IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,	)	
	)	
Plaintiff,	)	
	)	Civil Action No. 14-cv-1511 (ABJ)
v.	)	
	)	
U.S. DEPARTMENT OF STATE,	)	
	)	
Defendant.	)	
	)	

JOINT STATUS REPORT

Plaintiff Judicial Watch, Inc. and Defendant U.S. Department of State, by counsel and pursuant to the Court's June 5, 2015 minute order requiring the parties to "jointly propose a schedule for further proceedings, if any, by June 19, 2015," respectfully submit this Joint Status Report:

1. On June 13, 2014, Plaintiff submitted a Freedom of Information Act ("FOIA") request to Defendant requesting that the Office of the Secretary produce the following records:

> Any and all records concerning, regarding, or related to notes, updates, or reports created in response to the September 11, 2012 attack on the U.S. Consulate in Benghazi, Libya. This request includes, but is not limited to, notes taken by then Secretary of State Hillary Rodham Clinton or employees of the Office of the Secretary of State during the attack and its immediate aftermath.

The time frame of the request was identified as "September 11-15, 2012."

2. Plaintiff initiated the above-captioned lawsuit on September 4, 2014, and Defendant answered on October 10, 2014.

3. Defendant subsequently conducted a search of the Office of the Secretary and identified 403 records responsive to the request. Of these 403 responsive records, 320 were

produced without redactions, 71 were produced with redactions, and 12 were withheld in full. Defendant cited FOIA Exemptions 1, 5, and 6 in redacting or withholding responsive records. Defendant released those records not withheld in full to Plaintiff in a series of four rolling productions.

4. In addition, Defendant searched the collection of approximately 30,000 emails, comprising approximately 55,000 pages, provided to Defendant by former Secretary of State Hillary Rodham Clinton. Defendant released 68 responsive records from this collection and provided Plaintiff with a link to Defendant's FOIA website where the records can be accessed. Portions of these records have been withheld under FOIA Exemptions 5 and 6. Defendant has not stated whether it identified any responsive records from this collection that are being withheld under claim of exemption.

5. Plaintiff recommends that the Court order Defendant to conduct additional searches and to provide Plaintiff with certain information; Defendant recommends that the Court adopt a briefing schedule. The parties also submit the following further statements in support of their respective positions:

Plaintiff's Further Statement

6. Plaintiff objects to Defendant's assertion that it has completed its search for records responsive to the request. In light of the extraordinary and unprecedented revelations in March 2015 that Mrs. Clinton exclusively used one or more non-"state-gov" email addresses to conduct official business during her tenure as secretary of state and at least four of Mrs. Clinton's closest advisors, Cheryl Mills, Philippe Reins, Jacob Sullivan, and Huma Abedin, reportedly used non-"state.gov" email addresses to conduct at least some official business,[1]

[1] Michael S. Schmidt, "In Clinton Emails on Benghazi, Rare Glimpse at Her Concerns,"

FOIA obligates Defendant to do more than simply search the Office of the Secretary and review the 55,000 pages of emails subsequently made available by Mrs. Clinton. Not only does the request directly concern Mrs. Clinton's email communications, but records already produced by Defendant demonstrate that Ms. Mills, Mr. Reins, and Mr. Sullivan communicated by email about the subject matter of the request – Defendant's response to the September 11, 2012 terrorist attack on the U.S. Consulate in Benghazi, Libya. Under the circumstances, limiting the search to the Office of the Secretary and the 55,000 pages produced by Mrs. Clinton was not reasonably calculated to uncover all relevant documents.[2]

7. Specifically, Defendant should be ordered to do the following, at a minimum, to fulfill its FOIA obligations:

A. Identify to Plaintiff and the Court all State Department officials who used "clintonemail.com" email addresses to conduct official business and the addresses used by each official;

B. Identify to Plaintiff and the Court all devices (desktop computers, laptop computers, tablets, iPads, Blackberries, smart phones, *etc*.) used by the officials identified in response to paragraph A and any disk image, clone, duplication or backups of such devices;

C. Search all devices and any disk image, clone, duplication or backups of any devices identified in response to paragraph B;

New York Times, (March 23, 2015).

[2] "An agency fulfills its obligations under FOIA if it can demonstrate beyond material doubt that its search was 'reasonably calculated to uncover all relevant documents.'" *Valencia-Lucena v. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999) (quoting *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990)); *see also Steinberg v. Dep't of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994). The adequacy of an agency's search for documents under FOIA "is judged by a standard of reasonableness and depends, not surprisingly, upon the facts of each case." *Weisberg v. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

D. Search all State Department email accounts for emails sent to or received from "clintonemail.com" email addresses;

E. Search all paper and electronic records of Ms. Mills, Ms. Reins, Ms. Sullivan, Ms. Abedin, and any other State Department officials who used "clintonemail.com" email addresses to conduct official business;

F. Search all paper and electronic records of the Executive Secretariat; and

G. Search the server that hosted the "clintonemail.com" email addresses used by Mrs. Clinton, Ms. Mills, Mr. Reins, Mr. Sullivan, and Ms. Abedin, any disk image, clone, or duplication of the server's hard drive, and any backup tapes.[3]

8. Plaintiff submits that there is no reason to delay initiation of these additional, remedial search efforts, much less wait until summary judgments motions are fully briefed and adjudicated – which, under Defendant's proposed briefing schedule would not likely be until spring 2016 at the earliest. Defendant does not deny that Mrs. Clinton set up and used her own email server for her official communications and for the official communications of some of her top advisors. Defendant also readily admits that it limited its search to records in the Office of the Secretary and the collection of emails produced by Mrs. Clinton. As Mrs. Clinton was Defendant's head at the time she set up and used her own email server for her official communications and those of her top advisors, her actions must be attributed to Defendant. It was Defendant that created this extraordinary and unprecedented situation so directly affecting

[3] While Mrs. Clinton's counsel, David Kendall of Williams & Connolly LLP, has asserted that "there are no hdr22@clintonemail.com emails from Secretary Clinton's tenure as secretary of state on the server for any review," Mrs. Clinton reportedly used at least two "clintonemail.com" addresses (hrd22@clintonemail.com and hrod17@clintonemail.com), and her counsel's comments did not address the emails of the other State Department officials or any disk images, clones, or duplication of the server's hard drive or any backup tapes. *See* Michael S. Schmidt, "No Copies of Clinton Emails on Sever, Lawyer Says," *New York Times* (March 27, 2015).

Defendant's response to Plaintiff's FOIA request, and Defendant must be required to remedy it forthwith, not in a year or so in the future.[4] Nor are costly and time consuming summary judgment motions the only mechanism available to the Court to provide relief. The Court has ample inherent power to act.

9. Plaintiff also objects to the lack of information provided by Defendant about the use of non-"state.gov" email addresses by Mrs. Clinton and several of her closest advisors to conduct official business and the obvious impact of that use on Defendant's response to the request. Mrs. Clinton readily acknowledges that her use of a non-"state.gov" email address "was widely known to the over 100 Department and U.S. Government colleagues she emailed."[5] Even President Obama exchanged email with Mrs. Clinton using her "clintonemail.com" email address.[6] Yet at no point did Defendant apprise Plaintiff or the Court about Mrs. Clinton's use of a non-"state.gov" email address or how that use undoubtedly affected Defendant's search efforts. After the March 2, 2015 revelation, Plaintiff made three requests to Defendant – on March 7, 2015, April 10, 2015, and again on May 27, 2015 – for information about the use. The only response Plaintiff received was a boilerplate assertion that Defendant was "conducting searches and performing reviews reasonably calculated to uncover all documents in its possession and control" and that it "may have significant additional information" to share before its final

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[4] FOIA creates a statutory duty to search for and produce responsive documents in a timely manner. 5 U.S.C. § 552(a)(6)(A).

[5] Hillary Clinton, *Statement from the Office of Former Secretary Clinton* (March 10, 2015), available at http://insider.foxnews.com/2015/03/10/read-hillary-clintons-office-releases-qa-email-controversy.

[6] Devin Dwyer, "President Obama Knew Hillary Clinton's Private Email Address, But Not Details of Server," *ABC News* (March 9, 2015).

production. No such information was ever provided.[7] Defendant's failure to provide basic information to Plaintiff has caused needless delay and hindered the ultimate resolution of this lawsuit, which Defendant's own proposed briefing schedule bears out. Had Defendant provided Plaintiff with timely, meaningful information about the email server, at least some of the present dispute over remedial search efforts could have been avoided or resolved in a more timely manner. Going forward, Defendant should be required to provide regular, substantive updates to Plaintiff and the Court about its efforts to satisfy its FOIA obligations. *See, e.g.*, Order, *Judicial Watch, Inc. v. Internal Revenue Service*, Case No. 13-1559 (D.D.C. July 10, 2014) (requiring agency to submit declarations about its effort to recover allegedly "lost" email responsive to FOIA request); Order, *Judicial Watch, Inc. v. Internal Revenue Service*, Case No. 13-1559 (D.D.C. Aug. 14, 2014) (requiring agency to submit further declarations about its effort to recover allegedly "lost" email responsive to FOIA request).

10. Plaintiff also objects to Defendant's proposed briefing schedule. While Plaintiff submits that summary judgment should be held in abeyance until adequate, remedial search efforts have been be completed, only 83 records have been withheld in full or in part. Creating a *Vaughn* Index for this relative handful of records should not require such a lengthy briefing schedule. Plaintiff also is willing to accept a draft *Vaughn* Index in order to try to narrow disputes over claims of exemption.

[7] Plaintiff does not understand Defendant's references to discovery. Plaintiff's requests for information about Defendant's search efforts following the March 2015 revelations about Mrs. Clinton's email practices and the practices of her top advisors was not fact discovery under Rule 26. Nor is Plaintiff's request to be kept apprised of additional, remedial search efforts. They were (and are) reasonable efforts by Plaintiff to try to advance this litigation in an efficient and expeditious manner.

Defendant's Further Statement

11. Defendant believes it has conducted "search[es] reasonably calculated to uncover all relevant documents" in its custody and control. *Weisberg v. Department of Justice*, 705 F.2d 1344, 1350-51 (D.C. Cir. 1983). Plaintiff disagrees. The appropriate way to proceed is for the parties to file motions for summary judgment and follow-up briefs to present to the Court, in a fully fleshed out and researched manner, the factual and legal arguments in support of each party's positions. Defendant therefore respectfully proposes the following briefing schedule:

(a) Defendant's summary judgment motion due by October 2, 2015;[8]

(b) Plaintiff's opposition to motion for summary judgment, and any cross-motion for summary judgment, due by November 13, 2015;

(c) Defendant's combined reply and opposition to any cross-motion for summary judgment due by December 11, 2015;

(d) Plaintiff's reply in support of any cross-motion for summary judgment due by January 8, 2015.

In support of its recommendation, Defendant states the following:

12. Rather than propose a schedule for further proceedings, Plaintiff has instead sought extraordinary relief from the Court. First, it has asked the Court to order Defendant to produce discovery. *See* ¶¶ 7.A-B, *supra*. Second, it has asked the Court to order Defendant to conduct additional searches. *See* ¶¶ 7.C-G. Such requests for relief are inappropriate without a written motion that states with particularity the grounds for seeking the order, *see* Fed. R. Civ. P.

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[8] Because of the number of documents from which information has been withheld pursuant to the FOIA, and because of the complex issues Plaintiff raises regarding the adequacy of the search, Defendants estimate that it will take until September 4, 2015 for the Department of State to produce a search declaration and *Vaughn* index explaining the basis for withholdings from responsive documents.

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. Moreover, Plaintiff's requests for discovery and additional searches via a status report, rather than via written motion, are particularly inappropriate in a FOIA case before summary judgment briefing.

13. 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.[9] *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 submit its 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. United States 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 the search declarations when it opposes Defendant's motion for summary judgment and, at that time, cross-move for discovery. *See Miscavige v. I.R.S.*, 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

[9] Plaintiff expresses confusion over the characterization of its request for information as discovery. Plaintiff seeks information to support its argument that additional searches should be conducted; that is, information "relevant to [its] claim." *See* Fed. R. Civ. P. 26(b)(1) (defining the scope of discovery).

before "the government has first had a chance to provide the court with the information necessary to make a decision").

14. Plaintiff's attempt to short-circuit the summary judgment briefing process is even more improper with respect to the searches it requests. The relief Plaintiff seeks goes to a central issue in any FOIA case, the adequacy of the search for responsive records, an issue that is typically resolved on summary judgment. On summary judgment, "[a]n agency fulfills its obligations under FOIA if it can demonstrate beyond material doubt that its search was 'reasonably calculated to uncover all relevant documents.'" *Valencia–Lucena v. Coast Guard*, 180 F.3d 321, 325 (D.C.Cir.1999) (quoting *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C.Cir.1990)). Absent contrary evidence, an agency's declarations that explain the scope and method of its search "in reasonable detail" are sufficient to show that an agency complied with FOIA. *Perry v. Block*, 684 F.2d 121, 127 (D.C.Cir.1982). And yet Plaintiff seeks extraordinary relief—including an order that Defendant seize and search the property of a private citizen who is not a party to these proceedings, ¶ 7.G, *supra*, and that Defendant search the email accounts of as many as 24,000 employees,[10] ¶ 7.D, *supra* (demanding Defendant search "all State Department email accounts")—without any briefing or opportunity for Defendant to submit an affidavit.

15. Even if the Court believes that the issues Plaintiff raises should be addressed before summary judgment proceedings begin, there should still be detailed briefing. At minimum, Plaintiff should be required to submit a proper motion for relief, and Defendant should be allowed enough time to file an appropriate response.

[10] According to the Defendant's web site, there are some 13,000 employees in the Foreign Service and more than 11,000 in the Civil Service at the Department of State. http://careers.state.gov/learn/what-we-do/mission.

16. For these reasons, Defendant respectfully requests that the Court enter Defendant's proposed briefing schedule to allow an orderly and comprehensive airing of the issues in dispute.

ated: June 19, 2015

Respectfully submitted,

/s/ Paul J. Orfanedes

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