

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

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| _____                     | ) |                    |
| JUDICIAL WATCH, INC.,     | ) |                    |
|                           | ) |                    |
| <i>Plaintiff,</i>         | ) |                    |
|                           | ) | Case No. 15-688-RC |
| v.                        | ) |                    |
|                           | ) |                    |
| U.S. DEPARTMENT OF STATE, | ) |                    |
|                           | ) |                    |
| <i>Defendant.</i>         | ) |                    |
| _____                     | ) |                    |

**PLAINTIFF’S CROSS-MOTION FOR SUMMARY JUDGMENT**

Plaintiff Judicial Watch, Inc., by counsel and pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, hereby cross-moves for summary judgment against Defendant U.S. Department of State. As grounds therefor, Plaintiff respectfully refers the Court to the accompanying “Plaintiff’s Memorandum of Law in Opposition to Defendants’ Motion for Summary Judgment and in Support of Plaintiff’s Cross-Motion for Summary Judgment,” and “Plaintiff’s Response to Defendants’ Statement of Material Facts Not in Dispute and Statement of Material Facts in Support of Cross-Motion for Summary Judgment.”

Dated: June 6, 2016

Respectfully submitted,

/s/ Chris Fedeli

Chris Fedeli  
DC Bar No. 472919  
**JUDICIAL WATCH, INC.**  
425 Third Street S.W., Suite 800  
Washington, DC 20024  
(202) 646-5172

*Counsel for Plaintiff*

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

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| JUDICIAL WATCH, INC.,     | ) |                    |
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| <i>Plaintiff,</i>         | ) |                    |
|                           | ) | Case No. 15-688-RC |
| v.                        | ) |                    |
|                           | ) |                    |
| U.S. DEPARTMENT OF STATE, | ) |                    |
|                           | ) |                    |
| <i>Defendant.</i>         | ) |                    |
| _____                     | ) |                    |

**PLAINTIFF’S MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF’S  
OPPOSITION TO DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT AND IN  
SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT**

Plaintiff Judicial Watch, by counsel, respectfully submits this memorandum in opposition to Defendant Department of State’s motion for summary judgment and in support of Plaintiff’s cross-motion for summary judgment.

**Introduction**

Defendant has unlawfully withheld information from Plaintiff concerning Secretary Clinton’s conflicts of interest arising from her private speaking arrangements and involvement with the Clinton Foundation charitable organization. In addition, Defendant’s search for records in this case is inadequate at law and requires further efforts to produce records. This Court should so find and order production of withheld material and additional searches and productions of records in this FOIA lawsuit.

**I. FACTUAL BACKGROUND**

Plaintiff filed this FOIA lawsuit on May 6, 2015 for records related to State Department review of any conflicts of interest for former Secretary Clinton based on donations to the Clinton Foundation, and for records of policies and procedures to prevent conflicts of interest stemming

from former Secretary Clinton's personal or charitable financial relationships. ECF 1 at ¶ 5. The FOIA request sought records from January 1, 2009 to January 31, 2013. *Id.*

On October 23, 2015, Defendant identified sixteen documents responsive to Plaintiff's FOIA request, six of which were released in full, five of which were released "in part" with portions redacted and withheld, and five of which were completely withheld. ECF 28-2 at 4, ¶ 6. Defendant claims withholdings under FOIA Exemptions 5 and 6. Following additional searches, which Defendant claims yielded no additional responsive records, the parties proposed to resolve remaining disputed issues in this case on cross-motions for summary judgment.

## **II. SUMMARY OF ARGUMENT**

The State Department has made multiple withholdings under FOIA Exemption 5 that do not withstand scrutiny in light of the law and the facts presented in its narrative *Vaughn* index. First, the Defendant has claimed the deliberative privilege for communications between the agency and individuals who were neither federal employees nor consultants at the time of the communications. Second, the State Department has applied the privilege too broadly, withholding easily segregable facts from the records – facts which are not integrated with the deliberations and would not reveal the substance of the deliberations if disclosed.

In addition, the Defendant has wrongly withheld certain non-state.gov email addresses claiming privacy under Exemption 6. Under ordinary circumstances, there might be little public interest in these email addresses, and so the privacy interests of the individuals might prevail. However, given the widespread use of the clintonemail.com records system by Defendant and the complications it has created for FOIA compliance, the public interest in almost all additional information about this system and certain State Department officials' use of private emails generally is extremely high.

Finally, Defendant has failed to meet its burden of proof regarding the sufficiency of its search. Specifically, the State Department fails to adequately account for its decisions to search certain systems of records but not others within the components it identifies. The Court should order the State Department to conduct additional searches of additional components and records systems.

### **III. ARGUMENT**

#### **1. Many of Defendant's Withholdings Under Exemption 5 are Inadequately Supported and Must be Released**

##### **A. The Defendant Cannot Withhold Communications With Individuals who Were Neither Agency Officials nor Consultants Under the Deliberative Process Privilege**

Plaintiff challenges Defendant's b(5) withholdings in Documents C05867882, C05892232, C05892233, C05892234, C05892235, and C05892237, described in Defendant's narrative *Vaughn* index at paragraphs 34, 36-38, 42, and 43. ECF 28-2 at 13-16, 19-20, ¶¶ 34, 36-38, 42, 43. Defendant withheld communications between the State Department and Hillary Clinton and Harold Koh, even though these were discussions between future employees prior to their government employment, and neither Koh nor Clinton were alleged to be outside consultants at the time the communications were made. Furthermore, the Defendant withheld other communications between Cheryl Mills, Jacob Sullivan, Philippe Reines, and Secretary Clinton dating from before any of them were State Department employees or alleged to be consultants. Accordingly, whether this set of documents were "drafts" or "talking points" or "proposals" is irrelevant, because they all involve communications with or between non-agency employees who were not consultants. Defendant's arguments therefore do not address Plaintiffs' challenge here. ECF 28-1 at 8-10.

Only communications within or between government agencies, or between federal agencies and their consultants, can be withheld under the deliberative process privilege. *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1162 (D.C. Cir. 1987) (outside consultant communications may be withheld). However, the Defendant has improperly withheld substantive communications to and from Hillary Clinton and Harold Koh when they were mere nominees to their positions, unconfirmed by the Senate. Rather than agency deliberations, these withheld documents are final decisions of the State Department communicating the agency's recommendations to nominees on how to respond to confirmation hearing questions, along with nominee-Clinton's or Koh's comments or questions regarding the same. Although Secretary Clinton was a Senator prior to assuming the Secretary role, it has long been established that documents conveying advice from an agency to Congress for purposes of congressional decisionmaking are not "inter-agency" records under Exemption 5 because Congress is not itself an "agency" under FOIA. *Dow Jones & Co. v. Dept. of Justice*, 917 F.2d 571, 574 (D.C. Cir. 1990).

In the case of the Clinton-Mills and Sullivan-Reines email exchanges, these are discussions between non-agency employees who were not consultants, and so the deliberative process privilege does not apply here either.<sup>1</sup> As these withholdings are not properly exempt under FOIA, they must be released in full.

B. Defendant Wrongly Withheld Non-Integrated Facts Segregable From Agency Deliberations in Several Documents

Plaintiff also challenges certain of Defendant's b(5) withholdings in Documents C05880711, C05867888, C05867890, and C05867776 described in Defendant's narrative

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<sup>1</sup> Plaintiff does not challenge the withholding of the April, 2009 Jacob Sullivan-to-Richard Verna portions of these documents

*Vaughn* index at paragraphs 35 and 39- 41. ECF 28-2 at 14, 17-18, ¶¶ 35, 39-41. In each of these documents, based on Defendant's *Vaughn* index and a review of the documents themselves, Defendant has made some proper redactions of agency deliberations, but has also made other improper redactions of facts which are not integrated with those deliberations. Those facts could be released without disclosing the substance of the deliberations. Accordingly, withholding these facts is unlawful and the Defendant must release the information.

The deliberative process privilege may not be used to withhold factual information ordinarily available in discovery merely because the facts are contained within deliberative documents. *EPA v. Mink*, 410 U.S. 73, 91 (1973). While there are exceptions to this rule, none apply here. *See Montrose Chemical Corp. v. Train*, 491 F.2d 63 (DC Cir. 1974) (facts can be withheld if they were selected from a larger group of facts as a part of the deliberation); *Horowitz v. Peace Corps*, 428 F.3d 271, 277 (DC Cir. 2005) (facts may be withheld if they are so integrated into the deliberation that revealing the fact would reveal the substance of the deliberations themselves).

In this case, the factual withholdings Plaintiff seeks from these documents are merely the identities of the potential conflicts being deliberated upon. For instance, the *Vaughn* index for Document C05880711 describes withheld ethics deliberations about a potential speaking engagement for Secretary Clinton. ECF 28-2 at 13, ¶ 35. However, the agency does not explain why the identity of the group for the potential speech is "integrated" with the deliberations, and indeed no explanation is possible. The Defendant can and should release only that portion of the document that identifies the group for the potential speech without disclosing any of the ethical back-and-forth discussion conducted by the agency. Disclosure of the identity of the group would not, on its own, reveal the underlying deliberations about the ethics of the speaking

engagement. The same holds true about the facts in the other documents cited in this section: the identity of the potential sponsors in Document C05867888 (ECF 28-2 at 17, ¶ 39), the identity of the foreign government in Document C05867890 (ECF 28-2 at 17, ¶ 40), or the identity of potential consulting client in Document C05867776 (ECF 28-2 at 18, ¶ 41). In each case, Defendant can release single words or names in each document (or, potentially, just the subject lines of the emails) without revealing any detailed factual analysis. Accordingly, the withheld facts Plaintiff challenges are not “integral” to the deliberations. Defendant does not state that the withheld facts Plaintiff challenges *are* integral to the deliberations, ECF 28-1 at 8-10, and its argument that it cannot segregate further information for release is perfunctory and unpersuasive. ECF 28-1 at 12-13. As the exceptions allowing agencies to withhold these particular facts from deliberative documents do not apply, this factual information must be released.

**2. Given the State Department’s Highly Unusual Records Management Practices, the Public Interest Requires Disclosure of Officials’ Private Email Addresses Which Would Otherwise be Subject to Exemption 6**

Plaintiff challenges Defendant’s b(6) withholdings of private email addresses used by government employees in Documents C05892232 and C05892233, described in Defendant’s narrative *Vaughn* index at paragraphs 36-37. ECF 28-2 at 14-16, 18-19, ¶¶ 36, 37. The government’s claim that release of these personal email addresses will “shed no light on the conduct of U.S. Government business” is mistaken. *Id.* Furthermore, the withheld private email addresses appear to be from January 2009 emails between Hillary Clinton, Cheryl Mills, Phillippe Reines, and Jacob Sullivan. *Id.* Release of this information would potentially reveal whether any of these future State Department employees were using clintonemail.com addresses as early as two months before they began government employment. This may shed further light on the truth of the clintonemail arrangement (which has only come out in dribs and drabs over the past

year), and on the use of other private email addresses for business by State Department employees. Accordingly, the public interest outweighs any privacy interests in these email addresses.

“[U]nder Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere in the Act.” *Multi AG Media LLC v. USDA*, 515 F.3d 1224, 1227 (D.C. Cir. 2008), quoting *Nat’l Ass’n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002). Indeed, FOIA’s “presumption favoring disclosure . . . is at its zenith under Exemption 6.” *Consumers’ Checkbook Ctr. for the Study of Servs. v. HHS*, 554 F.3d 1046, 1057 (D.C. Cir. 2009). When Exemption 6 is claimed, the Court must assess whether the third party’s privacy interest is outweighed by the public interest in the disclosure. See *Citizens for Responsibility and Ethics v. Dep’t of Justice*, 840 F. Supp. 2d 226, 231 (D.D.C. 2012), quoting *ACLU v. Dep’t of Justice*, 655 F.3d 1, 12 (D.C. Cir. 2011). In *Dep’t of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989), the Supreme Court observed that the extent of the public interest in disclosure under FOIA is tied to how well the release of the information will “shed[] light on an agency’s performance of its statutory duties.”

The public interest in knowing which State Department officials used the clintonemail system (or other, as yet unknown non-state.gov email systems) and when they began doing so is enormous. The Inspector General of the Department of State has indicated that use of non-official emails for official State Department business may have led to the evasion of the federal Freedom of Information Act. In January 2016, the State Department Office of Inspector General issued a report, “Evaluation of the Department of State’s FOIA Process for Requests Involving the Office of the Secretary,” which explains at least one State Department lawyer believed that

the exclusion of Secretary Clinton's emails had led to a failure to comply with FOIA.<sup>2</sup> On Wednesday May 25, the State Department Inspector General provided a second report with more evidence that the clintonemail system was an evasion of existing rules, and that the records laws have still not been satisfied in the aftermath of its disclosure.<sup>3</sup> For instance, the May 2016 State Department Inspector General report identifies additional emails related to government business which were not released as a part of the 55,000 pages the former Secretary turned over. In one previously unknown email between Clinton and her deputy chief of staff, they discuss her use of private email system:

In November 2010, Secretary Clinton and her Deputy Chief of Staff for Operations discussed the fact that Secretary Clinton's emails to Department employees were not being received. The Deputy Chief of Staff emailed the Secretary that "we should talk about putting you on state email or releasing your email address to the department so you are not going to spam." In response, the Secretary wrote, "Let's get separate address or device but I don't want any risk of the personal being accessible."

*May 2016 OIG Report* at p. 38. In another instance, the same report hints at evidence of an attempted cover-up:

Two staff in [the State Department's Bureau of Information Resource Management] reported to OIG that, in late 2010, they each discussed their concerns about Secretary Clinton's use of a personal email account in separate meetings with the then-Director of S/ES-IRM. In one meeting, one staff member 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. According to the staff member, the Director 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. As previously noted, OIG found no evidence that staff in the Office of the Legal Adviser reviewed or approved Secretary Clinton's personal system. According to

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<sup>2</sup> See State Department Office of Inspector General, January 2016 Report, "Evaluation of the Department of State's FOIA Processes for Requests Involving the Office of the Secretary," Report ESP-16-01, p. 15, fn 64, available at <https://oig.state.gov/system/files/esp-16-01.pdf> ("January 2016 OIG Report").

<sup>3</sup> See State Department Office of Inspector General, May 2016 Report, "Office of the Secretary: Evaluation of Email Records Management and Cybersecurity Requirements," Report ESP-16-03, available at <https://oig.state.gov/system/files/esp-16-03.pdf> ("May 2016 OIG Report").

the other S/ES-IRM staff member who raised concerns about the server, the Director 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.

*May 2016 OIG Report* at p. 40.

“[T]he public interest in whether public servants carry out their duties in an efficient and law-abiding manner” outweighs the alleged privacy interest in the withheld email addresses.

*Chang v. Department of the Navy*, 314 F.Supp.2d 35, 44 (D.D.C. 2004). In light of the foregoing, the State Department's argument that “[p]rivate email addresses reveal nothing about State's conduct, and thus their disclosure would not advance the public interest” is incorrect.

ECF 28-1 at 12.

### **3. Defendant's Search Declaration Fails to Satisfy its Burden of Proof Given the Circumstances of This Case**

Defendant has failed to meet its burden of proof that it conducted a sufficient search, and its argument otherwise does little more than set out the legal standard and cite its own declaration. ECF 28-1 at 3-6. The adequacy of an agency's FOIA search declaration is “dependent on the circumstances of the case,” and the circumstances of this case are unusual due to Defendant's unusual records management and non-state.gov email practices, and the impact of those practices on FOIA compliance. *People for the Am. Way Found. v. Nat'l Park Serv.*, 503 F. Supp. 2d 284, 293 (D.D.C. 2007) (“Because the adequacy of an agency's search is dependent upon the circumstances of the case... there is no uniform standard for sufficiently detailed and nonconclusory affidavits.”) (internal punctuation omitted); *see generally January 2016 OIG Report* and *May 2016 OIG Report*. As the *January 2016 OIG Report* explained, the State Department's “lack of oversight by leadership and failure to routinely search emails” have

contributed to recent incomplete FOIA searches from Defendant, including “several instances when S/ES searches have yielded inaccurate or incomplete results...”<sup>4</sup>

To satisfy its burden, an agency’s search declaration must be “relatively detailed,” *Weisberg v. Dept. of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983), and must “explain” that the components and systems searched were “reasonably calculated to uncover all relevant documents” and that “no other record system was likely to produce responsive documents.” *Oglesby v. U.S. Dep’t of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). The Defendant has failed to meet this standard with its search declaration, which is incomplete in places, conclusory in other places, and is in no way adequate given the circumstance of this case. *See Boyd v. U.S. Marshals Serv.*, 2002 U.S. Dist. Lexis 27734, at \*2-3, No. 99-2712 (D.D.C. Mar. 15, 2002) (search declarations were insufficient because “neither agency provides an *explanation* for where it searched for records and *why* those locations are the only locations to contain responsive records.”) (italics added). Accordingly, the search is not sufficient and Defendant should be required to conduct additional searches.

Defendant’s search declaration is insufficient in several ways. *See* Plaintiff’s Statement of Facts (“SOF”) at ¶ 5. First, the State Department’s description of the search of the Office of the Legal Advisor raises more questions than it answers. ECF 28-2 at ¶¶ 12-16. Here, Defendant describes a search of the office of Ethics and Financial Disclosure (“EFD”) within the Legal Advisor’s office. This search apparently included certain records from the front office of the Legal Advisor contained in a “state-of-the-art” records management system called the “Content Server,” which includes “retired records” and “archived emails.” ECF 28-2 at ¶¶ 14 and fn 1. Separately, the search declaration states the Assistant Legal Advisor for EFD also

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<sup>4</sup> *January 2016 OIG Report*, p. 13, available at <https://oig.state.gov/system/files/esp-16-01.pdf>.

searched her emails, and the emails of her predecessor during the relevant time period, and the emails of an attorney who previously worked on relevant issues. ECF 28-2 at ¶ 15.

However, the State Department search declaration does not explain why it searched the particular locations it searched within the EDF office sufficiently to satisfy its burden. If the “Content Server” is a comprehensive database for EFD files, the defendant does not explain why a separate search of the Assistant Legal Advisor’s records was necessary. If the “Content Server” is not a comprehensive collection of EFD documents, Defendant failed to explain that, or to adequately address why there were no other relevant file storage locations that also should have been searched separately in addition to the search of the Assistant Legal Advisor’s records. Similarly, Defendant fails to explain why it did not conduct searches of other officials who regularly interacted with the EFD office beyond the Assistant Legal Advisor. Finally, Defendant fails to explain why different search terms were used for its search of the EFD “Content Server” and its search and the Assistant Legal Advisor’s records. ECF 28-2 at ¶¶ 14, 15. Defendant should be ordered to conduct further searches and produce all new records located, and provide the Court with a declaration that adequately explains that those additional searches now constitute a reasonable search.

Furthermore, the Defendant fails to explain how its search of the Retired Records Inventory Management System (“RIMS”) for EFD office “retired” records differs from the EFD office “Content Server” search, especially since the Content Server already contains the scanned and uploaded “retired” paper records from EFD. ECF 28-2 at ¶ 21-22; ECF 28-2 at ¶ 14 (“Retired L/EFD paper records related to Secretary Clinton have been scanned and loaded into Content Server and thus were included in the search described above.”). Similarly, the State Department’s declaration fails to address whether it made a search of (or using) the State

Messaging and Archive Retrieval Toolset (“SMART”). According to the *May 2016 OIG* report, SMART is a State Department-wide system that “enable[es] employees to preserve a record copy of emails through their Department email accounts without having to print and file them.”<sup>5</sup> If SMART is a system of records, it likely should have been searched in response to Plaintiff’s FOIA request. If SMART is a records management system, its use in the search should have been described, similarly to Defendant’s use of RIMS and the Content Server. Defendant’s declaration does not address SMART at all.

Furthermore, the Declaration also makes no more than a conclusory statement to explain why Defendant searched where it did, and does not adequately explain why Defendant did not conduct searches of the Office of the Secretary, or of other key officials who Secretary Clinton emailed frequently. ECF 28-2 at ¶ 11. Plaintiff’s FOIA request seeks records of a high level of sensitivity regarding potential conflicts of interest of a sitting Secretary of State, as evidenced by the searches of records of top advisors Cheryl Mills and Jacob Sullivan. ECF 28-2 at ¶ 20, 26. Beyond those advisors, during her tenure at the State Department, Secretary Clinton sent at least 717 emails to Lauren Jiloty, 522 emails to Robert Russo, 439 emails to Monica Hanley, and 434 emails to Lona Valmoro during their respective employment at the State Department. *See* Plaintiff’s SOF at ¶ 6; *see* Exhibit 1, Chris Fedeli Declaration at ¶ 2. The Defendant’s search declaration does not address or identify specific searches of the Office of the Secretary or of Jiloty, Russo, Hanley, or Valmoro’s records or state.gov emails, or searches of any non-state.gov email addresses these individuals may have used to conduct government business. At least one of these former State Department officials, Monica Hanley, has been confirmed to have used a non-state.gov email address to communicate with the Secretary concerning State Department

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<sup>5</sup> *May 2016 OIG Report* at p. 8, available at <https://oig.state.gov/system/files/esp-16-03.pdf>.

business. *See* Exhibit 1, Chris Fedeli Declaration at ¶ 3; *see also* Exhibit 2; *see also* Plaintiff's SOF at ¶ 7. This adds yet another circumstance of concern to the litany of problems with the State Department's records practices.

Finally, Defendant states that a separate search was conducted of Cheryl Mills' and Jacob Sullivan's official emails. ECF 28-2 at ¶ 20. But no adequate explanation is given for why Huma Abedin's official emails were not also separately searched. The State Department also chose to search only the individual electronic folders of Mills and Sullivan, but not Abedin. ECF 28-2 at ¶ 7. Similarly, in the search of non-state.gov records returned to the State Department from Secretary Clinton's top aides, Mills' and Sullivan's records were searched but not those of Abedin, and no adequate explanation for that omission is provided. ECF 28-2 at ¶ 26. Abedin was subject to the same Defendant request to return non-state.gov records after leaving the State Department as Mills. *See Judicial Watch, Inc. v. U.S. Dep't of State*, 2016 U.S. Dist. Lexis 62283 at \*3, Case No. 13-1363 (D.D.C. May 4, 2016) (Sullivan, J.) ("Pursuant to a Court order, the State Department collected and searched federal records that were voluntarily produced by Mrs. Clinton, Ms. Abedin and Ms. Cheryl Mills."). Furthermore, Abedin held a special employment status with Defendant that enabled her to work for both the State Department and the Clinton Foundation during at least some of the relevant time period. *Id.*, 2016 U.S. Dist. Lexis 62283 at \*2 ("Designated as a "special government employee," Ms. Abedin was allowed to engage in private sector work while also working at the State Department. Specifically, Ms. Abedin served as a consultant to Teneo Holdings and the Clinton Foundation.") (internal citations omitted). The Defendant's search declaration does not address why Huma Abedin's records within the Office of the Secretary or Abedin's returned non-state.gov records were not searched with anything more than a conclusory statement about a determination made by the

Office of Information Programs and Services. ECF 28-2 at ¶ 11. In light of Abedin's special status, and considering the Clinton Foundation conflict matters that are the subject of Plaintiff's FOIA request, the failure to specifically search these records is a glaring omission.

In light of the foregoing, the State Department's search is not adequate under FOIA.<sup>6</sup> Additional searches for responsive records should be performed, and further records should be produced.

### Conclusion

Plaintiff's motion should be granted, and Defendant's motion should be denied.

Dated: June 6, 2016

Respectfully submitted,

/s/ Chris Fedeli

Chris Fedeli

DC Bar No. 472919

**JUDICIAL WATCH, INC.**

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(202) 646-5172

*Counsel for Plaintiff*

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<sup>6</sup> As Plaintiff previously identified, there remain substantial questions as to whether Defendant's search can be adequate until it reviews the outstanding, unsearched 31,830 records on the clintonemail.com system. ECF 7 at ¶ 6. Plaintiff is currently proceeding with discovery in other FOIA cases, but has decided not to move for discovery under Rule 56(d) in this case even though grounds for doing so are present.

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FOR THE DISTRICT OF COLUMBIA**

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| JUDICIAL WATCH, INC.,     | ) |                    |
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| <i>Plaintiff,</i>         | ) |                    |
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| v.                        | ) |                    |
|                           | ) |                    |
| U.S. DEPARTMENT OF STATE, | ) |                    |
|                           | ) |                    |
| <i>Defendant.</i>         | ) |                    |
|                           | ) |                    |

**PLAINTIFF’S RESPONSE TO DEFENDANTS’ STATEMENT OF MATERIAL FACTS  
NOT IN DISPUTE AND PLAINTIFF’S STATEMENT OF MATERIAL FACTS IN  
SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT**

Plaintiff Judicial Watch, Inc., by counsel and pursuant to Local Civil Rule 7.1(h), respectfully submits this response to Defendants’ Statement of Material Facts Not in Dispute and Plaintiff’s Statement of Material Facts in Support of Cross-Motion for Summary Judgment:

**I. Plaintiff’s Response to Defendants’ Statement of Material Facts Not in Dispute.**

1. Not disputed.
2. Not disputed.
3. Not disputed.
4. Not disputed
5. Not disputed.
6. Not disputed
7. Not disputed.
8. Not disputed.
9. Not disputed.

10. Not disputed.
9. Not disputed.
10. Not disputed.
11. Not disputed.
12. Not disputed.
13. Not disputed.
14. Not disputed.
15. Not disputed.

**II. Plaintiff's Statement of Material Facts Not in Dispute in Support of Cross-Motion for Summary Judgment.**

1. Defendant Department of State identified sixteen documents it claims are responsive to Plaintiff's FOIA request. ECF 28-2 at 4, ¶ 6. The Defendant released six of documents in full, released five documents "in part" with portions redacted and withheld, and completely withheld another five documents. *Id.* The Defendant produced a narrative *Vaughn* index alleging these withholdings were proper under the FOIA exemptions. ECF 28-2 at 14-21, ¶¶ 34-43.

2. Certain of these documents, and certain portions of other documents, were redacted or withheld by the Defendant as allegedly exempt pursuant to FOIA Exemption 5, 5 U.S.C. § 552(b)(5), on the grounds that the information was subject to the deliberative process privilege and would not ordinarily be available to a party in litigation. ECF 28-2 at 14-21, ¶¶ 34-43.

3. Certain other portions of these documents were redacted or withheld by the Defendant as allegedly exempt pursuant to FOIA Exemption 6, 5 U.S.C. § 552(b)(6), on the grounds that disclosure of the information would constitute a clearly unwarranted invasion of

personal privacy. ECF 28-2 at 14-16, 18-19, ¶¶ 36, 37, 41.

4. In response to Plaintiff's FOIA request, Defendant alleged it performed an adequate search that was reasonably calculated to uncover all documents relevant to the request. ECF 28-1 at 3-4; ECF 28-2 at 3-10, ¶¶ 9-26.

5. Defendant's search declaration does not explain in detail why Huma Abedin's records were not searched, what the search of the "Content Server" and Retired Records Inventory Management System entailed, why the Legal Advisor's office search was limited, why the Office of the Secretary records were not searched, why emails of various top aides to the Secretary were not searched, or whether the State Messaging and Archive Retrieval Toolset ("SMART") was searched or used to conduct a search. ECF 28-2 at 3-10, ¶¶ 9-26.

6. During the course of their respective employment with Defendant, Secretary Clinton sent at least 717 emails to Lauren Jiloty, 522 emails to Robert Russo, 439 emails to Monica Hanley, and 434 emails to Lona Valmoro. Exhibit 1, Declaration of Chris Fedeli at ¶ 2.

7. Monica Hanley used a non-state.gov email to correspond with Secretary Clinton concerning State Department matters. Exhibit 2; *see also* Exhibit 1, Declaration of Chris Fedeli at ¶ 3.

Dated: June 6, 2016

Respectfully submitted,

/s/ Chris Fedeli

Chris Fedeli

DC Bar No. 472919

**JUDICIAL WATCH, INC.**

425 Third Street S.W., Suite 800

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(202) 646-5172

*Counsel for Plaintiff*

# Exhibit 1

**IN THE UNITED STATES DISTRICT COURT  
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|                           |   |                    |
|---------------------------|---|--------------------|
| JUDICIAL WATCH, INC.,     | ) |                    |
|                           | ) |                    |
| <i>Plaintiff,</i>         | ) |                    |
|                           | ) | Case No. 15-688-RC |
| v.                        | ) |                    |
|                           | ) |                    |
| U.S. DEPARTMENT OF STATE, | ) |                    |
|                           | ) |                    |
| <i>Defendant.</i>         | ) |                    |
|                           | ) |                    |

**DECLARATION OF CHRIS FEDELI**

Pursuant to 28 U.S.C. § 1746, I, Chris Fedeli, declare as follows:

1. I am an attorney with Judicial Watch, Inc. and counsel for Plaintiff in the above-captioned matter. I am over the age of eighteen and have personal knowledge of the matters set forth below.
  
2. During the course of this litigation, my office examined the now publicly-available emails from Secretary Clinton and identified as many as 717 emails from Clinton to Lauren Jiloty, 522 emails to Robert Russo, 439 emails to Monica Hanley, and 434 emails to Lona Valmoro during their respective employment with Defendant. These emails are available on the State Department’s website, [https://foia.state.gov/Search/Results.aspx?collection=Clinton\\_Email](https://foia.state.gov/Search/Results.aspx?collection=Clinton_Email) , and at Wikileaks.org, <https://wikileaks.org/clinton-emails/>.
  
3. Filed herewith as Exhibit 2 is a true and correct copy of an email exchange regarding government business conducted over the non-state.gov email addresses of both Monica Hanley and Secretary Clinton.

I declare under penalty of perjury that the foregoing is true and correct. Executed in Washington, DC on this 6<sup>th</sup> day of June, 2016.

*s / Chris Fedeli*

---

Chris Fedeli

# Exhibit 2

RELEASE IN PART  
B6

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**From:** Hanley, Monica R <HanleyMR@state.gov>  
**Sent:** Saturday, January 8, 2011 11:32 AM  
**To:** H; monica.hanley [redacted]  
**Cc:** Huma Abedin  
**Subject:** Re: My ipad

B6

Yup! I did receive it but had not checked my personal account yet.  
Not a problem. I'll bring the ipad.  
Sorry for the delay!

----- Original Message -----

**From:** H <HDR22@clintonemail.com>  
**To:** Hanley, Monica R; 'monica.hanley' [redacted] <monica.hanley [redacted]>  
**Cc:** Huma Abedin <Huma@clintonemail.com>  
**Sent:** Sat Jan 08 11:26:51 2011  
**Subject:** Fw: My ipad

Did you receive this? (I never know for sure if people do!)

----- Original Message -----

**From:** H  
**To:** 'monica.hanley' [redacted] <monica.hanley [redacted]>  
**Sent:** Sat Jan 08 10:41:49 2011  
**Subject:** My ipad

Could you pls pick it up from my desk at home and bring w you to the plane?

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

|                           |   |                    |
|---------------------------|---|--------------------|
| _____                     | ) |                    |
| JUDICIAL WATCH, INC.,     | ) |                    |
|                           | ) |                    |
| <i>Plaintiff,</i>         | ) |                    |
|                           | ) | Case No. 15-688-RC |
| v.                        | ) |                    |
|                           | ) |                    |
| U.S. DEPARTMENT OF STATE, | ) |                    |
|                           | ) |                    |
| <i>Defendant.</i>         | ) |                    |
| _____                     | ) |                    |

**[PROPOSED] ORDER**

Upon consideration of the Cross-Motions for Summary Judgment, it is hereby ORDERED that Plaintiff's Motion for Summary Judgment is GRANTED and Defendant's Motion for Summary Judgment is DENIED.

SO ORDERED.

DATE: \_\_\_\_\_

\_\_\_\_\_  
The Hon. Rudolph Contreras, U.S.D.J.