

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

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

JOINT STATUS REPORT

Pursuant to the Court’s June 10, 2015 Minute Order, Plaintiff Judicial Watch, Inc. and Defendant U.S. Department of State, by and through counsel, respectfully submit this Joint Status Report:

1. On March 17, 2015, Plaintiff submitted a FOIA request to Defendant seeking access to certain records related to former Secretary of State Hillary Clinton’s personal or charitable relationships, and conflicts of interests involving the Clinton Foundation. *See* ECF No. 1 at ¶ 5. Plaintiff initiated the above-captioned lawsuit on May 6, 2015, and Defendant subsequently filed its Answer on June 10, 2015. To date, Defendant has not issued a final response to Plaintiff’s FOIA request. Counsel for the parties conferred by telephone on June 23, 2015. However, after discussing their respective positions, counsel were unable to agree upon a joint language for a status report addressing the Court’s June 10, 2015 Minute Order. Accordingly, the parties present their separate statements and proposals below.

Plaintiff's Statement

2. Plaintiff has asked Defendant to provide an estimate of the total number of documents likely to be responsive to Plaintiff's lawsuit, along with estimates of the dates of rolling productions and when production should be complete based on the total number of likely responsive pages. Plaintiff explained that such estimates are necessary before the parties can reasonably provide the Court with dates for a proposed briefing schedule, as instructed. However, Defendant has not provided these estimates.

3. Plaintiff's FOIA request subject to this lawsuit seeks a discrete and narrow category of documents related to potential conflicts of interest between the former Secretary's role as Secretary of State and any personal or Clinton Foundation charitable relationships. Accordingly, this FOIA request and lawsuit should result in the production of a reasonable volume of documents which should not tax Defendant's ability to conduct a timely review and production. Plaintiff proposes the following estimates and schedule based on its knowledge of its FOIA requests and the nature of the anticipated search.

4. Given the discreteness of Plaintiff's request, Plaintiff believes that the production can and should be completed promptly.

5. In addition, Plaintiff believes records responsive to these request are likely to include email communications between former Secretary of State Hillary Clinton, other top State Department officials, and officials of the Clinton Foundation. Accordingly, in an effort to narrow issues before the Court, Plaintiff has asked Defendant certain questions about Defendant's efforts to secure records and the scope of its anticipated search, both generally and as specifically relating to the non-state.gov and "clintonemail.com" records, which have been the

subject of media reports. *See* Michael S. Schmidt, *Hillary Clinton Used Personal Email Account at State Dept., Possibly Breaking Rules*, *The New York Times* (Mar. 2, 2015).

6. Specifically, Plaintiff has asked Defendant whether the former Secretary ever sent electronic transmissions over the State Department's IT network, and whether any clintonemail.com emails might have been captured by any State Department computer recording tape system or other back up system the State Department uses for backup and recovery of records to protect against information loss or corruption. This would include both the 55,000 pages of clintonemail.com documents from the former Secretary reported to have been provided to the State Department, and all additional emails from the clintonemail.com account reported to have been deleted from the private server by the former Secretary.

7. Plaintiff has further asked Defendant whether it has made inquiries to the former Secretary or her representatives concerning whether any backups of the reportedly deleted clintonemail.com data exist, and specifically whether backups of the data stored on media not associated with the private server exist, and the nature of those inquiries and any response thereto.

8. Plaintiff has further asked Defendant whether it has made inquiries to any other senior State Department officials who may have used clintonemail.com emails to conduct State Department business to secure copies of these government records, including but not limited to Huma Abedin, Philippe Reines, Cheryl Mills, and Jake Sullivan, and the nature of those inquiries and any response thereto.

9. Plaintiff has asked Defendant whether it intends to conduct searches for responsive records including but not limited to of all the above-described document sets, as well as keyword searches of the email accounts of all State Department employees who likely would

have communicated regarding the Secretary's charitable relationships or potential conflicts. Such keyword searches should include, but are not limited to, searches for the email suffix clintonemail.com.

10. Accordingly, Plaintiff Judicial Watch hereby requests the Court issue a minute order directing the parties to proceed on the following schedule:

- Parties to confer regarding Plaintiff's above-requested information regarding scope of search and efforts to secure agency records by **July 15, 2015**;
- Parties to file a Second Joint Status Report advising the Court of efforts to narrow disputed issues related to securing records and scope of search by **July 30, 2015**.
- Defendant to complete its production of all responsive records by **October 30, 2015**.
- Defendant's motion for summary judgment due **November 30, 2015**.
- Plaintiff's opposition/cross-motion for summary judgment due **December 30, 2015**.
- Defendant's opposition/reply brief due **January 21, 2016**.
- Plaintiff's reply brief due **February 7, 2015**.

Defendant's Statement

11. On March 17, 2015, Plaintiff submitted a FOIA request to Defendant U.S.

Department of State ("State") seeking access to the following:

- 1) Any and all records that identify the policies and/or procedures in place to ensure that former Secretary of State Hillary Rodham Clinton's personal or charitable financial relationships with foreign leaders, foreign governments, and business entities posed no conflict of interest to her role as Secretary of State; and
- 2) Any and all records concerning, regarding, or related to State Department review of donations to the Clinton Foundation for potential conflicts of interest with former Secretary Clinton's role as Secretary of State.

12. State has concluded that conducting searches for records responsive to Plaintiff's FOIA request will require searching, among other locations, the approximately 55,000 pages of emails provided to the State Department by former Secretary Clinton from her non-'state.gov' account, which are the subject of another FOIA case presently before this Court, *Leopold v. U.S.*

Department of State, civil action No. 1:15-cv-00123 (RC). The *Leopold* court has ordered State to produce all non-exempt portions of the Clinton emails on the Department's website, on a rolling basis, by January 29, 2016. Consequently, State proposes that the most efficient way to proceed in the present case will be a bifurcated production schedule, as follows:

a. Production of records in the approximately 55,000 pages of emails provided to the State Department by former Secretary Clinton. State will complete production of responsive documents in this category by January 29, 2016, in accordance with the scheduling orders entered in *Leopold*. Upon the completion of production, the parties will meet and confer, and will provide the Court with a joint status report regarding whether the parties believe that further briefing is necessary and, if so, proposing a briefing schedule.

b. Production of all other responsive documents. By August 17, 2015, State will complete its search for responsive documents in this category and provide the Court with a status report stating the volume of estimated responsive records in this category. (1) If the estimated volume of potentially responsive records in this category consists of 250 pages or fewer, State will process all responsive documents and produce any non-exempt, responsive records to Plaintiff within 30 days of the filing of the August 17, 2015 status report. Upon completion of production, the parties will meet and confer, and will provide the Court with a joint status report regarding whether the parties believe that further briefing is necessary and, if so, proposing a briefing schedule. (2) If the estimated volume of potentially responsive records in this category consists of more than 250 pages, the August 17, 2015 status report will provide an estimated date to complete the processing of any responsive documents and production of any non-exempt, responsive documents to Plaintiff. Upon completion of production, the parties will

meet and confer, and will provide the Court with a joint status report regarding whether the parties believe that further briefing is necessary and, if so, proposing a briefing schedule.

13. Before Defendant completes its search for documents in response to Plaintiff's FOIA request, Defendant is unable to provide Plaintiff with a reasonable estimate of the volume of documents that is likely to be responsive to that request. And without the ability to estimate the volume of responsive documents, Defendant is similarly unable, *ex ante*, to provide any reasonable estimate of the date that production of non-exempt responsive documents is likely to be completed. Any such estimates at this juncture, prior to completing its search, would be speculative.

14. Furthermore, rather than simply proposing a briefing schedule, Plaintiff has instead sought discovery from Defendant. *See* ¶¶ 4-9, *supra*. Specifically, in addition to Defendant's obligations under FOIA to search for responsive documents and produce non-exempt, responsive documents, Plaintiff seeks to propound interrogatories on Defendant; *viz.*, to require Defendant to respond to "questions about Defendant's efforts to secure records and the scope of its anticipated search," information that Plaintiff apparently deems "relevant to [its] claim." *See* Fed. R. Civ. P. 26(b)(1) (defining the scope of discovery as "any nonprivileged matter that is relevant to any party's claim or defense – including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter"); Fed. R. Civ. P. 33(a)(2) ("An interrogatory may relate to any matter that may be inquired into under Rule 26(b)."). Plaintiff's request for discovery is particularly inappropriate in a FOIA case before the completion of production and the completion of summary judgment briefing.

15. Discovery is granted only rarely in FOIA cases, and only after Defendant has submitted declarations and Plaintiff has made some showing that those declarations are inadequate or submitted in bad faith. *Schrecker v. U.S. Dep't of Justice*, 217 F. Supp. 2d 29, 35 (D.D.C. 2002), *aff'd*, 349 F.3d 657 (D.C. Cir. 2003). Plaintiff has not – indeed, could not possibly have, given that it seeks to deny Defendant the opportunity to complete production of responsive documents, move for summary judgment, and submit supporting declarations before discovery is ordered – made a showing sufficient to “impugn [defendant’s] affidavits or declarations, or provide[ed] some tangible evidence that an exemption claimed by [defendant] should not apply or summary judgment is otherwise inappropriate.” *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994) (citing *Goland v. CIA*, 607 F.2d 339, 355 (D.C. Cir. 1978)). Rather than seeking discovery via a status report, Plaintiff should present any objections it may have concerning any search declarations if and when it opposes Defendant’s motion for summary judgment and, at that time, cross-moves for summary judgment. *See Miscavige v. IRS*, 2 F.3d 366, 369 (11th Cir. 1993) (finding that “[g]enerally, FOIA cases should be handled on motions for summary judgment” in rejecting plaintiff’s “early attempt” to litigate discovery before “the government has first had a chance to provide the court with the information necessary to make a decision”).

16. Even if the Court believes that the issues Plaintiff raises should be addressed before the completion of production and before summary judgment proceedings have begun, Plaintiff’s requests for relief are inappropriate without a written motion that states with particularity the grounds for seeking the order, *see* Fed. R. Civ. P. 7(b), and, under this Court’s local rules, without a proposed order, Local Civil Rules 7(c), a statement of specific points of

law and authority included with the motion, *id.* 7(a), and time for Defendant to file a written opposition, *id.* 7(b). Plaintiff should not seek, nor be granted, relief without filing a proper motion. At a minimum, Plaintiff should be required to submit a proper motion for relief, and Defendant should be allowed enough time to file an appropriate response.

17. In another similar FOIA case in another Court in this District, Plaintiff made similar demands for information from Defendant. *See* Joint Status Report dated June 19, 2015, *Judicial Watch, Inc. v. U.S. Department of State*, civil action no. 1:14-cv-01511 (ABJ) (ECF No. 13). Defendant argued there, as it does here, that demands for discovery are inappropriate before the Court has had an opportunity to consider agency affidavits describing the search. *Id.* The Court rejected Plaintiff's demands without comment and instead issued a briefing schedule. Minute Order dated June 22, 2015, *Judicial Watch, Inc. v. U.S. Department of State*, civil action no. 1:14-cv-01511 (ABJ). Notably, the Court rejected these attempts even though they had been posed at a more advanced juncture than the present case has reached, *viz.*, the completion of State's production of responsive documents to Plaintiff.

18. For the foregoing reasons, Defendant respectfully requests that the Court enter the above-listed schedule for the completion of production and processing of documents to Plaintiff.

Dated: June 25, 2015

Respectfully submitted,

s/ Chris Fedeli
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