IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION

Plaintiff Judicial Watch, Inc., by counsel, respectfully submits this reply to Defendant's Opposition to Plaintiff's Motion for Permission to Depose Rodham Clinton, Clarence Finney, and John Bentel.[1] As grounds therefor, Plaintiff states as follows:

I. Introduction.

Currently before the Court is whether Plaintiff has had the opportunity to develop a full and complete factual record to enable the Court to determine "whether the Government has conducted an adequate search in response to Judicial Watch's FOIA request." Order at 1. In its motion, Plaintiff plainly demonstrated that Secretary Clinton, Mr. Finney, and Mr. Bentel are all likely to provide necessary, additional information about the circumstances surrounding the creation, use and purpose of the clintonemail.com system, as well as why the emails contained on the system were not "records managed" and retained as required by law. Instead of refuting

[1] Due to the lengthy oppositions submitted by Secretary Clinton and the State Department, Plaintiff is submitting separate responses even though some of the issues overlap. To the extent the Court may have questions regarding the factual record, Plaintiff will address them at the upcoming oral argument or otherwise requests the opportunity for supplemental briefing, if the Court believes it is necessary.

that unanswered questions remain, Defendant argues that Plaintiff, at this time, has not uncovered sufficient evidence to demonstrate that the State Department and its former secretary deliberately thwarted FOIA or otherwise prevented the State Department from complying with its FOIA and federal recordkeeping obligations. Defendant's argument is incorrect.

The Court should also not accept the State Department's suggestion to delay ruling on this motion and effectively stay the case for an indefinite period of time. The Court has not yet ruled on whether the State Department has conducted an adequate search in response to Judicial Watch's FOIA request. Until then, any discussion about remedies is premature.

II. Argument.

A. The deposition of Hillary Clinton is necessary.[2]

In its motion, Plaintiff clearly demonstrated why Secretary Clinton's deposition is necessary. Instead of trying to refute the existence of unanswered questions or the fact that Secretary Clinton undoubtedly has relevant information, Defendant appears to renew its motion for summary judgment by arguing that Plaintiff has developed no evidence of intent to thwart FOIA. Def. Opp. at 8. Not only is Defendant's argument premature, it mischaracterizes the evidence.

The Court granted Plaintiff's request for discovery because "questions surrounding the creation, purpose and use of the clintonemail.com server must be explored through limited discovery before the Court can decide, as a matter of law, whether the Government has conducted an adequate search in response to Judicial Watch's FOIA request." Order at 1.

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[2] In addition to the reasons set forth below, Plaintiff also incorporates and relies on the reasons set forth in its reply to Secretary Clinton's opposition.

Plaintiff has collected substantial information, but additional sources of relevant evidence obviously remain. In addition, since Secretary Clinton is the former head of the agency, it would have been premature for Plaintiff to seek her deposition from the outset. It is proper now, as Plaintiff has exhausted other avenues, for Secretary Clinton to sit for a deposition for the following reasons.

First, neither Ms. Mills nor Ms. Abedin spoke with Secretary Clinton about the purpose for creating the clintonemail.com system. *See* Mills Deposition at 45:7 – 45:20 and Abedin Deposition at 71:16 – 73:2. In fact, as Defendant highlights, Ms. Abedin testified, "I just saw it as continu[ing] what she was doing before she arrived at the State Department." Def. Opp. at 10 (*quoting* Abedin Deposition at 38:19 – 39:8). So although Defendant asserts that the evidence shows that Secretary Clinton created the system to continue an established practice, the evidence actually just shows that a few individuals believe that to be the case based on what they assumed or have heard. No one testified that they actually know why Secretary Clinton created and used the clintonemail.com system.

Second, there is no evidence whatsoever about the creation of the system. No witness was able to provide meaningful testimony about when the system was created, who created it, and at whose direction it was created. Without any evidentiary support, Defendant asserts that Justin Cooper was ultimately responsible for the creation of the clintonemail.com system as well as Secretary Clinton and Ms. Abedin's use of the clintonemail.com system to conduct official government business. Def. Opp. at 9, n.3. There is no evidence showing that Secretary Clinton did not instruct Mr. Cooper to create the system. Nor is there any evidence to show that Secretary Clinton did not instruct Mr. Cooper to provide Ms. Abedin an email account on the

system. Common sense suggests that a personal employee of Secretary Clinton would not be creating systems for official State Department communications without any guidance or instruction. Secretary Clinton's testimony is necessary to uncover evidence about the circumstances surrounding the creation of the system by Mr. Cooper and/or Mr. Pagliano (Non-Party Cheryl Mills' Responses to Plaintiff's Interrogatories at 4-5) and what, if any discussions, she had with Mr. Cooper or Mr. Pagliano about the creation of the system, including who else would have email accounts on it.

Third, Defendant also ignores the obvious factual dispute between the State Department and its former agency head. Whereas Secretary Clinton continues to maintain that the system was "allowed," the State Department asserts that "[d]iscovery has produced no evidence that Secretary Clinton's use of a personal email account was approved by State." Def. Opp. at 17. Whether the system was formally authorized or even informally allowed is fundamental to the Court's resolution of this case. Secretary Clinton's testimony is therefore necessary to determine whether she received formal authorization or even informal approval, from whom she received it, and, if she did not receive formal authorization or even informal approval, why does she continue to maintain that the system was "allowed." Clearly, only Secretary Clinton can answer these questions.

Fourth, Secretary Clinton's testimony is necessary to uncover admissible evidence about what records she returned to the State Department as it relates to the State Department's processing of the FOIA request at issue in this case. No evidence currently exists about what

specific steps Secretary Clinton took to return the approximately 55,000 pages of emails.[3] When asked, Ms. Mills asserted the attorney-client privilege and refused to answer the question. Mills Deposition at 238:3 – 239:8. Ms. Lang, when asked if the State Department knows if Secretary Clinton turned over all records potentially responsive to the FOIA request at issue in this case, testified, "No. The department is relying on the representations" of Secretary Clinton. Lang Deposition at 203:17 – 203:22. This is of even more significance now that Secretary Clinton apparently believes that she possessed privately, under a claim of right, the approximately 30,000 emails that she returned to the State Department as well as the thousands of other emails identified by the FBI that she did not return to the State Department. Clinton Opp. at 11.

Defendant also expends substantial time arguing that discovery has refuted the basis for Plaintiff's "theory" of intent to thwart FOIA. Def. Opp. at 13-19. Again, Defendant's argument misses the point. Of course, discovery has provided context and substance to records Plaintiff obtained before discovery began. Some of the evidence uncovered shows that Plaintiff's interpretations of the records are accurate. Other evidence seems to suggest that the records actually had a different meaning. That is discovery. It is not a reason to end discovery before a complete record exists. If anything, the fact that Plaintiff is successfully uncovering additional, relevant evidence confirms that additional discovery is necessary.

Finally, this is the extraordinary case in which a former agency head's testimony is necessary. At issue is the unprecedented use of a non-state.gov system by the Secretary of State

[3] Besides using the clintonemail.com email account, Secretary Clinton used, albeit for a short period of time at the beginning of her tenure, a second email account to conduct official government business. As Secretary Clinton states, "[S]he was unable to retrieve or produce emails from" this other email account. Clinton Opp. at 13. Thus far, there is no evidence about what efforts Secretary Clinton took to recover and produce these emails to the State Department.

and her deputy chief of staff to conduct official government business and communicate with fellow State Department employees and other federal government employees, including those at the White House, as well as foreign leaders and other interested individuals. Although the system was used exclusively by Secretary Clinton for four years, the public did not know about it until the State Department and Secretary Clinton acknowledged the system only when compelled to do so by a *New York Times* report in March 2015, two years after she had left office. As this Court has stated previously, "This is a very troubling case." Transcript at pp. 63-64. In addition, Judge Lamberth has characterized Secretary Clinton's use of the clintonemail.com system as "extraordinary." *Judicial Watch, Inc. v. U.S. Department of State*, No. 124-cv-1242, 2016 U.S. Dist. LEXIS 41183 (D.D.C. Mar. 29, 2016). If there was ever an appropriate time for the deposition of a former agency head, this is it. Defendant provides no sufficient argument as to why this is not the case.

B. The deposition of Clarence Finney is necessary.

Defendant's entire argument as to why Mr. Finney should not be deposed boils down to nothing more than Plaintiff should have sought to depose Mr. Finney at the outset. Def. Opp. at 19-22. However, in March, Plaintiff did not know Mr. Finney's significance to this case. Only when Plaintiff received Defendant's responses to Plaintiff's interrogatories did Plaintiff learn that Mr. Finney had the day-to-day responsibility for records management and research, including conducting and coordinating searches in response to FOIA requests. Exhibit 1 to Plf. Mot. at 1-2. Ms. Mills then testified that Secretary Clinton was in daily contact with Mr. Finney and his staff. Mills Deposition at 262:7 – 263:1. Former Executive Secretary Mull also testified that Mr. Finney understood his responsibilities concerning Secretary Clinton's records. Mull

Deposition at 39:7 – 39:15. In addition, Ms. Abedin testified that Mr. Finney was responsible for ensuring that all of Secretary Clinton's records were properly inventoried and that no federal records left the State Department. Abedin Declaration at 135:18 – 141:22. Had Plaintiff known all of this information in March, it would have listed Mr. Finney on its initial, proposed discovery plan. If anything, the omission of Mr. Finney was the result of the failure of Defendant to identify him as a key witness.[4]

Moreover, the fact that Plaintiff learned during the 30(b)(6) deposition some of what Mr. Finney knows is irrelevant. The taking of a 30(b)(6) deposition does not preclude a party from taking additional depositions. As Rule 30(b)(6) of the Federal Rules of Civil Procedure plainly states, "This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules." Defendant's argument is therefore contrary to the plain language of the rule. In addition, at least one federal circuit court has concluded that additional depositions are not improper if the proposed "depositions would not be cumulative," if the need for additional depositions is "not purely speculative[,]" and if the party seeking the depositions "was not afforded a reasonable opportunity to elicit information" already. *Sahu v. Union Carbide Corp,* 528 Fed. Appx. 96, 104 (2d Cir. 2013).

In this instance, Plaintiff seeks to ask questions of Mr. Finney concerning the following issues, among others: whether he knew about the clintonemail.com system; what efforts he made to find out what systems Secretary Clinton was using for her official emails; what he was told

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[4] As the Court is well aware, Defendant has been less than forthright about providing Plaintiff with pertinent information. Transcript at 38-39 ("And what else remains? I mean, this is a constant drip, a declaration drip. That's what we're having here, you know –and it needs to stop.").

about the use of the unofficial system by Secretary Clinton and Ms. Abedin to conduct official government business; and, perhaps most significantly, what he was not told about the system. First, no other witness has been nor could have been asked about these issues. Only Ms. Lang discussed her testimony with Mr. Finney, and Ms. Lang's deposition was limited to "the processing of FOIA requests, including Plaintiff's FOIA request, for emails of Mrs. Clinton and Ms. Abedin both during Mrs. Clinton's tenure as Secretary of State and after." Order at 13. Second, Plaintiff is not speculating about this issue. Plf. Mot. at 13-15. The evidence collected to date demonstrates that Mr. Finney can provide direct testimony on these issues. *Id*. Third, pursuant to the agreed upon terms of discovery, Plaintiff could not have previously sought Mr. Finney's testimony without the Court's permission. Mr. Finney's testimony is not only necessary but also entirely appropriate.

C. The deposition of John Bentel is necessary.

Defendant asserts that Plaintiff has not "pointed to any evidence suggesting that Mr. Bentel would know whether or not Secretary Clinton or the State Department used clintonemail.com to deliberately thwart FOIA." Def. Opp. at 22. This assertion is incorrect. Plaintiff pointed to the evidence in the May 2016 OIG report, which Defendant, tellingly, fails to address.

According to the State Department's Inspector General, an employee who reported to Mr. Bentel "raised concerns that information sent and received on Secretary Clinton's account could contain Federal records that needed to be preserved in order to satisfy Federal recordkeeping requirements." OIG Report at 40. In response, Mr. Bentel stated "that the Secretary's personal system had been reviewed and approved by Department legal staff and that the matter was not to

be discussed any further." *Id*. Similarly, the May 2016 OIG Report states that another one of Mr. Bentel's employees "raised concerns about the server and that Mr. Bentel, in response, "stated that the mission of S/ES-IRM is to support the Secretary and instructed the staff never to speak of the Secretary's personal email system again." *Id*. This evidence suggests that the State Department, through Mr. Bentel, may have attempted to conceal the existence of the clintonemail.com system from officials responsible for managing the secretary's records systems. Plaintiff, at a minimum, should be allowed to question Mr. Bentel about these assertions.

In addition, Mr. Bentel's testimony to the Benghazi Select Committee is irrelevant. It appears that the committee, at the time it interviewed Mr. Bentel, did not possess the information Plaintiff identified in its motion or other evidence Plaintiff uncovered during discovery.[5] For example, in an email to Monica Hanley, an aide to Secretary Clinton, Mr. Bentel identifies a State Department email account for Secretary Clinton. Exhibit 1, document C to Plf. Mot. ("We actually have an account previously set up: SSHRC@state.gov. There are some old emails but none since Jan. '11."). Yet, Mr. Bentel testified to the Benghazi Select Committee that he was "[n]ot aware of" "an official email account for" Secretary Clinton. Select Committee on Benghazi, U.S. House of Representatives, Interview of Executive Secretariat Director of Information Resources Management (June 30, 2015, available at http://askedandanswered-democrats.benghazi.house.gov/transcripts/2015_06_30_SCB_INTERVIEW_EX_IRM_Director) at 35. Similarly, Mr. Bentel testified to the Benghazi Select Committee that he learned about the clintonemail.com server through media reports in 2015. *Id*. at 37. Yet, it appears that Mr. Bentel

[5] The Benghazi Select Committee interviewed Mr. Bentel in June 30, 2015.

had been made aware of the clintonemail.com server as early as March 2009, when a review of communications systems at Secretary Clinton's residence was undertaken and the server was identified as an "Unclassified Partner System." Exhibit 2, document A to Plf. Mot. With this additional information, Plaintiff expects Mr. Bentel can provide more complete answers to its questions. Mr. Bentel's testimony is necessary.

D. The Court should rule on Plaintiff's pending motion.

As this Court previously stated:

> Although the State Department has taken some action to recover federal records related to this case, those efforts do not resolve the question of whether the agency's search in response to Judicial Watch's FOIA request was reasonable. As Judge Lamberth recently observed "[t]he State Department's willingness to now search documents voluntarily turned over to the Department by Secretary Clinton and other officials hardly transforms such a search into an 'adequate' or 'reasonable' one." *See* Civil Action No. 14-1242 (RCL), Docket No. 39.

Order at 11-12. Whether the FBI at some time in the future will provide the State Department with additional records is irrelevant.[6] These records are just another subset of a larger set of records. Until the Court resolves whether Defendant's search in response to Judicial Watch's FOIA request was reasonable, any discussion of remedies is premature. The Court should rule upon the motion currently before the Court. Doing so will move this case closer towards a final resolution. Delaying adjudication will only prejudice Plaintiff. It has now been more than three years since Plaintiff submitted its FOIA request. Plaintiff still has a right to a sufficient search,

[6] In addition, according to the State Department's spokesman, Defendant does not know "at this point" how many emails exist, when they will be reviewed, how long the review will take, and when records will be made available to the public. *See* Katie Bo Williams, State Department will release deleted emails, *The Hill* (July 13, 2016, available at http://thehill.com/policy/national-security/287630-state-department-will-release-deleted-clinton-emails).

and Plaintiff cannot and will not receive one until the Court receives answers to "questions surrounding the creation, purpose and use of the clintonemail.com server" so that it "can decide, as a matter of law, whether the Government has conducted an adequate search in response to Judicial Watch's FOIA request." Order at 1.

III. Conclusion.

For the reasons set forth in Plaintiff's initial brief and the additional reasons stated above, Plaintiff respectfully requests that the Court authorize Plaintiff to take the depositions of Hillary Clinton, Clarence Finney, and John Bentel within four weeks.

Dated: July 14, 2016

Respectfully submitted,

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