

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.

*****NOTE TO PUBLIC ACCESS USERS*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.**

U.S. District Court

District of Columbia

Notice of Electronic Filing

The following transaction was entered by Wolverton, Caroline on 7/15/2016 at 11:59 AM and filed on 7/15/2016

Case Name: JUDICIAL WATCH, INC. v. DEPARTMENT OF STATE

Case Number: [1:13-cv-01363-EGS](#)

Filer: U.S. DEPARTMENT OF STATE

Document Number: [110](#)

Docket Text:

[SURREPLY to re \[97\] MOTION for Order to Depose Hillary Clinton, Clarence Finney, and John Bentel filed by U.S. DEPARTMENT OF STATE. \(Wolverton, Caroline\)](#)

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

JUDICIAL WATCH, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF STATE,

Defendant.

No. 1:13-cv-01363-EGS

**NON-PARTY HILLARY RODHAM CLINTON'S SURREPLY
IN FURTHER OPPOSITION TO PLAINTIFF'S MOTION TO DEPOSE
HILLARY RODHAM CLINTON, CLARENCE FINNEY, AND JOHN BENTEL**

David E. Kendall (D.C. Bar No. 252890)
Katherine M. Turner (D.C. Bar No. 495528)
Amy Mason Saharia (D.C. Bar No. 981644)
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
Telephone: (202) 434-5000
Facsimile: (202) 434-5029

*Counsel for Non-Party Hillary Rodham
Clinton*

INTRODUCTION

As this Court has recognized, discovery in a FOIA action “is the exception, not the rule.” Feb. 23, 2016 Hr’g Tr. at 8:20–21. And, as Judicial Watch concedes, a deposition of a former Cabinet Secretary is even rarer, requiring a showing of “extraordinary circumstances.” Dkt. 106 at 12–13. Judicial Watch has not made that showing. Judicial Watch’s reply confirms that there is nothing more than speculation behind its allegation that the State Department and Secretary Clinton “deliberately thwarted FOIA.” Feb. 23, 2016 Hr’g Tr. at 10:3–7. In any event, the requested discovery is now moot. Judicial Watch has argued that the Department’s search was inadequate because it did not acquire and search certain sources of Secretary Clinton’s e-mail. The FBI will provide to the Department e-mail it has retrieved from those sources, and the Department intends to search it for records responsive to Judicial Watch’s request. *See* Dkt. 103 at 24; Dkt. 105-1. Judicial Watch thus will be obtaining its requested relief. In this circumstance, there is no need for discovery, and permitting Judicial Watch to depose a former Cabinet Secretary would be futile and inappropriate.

ARGUMENT

I. THE FBI’S JULY 12, 2016 LETTER TO THE STATE DEPARTMENT DEMONSTRATES THAT THE REQUESTED DISCOVERY IS MOOT.

Judicial Watch has repeatedly stated that the relief it seeks is to have Secretary Clinton’s e-mail turned over to the Department for searching. *See, e.g.*, Feb. 23, 2016 Hr’g Tr. at 10:23–11:10, 15:18–16:1, 18:8–24, 27:1–15, 45:6–22. It is now evident that Judicial Watch will be obtaining that very relief. On July 12, 2016, the FBI informed the Department that it will provide the Department with materials obtained during its investigation that may contain agency records. Dkt. 105-1. This includes “materials retrieved from any server equipment and related devices” obtained from Secretary Clinton. *See Leopold v. Dep’t of Justice*, No. 15-cv-2117, Dkt. 18 (D.D.C.

July 13, 2016). To the extent the FBI retrieved additional work-related e-mails of Secretary Clinton, the Department will have them and has pledged to produce any responsive records. (Contrary to Judicial Watch's assertion, Secretary Clinton recognizes that the Department has a right to *federal record e-mails* within her clintonemail.com account. *See* Dkt. 106 at 8–9.)

The FBI's forthcoming provision of Secretary Clinton's e-mails to the Department moots any need for additional discovery. "[A] discussion about remedies" is not "premature," as Judicial Watch claims. Dkt. 106 at 14. The ultimate issue of fact in this case—whether the Department "has conducted an adequate search," Dkt. 106 at 3 (quotation marks omitted)—is inherently intertwined with the remedy Judicial Watch seeks: to have Secretary Clinton's e-mails provided to the Department for searching. If the FBI will provide those materials to the Department, there is no need to engage in additional discovery to determine whether FOIA requires the Department to acquire Secretary Clinton's e-mail account on an "intent to thwart FOIA" theory.

Faced with the fact that it will be obtaining its requested relief, Judicial Watch does an about-face—suggesting, implausibly, that it might want different relief. *See* Dkt. 106 at 14. It first argues that this Court could order the Department to search e-mail accounts of employees who might have communicated with Secretary Clinton about the subject matter of the FOIA request at issue. The Department, however, has already done that, *see* Dkt. 47-2, ¶¶ 9, 20—which is undoubtedly why Judicial Watch has not made that argument before.

Judicial Watch next argues that the Court could order the Department to issue subpoenas to "other government agencies or other pertinent entities." Dkt. 106 at 14. The agency in possession of Secretary Clinton's clintonemail.com e-mails, however, is the FBI, which has already stated that it will provide materials obtained during its investigation that may contain agency records to the Department. Neither Secretary Clinton nor her counsel are aware of any other entity

possessing her clintonemail.com e-mails; as part of its investigation, the FBI endeavored to collect all available sources of Secretary Clinton's clintonemail.com e-mails. It would be inappropriate for this Court to permit Judicial Watch to depose a former Cabinet Secretary for the purpose of determining whether this Court should order relief that is now moot.

II. JUDICIAL WATCH'S ALLEGATION THAT THE DEPARTMENT SOUGHT TO THWART FOIA IS SPECULATIVE.

Even if the requested discovery were not moot, Judicial Watch is not entitled to probe in discovery "the circumstances surrounding the creation, use and purpose of the clintonemail.com system" merely to satisfy its curiosity about that subject. Dkt. 107 at 1. This Court granted "limited discovery" to determine whether there is evidence substantiating Judicial Watch's allegation that "the State Department and Mrs. Clinton sought to deliberately thwart FOIA through the creation and use of clintonemail.com." Dkt. 73 at 1, 11 (quotation marks omitted). No evidence has emerged from discovery or the multiple public inquiries that substantiates that allegation, and Judicial Watch simply ignores the ample evidence to the contrary that is now in the record. Accordingly, there is no basis for further discovery, let alone discovery for which "extraordinary circumstances" must be demonstrated.

Judicial Watch's principal argument is that it needs to depose Secretary Clinton because her prior statements about why she used a private e-mail account are unsworn. *See* Dkt. 106 at 4-7. As Judicial Watch concedes, Secretary Clinton has publicly stated that she used a private e-mail account for the sake of convenience. Director Comey has testified that she said the same thing to the FBI. *See* Dkt. 102-3 at 74. Judicial Watch identifies no evidence suggesting that, if deposed, Secretary Clinton would identify an improper purpose, contrary to her many statements.

Because it has no actual evidence of an intent to thwart FOIA, Judicial Watch flatly misrepresents the record and manufactures inconsistencies where none exist. For example:

- Judicial Watch claims that it is “striking” that Clarence Finney did not know of Secretary Clinton’s private e-mail address because, “as Ms. Mills testified, Secretary Clinton was in contact with Mr. Finney every day.” Dkt. 106 at 6–7. Ms. Mills said no such thing in her deposition. Judicial Watch provides no reason to believe that Secretary Clinton’s e-mail account was concealed from Mr. Finney. That assertion is implausible given that she openly e-mailed with more senior officials responsible for records management.
- Judicial Watch inaccurately represents the substance of Director Comey’s testimony. When asked, “[W]as the reason she set up her own private server in your judgment because she wanted to shield communications from Congress and the public?,” he did not simply state that the FBI was unable to determine the answer to that question. *See* Dkt. 106 at 2–3. Instead, he responded, “I can’t say that. Our best information is that she set it up as a matter of convenience.” Dkt. 102-3 at 20.
- There is no “discrepancy” between the FBI’s findings and the evidence in this case. Dkt. 106 at 4–5. Director Comey explained that Secretary Clinton decided to have a “domain”—*i.e.*, clintonemail.com—added to former President Clinton’s server. That is completely consistent with the testimony of Ms. Mills.

Judicial Watch also ignores the fundamental issue before this Court by insisting that it needs Secretary Clinton’s testimony about arcane details of her e-mail system—for example, what precise services Bryan Pagliano performed or why e-mail was not archived. But, again, it offers no reason to suspect that Secretary Clinton’s answers to those questions (which would undoubtedly be “I don’t know”) would support its allegation that the Department intended to thwart FOIA. Judicial Watch requested and obtained discovery on the premise that there was a “reasonable suspicion” that the Department and Secretary Clinton intended to thwart FOIA. Dkt. 51 at 1. The record now disproves that suspicion. Judicial Watch’s speculation is insufficient reason to permit the extraordinary measure of deposing a former Cabinet Secretary, especially when further discovery could not, in any event, yield any additional relief.

CONCLUSION

Counsel to Secretary Clinton respectfully request that this Court deny Judicial Watch’s motion for permission to depose Secretary Clinton.

Respectfully submitted,

/s/ David E. Kendall

David E. Kendall (D.C. Bar No. 252890)
Katherine M. Turner (D.C. Bar No. 495528)
Amy Mason Saharia (D.C. Bar No. 981644)
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
Telephone: (202) 434-5000
Facsimile: (202) 434-5029
dkendall@wc.com
kturner@wc.com
asaharia@wc.com

*Counsel for Non-Party Hillary Rodham
Clinton*

July 15, 2016

CERTIFICATE OF SERVICE

I, David E. Kendall, counsel for Non-Party Hillary Rodham Clinton, certify that, on July 15, 2016, a copy of this Surreply in Further Opposition to Plaintiff's Motion to Depose Hillary Rodham Clinton, Clarence Finney, and John Bentel was filed via the Court's electronic filing system, and served via that system upon all parties required to be served.

/s/ David E. Kendall

David E. Kendall