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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,)	Civil Action
)	No. 15-688 (RC)
Plaintiff,)	
)	STATUS CONFERENCE
vs.)	
)	Washington, DC
U.S. DEPARTMENT OF STATE,)	Date: July 9, 2015
)	Time: 10:01 a.m.
Defendant.)	

TRANSCRIPT OF STATUS CONFERENCE
HELD BEFORE
THE HONORABLE JUDGE RUDOLPH CONTRERAS
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S

For the Plaintiff: Chris Fedeli, Esq.
Judicial Watch
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Washington, DC 20024
202-646-5172

For the Defendant: Daniel Riess, Esq.
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Also Present: Tom Fitton, Judicial Watch
Paul Orfanedes

Proceedings reported by machine shorthand, transcript
produced by computer-aided transcription.

Court Reporter: Annette M. Montalvo, CSR, RDR, CRR
Official Court Reporter
United States Courthouse, Room 6722
333 Constitution Avenue, NW
Washington, DC 20001
202-354-3111

1 (WHEREUPON, commencing at 10:01 a.m., the
2 following proceedings were had in open court, to wit:)

3 THE COURTROOM DEPUTY: Civil Action 15-688.
4 *Judicial Watch Inc. v. US Department of State.*

5 Counsel, please step forward to the podium and
6 state your appearance for the record.

7 MR. FEDELI: Good morning, Your Honor. Chris
8 Fedeli for plaintiff Judicial Watch.

9 THE COURT: Good morning.

10 MR. RIESS: Good morning, Your Honor. Daniel
11 Riess for the defendant.

12 THE COURT: Good morning.

13 All right. I got a status report in which the
14 parties took very differing positions, so let's talk about
15 the various issues. Who wants to go first?

16 You want to go first since it is your FOIA
17 request?

18 MR. FEDELI: Yes, Your Honor.

19 So what I would like to talk about is three of the
20 four questions I posed to defense counsel were about
21 preservation of records, the fourth being about search
22 terms.

23 Now, ordinarily, in a FOIA case, I never ask
24 opposing counsel if they are preserving records, but there
25 are very unusual facts underlying this FOIA case.

1 The request was an attempt to narrow the issues
2 and get assurances so we didn't have to come to the Court
3 about preservation issues. Opposing counsel was unwilling
4 to provide those assurances so I wanted to make the Court
5 aware that we have concerns about preservations. We think
6 they are reasonable concerns, given what's gone on and
7 what's been reported about how documents were managed by the
8 State Department. And we feel that the records we seek are
9 very likely to include high-level discussions about
10 conflicts between the Secretary and the Clinton Foundation.
11 They may be the records which have been reported to have
12 been kept off-site and managed in unusual ways. So we think
13 it is reasonable to ask for those assurances and to get
14 assurances the records are being preserved.

15 And the preservation requirements here we believe
16 are also a little bit unusual. Ordinarily, preservation is
17 you send out a memo saying, "Please, nobody delete
18 anything." In this case, I think active steps are going to
19 be required for defendant to make assurances that all
20 records are being preserved. And those active steps I've
21 outlined in the questions I posed.

22 THE COURT: Okay. Now, with respect to whatever
23 areas, if any, the parties may be in agreement on, is there
24 anything about the government's proposal that you think you
25 can live with?

1 MR. FEDELI: I thought the proposal regarding the
2 timing of the, you know, the initial search and the 250
3 pages is reasonable, assuming, of course, obviously, we want
4 that search to be as broad as possible and it's going to
5 include documents that we don't yet know are, you know,
6 secured and being preserved and have been obtained by the
7 State Department. We do understand as of two days ago in a
8 filing in another case involving the State Department and
9 Judicial Watch, another FOIA case, that defendant has taken
10 the steps of contacting former officials, three former
11 officials --

12 THE COURT: Which case was that?

13 MR. FEDELI: I have it right here. It was a case
14 before Judge Lamberth. And I have the case number, if you
15 would like me to grab that.

16 THE COURT: I would.

17 MR. FEDELI: This is Case No. 14-1242. And in
18 that filing on July 7 --

19 THE COURT: Are you the party in that case?

20 MR. FEDELI: Judicial Watch is the party, yes.

21 THE COURT: Okay.

22 MR. FEDELI: And in that filing, the State
23 Department attached a declaration indicating they have
24 already sent letters to former State Department officials,
25 Ms. Mills, Mr. Sullivan, and Ms. Abedin, who were reported

1 to be using non-state.gov e-mails, and that as of a week ago
2 two of the three had turned over documents to the State
3 Department, work related e-mails. And one of those was
4 responsive to the FOIA request in that case.

5 So apparently defendant agrees with me, at least
6 to an extent, that there are unusual steps necessary here
7 for preservation. Ordinarily, when you get a FOIA request,
8 you would not pick up the phone and start calling former
9 employees and saying "Can you please bring back those
10 documents." Here, we think the duty of preservation would
11 include steps such as those.

12 THE COURT: Okay. Let me hear from the
13 government. Thank you.

14 Before you get started, at the beginning of the
15 *Leopold* case, in which I am on as well and which you cited
16 in the status report, I asked the government whether the
17 government -- because there's a number of these cases out
18 there now, whether the government plans to do anything to
19 consolidate these because it doesn't make a lot of sense for
20 six different judges to be ordering six different things, to
21 a certain extent.

22 Has the government given that any thought?

23 MR. RIESS: To my knowledge, Your Honor, there
24 hasn't been any talk of consolidation of the cases.

25 THE COURT: Okay. Well, as you know, these are

1 very unusual circumstances, and it would not take a wild
2 imagination to think that there will be some discovery in
3 these FOIA cases, and if six different judges start ordering
4 six different forms of discovery, that's going to be
5 impossible to manage for everybody. So give that some
6 thought.

7 MR. RIESS: I understand, Your Honor. We will.

8 THE COURT: All right.

9 MR. RIESS: Just briefly, with respect to the
10 questions, there are a number of questions -- as Your Honor
11 mentioned, there are about, I believe, 35 cases at last
12 count, mostly against the State Department, that are seeking
13 records related to the former Secretary Clinton's e-mails.
14 At least 8 to 10 of them are brought by Judicial Watch as a
15 plaintiff. And in each one of those, at least 8 to 10, they
16 are propounding questions.

17 And so the position we have is that we don't want
18 to set a precedent. The purpose of FOIA is to search for
19 responsive records and provide them to the requester, not to
20 go beyond that and respond to what is, in effect,
21 interrogatories.

22 THE COURT: Questions about preservation are not
23 interrogatories, are they? Isn't that the normal meet and
24 confer requirement that every party takes at the beginning
25 of a case?

1 MR. RIESS: In civil litigation, I believe, I
2 mean, there are litigation holds, but, to my knowledge, in
3 FOIA cases, I have not seen, let's see, a request that there
4 be preservation of records. I have seen it typically
5 proceed that the requester asks for records, we conduct the
6 search and process the documents and provide them.

7 THE COURT: All right. If an agency receives a
8 request for documents, and subsequent to that point the
9 documents are destroyed, isn't that a violation of FOIA?

10 MR. RIESS: I think that it could be construed as
11 that, yes, Your Honor.

12 THE COURT: So there's some duty to preserve, you
13 have to concede that, don't you?

14 MR. RIESS: Yes. I think, though, in this
15 instance, since we are talking about at least in this case a
16 relatively quick turn over, and in the *Leopold* case we are
17 talking about production on a rolling basis until January
18 29, I don't think there's a realistic expectation that
19 people are going to go out and destroy records between now
20 and then. And as to the extent of this that's not seeking
21 Clinton e-mails, we've -- my client has said they can
22 perform the search by mid August. And the only question is
23 just they don't know the number -- the volume of responsive
24 documents, and they have asked for a little bit of leeway,
25 depending on how many documents it turns out not related to

1 the e-mails that are responsive.

2 THE COURT: Okay. Counsel for Judicial Watch
3 mentioned this case in front of Judge Lamberth, which I am
4 unfamiliar with. In that case, the government reached out
5 to former employees to secure official documents?

6 MR. RIESS: Yes, I believe that's right. They
7 filed a summary judgment motion in No. 14-1242 on July 7, I
8 believe. So that case was actually at a more advanced
9 stage.

10 THE COURT: So the representations about who
11 was -- former employees that were reached out to was in the
12 context of declarations for summary judgment?

13 MR. RIESS: I believe that's correct, Your Honor.

14 THE COURT: All right. Have any efforts in this
15 case been made to reach out to former employees?

16 MR. RIESS: No. Not in this case, Your Honor.

17 THE COURT: Okay. With respect to the 55,000 or
18 so Clinton e-mails, I gather from in *Leopold*, those
19 documents were digitized and searchable? Is my recollection
20 correct?

21 MR. RIESS: To be honest, I don't know,
22 Your Honor. I can find out.

23 THE COURT: Okay.

24 MR. RIESS: I would assume that since its rolling
25 production and with that larger volume --

1 THE COURT: Hold on.

2 MS. SHAPIRO: Sorry. I am sorry to jump in,
3 Your Honor.

4 THE COURT: Not at all. That's why I wish there
5 would be more coordination. It seems like when it is
6 convenient to refer to other cases, it is done, but when it
7 is not, it is not done. So, you know, I would like to get
8 answers.

9 MS. SHAPIRO: Right. And I jumped up because I
10 think I can give you a little more of a bird's-eye view.

11 THE COURT: Are you supervising all of the Clinton
12 e-mails cases?

13 MS. SHAPIRO: Not all of them, but one of two,
14 that would be -- and I think we do have a bird's-eye view of
15 all of them. And there are approximately 35 at various
16 stages and in various forms, and we have carefully thought
17 about consolidating. There are difficulties in terms of how
18 they would be consolidated, and since some of them are
19 different claims, there are different parties, there are
20 different stages. So the mechanics of that have eluded us
21 to date, but we haven't given up on the idea.

22 With respect to the reaching out to the third
23 parties, I think, here, we didn't view Judicial Watch's
24 questions about preservation. I think the reaching out to
25 the third parties was not done in any specific case. It was

1 done as a matter of choice that the State Department decided
2 that it should and did, irrespective of any litigation,
3 reach out to these people.

4 They are differently situated than the Hillary
5 Clinton situation because they all maintain state.gov
6 e-mails and used those e-mail accounts. So they are more in
7 the nature of ordinary government employees that have
8 government e-mail accounts that are searched.

9 However, because --

10 THE COURT: To your knowledge, did any of those
11 individuals use Clinton e-mail servers?

12 MS. SHAPIRO: Yes. And because of that --

13 THE COURT: I am not saying not in sending things
14 to that server, but used it as their platform for sending
15 their own e-mails?

16 MS. SHAPIRO: Separate and apart from
17 communicating with --

18 THE COURT: Correct.

19 MS. SHAPIRO: I am not positive of the answer to
20 that. But because we know that they do appear in the
21 Hillary Clinton e-mails and in using that server the State
22 Department reached out to them and have received documents
23 back from two of them.

24 And those are now in the State Department's
25 possession, and will be searched like the Hillary Clinton

1 e-mails are being searched. But that will be done across
2 all the cases, not in any particular case, where
3 documents -- it would be reasonable to think that documents
4 would be found among that collection.

5 THE COURT: Uh-huh. Okay.

6 MS. SHAPIRO: And with respect to the summary
7 judgment motion that was filed, that case related to one of
8 the Benghazi related requests, and all the searches have
9 been done for all of the e-mails that are in the possession
10 of the State Department now, including the ones that were
11 recently received from the two additional employees.

12 THE COURT: Okay. With respect to the 55,000 or
13 so Hillary Clinton e-mails that she provided from her
14 server, is my recollection correct that those were digitized
15 and are searchable?

16 MS. SHAPIRO: Yes, they were digitized as of
17 approximately mid June, and they are searchable, and are
18 being searched and reviewed in response to your order in the
19 other case that --

20 THE COURT: *Leopold.*

21 MS. SHAPIRO: -- right, that captures all 55,000.

22 THE COURT: So given that these are separate cases
23 and they are not being consolidated, and given that it is
24 this case, this case here today, is a relatively narrow
25 case, why is the State Department reluctant to make a search

1 for the Foundation conflict documents, which sounds like a
2 relatively straightforward process?

3 MS. SHAPIRO: One, it is not clear that it is a
4 relatively straightforward process about how to construct a
5 search that would be likely to capture those records and
6 then deal with whatever comes back, both in terms of
7 responsive records and nonresponsive records that are just
8 caught up in the search. So that is a time-consuming
9 process.

10 And the resources of the State Department right
11 now are so taxed that any sort of side search for a sort of,
12 you know, even discrete, would take resources away from what
13 is an extremely burdensome but also very taxing process
14 right now to the department. So to the extent that even one
15 person's time or two people's time in order to process
16 another request, it disrupts the entire chain of the way
17 these e-mails are being moved from station to station in
18 response to Your Honor's other order. And I just add that,
19 as Mr. Riess mentioned, with the number of cases both being
20 brought by Judicial Watch and others where the argument is
21 this a discrete search, you then have 8, 10, 15 discrete
22 searches, and to take each one of those and say that they
23 are discrete in isolation, it becomes no longer discrete and
24 would completely derail, I think, the process that -- where
25 that's really very little room for disruption in order to --

1 THE COURT: My order in *Leopold* was based on
2 numbers and percentages. To the extent that documents from
3 that universe are produced in this case, they qualify for
4 the numbers in *Leopold*, don't they? So that they're not
5 mutually exclusive from a resource standpoint, are they?

6 MS. SHAPIRO: No, that's right. It is just that
7 the documents in the entire 55,000 collection are being done
8 systematically and not necessarily with respect to a
9 specific topic. So here you would be doing a search for a
10 specific subject, gathering those and then taking the time
11 to process those sort of separately and deal with the
12 responsiveness issue, whereas if we continued to process in
13 order, Judicial Watch will have all of the records, and, you
14 know, not just the ones that may be responsive to these, but
15 also to the 8 to 10 to 12 other requests that they have in
16 litigation right now.

17 THE COURT: Okay. Are there any other points that
18 you want to cover?

19 MR. RIESS: No, Your Honor.

20 THE COURT: Okay.

21 MS. SHAPIRO: Thank you.

22 THE COURT: All right. With respect to the
23 government's proposal about in Section B, focus on the
24 August 17 date, it sounds like the parties are more or less
25 in agreement on that, so we will go with that.

1 With respect to the 55,000 Clinton e-mails from
2 her server, I want the parties to meet and confer within the
3 next two weeks and try to agree on search terms, and then
4 file, to the extent you are in agreement or to the extent
5 you are not in agreement, file a joint status report at that
6 point with the court, and then I will decide at that point
7 what to do with that, but I will say my inclination is to
8 have a search done of the Clinton e-mail database that's
9 digitized and searchable for this relatively narrow, in my
10 view, relatively narrow request.

11 Is there any universe that's not covered yet that
12 you want the questions answered?

13 MR. FEDELI: Well, if I may, Your Honor, I
14 think --

15 THE COURT: July 23 is two weeks.

16 MR. FEDELI: As far as the preservation issues, we
17 do think those are important. Counsel suggested that the
18 Court can't really do anything about that without a motion.
19 We would be happy to file one.

20 THE COURT: But if everyone files motions, August
21 17 will be here and that just adds more paper to it. I
22 think August 17 is close enough that there's no point in a
23 lot of motions work. Do you agree with that?

24 MR. FEDELI: Certainly understand that,
25 Your Honor. The concerns that we have about preservation do

1 remain outstanding for us.

2 THE COURT: I'm sorry?

3 MR. FEDELI: The concerns we have about
4 preservation, having not been really fully addressed yet,
5 remain outstanding for us.

6 THE COURT: I understand that, and I am concerned
7 about that as well. If documents are destroyed between now
8 and August 17, the government will have to answer for that,
9 and, you know, if they don't want to do anything out of the
10 ordinary to preserve between now and then, they can make
11 that choice. I will allow them to make that choice, but
12 they will answer for it, if something happens.

13 MR. FEDELI: Thank you, Your Honor.

14 THE COURT: They are prudent people.

15 MS. SHAPIRO: Sorry, just one note to the
16 preservation point.

17 THE COURT: Sure.

18 MS. SHAPIRO: Again, I don't think we construed
19 the questions that were asked as preservation related
20 questions. There's no question that the government will
21 preserve every record in its possession that relates to this
22 and all the other requests --

23 THE COURT: Now "possession" is probably a term of
24 art in this context. What does the government consider its
25 possession, and does it also include custody or control?

1 MS. SHAPIRO: Well, custody and control are --
2 again, they're legal terms.

3 THE COURT: Sure.

4 MS. SHAPIRO: The State Department will not be
5 destroying anything that relates to any of these cases.

6 With respect to individuals over which the State
7 Department has no control, because they are former
8 government employees --

9 THE COURT: But to the extent that they have
10 official government records, what do you believe is the
11 State Department's duty?

12 MS. SHAPIRO: The State Department has asked for
13 the return of those records.

14 THE COURT: Okay.

15 MS. SHAPIRO: And those individuals have that
16 correspondence, and anything that comes back to the
17 government, of course, will be preserved and maintained.
18 And, you know, we can put that assurance in an e-mail to the
19 plaintiffs, if that makes them more comfortable. I think
20 there should be no question that the government is
21 preserving records and satisfying its litigation obligation.

22 THE COURT: You know, I understand everyone's
23 position, and it is to state the obvious that this is not an
24 ordinary case, and everyone should be working to make sure
25 that whatever documents exist today remain in existence. I

1 understand the government's position that discovery is
2 extraordinary in FOIA cases. But I am a little bit
3 mystified that the government is not more forthcoming in
4 just answering questions that will help this case proceed on
5 a systematic basis, and on a basis that will allow everyone
6 to get the answers that will eventually help resolve these
7 cases, all 35 of them.

8 MS. SHAPIRO: They are doing the best they can
9 under trying circumstances, Your Honor.

10 THE COURT: Okay. Is there anything else we need
11 to cover today?

12 MR. FEDELI: No, Your Honor.

13 MR. RIESS: No, Your Honor.

14 THE COURT: Okay. Thank you.

15 (WHEREUPON, at 10:24 a.m. the proceedings were
16 concluded.)

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