IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC., Plaintiff, v. U.S. DEPARTMENT OF STATE, Defendant.	Civil Action No. 14-cv-1242 (RCL)

PLAINTIFF'S RESPONSE TO DEFENDANT'S
PROPOSED DISCOVERY PLAN AND SCHEDULE

Plaintiff, by counsel and in accordance with a request by the Court, respectfully submits this response to Defendant's "discovery plan and schedule" (Dkt. Entry No. 63) ("Def's Plan"):

Background

The government once again attempts to stymie the ability of the Court and Plaintiff to vindicate the public's faith in the State and Justice Departments. This Court authorized discovery regarding the government's response to one of the "gravest modern offenses to government transparency." Dkt. Entry No. 54 (Memorandum Opinion ("Mem. Op.") at 2). The government, however, rejected nearly all of Plaintiff's plan for discovery (Dkt. Entry No. 62 ("Plaintiff's plan")) and submitted its own exceedingly limited and "designed to fail" plan for discovery. The government's proposal, which is really nothing more than an opposition to Plaintiff's plan, demonstrates that it continues to reject any impropriety on its part and that it seeks to block any meaningful inquiry into its "outrageous misconduct." Mem. Op. at 5.

I. Plaintiff's Plan Is Reasonable and Measured.

The government's first objection is that Plaintiff's plan is overbroad, allegedly seeking the "underlying substance of the Benghazi attacks" and the government's response. Def's Plan at 11-13. On the contrary, as the Court has already recognized, understanding the context of the preparation and dissemination of the talking points is central to the issues before the Court:

> Did State know Clinton deemed the Benghazi attack terrorism hours after it happened, contradicting the Obama Administration's subsequent claim of a protest-gone-awry? *See* E-mail from H, hrod17@clintonemail.com, to Diane Reynolds (Sept. 11, 2012, 11:12 PM), https://benghazi.house.gov/sites/-republicans.benghazi.house.gov/files/documents/Tab%2050.pdf; *see also* Nick Gass, *Chelsea Clinton's Secret Identity*, Politico (Mar. 5, 2015, 7:57 AM), https://www.politico.com/story/2015/03/chelsea-clinton-diane-reynolds-secret-email-115786 (establishing Diane Reynolds as an email pseudonym for Chelsea Clinton). Did State know Clinton sent or received top-secret information through her private email? *See* Statement by FBI Director James B. Comey on the Investigation of Secretary Hillary Clinton's Use of a Personal E-Mail System (July 5, 2016), https://www.fbi.gov/news/pressrel/press-releases/statement-by-fbi-director-james-b-comey-on-the-investigation-of-secretary-hillary-clinton2019s-use-of-a-personal-mail-system (noting the FBI recovered eight email chains from Clinton's server containing top-secret information). Did the Department merely fear what might be found? Or was State's bungling just the unfortunate result of bureaucratic red tape and a failure to communicate? To preserve the Department's integrity, and to reassure the American people their government remains committed to transparency and the rule of law, this suspicion cannot be allowed to fester.

Mem. Op. at 7-8. By its own admission, the government's plan is not intended to answer any of these questions as the government rejects the inquiry. Plaintiff, on the other hand, seeks to ask the relevant individuals (Susan Rice, Ben Rhodes) about the creation and dissemination of the talking points. It is necessary and reasonable to obtain testimony from Rice, the official who presented the talking points to the American public, and Rhodes, the author of the talking points. No one other than these individuals know better who they were communicating with and where records might be located.

II. Plaintiff's Proposed Plan Seeks New Information.

The Court has previously considered and rejected the government's contention that Plaintiff's proposed plan is duplicative of information already available. Mem. Op. at 8 ("Nor is the government correct that Judicial Watch's proposal mimics information already made public."). Moreover, Plaintiff's plan does not duplicate discovery in *Judicial Watch, Inc. v. State*, Civil Action No. 13-1363 (D.D.C.) (Sullivan, J.). Of the individuals Plaintiff presently seeks to depose, none were deposed in Civil Action No. 13-1363. The proposed interrogatories and document requests also do not duplicate any discovery in Civil Action No. 13-1363. The government does not claim otherwise.

III. Plaintiff's Proposed Depositions Are Relevant and Necessary.

The government agrees to only two depositions – a 30(b)(6) deposition of the State Department and a deposition of former Clinton aide Jacob Sullivan. Def's Plan at 14-15.[1] While Plaintiff believes that they may be of some use, 30(b)(6) depositions by themselves are unlikely to be sufficient. Plaintiff needs direct, unfiltered access to key witnesses with firsthand knowledge and the opportunity to ask follow-up questions.

Based on the information currently available, Plaintiff has identified individuals that are highly likely to have relevant information. These include, for example, Clarence Finney, the principal advisor and records management expert in the Office of the Secretary who was responsible for control of all correspondence and records for Clinton and other State Department

[1] It is telling that while the government ostensibly does not object to the deposition of Sullivan, counsel for the government proactively sought out and cooperated with Sullivan's counsel to include a statement from Sullivan in the government's plan as to why Sullivan believes he should not be deposed.

officials. Another is Jonathon Wasser who worked for Finney and who actually conducted searches for records in response to FOIA requests, including likely in this case.

Internal State Department emails demonstrate the importance of Finney and Wasser. *See* Plaintiff's Plan, Exhibit C at page 23. The emails, dated August 8, 2014, begin with a message from Clarence Finney to a person believed to be in the Office of the Legal Advisor named James Bair (copied to Mr. Wasser), who then forwarded the message to Gene Smilansky, Office of the Legal Advisor. The subject of the emails is "Former Secretary E-Mail Account." Plaintiff is seeking the unredacted versions of these emails. Even in their redacted form, however, the emails demonstrate Mr. Finney's awareness of the Clinton email issue as early as August 2014 and the awareness of Mr. Smilansky in Office of the Legal Advisor. Plaintiff needs to be able to ask Finney and Wasser (as well as Smilansky) about these emails with the opportunity to ask follow-up questions.

Nevertheless, the government opposes the depositions of Finney, Wasser, and other State Department employees, seeking to shield them behind a 30(b)(6) designee as it did previously in Civil Action No. 13-1363. In that case, for example, the only information Plaintiff received as to Mr. Finney's knowledge was through the filtered testimony of the 30(b)(6) designee Karin Lang. *See Judicial Watch v. State*, Civ. Action No. 13-1363 (D.D.C.) (Dkt. Entry No. 171) (Deposition Tr. of Karin Lang ("Lang Tr.")). While Plaintiff learned about some of what Mr. Finney knew or did not know about the clintonemail.com system, it was only through the filter of Ms. Lang and limited to the scope of the 30(b)(6) deposition. In fact, because of her incomplete and secondhand knowledge, Ms. Lang testified that she made a telephone call to Mr. Finney during one of the breaks in her testimony to obtain answers to questions that arose during her deposition. *See id.* at 186:5 – 187:3.

This filtering of Mr. Finney's knowledge significantly hindered Plaintiff's ability to gather relevant information. For example, Ms. Lang testified that after Mr. Finney saw a photograph of Secretary Clinton using a Blackberry he checked with the head of the information technology department for the Office of the Secretary ("S/ES-IRM") to see if the secretary was using a state.gov email account. *See id.* at 64:6 – 65:7. When asked about specifics of Mr. Finney's conversation with S/ES-IRM, the State Department objected to the question as being outside the scope of the 30(b)(6) topic and instructed the witness not to answer. *See id.* In addition, Ms. Lang testified that she did not know if Mr. Finney had any additional conversations with S/ES-IRM about Secretary Clinton's use/non-use of a state.gov email account. *See id.* And of course, Plaintiff had no opportunity to ask Mr. Finney directly any follow-up questions concerning his highly relevant knowledge.

Instead of having to obtain information through the filter of a 30(b)(6) designee, Plaintiff must be able to obtain direct testimony from Mr. Finney and the other witnesses with firsthand and highly relevant information identified by Plaintiff. In Civil Action No. 13-1363, Ms. Lang, who had no firsthand knowledge, testified that she spoke to numerous specific State Department employees in preparation for her 30(b)(6) testimony. Lang Tr. at 152-53. Plaintiff has identified at least five of these individuals (Clarence Finney, Jonathon Wasser, John Hackett, Sheryl Walter, Gene Smilansky) as likely having highly relevant information and seeks their direct testimony with opportunity to ask follow-up questions. Their testimony should not come through the filter of a 30(b)(6) designee.

The government also objects to various other individuals as "unlikely to provide relevant information." Def's Plan at 17-19. One of these is FBI Assistant Director for Counterintelligence E.W. Priestap who supervised the Clinton email investigation. Plaintiff

seeks information from Priestap as to other potential sources of unrecovered Clinton emails, including to what extent the FBI pursued senders/recipients as sources of recoverable emails. In a declaration submitted in another lawsuit, Priestap stated that the FBI interviewed Secretary Clinton's "most frequent correspondents" in an effort to recover records. *Judicial Watch v. Kerry*, Civ. Action No. 15-785 (D.D.C.) (Dkt. Entry No. 52-1 ¶ 4 (Amended Supplemental Decl. of E.W. Priestap)). Priestap does not explain the nature or extent of the FBI's efforts, such as who the FBI attempted to contact, who the FBI actually talked to, who the FBI requested records from, who actually provided records, and whether the FBI believes those that they requested records from actually returned all of the requested records. This information could shed additional light on the adequacy of the State Department's search and other sources from which it might yet obtain records.

The government similarly resists the deposition of Justin Cooper, the very person who created and managed the clintonemail.com server. As such, it is more than likely that Cooper would have information as to Secretary Clinton's use of the server. Also, Mr. Cooper's testimony to Congress appears to conflict with the testimony of Huma Abedin in Civil Action No. 13-1363. Cooper specifically stated that Abedin was involved in setting up the server,[2]

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[2] RUSSELL: Now, Mr. Cooper, you conveyed . . . that Huma Abedin assisted in arrangements on the use of the private server when all of this was being set up. Is that correct?

COOPER: Yes.

See Examining Preservation of State Department Federal Records: Hearing Before the House Committee on Oversight and Government Reform, 114th Cong. Sep't 13 and 22, 2016)(available at https://www.govinfo.gov/content/pkg/CHRG-114hhrg26120/pdf/CHRG-114hhrg26120.pdf) Testimony of J. Cooper at 37.

while Abedin testified that she did not know about the server until six years later.[3]

The government also asserts that Eric Boswell, former Assistant Secretary for Diplomatic Security, is "unlikely" to possess relevant information. Def's Plan at 19. As explained in Plaintiff's plan, Mr. Boswell authored a memo to Cheryl Mills on email security and the use of Blackberry devices.[4] Secretary Clinton subsequently acknowledged reading the memo in a conversation with Mr. Boswell. Plaintiff seeks discovery from Mr. Boswell as to that conversation and his knowledge regarding Clinton's email use. Yet again, the government preemptively attempts to restrict Plaintiff's efforts to uncover relevant information and opposes Boswell's deposition.

The government objects at length to Plaintiff's proposal to depose State Department counsel Gene Smilansky. Def's Plan at 19-23. Plaintiff recognizes that it is the rare case in which an attorney must be deposed. As the Court has recognized, however, this is that rare case.

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[3] Q: When was the server set up?
A: I don't know exactly.
Q: Do you have – and I'm not looking for a specific date, but a time frame of when the server was set up?
A: I wasn't involved in the – in the setting up of the server, so any answer I give – I would give you would be me speculating.
Q: Okay. When did you first become aware of the Clinton server.
A: I don't – I don't know that I experienced the – the notion of the server for – for my purposes. It was a matter of obtaining an e-mail address. I – I don't -
Q: Okay.
A: I didn't really think about the server until the – all the press reports in the last year and a half –
Q: Okay.
A: - came out.

See Judicial Watch v. State, Civ. Action No. 13-1363 (D.D.C.) (Dkt. Entry No. 129) (Abedin Deposition at 19:17-20:14).

[4] Contrary to the government's assertion, Boswell's memo was not limited to the use of Blackberries on "Mahogany Row" (the Secretary's office suite). *See* Exhibit A (discussing use of Blackberries and the insecurity of emails outside of Mahogany Row).

Moreover, the government confirms that Smilansky has knowledge highly relevant to this case. According to the government, Smilansky has served as agency counsel in a "litigation matter brought by Judicial Watch, related to the Benghazi attacks, and the talking points provided to Susan Rice (rather than under this particular docket number)." *Id.* at 21. As discussed above, the emails that are part of Exhibit C to Plaintiff's plan also demonstrate Mr. Smilansky's knowledge of this matter. While the government now asserts that Mr. Smilansky was not agency counsel in this particular case, it fails to identify who that person is. This again demonstrates why depositions are necessary – including depositions of attorneys – so that Plaintiff can obtain relevant information from Mr. Smilansky as well as identify persons such as the particular agency counsel in this case.

Finally, the government also objects to testimony from other State Department employees identified by Plaintiff, including Sheryl Walter, John Hackett, Heather Samuelson, Monica Hanley, and Lauren Jiloty. Def's Plan at 15-17. It claims that their testimony would be either "piecemeal" or "duplicative" or better obtained through a 30(b)(6) witness or interrogatories. Again, the unavailability of direct testimony and ask follow-up questions of these witnesses would impede discovery and prevent Plaintiff from having sufficient latitude to investigate the issues in this case.[5]

IV. Other Issues.

The government appears to agree that Plaintiff may serve its proposed document requests and interrogatories on the State Department. It is important to note, however, that the

[5] As stated in Plaintiff's plan, Plaintiff intends to update the Court regarding the depositions of Hillary Clinton and Cheryl Mills at the conclusion of the 16-week discovery period, unless the Court believes such notice is not necessary.

government has not agreed to actually provide any particular documents or respond to any particular interrogatories. The counsel for the government has stated that it intends to assert privileges as it believes appropriate. Thus, it is far from clear whether any meaningful and timely information will be obtained through documents requests and interrogatories. In fact, the government proposes producing its "privilege log" and "final rolling production" only at the end of the 16-week discovery period. Def's Plan at 3. This would prevent Plaintiff from making any meaningful use of documents actually produced during discovery.

The government's proposal that discovery be expressly limited to not duplicate discovery in Civil Action No. 13-1363 is unnecessary and unworkable. Def's Plan 3 ¶ 2 (proposing that the "scope of discovery [be] limited to the extent *any* such discovery would duplicate discovery ordered in *Judicial Watch v. U.S. Dep't of State*, Civil No. 13-1363-RGS.") (emphasis added). As demonstrated by its proposal, Plaintiff does not seek to duplicate any discovery previously taken.[6] None of the persons Plaintiff seeks to depose were deposed in Civil Action No. 13-1363. On the other hand, some information, even basic information like names and places, will likely overlap with information previously sought in that matter. A court order limiting any duplication will significantly impede meaningful discovery. A certain degree of latitude is essential to exploring these serious issues in which the good faith of the agencies and counsel is at issue.

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[6] Any suggestion that Plaintiff might abuse the discovery process is misplaced. In Civil Action No. 13-1363, Judge Sullivan recognized that discovery and all depositions were conducted in an orderly and professional manner. *See* Dkt. Entry No. 159 (*Judicial Watch v. State*, Civ. Action No. 13-1363 (D.D.C.) (Tr. of July 18, 2016 hearing at 21:3-7)(Judge Sullivan stating "[y]ou've taken a lot of depositions, and I just want to give some credit to the attorneys for the individuals and also for Judicial Watch for – my assumption is they were all conducted in a very civil manner. I didn't hear anything to the contrary.")

Dated: January 4, 2019

Respectfully submitted,

JUDICIAL WATCH, INC.

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