, exempt from release under Exemption 5, 5 U.S.C. § 552(b)(5) pursuant to the deliberative process privilege.

FOIA Exemption 6—Personal Privacy

25. 5 U.S.C. § 552 (b)(6) states that the FOIA does not apply to

⁷ Four documents were withheld in part pursuant to various FOIA exemptions. Counsel for Plaintiff has confirmed via email that Plaintiff is not challenging any of the redactions in the documents produced to it. Ex. F (Email from Ramona Cotca, June 15, 2015). Therefore, this declaration only addresses the exemptions that apply to the document that was provided by Mr. Sullivan on June 26, 2015, which has been withheld in full.

personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy...”

26. Courts have interpreted the language of Exemption 6 broadly to encompass all personal information that applies to an individual, without regard to whether it was located in a particular type of file. The Department withheld only the domain names in the personal email addresses of Jacob Sullivan, Cheryl Mills, and Philippe Reines under Exemption 6.

27. Inasmuch as the information withheld is personal to an individual, there is clearly a privacy interest involved. I am required, therefore, to determine whether there exists any public interest in disclosure and to weight any such interest against the extent of the invasion of privacy.

28. In *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), the Supreme Court laid down two rules for determining public interest in disclosure of information involving a privacy interest: (1) whether disclosure would serve the “core purpose” for which Congress enacted the FOIA, i.e., to show “what the government is up to,” and (2) that public interest means the interest of the public in general, not particular interests of the person or group seeking the information. Accordingly, the identity of the requester as well as the purpose for which the information is sought is irrelevant in making the disclosure determination.

29. As for all of the information withheld pursuant to Exemption 6, I have concluded that (1) disclosure of the information withheld would result in a clearly unwarranted invasion of personal privacy; and (2) disclosure of the information would not serve the “core purpose” of the FOIA, i.e., it would not disclose information about “what the government is up to.”

Accordingly, I have determined that the privacy interests clearly outweigh any public interest in disclosure of the withheld information.

Document Description

30. **Document C05831334**, which is discussed above, *see* ¶¶ 20-21, is a three-page intra-agency email exchange consisting of two messages. The earlier message is from Jacob Sullivan to former Secretary Clinton's non-state.gov email address and Cheryl Mills (who is listed on the "Cc" address line) and has the subject "Key Points." It was sent on September 29, 2012 at 11:09 AM. The later message is from Cheryl Mills to Jake Sullivan and Philippe Reines (Deputy Assistant Secretary of State for Strategic Communications and Senior Communications Advisor to Secretary Clinton) and has the subject "Fwd: REVISED Key Points." It was sent on September 29, 2012 at 1:18 PM. The bodies of the messages consist of drafts, composed by advisors to former Secretary Clinton, of a proposed future communication from the former Secretary to a member of the U.S. Senate concerning various issues related to the attacks of September 11, 2012 in Benghazi. A portion of each draft consisted of a summary of the talking points that had been sent to Ambassador Rice (although, as explained above, *see* ¶¶ 20-21, the Department did not realize that the earlier message included a reference to those talking points until the Department received and reviewed the second message in the email chain). The Department has withheld the email chain in full under FOIA Exemption 5 pursuant to the

deliberative process privilege and the domain names associated with the private email addresses of Ms. Mills, Mr. Sullivan, and Mr. Reines under Exemption 6.⁸

31. As non-final drafts, the bodies of these messages consist in their entirety of information that is pre-decisional and deliberative in nature. Release of this material could reasonably be expected to chill the frank deliberations that occur when senior staff are preparing points or other draft remarks for use by senior Department officials in addressing a matter of public controversy. The material is therefore exempt under FOIA Exemption 5, 5 U.S.C. § 552(b)(5) pursuant to the deliberative process privilege.

32. Inasmuch as the information withheld under Exemption 6 in the email chain identifies a specific individual, a personal privacy interest exists in the information. Therefore, I am now required to determine whether there exists any public interest in disclosure and, if a public interest is implicated, to weigh any such interest against the privacy interest to determine whether disclosure would constitute a clearly unwarranted invasion of personal privacy.

33. Any individual, including a U.S. Government employee, has a privacy interest in his or her personal email address because the release of this information could result in harassment or unwanted attention. Moreover, the release of the domain name of a personal email address would not shed light on government operations. The domain names of the personal email addresses in the email chain are therefore exempt under FOIA Exemption 6, 5 U.S.C. § 552(b)(6).

⁸ The Department does not seek to protect the non-state.gov email address of former Secretary Clinton ("hdr22@clintonemail.com"), which is in the earlier email in the email chain.

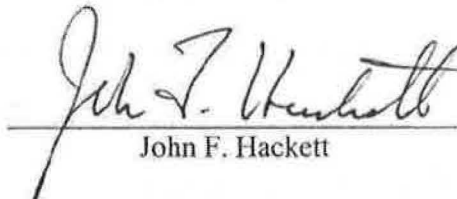
34. The Department conducted a line-by-line review of the email chain and determined that there was no reasonably segregable, non-exempt material that could be released, other than the information disclosed in the preceding two paragraphs.

CONCLUSION

35. In summary, the Department conducted a thorough search of all Department records systems within the Office of the Secretary that were reasonably likely to maintain records responsive to Plaintiff's FOIA request and located five responsive documents, one of which it released in full, three of which it released in part, and one of which it withheld in full.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 7th day of July 2015, Washington, D.C.


John F. Hackett