IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,	)	
	)	
Plaintiff,	)	
	)	Civil Action No. 15-0785 (JEB)
v.	)	
	)	
JOHN F. KERRY,	)	
in his official capacity as	)	
U.S. Secretary of State	)	
	)	
Defendant.	)	
	)	

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO CONSOLIDATE AND MOTION TO EXTEND DATE TO RESPOND TO THE COMPLAINT

Plaintiff Judicial Watch, Inc., by counsel, submits this opposition to Defendant's motion to consolidate and motion to extend date to respond to the complaint. Defendant seeks to consolidate this case with a later-filed case captioned *Cause of Action Institute v. Kerry, et al.* (No. 15-1068)(JEB) ("*COAI*") and a 38-day extension of time, beyond the 60 days already afforded to him, to respond to the Complaint in this case. As Defendant's motion did not fully explain Plaintiff's position on these matters, Plaintiff states as follows:

MEMORANDUM OF POINTS AND AUTHORITIES

1. Plaintiff, in principle, does not oppose consolidation.[1] This case was filed first. Cause of Action Institute filed its complaint nearly six weeks after Plaintiff filed its complaint and largely copied Plaintiff's legal theory. Thus, if consolidated, *COAI* should be consolidated into this case.

[1] Prior to the filing of this motion, Plaintiff informed Defendant's counsel that Plaintiff would not oppose consolidation and a reasonable request for an extension of time of up to 14 days. *See* Exh. A (July 23, 2015 email exchange between counsel).

2. Plaintiff does oppose, however, consolidation of these cases as an excuse to delay Defendant's response in this case. Defendant seeks a 38-day extension of time, on top of the 60 days he already has utilized, to respond to the Complaint. If, as Defendant contends, that the complaints are so similar that consolidation is proper, Defendant should be able to respond to both complaints on the date that a response to Plaintiff's complaint is due, not when the *COAI* response is due, 38 days later. Moreover, any extended delay runs directly contrary to Rule 42 which states that consolidation is intended to "*avoid* unnecessary cost or delay." Fed. R. Civ. P. 42(a)(3)(emphasis added).

3. The lengthy, unnecessary extension of time proposed by Defendant is particularly ill suited in this matter. This case involves the removal and ongoing failure to recover agency records. Nearly every day brings new, startling revelations of possible destruction of these records and Defendant's continuing failure to recover them. *See* Exh. B (Michael S. Schmidt, *No Copies of Clinton Emails, Lawyer Says*, N.Y. TIMES, July 24, 2015). Even more disturbing, many of which apparently contain classified information. *See* Exh. C (Michael S. Schmidt and Matt Apuzzo, *Hillary Clinton Emails Said to Contain Classified Data*, N.Y. TIMES, July 24, 2015). While Defendant would like 98 days to fashion a response to the Complaint, time is of the essence in taking action to recover these records.

WHEREFORE, Plaintiff respectfully requests that the Court deny Defendant's motion.

Dated: July 29, 2015

Respectfully submitted,

/s/ James F. Peterson
James F. Peterson (D.C. Bar No. 450171)
JUDICIAL WATCH, INC.
425 Third Street, S.W., Suite 800
Washington, DC 20024
(202) 646-5172

Counsel for Plaintiff

Exhibit A

Jim Peterson

From: Jim Peterson
Sent: Thursday, July 23, 2015 2:46 PM
To: 'Federighi, Carol (CIV)'
Subject: RE: JW v. Kerry, No. 15-0785

Carol – You indicated during our phone call that your client wanted an extension to the date that a response to the Cause of Action complaint is due, sometime apparently in September. If the defendant needs a brief extension of time to respond to Judicial Watch's complaint, beyond the 60 days he already has had, such as a week or two, we would not oppose that. Otherwise, we see no reason to delay this case because another organization copied our legal theory five weeks later.

If defendant intends to seek consolidation and also a lengthy extension of time into September, Judicial Watch opposes both.

J. Peterson

From: Federighi, Carol (CIV) [mailto:Carol.Federighi@usdoj.gov]
Sent: Thursday, July 23, 2015 1:51 PM
To: Jim Peterson
Subject: RE: JW v. Kerry, No. 15-0785

Jim – As I mentioned over the phone, defendant's request for (and need for) an extension is not tied to consolidation, and we would be requesting the extension regardless of consolidation, due to a variety of factors, including the fact that I was only recently assigned the case and the difficulty in getting adequate participation by all necessary parties in August. I appreciate if you would reconsider this request for a reasonable extension. In any event, can I represent that Judicial Watch does not oppose consolidation but does oppose extending the answer date? Thanks, Carol

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From: Jim Peterson [mailto:JPeterson@JUDICIALWATCH.ORG]
Sent: Thursday, July 23, 2015 1:33 PM
To: Federighi, Carol (CIV)
Subject: JW v. Kerry, No. 15-0785

Carol –

As we discussed this morning, my client is not opposed in principle to your proposed motion to consolidate Judicial Watch's case with the later-filed Cause of Action complaint. If, however, this results in delay, by your client requesting an extension of time to respond to the other complaint, we cannot consent to the consolidation.

In our view, the defendant will have had a full sixty days to prepare a response to Judicial Watch's complaint. If it is your client's position that the two complaints are so similar that they should be consolidated, we are aware of no reason that the defendant should be able to respond to both complaints on the date that a response to Judicial Watch's complaint is due.

Thus, if defendant's position is that he seeks consolidation and also an extension of time, Judicial Watch opposes both.

Regards,

J. Peterson

Exhibit B

The New York Times | http://nyti.ms/1Nmwqe2

POLITICS

No Copies of Clinton Emails on Server, Lawyer Says

By MICHAEL S. SCHMIDT MARCH 27, 2015

WASHINGTON — An examination of the server that housed the personal email account that Hillary Rodham Clinton used exclusively when she was secretary of state showed that there are no copies of any emails she sent during her time in office, her lawyer told a congressional committee on Friday.

After her representatives determined which emails were government-related and which were private, a setting on the account was changed to retain only emails sent in the previous 60 days, her lawyer, David Kendall, said. He said the setting was altered after she gave the records to the government.

"Thus, there are no hdr22@clintonemail.com emails from Secretary Clinton's tenure as secretary of state on the server for any review, even if such review were appropriate or legally authorized," Mr. Kendall said in a letter to the House select committee investigating the 2012 attacks in Benghazi, Libya.

The committee subpoenaed the server this month, asking Mrs. Clinton to hand it over to a third party so it could determine which emails were personal and which were government records.

At a news conference this month, Mrs. Clinton appeared to provide two answers about whether she still had copies of her emails. First, she said that she "chose not to keep" her private personal emails after her lawyers had examined the account and determined on their own which ones were personal and which were State Department records. But later, she said that the server, which contained personal communication by her and her husband, former President Bill Clinton, "will remain private." The server was kept at their home in Chappaqua, N.Y., which is protected around the clock by the Secret Service.

Mrs. Clinton's disclosure on Friday only heightened suspicions by the committee's chairman, Representative Trey Gowdy, Republican of South Carolina, about how she handled her emails, and it is likely to lead to more tension between her and the committee.

Mr. Gowdy said in a written statement that it appeared that Mrs. Clinton deleted the emails after Oct. 28, when the State Department first asked her to turn over emails that were government records.

"Not only was the secretary the sole arbiter of what was a public record, she also summarily decided to delete all emails from her server, ensuring no one could check behind her analysis in the public interest," Mr. Gowdy said.

Mrs. Clinton's "unprecedented email arrangement with herself and her decision nearly two years after she left office to permanently delete all emails" had deprived Americans of a full record of her time in office, he added.

Mr. Gowdy said that Mrs. Clinton would have to answer questions from Congress about her decision, but he did not say whether that would be at a hearing or a private interview.

A spokesman for Mrs. Clinton said in a statement, "She's ready and willing to come and appear herself for a hearing open to the American

public."

The spokesman, Nick Merrill, added that Mrs. Clinton's representatives "have been in touch with the committee and the State Department to make clear that she would like her emails made public as soon as possible."

The ranking Democrat on the committee, Elijah E. Cummings of Maryland, defended Mrs. Clinton's disclosure.

"This confirms what we all knew — that Secretary Clinton already produced her official records to the State Department, that she did not keep her personal emails, and that the select committee has already obtained her emails relating to the attacks in Benghazi," Mr. Cummings said.

In the letter, Mr. Kendall offered a defense for the process Mrs. Clinton had used to differentiate between personal messages and government records. He said that those procedures were consistent with guidelines from the National Archives and the State Department, which say that an individual can make the decision about what should be preserved as a federal record.

So, Mr. Kendall contended, the process Mrs. Clinton used was "not an 'arrangement' that is 'unprecedented' or 'unique,' but instead the normal procedure carried out by tens of thousands of agency officials and employees in the ordinary course."

Mrs. Clinton's review of her emails, however, did not occur when she was secretary of state or shortly after she left office. Last October, nearly two years after she left office, the State Department sent her a letter requesting all government records, like emails, she may have possessed.

In response, she provided the State Department in December with about 30,000 printed emails that she said were government records. She has said that an additional 30,000 emails were personal.

It appears that Mrs. Clinton still has copies of the emails she deemed

public records. Attached to Mr. Kendall's letter was one sent to him by the State Department this week. A letter from the under secretary of state for management, Patrick F. Kennedy, said that the department understood that she wanted to keep copies of those documents. Mr. Kennedy said that the agency had consulted with the National Archives, and that allowing her "access to the documents is in the public interest as it will promote informed discussion" as she responds to congressional and other inquiries.

Mrs. Clinton cannot make the emails public without the State Department's approval. Mr. Kennedy said that if the State Department determined that any of the documents were classified, "additional steps will be required to safeguard and protect the information." Mrs. Clinton has said she had no classified information in her emails.

A version of this article appears in print on March 28, 2015, on page A14 of the New York edition with the headline: No Emails From Clinton's Time at State Dept. Are on Her Server, Lawyer Says.

Exhibit C

The New York Times | http://nyti.ms/1CVpYvr

POLITICS

Hillary Clinton Emails Said to Contain Classified Data

By MICHAEL S. SCHMIDT and MATT APUZZO JULY 24, 2015

WASHINGTON — Government investigators said Friday that they had discovered classified information on the private email account that Hillary Rodham Clinton used while secretary of state, stating unequivocally that those secrets never should have been stored outside of secure government computer systems.

Mrs. Clinton has said for months that she kept no classified information on the private server that she set up in her house so she would not have to carry both a personal phone and a work phone. Her campaign said Friday that any government secrets found on the server had been classified after the fact.

But the inspectors general of the State Department and the nation's intelligence agencies said the information they found was classified when it was sent and remains so now. Information is considered classified if its disclosure would likely harm national security, and such information can be sent or stored only on computer networks with special safeguards.

"This classified information never should have been transmitted via an unclassified personal system," Steve A. Linick, the State Department inspector general, said in a statement signed by him and I. Charles McCullough III, the inspector general for the intelligence community.

The findings by the two inspectors general raise new questions about Mrs. Clinton's use of her personal email at the State Department, a practice that since March has been criticized by her Republican adversaries as well as advocates of open government, and has made some Democrats uneasy. Voters, however, do not appear swayed by the issue, according to polls.

In their joint statement, the inspectors general said the classified information had originated with the nation's intelligence agencies, such as the Central Intelligence Agency or the National Security Agency. It is against the law for someone to receive a classified document or briefing and then summarize that information in an unclassified email.

The two investigators did not say whether Mrs. Clinton sent or received the emails. If she received them, it is not clear that she would have known that they contained government secrets, since they were not marked classified. The inspectors general did not address whether they believed Mrs. Clinton should have known such information was not appropriate for her personal email.

Regardless, the disclosure is an example of an unforeseen consequence of Mrs. Clinton's unusual computer setup. Security experts have questioned whether her practice made government secrets more vulnerable to security risks and hacking.

Exactly how much classified information Mrs. Clinton had on the server is unclear. Investigators said they searched a small sample of 40 emails and found four that contained government secrets. But Mr. McCullough said in a separate statement that although the State Department had granted limited access to its own inspector general, the department rejected Mr. McCullough's request for access to the 30,000 emails that Mrs. Clinton said were government-related and gave to the State Department.

Mrs. Clinton's lawyer, David Kendall, is "purported" to also have copies of the 30,000 emails on a thumb drive, according to Mr. McCullough.

Campaigning in New York on Friday, Mrs. Clinton pledged to cooperate with inquiries into her emails, but also said she would stay focused on the issues at the heart of her presidential campaign.

"We are all accountable to the American people to get the facts right, and I will do my part," Mrs. Clinton said. "But I'm also going to stay focused on the issues, particularly the big issues, that really matter to American families."

The discovery of the four emails prompted Mr. McCullough to refer the matter to F.B.I. counterintelligence agents, who investigate crimes related to the mishandling of classified information. On Thursday night and again Friday morning, the Justice Department referred to the matter as a "criminal referral," but later Friday dropped the word "criminal." The inspectors general said late Friday that it was a "security referral" intended to alert authorities that "classified information may exist on at least one private server and thumb drive that are not in the government's possession."

Irrespective of the terminology, the referral raises the possibility of a Justice Department investigation into Mrs. Clinton's emails as she campaigns for president. Polls show she is the front-runner for the Democratic nomination by a wide margin.

Mishandling classified information is a crime. Justice Department officials said no decision had been made about whether to open a criminal investigation.

The refusal by the State Department to give Mr. McCullough access to the emails has reignited calls by Republicans for Mrs. Clinton to hand over the server that she used to house the personal email account.

"If Secretary Clinton truly has nothing to hide, she can prove it by immediately turning over her server to the proper authorities and allowing them to examine the complete record," Speaker John A. Boehner, Republican of Ohio, said on Friday. "Her poor judgment has undermined our national security, and it is time for her to finally do the right thing."

The Justice Department is typically reluctant to open politically charged investigations unless there is clear evidence of criminal wrongdoing. For example, authorities said last year that they would not open an investigation into dueling claims by the C.I.A. and the Senate Intelligence Committee in a dispute that also centered around access to classified information.

Maggie Haberman contributed reporting from New York.

A version of this article appears in print on July 25, 2015, on page A1 of the New York edition with the headline: Clinton Emails Said to Contain Classified Data.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC., Plaintiff, v. JOHN F. KERRY, in his official capacity as U.S. Secretary of State Defendant.	)	Civil Action No. 15-0785 (JEB)

[PROPOSED] ORDER

Upon consideration of the Defendant's Motion to Consolidate and Motion to Extend Date to Respond to the Complaint and the entire record herein, it is hereby ordered that:

Defendant's Motion is DENIED.

SO ORDERED.

Dated: _____

_____
The Hon. James E. Boasberg
United States District Judge