

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)

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant, the United States Department of State, respectfully moves for summary judgment pursuant to Federal Rule of Civil Procedure 56 and Local Rule 7. The reasons for this Motion are set forth in the Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment, the Statement of Material Facts as to Which There Is No Genuine Issue, and the Declaration of John F. Hackett (as well as the exhibits thereto). A proposed order is filed concurrently herewith.

Dated: July 7, 2015

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INTRODUCTION

Plaintiff in this Freedom of Information Act (“FOIA”) case, Judicial Watch, Inc., requested that the Office of the Secretary, a component of Defendant United States Department of State (the “Department”), disclose to it copies of updates and talking points about the attacks of September 11, 2012, in Benghazi, Libya, that were given to former United States Ambassador to the United Nations Susan Rice and any communications about such updates or talking points. The Department conducted searches reasonably calculated to uncover responsive documents and produced to Judicial Watch four documents, one in full and three with redactions. A fifth document was withheld in full. Because the Department’s searches satisfy FOIA, because Judicial Watch does not challenge any of the redactions to the documents produced by the Department, and because the Department properly withheld a document in full pursuant to FOIA Exemptions 5 and 6, the Department is entitled to summary judgment.

BACKGROUND

On March 13, 2014, Judicial Watch submitted a two-part FOIA request (the “FOIA Request”) to the Department’s Office of the Secretary requesting the following:

- 1) Copies of any updates and/or talking points given to Ambassador Rice by the White House or any federal agency concerning, regarding, or related to the September 11, 2012 attack on the U.S. consulate in Benghazi, Libya.
- 2) Any and all records or communications concerning, regarding, or relating to talking points or updates on the Benghazi attack given to Ambassador Rice by the White House or any federal agency.

Complaint ¶ 5 (ECF No. 1); Declaration of John F. Hackett ¶ 4 & Ex. A (“Hackett Declaration” or “Hackett Decl’n”). In correspondence with counsel for the Department, counsel for Judicial Watch clarified that its request does not seek all records relating to the attacks of September 11, 2012 in Benghazi, but rather only “talking points and updates to those talking points, not general

intelligence updates about the Benghazi attacks (unless those updates were sent in furtherance of developing or updating talking points).” Hackett Decl’n ¶ 5 & Ex. B.

The FOIA Request used the same wording as an earlier FOIA request dated October 18, 2012, that Judicial Watch had submitted to the Department’s United States Mission to the United Nations (“US/UN”)—the component of the Department at which former Ambassador Rice worked (the “US/UN FOIA Request”).¹ Hackett Decl’n at n. 1 & Ex. C. During the course of previous litigation involving the US/UN FOIA Request, the Department released to Judicial Watch 98 documents, in whole or in part, totaling 1,439 pages. Hackett Decl’n at n.1. The parties executed a settlement agreement and filed a stipulation of dismissal of that prior case with prejudice on September 12, 2014. *Judicial Watch v. State*, (D.D.C. 13-951), Stipulation of Dismissal with Prejudice (ECF No. 18).

Judicial Watch, Inc. initiated this lawsuit against the Department on July 21, 2014. (ECF No. 1). The Department answered the complaint on August 27, 2014. (ECF No. 6). On September 12, 2014, in response to the Department’s unopposed motion for a scheduling order, the Court set the following deadlines: (1) November 12, 2014 for the Department to produce to Judicial Watch all non-exempt, responsive documents subject to the FOIA; (2) December 5, 2014 for the Department to produce to Judicial Watch a draft *Vaughn* index; (3) December 19, 2014 for Judicial Watch to provide to the Department any objections to the withholdings described in the draft *Vaughn* index and the parties to confer thereafter to attempt to resolve this matter without litigation; (4) January 2, 2015 for the parties to file a joint status report. *See* Def.’s Mot. for Scheduling Order (ECF No. 8); Order of Sep. 15, 2014 (ECF No. 9).

The Department conducted searches reasonably calculated to uncover all responsive documents in its custody and control, including key-word searches of four electronic records systems within the Office of the Secretary and key-word searches of the state.gov email accounts

¹ The US/UN FOIA Request was date-limited to September 11, 2012, through September 30, 2012.

of three individuals who had dealt with the subject matter of the FOIA Request and whose records were therefore reasonably likely to contain responsive records. Hackett Decl'n ¶¶ 10-14. These searches produced a number of records which were then reviewed for responsiveness. *Id.* ¶ 14. Further, as a safeguard against overlooking responsive records, the Department also reviewed each of the documents produced in response to Judicial Watch's US/UN FOIA Request to determine whether any of those documents had been sent from or to anyone in the Office of the Secretary. *Id.* ¶ 15.

These searches of electronic records systems, emails, and the US/UN FOIA release discovered four responsive documents, which the Department produced to Judicial Watch by letter dated November 11, 2014. Hackett Decl'n ¶ 16. On December 5, 2014, in accordance with the Court's order, the Department produced to Plaintiff a draft *Vaughn* index describing the redactions taken and explaining why the information withheld was exempt from disclosure under the FOIA. Judicial Watch raised no objections to the withholdings described in the *Vaughn* index, but asked for a description of the search. The parties conferred and, in an effort to resolve the litigation, the Department agreed to provide a draft declaration describing the searches it had conducted. Judicial Watch agreed to allow the Department until February 2, 2015, to provide the draft search declaration. *See* Joint Status Report (ECF No. 11).

After the searches in this case had been completed and the four responsive documents had been delivered to Judicial Watch, the Department received approximately 55,000 pages of hard copy emails and attachments to emails from former Secretary Clinton.² Hackett Decl'n ¶ 17. Because it was reasonably likely that these emails contained documents responsive to the FOIA Request, counsel for the Department informed counsel for Judicial Watch by phone that the Department needed to conduct searches of emails that were not addressed during the initial

² Former Secretary Clinton provided these emails in response to an earlier request from the Department of State that, if former Secretaries or their representatives were "aware or [were to] become aware in the future of a federal record, such as an email sent or received on a personal email account while serving as Secretary of State, that a copy of this record be made available to the Department." Hackett Decl'n ¶ 17.

search. Judicial Watch agreed to give the Department until April 2, 2015 to conduct the additional searches, produce any responsive documents and, if necessary, a revised *Vaughn* index, and to provide a draft search declaration. *See* Joint Status Report of February 2, 2015 (ECF No. 11). The parties further agreed that Judicial Watch would complete its review of any materials provided and notify the Department whether it would raise any objections to the search or to any of the withholdings from the responsive documents. *Id.*

The Department searched those emails that were sent or received by Former Secretary Clinton on or after September 11, 2012 (the date of the attacks in Benghazi), through the end of former Secretary Clinton's tenure on January 31, 2013. Hackett Decl'n ¶ 17. No responsive records were found. Hackett Decl'n ¶ 17. On April 2, 2015, the Department notified Judicial Watch that no additional responsive records had been found and provided it with a draft search declaration as agreed. On April 30, 2015, in response to questions raised during a phone call between counsel for the Department and counsel for Judicial Watch, the Department provided a second draft search declaration providing additional information. The parties were still unable to reach agreement. On May 1, 2015, the parties filed a Joint Status Report (ECF No. 16) in which Judicial Watch noted its objections to the search and suggested that the Court hold a status conference between May 20 and May 29, 2015; the Department suggested that the Court set a briefing schedule for summary judgment.³

³ In that status report, the parties asked that the Court, should it choose to not set a status conference, instead set a briefing schedule under which Defendant would file its summary judgment motion by June 30, 2015, with briefing to be completed by September 16, 2015. Joint Status Report of May 1, 2015 at 6. On June 30, 2015, Defendant filed a notice with a slightly adjusted proposed briefing schedule, to which Plaintiff agreed: (a) Defendant's summary judgment motion due by July 7, 2015; (b) Plaintiff's opposition to motion for summary judgment, and any cross-motion for summary judgment due by August 14, 2015; (c) Defendant's combined reply and opposition to any cross-motion for summary judgment due by September 11, 2015; (d) Plaintiff's reply in support of any cross-motion for summary judgment due by September 25, 2015. *See* Defendant's Notice Regarding Briefing Schedule ¶ 4 (ECF No. 17). The Court adopted this schedule in its minute order of July 1, 2015.

ARGUMENT

I. STANDARD OF REVIEW

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a); *Diamond v. Atwood*, 43 F.3d 1538, 1540 (D.C. Cir. 1995). FOIA actions are typically resolved on summary judgment. *Reliant Energy Power Generation, Inc. v. FERC*, 520 F. Supp. 2d 194, 200 (D.D.C. 2007).

A court reviews an agency's response to a FOIA request *de novo*. *See* 5 U.S.C. § 552(a)(4)(B). When a requester challenges the adequacy of an agency's search, "[i]n order to obtain summary judgment, the agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Oglesby v. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990); *Weisberg v. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984) (internal quotations and citations omitted).

The agency must also justify any records withheld (in whole or in part) subject to FOIA's statutory exemptions. "FOIA represents a balance struck by Congress between the public's right to know and the government's legitimate interest in keeping certain information confidential." *Ctr. For Nat'l Sec. Studies v. DOJ*, 331 F.3d 918, 925 (D.C. Cir. 2003). Congress recognized "that legitimate governmental and private interests could be harmed by release of certain types of information and provided nine specific exemptions under which disclosure could be refused." *FBI v. Abramson*, 456 U.S. 615, 621 (1982). These exemptions are specified in 5 U.S.C. § 552(b).

II. THE DEPARTMENT'S SEARCHES SATISFY FOIA

The Court may grant summary judgment concerning the adequacy of an agency's search for responsive records based on information provided in "[a] reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely

to contain responsive materials (if such records exist) were searched.” *Valencia–Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999) (quoting *Oglesby*, 920 F.2d at 68) (alteration in original); *Meeropol v. Meese*, 790 F.2d 942, 952 (D.C. Cir. 1986); *Riccardi v. Dep’t of Justice*, 32 F.Supp.3d 59, 63 (D.D.C. Mar. 27, 2014). “Such agency affidavits attesting to a reasonable search ‘are afforded a presumption of good faith,’ and ‘can be rebutted only with evidence that the agency’s search was not made in good faith.’” *Id.* (citations omitted).

Reasonableness, not perfection, is therefore the Court’s guiding principle in determining the adequacy of a FOIA search. *Id.*; *Campbell v. Dep’t of Justice*, 164 F.3d 20, 27 (D.C. Cir. 1998). “There is no requirement that an agency search every record system.” *Oglesby*, 920 F.2d at 68. Moreover, the mere fact that a search uncovers few documents—or even none at all—does not render that search inadequate: “the issue to be resolved is not whether there might exist any . . . documents possibly responsive to the request, but rather whether the search for those documents was adequate.” *Weisberg*, 745 F.2d at 1485 (internal citation omitted); *see also Meeropol*, 790 F.2d at 952-53 (search is not presumed unreasonable simply because it fails to produce all relevant material); *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982) (agency need not demonstrate that all responsive documents were found and that no other relevant documents could possibly exist). Conducting a “reasonable” search is a process that requires “both systemic and case-specific exercises of discretion and administrative judgment and expertise” and is “hardly an area in which the courts should attempt to micromanage the executive branch.” *Schrecker v. Dep’t of Justice*, 349 F.3d 657, 662 (D.C. Cir. 2003) (quoting *Johnson v. Exec. Office for U.S. Attorneys*, 310 F.3d 771, 776 (D.C. Cir. 2002)).

In evaluating the adequacy of a search, courts accord agency affidavits a presumption of good faith that cannot be rebutted by a plaintiff’s speculation “about the existence and discoverability of other documents.” *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (internal quotation and citation omitted); *see also Ground Saucer Watch, Inc. v. CIA*,

692 F.2d 770, 771 (D.C. Cir. 1981) (same). Rather, to establish the sufficiency of its search, the agency's affidavits need only explain the "scope and method of the search" in "reasonable detail." *Kidd v. Dep't of Justice*, 362 F. Supp. 2d 291, 295 (D.D.C. 2005) (quoting *Perry*, 684 F.2d at 127). The agency need only search those systems in which it believes responsive records are likely to be located. *W. Ctr. for Journalism v. IRS*, 116 F. Supp. 2d 1, 9 (D.D.C. 2000); *Roberts v. Dep't of Justice*, No. 92-1707, 1995 WL 356320, at * 1 (D.D.C. Jan. 29, 1993). The Department of State has done that here.

The Declaration of John F. Hackett, Director of the Department's Office of Information Programs and Services, establishes that the Department "made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested," *Oglesby*, 920 F.2d at 68. "[T]he Department conducted a thorough search of all Department records systems within the Office of the Secretary that were reasonably likely to maintain records responsive to Plaintiff's FOIA request." Hackett Decl'n ¶ 35. Because the FOIA Request specified that it sought records only from the Office of the Secretary, the Department's Office of the Executive Secretariat Staff ("S/ES-S"), which is responsible for coordinating search responses for the Office of the Secretary of State, conducted the searches for responsive records. Hackett Decl'n ¶ 8.

S/ES-S identified four electronic records systems or databases reasonably likely to contain responsive records within the Office of the Secretary:

- Secretariat Tracking and Retrieval System ("STARS"), "an automated system used to track, control, and record documents containing substantive foreign policy information passing to, from, and through the offices of the Secretary of State, the Deputy Secretary of State, and other Department principal officers. Original documents are indexed, scanned, and stored as images in STARS. Information in STARS covers the period 1988 to the present." *Id.* ¶ 10, n. 3. Each document in STARS contains a searchable abstract created by a Technical Information Specialist when the document was added to the database; each abstract is designed to capture the subject matter of the document. *Id.* ¶ 13. For documents from the time period relevant to the FOIA Request, the abstracts are the only portions of STARS whose text may be searched. *Id.*

- Secretariat Telegram Processing System (“STePS”), an electronic system “designed to distribute cables among the Department’s principals.” *Id.* ¶ 10, n. 4. The full text of the documents in STePS is searchable. *Id.* ¶ 13.
- Cable Archiving Retrieval System (“CARS”), an electronic system “designed to provide access to a contemporary portion of the Department’s telegram archive deemed to be of general interest.” *Id.* ¶ 10, n. 5. The full text of the documents in CARS is searchable. *Id.* ¶ 13.
- Top Secret files (“TS”). *Id.* ¶ 10. During searches of the TS files, search terms are applied to an index of TS files. *Id.* ¶ 13. Each TS index entry, along with key words and a topic description, was added by a Management Analyst. *Id.* This index, rather than the full text of the TS files themselves, can be searched. *Id.*

In addition, members of the Office of the Secretary, based on their knowledge of which staff members within that office during former Secretary Clinton’s tenure worked on issues relevant to this FOIA request, identified three individuals whose state.gov email accounts were reasonably likely to contain responsive records: Jacob Sullivan, the Deputy Chief of Staff to former Secretary Clinton; Cheryl Mills, Counselor and Chief of Staff to former Secretary Clinton; and Huma Abedin, Deputy Chief of Staff to former Secretary Clinton. Hackett Decl’n ¶ 11.

The Hackett Declaration explains how a Management Analyst searched these four electronic records systems and the state.gov accounts of these three individuals using broad, overlapping search terms to ensure that the search would be over-inclusive, minimizing the chance that a responsive record would be overlooked. The Management Analyst used the following search terms:

- Ambassador
- Rice
- USUN/W
- September 11, 2012
- attack
- Benghazi

- Libya
- talking points
- TPs
- updates

Hackett Decl’n ¶ 12. These search terms were used to conduct a disjunctive search (also known as an “or search” because they are created using a Boolean “or” operator), which means any document (or abstract, in the case of STARS, or index entry, in the case of the TS files) that contained any one of these words would be returned. *Id.* ¶ 14. Thus, the searches returned each record that contained (or whose abstract or index entry contained) the word “Ambassador”, as well as each one that contained the word “attack” or “Benghazi” or “Libya,” whether or not that document actually referred to the attacks or had been given to Ambassador Rice. *Id.* The records returned by the text searches were then reviewed for responsiveness. *Id.*

In addition to these primary searches, the Management Analyst also reviewed each of the 98 documents, totaling 1,439 pages, that were produced in response to the US/UN FOIA Request, which had identical wording to the FOIA Request at issue here. Hackett Decl’n ¶¶ 4, 15. During this review, the Management Analyst examined each sender and recipient in those documents; any document with a recipient or sender who was in the Office of the Secretary at the time the document was sent was treated as responsive. *Id.* ¶ 15. This check was undertaken to guard against the possibility that a record had been overlooked in the primary searches. *Id.*

As a result of the primary searches and the additional review of the documents produced in response to the US/UN FOIA Request, the Management Analyst found four responsive documents, all of which had been produced in response to the US/UN FOIA Request. Hackett Decl’n ¶ 16 & Ex. D. These records were produced again to Plaintiff in this litigation, and Plaintiff has not challenged any redactions contained on those documents, either in this suit or in the related litigation stemming from the US/UN FOIA Request. *Id.* at n. 7 & Ex. F.

The Deputy Director of S/ES-S searched the approximately 55,000 pages of emails and attachments to emails provided to the Department by former Secretary Clinton by applying the same search terms used for the other searches, *see* Hackett Decl’n ¶ 12, to two PDFs containing scanned images of those documents that were sent or received on or after September 11, 2012 (the date of the attacks in Benghazi), through the end of former Secretary Clinton’s tenure on January 31, 2013. *Id.* ¶ 17. For each PDF, the Deputy Director entered a search term individually into the “Find” command in Adobe Reader and navigated to each occurrence of the search term in the PDF. *Id.* The Deputy Director reviewed for responsiveness each individual document that contained an occurrence of the search term. This process was repeated for each search term listed above in Paragraph 12. *Id.* No responsive records were found. *Id.*

Finally, on June 26, 2015, the Department received additional documents from Ms. Mills and Mr. Sullivan that, the Department determined, might contain responsive documents. Hackett Decl’n ¶ 20. These documents were provided to the Department in response to letters, sent earlier this year, to Ms. Mills, Mr. Sullivan, and Ms. Abedin, in which the Department asked those individuals to make available to the Department any federal records that they may have in their possession, such as emails concerning official government business sent or received on a personal email account while serving in their official capacities with the Department, if there is any reason to believe that those records may not otherwise be preserved in the Department’s recordkeeping system.⁴ *Id.* ¶ 18. An attorney in the Department’s Office of the Legal Adviser reviewed the documents provided by Ms. Mills and Mr. Sullivan and found one responsive document, a two-message email chain that mentioned the talking points in the course of a larger

⁴ Respective counsel for these three individuals informed the Department that they may provide a further response to the letter in the future. Hackett Decl’n ¶ 19. If the Department receives any additional documents that relate to the subject matter of the FOIA Request, the Department will advise Judicial Watch so that the parties can discuss how to address any such documents.

discussion, which the Department determined should be withheld in full pursuant to FOIA Exemption 5. *Id.* ¶¶ 20, 30.⁵

The broad keyword search across four electronic records systems and the state.gov email accounts of those Office of the Secretary employees who worked on the issues underlying the FOIA Request, the extra confirmation check against the records of the office where the person at the center of the FOIA Request worked, the keyword search of the emails of former Secretary Clinton that were sent or received at any time on or after the day of the attacks, and the manual review of documents received from Ms. Mills and Mr. Sullivan, taken together, covered all files likely to produce responsive records and is more than adequate to satisfy the Department's obligations under FOIA. Despite these broad searches, Judicial Watch wants the Department to conduct a "wider agency search"—outside the bounds of its original request (that is, the Office of the Secretary)—of the emails "of potential recipients to Secretary Clinton and the other three individuals who dealt with the subject matter of the request within the Office of the Secretary." Joint Status Report at 5, May 1, 2015 (ECF No. 16).⁶

Additional searches such as those requested by Judicial Watch would be unlikely to uncover more responsive documents. The FOIA Request, which was limited by its own terms to the Office of the Secretary, seeks talking points and updates related to talking points sent to former Ambassador Rice, who worked in US/UN. Common sense indicates that it is within

⁵ The Department had reviewed the earlier email in this chain during the Department's search of the 55,000 pages received from former Secretary Clinton. Hackett Decl'n ¶ 21. It was deemed unresponsive because the references to "talking points" contained therein appeared to be about a separate set of talking points being developed within the Office of the Secretary for future use. *Id.* However, the later message in the email chain, which was not sent to former Secretary Clinton, made it clear that one portion of the earlier message had, indeed, been discussing the talking points given to Ambassador Rice. *Id.*

⁶ Judicial Watch noted two additional objections to the search in the Joint Status Report: (1) Judicial Watch wants the Department to disclose the identity of the three individuals whose state.gov emails were searched; and (2) Judicial Watch wants to know what responses the Department has received, if any, to the letters sent to those three individuals asking them to make available to the Department any federal records that they may have in their possession, if there is any reason to believe that those records may not otherwise be preserved in the Department's recordkeeping system. Joint Status Report at 5, May 1, 2015 (ECF No. 16). The Hackett Declaration discloses the names and titles of those individuals, Hackett Decl'n ¶ 11, and provides the latest available information concerning the letters sent to them, *id.* ¶¶ 18-21.

US/UN, not within the Office of the Secretary, that most responsive records would be found, and that search has already been done, litigated, and settled in a prior litigation with this Plaintiff. And, indeed, Plaintiff's identically worded US/UN FOIA Request directed at the Mission resulted in the release of 98 responsive documents totaling almost 1,500 pages. Of those documents, only 4, totaling 12 pages—or 0.8% of the pages produced previously—bore any indication that they involved the Office of the Secretary. “Mere speculation that as yet uncovered documents may exist does not undermine the finding that the agency conducted a reasonable search for them.” *SafeCard*, 926 F.2d at 1201 (citing *Weisberg*, 745 F.2d at 1486–87; *Ground Saucer Watch, Inc. v. CIA*, 692 F.2d 770, 771 (D.C.Cir.1981)).

III. THE DEPARTMENT PROPERLY WITHHELD INFORMATION UNDER EXEMPTIONS FIVE AND SIX

A. The Department Properly Withheld Exempt Information Under Exemption Five

The Department properly withheld in full, pursuant to FOIA Exemption 5 and the deliberative process privilege, the document obtained from Mr. Sullivan.⁷ FOIA Exemption 5 exempts from disclosure “inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency.” 5 U.S.C. § 552(b)(5). The exemption ensures that members of the public cannot obtain through FOIA what they could not ordinarily obtain through discovery in a lawsuit against the agency. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). Among the privileges protected by Exemption 5 is the deliberative process privilege, a privilege uniquely available to the government. *See Rockwell Int'l Corp. v. Dep't of Justice*, 235 F.3d 598, 601 (D.C. Cir. 2001).

The deliberative process privilege applies to “decisionmaking of executive officials generally,” and protects documents containing deliberations that are part of the process by which

⁷ Counsel for Judicial Watch has confirmed via email that Judicial Watch is not challenging any of the redactions in the documents produced to it. Hackett Decl'n ¶ 24 & Ex. F. For this reason, only the responsive document that the Department received on June 26, 2015, and withheld in full is addressed in this section and the Hackett Declaration.

government decisions are formulated. *In re Sealed Case*, 121 F.3d 729, 737, 745 (D.C. Cir. 1997). The purpose of the deliberative process privilege is to encourage full and frank discussion of legal and policy issues within the government, and to protect against public confusion resulting from disclosure of reasons and rationales that were not ultimately the bases for the agency's action. *See, e.g., Mapother v. Dep't of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993); *Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982). The privilege is animated by the common-sense proposition that "those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decision making process." *Sears, Roebuck & Co.*, 421 U.S. at 150-51 (citation omitted).

To come within the scope of the deliberative process privilege, a document must be both predecisional and deliberative. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). A document is predecisional if "it was generated before the adoption of an agency policy" and it is deliberative if "it reflects the give-and-take of the consultative process." *Id.* "To establish that [a] document is predecisional, the agency need not point to an agency final decision, but merely establish what deliberative process is involved, and the role that the documents at issue played in that process." *Judicial Watch v. Export-Import Bank*, 108 F. Supp. 2d 19, 35 (D.D.C. 2000) (citing *Formaldehyde Inst. v. HHS*, 889 F.2d 1118, 1223 (D.C. Cir. 1989)). The privilege therefore applies broadly to "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Coastal States*, 617 F.2d at 866.

"[D]raft documents by their very nature, are typically predecisional and deliberative, because they reflect only the tentative view of their authors; views that might be altered or rejected upon further deliberation either by their authors or by superiors." *In re Apollo Group, Inc. Securities Litigation*, 251 F.R.D. 12, 31 (D.D.C. 2008) (non-FOIA case) (quotations omitted). Accordingly, "drafts are commonly found exempt under the deliberative process

exemption.” *People for the American Way Foundation v. National Park Service*, 503 F. Supp. 2d 284, 303 (D.D.C. 2007); *see also*, *Judicial Watch v. Clinton*, 880 F. Supp. 1, 13 (D.D.C. 1995) (upholding nondisclosure of draft responses to a congressional inquiry).

The Department properly withheld such information under the deliberative process privilege. As a threshold matter, the document qualifies as “inter-agency or intra-agency memorandums or letters,” 5 U.S.C. § 552(b)(5), because it contains internal communications between and among Department of State employees. *See* Hackett Decl’n ¶¶ 30. Specifically, the document is a three-page email exchange among then-current State Department employees consisting of two messages. *Id.* The earlier message is from Jacob Sullivan to former Secretary Clinton and Cheryl Mills (who is listed on the “cc” address line) and has the subject “Key Points.” It was sent on September 29, 2012 at 11:09 AM. The later message is from Cheryl Mills to Jake Sullivan and Philippe Reines (Deputy Assistant Secretary of State for Strategic Communications and Senior Communications Advisor to Secretary Clinton) and has the subject “Fwd: REVISED Key Points.” It was sent on September 29, 2012 at 1:18 PM.

The bodies of the messages consist of drafts, composed by advisors to former Secretary Clinton, of a proposed future communication from the former Secretary to a member of the U.S. Senate concerning various issues related to the attacks of September 11, 2012 in Benghazi. Hackett Decl’n ¶ 30. Thus, as non-final drafts, the bodies of the messages in this document are predecisional and deliberative in nature. *Id.* ¶ 31. Release of this material could reasonably be expected to chill the frank deliberations that occur when senior staff are preparing points or other draft remarks for use by senior Department officials in addressing a matter of public controversy and the material is thus exempt under FOIA exemption 5. *Id.* The Department conducted a line-by-line review of the documents and determined there was no reasonably segregable, non-exempt material that could be released. *Id.* ¶ 34.

The deliberative process privilege applies to precisely the sort of information that makes up the entirety of this document, that is, the sort of frank deliberations that occur when senior staff are preparing points or other draft remarks regarding how high level officials of the Department should address a matter of public controversy. *See, e.g., Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec.*, 736 F. Supp. 2d 202, 208 (D.D.C. 2010) (in concluding that discussions of how to respond to inquiries from the press and Congress were protected by the deliberative process privilege, explaining that, “[b]ecause the handling of [the] case was controversial, it is understandable that . . . numerous discussions involving the controversy took place and required multiple decisions”). Thus, the document is exempt from production under FOIA Exemption 5, 5 U.S.C. § 552(b)(5).

B. The Department Properly Withheld Exempt Information Under Exemption Six

In addition, the Department properly withheld the domain names of the private email addresses of three Department employees, pursuant to FOIA Exemption 6, in the document obtained from Mr. Sullivan.⁸ FOIA Exemption 6 protects “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). The Supreme Court has adopted a broad construction of the privacy interests protected by Exemption 6. In *Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 763 (1989), the Court rejected a “cramped notion of personal privacy” under the FOIA’s exemptions and instead emphasized that “privacy encompass[es] the individual’s control of information concerning his or her person.” More specifically, the Court noted that “[p]rivacy is the claim of individuals . . . to determine for themselves when, how, and to what extent information about them is communicated to others.” *Id.* at 764 n.16 (citation omitted). Privacy is of particular importance in the FOIA context because a disclosure required by the FOIA is a disclosure to the public at large. *See Painting &*

⁸ The domain name of an email address is the part that comes after the “@” symbol. For example, in the email address “george.washington@hotmail.com”, the domain name is “hotmail.com”.

Drywall Work Preservation Fund, Inc. v. HUD, 936 F.2d 1300, 1302 (D.C. Cir. 1991) (finding that if information “must be released to one requester, it must be released to all, regardless of the uses to which it might be put”).

Exemption 6 requires an agency to balance the individual’s right to privacy against the public’s interest in disclosure. *See Rose*, 425 U.S. at 372. The agency must determine whether disclosure of the information threatens a protectable privacy interest; if so, the agency must weigh that privacy interest against the public interest in disclosure, if any. *See Reed v. NLRB*, 927 F.2d 1249, 1251 (D.C. Cir. 1991). The “only relevant public interest to be weighed in this balance is the extent to which disclosure would serve the core purpose of FOIA, which is contribut[ing] significantly to public understanding of the operations or activities of the government.” *Dep’t of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994) (emphasis as in *Fed. Labor Relations Auth.*; internal citation and quotation marks omitted). Plaintiff bears the burden of demonstrating that the release of the withheld documents would serve this interest. *See Carter v. Dep’t of Commerce*, 830 F.2d 388, 391-92 nn. 8 & 13 (D.C. Cir. 1987).

The Department properly withheld the domain names of the private email addresses of three Department employees—Ms. Mills, Mr. Sullivan, and Mr. Reines—that were in the later email in the email chain provided by Mr. Sullivan.⁹ Director Hackett weighed the public interest in disclosure against the privacy interests of the individuals whose private email addresses appear in the email chain. Hackett Decl’n ¶ 32-33. Director Hackett found that disclosure of the email addresses could subject the individuals to harassment and would result in a clearly unwarranted invasion of privacy. *Id.* ¶¶ 29, 33. He also determined that the release would shed no light on government operations and thus would not serve the “core purpose” for which Congress enacted FOIA. *Id.* ¶¶ 29, 33. For these reasons, he concluded that the privacy interest

⁹ The Department does not seek to protect the personal email address of former Secretary Clinton (“hdr22@clintonemail.com”), which is in the earlier email in the email chain. Hackett Decl’n ¶ 30, n. 8.

clearly outweighs any public interest in disclosure. *Id.* ¶ 29. The domain names of the private email addresses are therefore exempt from release under FOIA Exemption 6. *Id.* ¶ 33.

Agency employees “obviously have a powerful privacy interest” in their personal email addresses, even when used for work-related correspondence. *Competitive Enter. Inst. v. United States Envtl. Prot. Agency*, 12 F. Supp. 3d 100, 122 (D.D.C. 2014); *see also Shurtleff v. United States Envtl. Prot. Agency*, 991 F. Supp. 2d 1, 18 (D.D.C. 2013) (noting that “preventing the burden of unsolicited emails and harassment” is a “substantial privacy interest”). And any public interest associated with the use of a private email account for work-related correspondence is “satisfied by the *Vaughn* entries . . . , which both name the employee and explain that his or her ‘personal email address[es] . . . [have been] withheld on the basis of Exemption 6.’” *Id.* (quoting *Vaughn* index in that case). “Beyond that, there is no public interest in knowing, for example, whether [agency] employees used Hotmail or Yahoo for their personal email correspondence.” *Id.* Likewise, the *Vaughn* entry in this case has both named the employees whose personal email accounts appear in the document and stated that they have been withheld under Exemption 6, satisfying any public interest that may exist here. *See Hackett Decl’n* ¶ 30.

CONCLUSION

For the foregoing reasons, the Court should grant the Department of State’s Motion for Summary Judgment and enter judgment for defendant.

July 7, 2015

Respectfully submitted,

BENJAMIN C. MIZER
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ELIZABETH J. SHAPIRO
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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JUDICIAL WATCH

Plaintiff,

v.

U.S. Department of State,

Defendant.

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No. 1:14-cv-01242-RCL

**DECLARATION OF JOHN F. HACKETT
REGARDING EXEMPTIONS TAKEN IN RESPONSIVE DOCUMENTS**

Pursuant to 28 U.S.C. § 1746, I, John F. Hackett, declare and state as follows:

1. I am the Director of the Office of Information Programs and Services (“IPS”) of the United States Department of State (the “Department”). In this capacity, I am the Department official immediately responsible for responding to requests for records under the Freedom of Information Act (the “FOIA”), 5 U.S.C. § 552, the Privacy Act of 1974, 5 U.S.C. § 552a, and other applicable records access provisions. I have been employed by the Department in this capacity since June 2015. Prior to assuming this role, I served as the Acting Director of IPS since April 2014 and Deputy Director since April 2013. As the IPS Director, I am authorized to classify and declassify national security information. I make the following statements based upon my personal knowledge, which in turn is based on a personal review of the records in the case file established for processing the subject request and upon information furnished to me in the course of my official duties. I am familiar with the efforts of Department personnel to process the subject request, and I am in charge of coordinating the agency’s search and recovery efforts with respect to that request.

2. The core responsibilities of IPS include: (1) responding to records access requests made by the public (including under the FOIA, the Privacy Act, and the mandatory declassification review requirements of the Executive Order governing classified national security information), by members of Congress, by other government agencies, and those made pursuant to judicial process such as subpoenas, court orders and discovery requests; (2) records management; (3) privacy protection; (4) national security classification management and declassification review; (5) corporate records archives management; (6) research; (7) operation and management of the Department's library; and (8) technology applications that support these activities.

3. This declaration explains the Department's search for records responsive to the FOIA request at issue in this litigation.

**I. ADMINISTRATIVE PROCESSING OF PLAINTIFF'S
REQUEST AND THE SEARCH FOR RESPONSIVE DOCUMENTS**

4. By letter dated May 13, 2014, Judicial Watch ("Plaintiff") submitted a FOIA request to the Department requesting that "the Office of the Secretary produce the following within twenty (20) business days:

- 1) Copies of any updates and/or talking points given to Ambassador Rice by the White House or any federal agency concerning, regarding, or related to the September 11 2012 attack on the U.S. consulate in Benghazi, Libya.
- 2) Any and all records or communications concerning, regarding, or relating to talking points or updates on the Benghazi attack given to Ambassador Rice by the White House or any federal agency.

See Ex. A (Plaintiff's FOIA request, F-2014-08848).¹

5. In correspondence with counsel for the Department, Plaintiff further clarified that its request does not seek all records relating to the attacks of September 11, 2012 in Benghazi, but rather only "talking points and updates to those talking points, not general intelligence updates about the Benghazi attacks (unless those updates were sent in furtherance of developing or updating talking points)." *See* Ex. B (Email from Ramona Cotca, Sep. 4, 2014) (confirming scope of request).

6. When the Department receives a FOIA request, IPS evaluates the request to determine which offices, overseas posts, or other records systems within the Department may reasonably be expected to contain the records requested. This determination is based on the description of the records requested and requires a familiarity with the holdings of the Department's records systems, applicable records disposition schedules, and the substantive and functional mandates of numerous Department offices and Foreign Service posts and missions. Factors such as the nature, scope, and complexity of the request itself are also relevant.

7. Each office within the Department, as well as each Foreign Service post and mission, maintains files concerning foreign policy and other functional matters related to the daily operations of that office, post, or mission. These files consist generally of working copies of documents, information copies of documents maintained in the Central Foreign Policy

¹ This request was identically worded to a request previously made by the Plaintiff and directed toward the United States Mission to the United Nations ("USUN/W"). This previous request was the subject of related litigation, 1:13-cv-00951, which the parties settled after the Department produced 98 documents totaling 1,439 pages responsive to that request. *See* Ex. C at 1 (*Judicial Watch v. State*, (D.D.C. 13-951), FOIA Request Letter (Dkt No. 8-1)).

Records collection, and other documents prepared by or furnished to the office in connection with the performance of its official duties, as well as electronic copies of documents and e-mail messages.

8. Plaintiff's request specified that it sought records only from the Office of the Secretary. Therefore, the Department tasked only the Executive Secretariat to search for agency records responsive to Plaintiff's avowed construction of its request that were generated between September 11, 2012, and September 23, 2014, the day that the search was conducted.²

The Executive Secretariat ("S/ES")

9. The Office of the Executive Secretariat Staff ("S/ES-S") is responsible for coordination of the work of the Department internally, serving as the liaison between the Department's bureaus and the offices of the Secretary, the Deputy Secretary, and the Under Secretaries. It is responsible for coordinating search responses for the Office of the Secretary of State ("S"), the Office of the Deputy Secretary of State ("D"), the Office of Policy Planning ("S/P"), the Office of the Under Secretary for Political Affairs ("P"), and the Counselor of the Department ("C").

10. On September 9, 2014, a Management Analyst who was knowledgeable of both the request and S/ES-S records systems conducted a search of S/ES-S electronic records systems reasonably likely to contain responsive records. These systems include the Secretariat Tracking

² The immediate Office of the Secretary is comprised of the Secretary's Chief of Staff, the Counselor of the Department, Deputy Chief of Staff, the Secretary's secretary, the Executive Assistant, special assistants, the Secretary's scheduler, staff assistant, and personal assistants. This staff handles all of the day-to-day matters of the Secretary, including meetings at the Department, functions in Washington and throughout the country, and travel around the world.

and Retrieval System (“STARS”),³ the Secretariat Telegram Processing System (“STePS”),⁴ the Cable Archiving Retrieval System (“CARS”),⁵ and the Top Secret files (“TS”). These systems’ search capabilities are wildcard-based, meaning that common variations of the keywords being searched would be retrieved (*e.g.*, a search for “directive” would produce “directive’s”).

11. On September 23, in furtherance of this process, S/ES-S also searched the state.gov email accounts of three individuals—Cheryl Mills (Counselor and Chief of Staff to former Secretary Clinton), Jacob Sullivan (Deputy Chief of Staff for Policy to former Secretary Clinton), and Huma Abedin (Deputy Chief of Staff for Operations to former Secretary Clinton)—within the Office of the Secretary. These individuals were selected by members of the Office of the Secretary based on their understanding of which staff members within the Office of the Secretary during former Secretary Clinton’s tenure worked on issues related to the Benghazi attacks and whose records may therefore reasonably be expected to contain responsive records.

12. For both the databases and the email records, S/ES used the search terms “Ambassador” or “Rice” or “USUN/W” or “September 11, 2012” or “attack” or “Benghazi” or “Libya” or “talking points” or “TPs” or “updates.”

³ STARS is an automated system used to track, control, and record documents containing substantive foreign policy information passing to, from, and through the offices of the Secretary of State, the Deputy Secretary of State, and other Department principal officers. Original documents are indexed, scanned, and stored as images in STARS. Information in STARS covers the period 1988 to the present.

⁴ STePS is designed to distribute cables among the Department’s principals.

⁵ CARS is designed to provide access to a contemporary portion of the Department’s telegram archive deemed to be of general interest.

13. During searches of the email records, as well as the STePs and CARS databases, the search terms were applied to each document, as well as attachments that contain searchable text. During the search of STARS, the search terms were applied to a descriptive abstract attached to each document. Each STARS abstract was created by a Technical Information Specialist when the document was added to the database; this abstract is designed to capture the subject matter of the related document. For documents from the time period relevant to the FOIA request, the abstracts are the only portions of the STARS database whose text may be searched. Similarly, during the TS search, the search terms were applied to an index of TS files. Each TS index entry, along with key words and a topic description, was added by a Management Analyst into the index. This index, rather than the full text of the TS files themselves, can be searched.

14. The use of “or” between the search terms indicates that this was a disjunctive search; the terms listed would have retrieved any documents that contain (for email, STePS, CARS records), or whose abstracts or indexes contain (for STARS and TS records), the word “Ambassador,” for example, even if the document, abstract, or index contained none of the other search terms. These searches were completed on September 23, 2014, and returned a number of records, which were then reviewed for responsiveness.

15. In addition, to guard against the possibility that a particular document was overlooked, the Management Analyst also reviewed each of the documents that were produced to Plaintiff from USUN/W, rather than the Office of the Secretary, in the related litigation described in footnote 1 above. The Management Analyst examined each sender or recipient of each

document produced in that litigation; documents with a recipient or sender who was in the Office of the Secretary at the time the email was sent were treated as responsive.

16. As a result of the searches of email records, database records, and records produced in the prior related litigation as described in this paragraph, the Management Analyst found four documents responsive to Plaintiff's FOIA request, all of which had been previously produced to Plaintiff in the related litigation described in footnote 1. By letter dated November 11, 2014, the Department released one document in full and three documents in part. *See* Ex. D (Letter of Nov. 12, 2014).

17. After the searches in this case had been completed and the four responsive documents delivered to the Plaintiff, the Department received approximately 55,000 pages of hard copy emails and attachments to emails, arranged in chronological order, from former Secretary Clinton.⁶ These records were provided by her in response to an earlier request from the Department of State that, if former Secretaries or their representatives were "aware or [were to] become aware in the future of a federal record, such as an email sent or received on a personal email account while serving as Secretary of State, that a copy of this record be made available to the Department." *See* Ex. E (Text of Letter to Former Secretaries of State Concerning the Federal Records Act of 1950). The Deputy Directory of S/ES-S applied the same search terms described above, see ¶ 12, to two PDFs containing scanned images of a subset of these documents, specifically, the documents that were sent or received on or after September

⁶ Former Secretary Clinton did not use a state.gov email account.

11, 2012, through the end of former Secretary Clinton's tenure on January 31, 2013. For each PDF, the Deputy Director entered a search term individually into the Find command in Adobe Reader and navigated to each occurrence of the search term in the PDF. The Deputy Director reviewed for responsiveness each individual document that contained an occurrence of the search term. This process was repeated for each search term listed above in Paragraph 12. No responsive records were found.

18. Earlier this year, the Department sent letters to Ms. Mills, Mr. Sullivan, and Ms. Abedin, whose state.gov accounts were searched in response to this FOIA request. In those letters, the Department asked those individuals to make available to the Department any federal records that they may have in their possession, such as emails concerning official government business sent or received on a personal email account while serving in their official capacities with the Department, if there is any reason to believe that those records may not otherwise be preserved in the Department's recordkeeping system.

19. All three individuals have responded to those letters, through counsel, to inform the Department that they have begun the process of searching for and providing the Department documents in their possession that may potentially be federal records. That process is ongoing.

20. On June 26, 2015, counsel for Ms. Mills and counsel for Mr. Sullivan provided the Department with a number of documents in response to the letters. An attorney in the Department's Office of the Legal Adviser has reviewed these newly received documents and discovered one responsive document among those that had been provided by Mr. Sullivan, a two-message email chain that mentioned the talking points in the course of a larger discussion,

which it has determined should be withheld in full pursuant to FOIA Exemption 5. *See* ¶¶ 25-27, *infra*.

21. The earlier message in that email chain is a forward of an email that was sent to, among other people, former Secretary Clinton. A Department attorney has determined that it was among the 55,000 pages provided to the Department by former Secretary Clinton. This earlier message had been reviewed by Staff in the Office of the Secretary during the process described above in Paragraph 17 but deemed unresponsive because the references to “talking points” contained therein appeared to be about a separate set of talking points being developed within the Office of the Secretary for future use. It was not clear from the face of the earlier message that one of the references to “talking points” was to those that had been given to Ambassador Rice. A Department attorney has determined that the copy of the earlier message included in the document received from Mr. Sullivan is identical to the copy received from former Secretary Clinton. However, the later message in the email chain, which was not sent to former Secretary Clinton, made it clear that one portion of the earlier message had, indeed, been discussing the talking points given to Ambassador Rice.

II. EXEMPTIONS CLAIMED

FOIA Exemption 5—Deliberative Process Privilege

22. 5 U.S.C. § 552(b)(5) states that the FOIA does not apply to:

inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency....

23. Exemption 5, 5 U.S.C. § 552(b)(5), protects from disclosure information that is normally privileged in the civil discovery context, including information that is protected by the

deliberative process. The deliberative process privilege protects the confidentiality of candid views and advice of U.S. Government officials in their pre-decisional deliberations related to policy formulation and administrative direction.

24. For example, certain information withheld in this case reflects drafts of materials being prepared for senior Department officials, together with suggested revisions being offered by Department employees.⁷ Disclosure of material containing such deliberations or material on which such deliberations are based could reasonably be expected to chill the open and frank exchange of ideas and recommendations in which Department officials are involved. It would severely hamper the ability of responsible Department officials to formulate and carry out executive branch programs. Information in one document in this case, as detailed below, has been withheld on the basis of this exemption. Disclosure of this information, which is pre-decisional and deliberative, and contains selected factual material intertwined with opinion, would inhibit candid internal discussion and the expression of recommendations and judgments regarding current problems and preferred courses of action by Department personnel with respect to materials being prepared for senior Department officials. The withheld information is, accordingly, exempt from release under Exemption 5, 5 U.S.C. § 552(b)(5) pursuant to the deliberative process privilege.

FOIA Exemption 6—Personal Privacy

25. 5 U.S.C. § 552 (b)(6) states that the FOIA does not apply to

⁷ Four documents were withheld in part pursuant to various FOIA exemptions. Counsel for Plaintiff has confirmed via email that Plaintiff is not challenging any of the redactions in the documents produced to it. Ex. F (Email from Ramona Cotca, June 15, 2015). Therefore, this declaration only addresses the exemptions that apply to the document that was provided by Mr. Sullivan on June 26, 2015, which has been withheld in full.

personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy...”

26. Courts have interpreted the language of Exemption 6 broadly to encompass all personal information that applies to an individual, without regard to whether it was located in a particular type of file. The Department withheld only the domain names in the personal email addresses of Jacob Sullivan, Cheryl Mills, and Philippe Reines under Exemption 6.

27. Inasmuch as the information withheld is personal to an individual, there is clearly a privacy interest involved. I am required, therefore, to determine whether there exists any public interest in disclosure and to weight any such interest against the extent of the invasion of privacy.

28. In *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), the Supreme Court laid down two rules for determining public interest in disclosure of information involving a privacy interest: (1) whether disclosure would serve the “core purpose” for which Congress enacted the FOIA, i.e., to show “what the government is up to,” and (2) that public interest means the interest of the public in general, not particular interests of the person or group seeking the information. Accordingly, the identity of the requester as well as the purpose for which the information is sought is irrelevant in making the disclosure determination.

29. As for all of the information withheld pursuant to Exemption 6, I have concluded that (1) disclosure of the information withheld would result in a clearly unwarranted invasion of personal privacy; and (2) disclosure of the information would not serve the “core purpose” of the FOIA, i.e., it would not disclose information about “what the government is up to.”

Accordingly, I have determined that the privacy interests clearly outweigh any public interest in disclosure of the withheld information.

Document Description

30. **Document C05831334**, which is discussed above, *see* ¶¶ 20-21, is a three-page intra-agency email exchange consisting of two messages. The earlier message is from Jacob Sullivan to former Secretary Clinton's non-state.gov email address and Cheryl Mills (who is listed on the "Cc" address line) and has the subject "Key Points." It was sent on September 29, 2012 at 11:09 AM. The later message is from Cheryl Mills to Jake Sullivan and Philippe Reines (Deputy Assistant Secretary of State for Strategic Communications and Senior Communications Advisor to Secretary Clinton) and has the subject "Fwd: REVISED Key Points." It was sent on September 29, 2012 at 1:18 PM. The bodies of the messages consist of drafts, composed by advisors to former Secretary Clinton, of a proposed future communication from the former Secretary to a member of the U.S. Senate concerning various issues related to the attacks of September 11, 2012 in Benghazi. A portion of each draft consisted of a summary of the talking points that had been sent to Ambassador Rice (although, as explained above, *see* ¶¶ 20-21, the Department did not realize that the earlier message included a reference to those talking points until the Department received and reviewed the second message in the email chain). The Department has withheld the email chain in full under FOIA Exemption 5 pursuant to the

deliberative process privilege and the domain names associated with the private email addresses of Ms. Mills, Mr. Sullivan, and Mr. Reines under Exemption 6.⁸

31. As non-final drafts, the bodies of these messages consist in their entirety of information that is pre-decisional and deliberative in nature. Release of this material could reasonably be expected to chill the frank deliberations that occur when senior staff are preparing points or other draft remarks for use by senior Department officials in addressing a matter of public controversy. The material is therefore exempt under FOIA Exemption 5, 5 U.S.C. § 552(b)(5) pursuant to the deliberative process privilege.

32. Inasmuch as the information withheld under Exemption 6 in the email chain identifies a specific individual, a personal privacy interest exists in the information. Therefore, I am now required to determine whether there exists any public interest in disclosure and, if a public interest is implicated, to weigh any such interest against the privacy interest to determine whether disclosure would constitute a clearly unwarranted invasion of personal privacy.

33. Any individual, including a U.S. Government employee, has a privacy interest in his or her personal email address because the release of this information could result in harassment or unwanted attention. Moreover, the release of the domain name of a personal email address would not shed light on government operations. The domain names of the personal email addresses in the email chain are therefore exempt under FOIA Exemption 6, 5 U.S.C. § 552(b)(6).

⁸ The Department does not seek to protect the non-state.gov email address of former Secretary Clinton ("hdr22@clintonemail.com"), which is in the earlier email in the email chain.

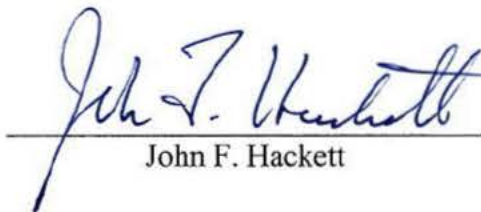
34. The Department conducted a line-by-line review of the email chain and determined that there was no reasonably segregable, non-exempt material that could be released, other than the information disclosed in the preceding two paragraphs.

CONCLUSION

35. In summary, the Department conducted a thorough search of all Department records systems within the Office of the Secretary that were reasonably likely to maintain records responsive to Plaintiff's FOIA request and located five responsive documents, one of which it released in full, three of which it released in part, and one of which it withheld in full.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 7th day of July 2015, Washington, D.C.



John F. Hackett

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

JUDICIAL WATCH

Plaintiff,

v.

U.S. Department of State,

Defendant.

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No. 1:14-cv-01242-RCL

**DECLARATION OF JOHN F. HACKETT
REGARDING EXEMPTIONS TAKEN IN RESPONSIVE DOCUMENTS**

EXHIBIT A

Plaintiff's FOIA Request



**Judicial
Watch**
*Because no one
is above the law!*

2014-06848

May 13, 2014

VIA CERTIFIED MAIL

Office of Information Programs and Services
A/GIS/IPS/RL
U. S. Department of State
Washington, D. C. 20522-8100

Re: Freedom of Information Act Request

Dear Freedom of Information Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, Judicial Watch, Inc. hereby requests that Office of the Secretary of State produce the following within twenty (20) business days:

- 1) Copies of any updates and/or talking points given to Ambassador Rice by the White House or any federal agency concerning, regarding, or related to the September 11 2012 attack on the U.S. consulate in Benghazi, Libya.
- 2) Any and all records or communications concerning, regarding, or relating to talking points or updates on the Benghazi attack given to Ambassador Rice by the White House or any federal agency.

We call your attention to President Obama's January 21, 2009 Memorandum concerning the Freedom of Information Act, in which he states:

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA...The presumption of disclosure should be applied to all decisions involving FOIA.¹

The memo further provides that "The Freedom of Information Act should be administered with a clear presumption: In the case of doubt, openness prevails."

Nevertheless, if any responsive record or portion thereof is claimed to be exempt from production under FOIA, please provide sufficient identifying information with respect to each allegedly exempt record or portion thereof to allow us to assess the propriety of the claimed exemption. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973),

¹ Freedom of Information Act. Pres. Mem. of January 21, 2009, 74 Fed. Reg. 4683.

Department of State

May 13, 2014

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cert. denied, 415 U.S. 977 (1974). In addition, any reasonably segregable portion of a responsive record must be provided, after redaction of any allegedly exempt material. 5 U.S.C. § 552(b).

For purposes of this request, the term “record” shall mean: (1) any written, printed, or typed material of any kind, including without limitation all correspondence, memoranda, notes, messages, letters, cards, facsimiles, papers, forms, telephone messages, diaries, schedules, calendars, chronological data, minutes, books, reports, charts, lists, ledgers, invoices, worksheets, receipts, returns, computer printouts, printed matter, prospectuses, statements, checks, statistics, surveys, affidavits, contracts, agreements, transcripts, magazine or newspaper articles, or press releases; (2) any electronically, magnetically, or mechanically stored material of any kind, including without limitation all electronic mail or e-mail; (3) any audio, aural, visual, or video records, recordings, or representations of any kind; (4) any graphic materials and data compilations from which information can be obtained; and (5) any materials using other means of preserving thought or expression.

Judicial Watch also hereby requests a waiver of both search and duplication fees pursuant to 5 U.S.C. §§ 552(a)(4)(A)(ii)(II) and (a)(4)(A)(iii). Judicial Watch is entitled to a waiver of search fees under 5 U.S.C. § 552(a)(4)(A)(ii)(II) because it is a member of the news media. *Cf. National Security Archive v. Department of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989)(defining news media within FOIA context). Judicial Watch has also been recognized as a member of the news media in other FOIA litigation. *See, e.g., Judicial Watch, Inc. v. U.S. Department of Justice*, 133 F. Supp.2d 52 (D.D.C. 2000); and, *Judicial Watch, Inc. v. Department of Defense*, 2006 U.S. Dist. LEXIS 44003, *1 (D.D.C. June 28, 2006). Judicial Watch regularly obtains information about the operations and activities of government through FOIA and other means, uses its editorial skills to turn this information into distinct works, and publishes and disseminates these works to the public. It intends to do likewise with the records it receives in response to this request.

Judicial Watch also is entitled to a complete waiver of both search fees and duplication fees pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). Under this provision, records:

shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester.

5 U.S.C. § 552(a)(4)(A)(iii).

Department of State

May 13, 2014

Page 3 of 3

In addition, if records are not produced within twenty (20) business days, Judicial Watch is entitled to a complete waiver of search and duplication fees under Section 6(b) of the OPEN Government Act of 2007, which amended FOIA at 5 U.S.C. § (a)(4)(A)(viii).

Judicial Watch is a 501(c)(3), not-for-profit, educational organization, and, by definition, it has no commercial purpose. Judicial Watch exists to educate the public about the operations and activities of government, as well as to increase public understanding about the importance of ethics and the rule of law in government. The particular records requested herein are sought as part of Judicial Watch's ongoing efforts to document the operations and activities of the federal government and to educate the public about these operations and activities. Once Judicial Watch obtains the requested records, it intends to analyze them and disseminate the results of its analysis, as well as the records themselves, as a special written report. Judicial Watch will also educate the public via radio programs, Judicial Watch's website, and/or newsletter, among other outlets. It also will make the records available to other members of the media or researchers upon request. Judicial Watch has a proven ability to disseminate information obtained through FOIA to the public, as demonstrated by its long-standing and continuing public outreach efforts.

Given these circumstances, Judicial Watch is entitled to a public interest fee waiver of both search costs and duplication costs. Nonetheless, in the event our request for a waiver of search and/or duplication costs is denied, Judicial Watch is willing to pay up to \$350.00 in search and/or duplication costs. Judicial Watch requests that it be contacted before any such costs are incurred, in order to prioritize search and duplication efforts.

In an effort to facilitate record production within the statutory time limit, Judicial Watch is willing to accept documents in electronic format (e.g. e-mail, .pdfs). When necessary, Judicial Watch will also accept the "rolling production" of documents.

If you do not understand this request or any portion thereof, or if you feel you require clarification of this request or any portion thereof, please contact us immediately at 202-646-5172 or kbailey@judicialwatch.org. We look forward to receiving the requested documents and a waiver of both search and duplication costs within twenty (20) business days. Thank you for your cooperation.

Sincerely,



Kate Bailey
Judicial Watch

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

JUDICIAL WATCH

Plaintiff,

v.

U.S. Department of State,

Defendant.

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No. 1:14-cv-01242-RCL

**DECLARATION OF JOHN F. HACKETT
REGARDING EXEMPTIONS TAKEN IN RESPONSIVE DOCUMENTS**

EXHIBIT B

Email from Ramona Cotca, Sep. 4, 2014

Prince, Robert (CIV)

From: Ramona Cotca <rcotca@JUDICIALWATCH.ORG>
Sent: Friday, September 12, 2014 9:45 AM
To: Prince, Robert (CIV)
Subject: RE: JW v State 14-1242

All good. Confirmed your language below is ok. Thanks.

Ramona R. Cotca
Senior Attorney
Judicial Watch, Inc.
425 Third Street, SW
Suite 800
Washington, DC 20024
(202)646-5172, ext. 328
(202)646-5199, facsimile
rcotca@JudicialWatch.org

This email is covered by the Electronic Communications Privacy Act, 18 U.S.C. Sec. 2510-2521 and may be legally privileged. This email is intended solely for the use of the individual to whom it is addressed and may contain information that is privileged, confidential or otherwise exempt from disclosure under applicable law. This message may be an attorney-client communication and as such is PRIVILEGED AND CONFIDENTIAL. If you are not the intended recipient, any dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please notify the sender immediately and permanently delete the original message. Thank you.

-----Original Message-----

From: Ramona Cotca
Sent: Friday, September 12, 2014 9:35 AM
To: 'Prince, Robert (CIV)'
Subject: RE: JW v State 14-1242
Importance: High

Btw, hold off on filing anything. Still hearing from the client on the scope paragraph below. Will confirm soon, but JW wanted it broader, I understand we may have to change our proposed deadlines. Thanks.

Ramona R. Cotca
Senior Attorney
Judicial Watch, Inc.
425 Third Street, SW
Suite 800
Washington, DC 20024
(202)646-5172, ext. 328
(202)646-5199, facsimile
rcotca@JudicialWatch.org

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-----Original Message-----

From: Prince, Robert (CIV) [mailto:Robert.Prince@usdoj.gov]
Sent: Thursday, September 11, 2014 4:42 PM
To: Ramona Cotca
Subject: RE: JW v State 14-1242

Ramona,

Attached as a courtesy are drafts of the motion and proposed order we agreed to yesterday regarding the schedule in this case. Can you please let me know by noon tomorrow (Friday) if there is any aspect that you feel does not accurately reflect our agreement? I need to file before I leave on my trip.

Also, to confirm my earlier discussion with you about the scope of your client's FOIA request, the Department is interpreting the phrases "updates and/or talking points" and "talking points or updates" to focus on talking points and updates to those talking points, not general intelligence updates about the Benghazi attacks (unless those updates were sent in furtherance of developing or updating talking points).

Thanks,

Rob

The information in this transmittal (including attachments, if any) is intended only for the recipient(s) listed above and contains information that is confidential. Any review, use, disclosure, distribution, or copying of this transmittal is prohibited except by or on behalf of the intended recipient. If you have received this transmittal in error, please notify me immediately and destroy all copies of the transmittal. Your cooperation is appreciated.

-----Original Message-----

From: Ramona Cotca [mailto:rcotca@JUDICIALWATCH.ORG]
Sent: Tuesday, September 09, 2014 1:03 PM
To: Prince, Robert (CIV)
Subject: RE: JW v State 14-1242

Sure. Now is good

Ramona R. Cotca
Senior Attorney
Judicial Watch, Inc.
425 Third Street, SW
Suite 800
Washington, DC 20024
(202)646-5172, ext. 328
(202)646-5199, facsimile
rcotca@JudicialWatch.org

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-----Original Message-----

From: Prince, Robert (CIV) [mailto:Robert.Prince@usdoj.gov]
Sent: Tuesday, September 09, 2014 1:00 PM
To: Ramona Cotca
Subject: RE: JW v State 14-1242

To clarify, I'm out of the office but can call on my cell. Just let me know when.

----- Original message -----

From: Ramona Cotca
Date: 09/09/2014 12:52 PM (GMT-05:00)
To: "Prince, Robert (CIV)"
Subject: RE: JW v State 14-1242

Rob,
I spoke with my client. It will be easier to discuss by phone at this point. Let me know when you have time for a call.
Thanks.
Ramona

Ramona R. Cotca
Senior Attorney
Judicial Watch, Inc.
425 Third Street, SW
Suite 800
Washington, DC 20024
(202)646-5172, ext. 328
(202)646-5199, facsimile
rcotca@JudicialWatch.org

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-----Original Message-----

From: Prince, Robert (CIV) [mailto:Robert.Prince@usdoj.gov]
Sent: Tuesday, September 09, 2014 9:24 AM

To: Ramona Cotca
Subject: RE: JW v State 14-1242

Ramona, if you need to get in touch with me today about this, email will reach me much more quickly than voicemail.

----- Original message -----

From: Ramona Cotca
Date: 09/05/2014 2:24 PM (GMT-05:00)
To: "Prince, Robert (CIV)"
Subject: RE: JW v State 14-1242

Sure. How about 4?

Ramona R. Cotca
Senior Attorney
Judicial Watch, Inc.
425 Third Street, SW
Suite 800
Washington, DC 20024
(202)646-5172, ext. 328
(202)646-5199, facsimile
rcotca@JudicialWatch.org<mailto:rcotca@JudicialWatch.org>

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From: Prince, Robert (CIV) [mailto:Robert.Prince@usdoj.gov]
Sent: Friday, September 05, 2014 1:07 PM
To: Ramona Cotca
Subject: JW v State 14-1242
Importance: High

Are you available for a call today about this case? According to the Court's order, we have to file dispositive motions by September 29. I'd like to talk about the scope of the search and a disclosure schedule we could propose to the Court; I think we need to file next week, based on my experience with Judge Lamberth.

Please let me know when would be a good time to talk.

Thanks,

Rob

Robert Prince
Trial Attorney

U.S. Department of Justice, Civil Division Federal Programs Branch For U.S. mail:

Post Office Box 883

Washington, D.C. 20044

For courier and hand deliveries:

20 Massachusetts Ave., N.W., Room 5106

Washington, D.C. 20001

(202) 305-3654 (phone)

(202) 616-8470 (fax)

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

JUDICIAL WATCH

Plaintiff,

v.

U.S. Department of State,

Defendant.

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No. 1:14-cv-01242-RCL

**DECLARATION OF JOHN F. HACKETT
REGARDING EXEMPTIONS TAKEN IN RESPONSIVE DOCUMENTS**

EXHIBIT C

**Judicial Watch v. State, (D.D.C. 13-951),
FOIA Request Letter**



**Judicial
Watch®**
*Because no one
is above the law!*

October 18, 2012

VIA CERTIFIED MAIL

Office of Information Programs and Services
A/GIS/IPS/RL
U. S. Department of State
Washington, D. C. 20522-8100

Re: Freedom of Information Act Request

Dear Freedom of Information Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, Judicial Watch, Inc. hereby requests that the United States Mission to the United Nations produce the following within twenty (20) business days:

- 1) Copies of any updates and/or talking points given to Ambassador Rice by the White House or any federal agency concerning, regarding, or related to the September 11 2012 attack on the U.S. consulate in Benghazi, Libya.
- 2) Any and all records or communications concerning, regarding, or relating to talking points or updates on the Benghazi attack given to Ambassador Rice by the White House or any federal agency.

The time frame for this request is September 11th to September 30th, 2012.

We call your attention to President Obama's January 21, 2009 Memorandum concerning the Freedom of Information Act, in which he states:

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA...The presumption of disclosure should be applied to all decisions involving FOIA.¹

The memo further provides that "The Freedom of Information Act should be administered with a clear presumption: In the case of doubt, openness prevails."

Nevertheless, if any responsive record or portion thereof is claimed to be exempt

¹ Freedom of Information Act. Pres. Mem. of January 21, 2009, 74 Fed. Reg. 4683.

Department of State

October 18, 2012

Page 2 of 4

from production under FOIA, please provide sufficient identifying information with respect to each allegedly exempt record or portion thereof to allow us to assess the propriety of the claimed exemption. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). In addition, any reasonably segregable portion of a responsive record must be provided, after redaction of any allegedly exempt material. 5 U.S.C. § 552(b).

For purposes of this request, the term "record" shall mean: (1) any written, printed, or typed material of any kind, including without limitation all correspondence, memoranda, notes, messages, letters, cards, facsimiles, papers, forms, telephone messages, diaries, schedules, calendars, chronological data, minutes, books, reports, charts, lists, ledgers, invoices, worksheets, receipts, returns, computer printouts, printed matter, prospectuses, statements, checks, statistics, surveys, affidavits, contracts, agreements, transcripts, magazine or newspaper articles, or press releases; (2) any electronically, magnetically, or mechanically stored material of any kind, including without limitation all electronic mail or e-mail; (3) any audio, aural, visual, or video records, recordings, or representations of any kind; (4) any graphic materials and data compilations from which information can be obtained; and (5) any materials using other means of preserving thought or expression.

Judicial Watch also hereby requests a waiver of both search and duplication fees pursuant to 5 U.S.C. §§ 552(a)(4)(A)(ii)(II) and (a)(4)(A)(iii). Judicial Watch is entitled to a waiver of search fees under 5 U.S.C. § 552(a)(4)(A)(ii)(II) because it is a member of the news media. Cf. *National Security Archive v. Department of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989)(defining news media within FOIA context). Judicial Watch has also been recognized as a member of the news media in other FOIA litigation. See, e.g., *Judicial Watch, Inc. v. U.S. Department of Justice*, 133 F. Supp.2d 52 (D.D.C. 2000); and, *Judicial Watch, Inc. v. Department of Defense*, 2006 U.S. Dist. LEXIS 44003, *1 (D.D.C. June 28, 2006). Judicial Watch regularly obtains information about the operations and activities of government through FOIA and other means, uses its editorial skills to turn this information into distinct works, and publishes and disseminates these works to the public. It intends to do likewise with the records it receives in response to this request.

Judicial Watch also is entitled to a complete waiver of both search fees and duplication fees pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). Under this provision, records:

shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester.

Department of State

October 18, 2012

Page 3 of 4

5 U.S.C. § 552(a)(4)(A)(iii).

In addition, if records are not produced within twenty (20) business days, Judicial Watch is entitled to a complete waiver of search and duplication fees under Section 6(b) of the OPEN Government Act of 2007, which amended FOIA at 5 U.S.C. § (a)(4)(A)(viii).

Judicial Watch is a 501(c)(3), not-for-profit, educational organization, and, by definition, it has no commercial purpose. Judicial Watch exists to educate the public about the operations and activities of government, as well as to increase public understanding about the importance of ethics and the rule of law in government. The particular records requested herein are sought as part of Judicial Watch's ongoing efforts to document the operations and activities of the federal government and to educate the public about these operations and activities. Once Judicial Watch obtains the requested records, it intends to analyze them and disseminate the results of its analysis, as well as the records themselves, as a special written report. Judicial Watch will also educate the public via radio programs, Judicial Watch's website, and/or newsletter, among other outlets. It also will make the records available to other members of the media or researchers upon request. Judicial Watch has a proven ability to disseminate information obtained through FOIA to the public, as demonstrated by its long-standing and continuing public outreach efforts.

Given these circumstances, Judicial Watch is entitled to a public interest fee waiver of both search costs and duplication costs. Nonetheless, in the event our request for a waiver of search and/or duplication costs is denied, Judicial Watch is willing to pay up to \$350.00 in search and/or duplication costs. Judicial Watch requests that it be contacted before any such costs are incurred, in order to prioritize search and duplication efforts.

In an effort to facilitate record production within the statutory time limit, Judicial Watch is willing to accept documents in electronic format (e.g. e-mail, .pdfs). When necessary, Judicial Watch will also accept the "rolling production" of documents.

If you do not understand this request or any portion thereof, or if you feel you require clarification of this request or any portion thereof, please contact us immediately at 202-646-5172 or kbailey@judicialwatch.org. We look forward to receiving the requested documents and a waiver of both search and duplication costs within twenty (20) business days. Thank you for your cooperation.

Sincerely,



Department of State

October 18, 2012

Page 4 of 4

Kate Bailey
Judicial Watch

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

JUDICIAL WATCH

Plaintiff,

v.

U.S. Department of State,

Defendant.

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No. 1:14-cv-01242-RCL

**DECLARATION OF JOHN F. HACKETT
REGARDING EXEMPTIONS TAKEN IN RESPONSIVE DOCUMENTS**

EXHIBIT D

Letter of Nov. 12, 2014



United States Department of State

Washington, D.C. 20520

NOV 12 2014

Case No. F-2014-08848

Ms. Kate Bailey
425 Third St., SW, Suite 800
Washington, DC 20024

Dear Ms. Bailey:

In response to your request dated May 13, 2014 under the Freedom of Information Act (the "FOIA"), 5 U.S.C. § 552, we have initiated a search of the following Department of State record systems: the Office of the Secretary.

The search of the records of the Office of the Secretary has resulted in the retrieval of four documents responsive to your request. We have determined that all four documents have been previously released to you in case number F-2012-38774. Documents C05415288, C05415290, C05415756 and C05415775 were released to you on April 17, 2014. The released documents are enclosed.

If you have any questions, you may contact Assistant United States Attorney Robert Prince at (202) 305-3654 or Robert.Prince@usdoj.gov. Please be sure to refer to the case number shown above in all correspondence about this case.

Sincerely,

A handwritten signature in dark ink, appearing to read "John F. Hackett".
John F. Hackett, Acting Director
Office of Information Programs and Services

Enclosures:
As stated.

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

JUDICIAL WATCH

Plaintiff,

v.

U.S. Department of State,

Defendant.

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No. 1:14-cv-01242-RCL

**DECLARATION OF JOHN F. HACKETT
REGARDING EXEMPTIONS TAKEN IN RESPONSIVE DOCUMENTS**

EXHIBIT E

**Text of Letter to Former Secretaries of State
Concerning the Federal Records Act of 1950**

Gerlach, Alec

From: State Department Press Office <usstatebpa@subscriptions.fcg.gov>
Sent: Tuesday, March 10, 2015 5:28 PM
To: Gerlach, Alec
Subject: Letter Sent by the Department to Representatives of Former Secretaries of State

March 10, 2015

State Department Press Corps,

Please find below the text of the October 28, 2014 letter sent by the Department to representatives of former Secretaries of State, including Secretaries Madeleine K. Albright, Colin Powell, Condoleezza Rice, and Hillary Clinton. The letter requested that copies of any federal record be made available to the State Department for preservation.

Full text of the letters follow:

Dear [Representative of former Secretary of State]:

The Department of State has a longstanding and continuing commitment to preserving the history of U.S. diplomacy, established in authorities under the Federal Records Act of 1950. I am writing to you, the representative of Secretary of State [NAME], as well as to representatives of other former Secretaries (principals), to request your assistance in further meeting this requirement.

The Federal Records Act of 1950, as amended, 44 U.S.C. chapters 29, 31 and 33, seeks to ensure the preservation of an authoritative record of official correspondence, communications, and documentation. Last year, in Bulletin 2013- 03, the National Archives and Records Administration (NARA) clarified records management responsibilities regarding the use of personal email accounts for official government business. NARA recommended that agencies refer to its guidance when advising incoming and departing agency employees about their records management responsibilities. This bulletin was followed by additional NARA guidance on managing email issued on September 15, 2014. See enclosed.

We recognize that some period of time has passed since your principal served as Secretary of State and that the NARA guidance post-dates that service. Nevertheless, we bring the NARA guidance to your attention in order to ensure that the Department's records are as complete as possible. Accordingly, we ask that should your principal or his or her authorized representative be aware or become aware in the future of a federal record, such as an email sent or received on a personal email account while serving as Secretary of State, that a copy of this record be made available to the Department. In this regard, please note that diverse Department records are subject to various disposition schedules, with most Secretary of State records retained permanently. We ask that a record be provided to the Department if there is reason to believe that it may not otherwise be preserved in the Department's recordkeeping system.

The Department is willing to provide assistance to you in this effort. In the meantime, should you have any questions regarding this request, please do not hesitate to contact [Name of Agency Records Officer], A/GIS/IPS/RA, Agency Records Officer, at [(XXX) XXX-XXXX].

We greatly appreciate your consideration of and assistance with this matter.

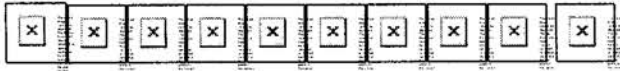
Sincerely,

Patrick F. Kennedy

Stay connected with the State Department Office of Press Relations:



Stay connected with the State Department:



This email was sent to gerlachja2@state.gov using GovDelivery, on behalf of U.S. Department of State - 2201 C Street NW
Washington, DC 20520



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

JUDICIAL WATCH

Plaintiff,

v.

U.S. Department of State,

Defendant.

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No. 1:14-cv-01242-RCL

**DECLARATION OF JOHN F. HACKETT
REGARDING EXEMPTIONS TAKEN IN RESPONSIVE DOCUMENTS**

EXHIBIT F

Email from Ramona Cotca, Jun. 15, 2015

Prince, Robert (CIV)

From: Ramona Cotca <rcotca@JUDICIALWATCH.ORG>
Sent: Monday, June 15, 2015 10:06 PM
To: Prince, Robert (CIV)
Subject: Re: JW v. State 14-1242

That's what I thought. Just making sure. Thanks.
Ramona

> On Jun 15, 2015, at 9:20 PM, Prince, Robert (CIV) <Robert.Prince@usdoj.gov> wrote:

>

> Thanks, Ramona. The Department did not withhold any records in full; it produced 3 with redactions and 1 in full.

>

> ----- Original message -----

> From: Ramona Cotca

> Date:06/15/2015 8:34 PM (GMT-05:00)

> To: "Prince, Robert (CIV)"

> Subject: JW v. State 14-1242

>

> Rob, regarding the other case (14-1242), JW is not challenging the redactions of the pages produced. I am not aware of any records having been withheld in full, but to the extent such records were withheld, this response does not apply to those records. If you have any questions, please let me know. Thanks.

> Ramona

>

> Ramona R. Cotca

> Senior Attorney

> Judicial Watch, Inc.

> 425 Third Street, SW

> Suite 800

> Washington, DC 20024

> (202)646-5172, ext. 328

> (202)646-5199, facsimile

> rcotca@JudicialWatch.org<mailto:rcotca@JudicialWatch.org>

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>

> From: Prince, Robert (CIV) [mailto:Robert.Prince@usdoj.gov]

> Sent: Friday, June 12, 2015 11:53 AM

> To: Ramona Cotca

> Subject: RE: Activity in Case 1:15-cv-00692-APM JUDICIAL WATCH, INC.

> v. U.S. DEPARTMENT OF STATE Order

>
> Thanks, Ramona.
>
> From: Ramona Cotca [mailto:rcotca@JUDICIALWATCH.ORG]
> Sent: Friday, June 12, 2015 11:53 AM
> To: Prince, Robert (CIV)
> Subject: RE: Activity in Case 1:15-cv-00692-APM JUDICIAL WATCH, INC.
> v. U.S. DEPARTMENT OF STATE Order
>
> My thought was to give us enough time if we need to go back to our clients before we have to file. I can get a quick turn-around from my end, but I know sometimes State can be slower at getting back. But if you think Monday or Tuesday will give you enough time, that works for me. Let me know which day you prefer.
> In regards to the other case (14-1242), I cannot confirm that at present. I have to get back to you on that one but will do so as soon as possible.
>
> Ramona
>
> Ramona R. Cotca
> Senior Attorney
> Judicial Watch, Inc.
> 425 Third Street, SW
> Suite 800
> Washington, DC 20024
> (202)646-5172, ext. 328
> (202)646-5199, facsimile
> rcotca@JudicialWatch.org<mailto:rcotca@JudicialWatch.org>
>
> This email is covered by the Electronic Communications Privacy Act, 18 U.S.C. Sec. 2510-2521 and may be legally privileged. This email is intended solely for the use of the individual to whom it is addressed and may contain information that is privileged, confidential or otherwise exempt from disclosure under applicable law. This message may be an attorney-client communication and as such is PRIVILEGED AND CONFIDENTIAL. If you are not the intended recipient, any dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please notify the sender immediately and permanently delete the original message. Thank you.
>
> From: Prince, Robert (CIV) [mailto:Robert.Prince@usdoj.gov]
> Sent: Friday, June 12, 2015 11:44 AM
> To: Ramona Cotca
> Subject: RE: Activity in Case 1:15-cv-00692-APM JUDICIAL WATCH, INC.
> v. U.S. DEPARTMENT OF STATE Order
>
> Ramona,
>
> Realistically, I think we should try to talk early the week after, say Monday the 22d or Tuesday the 23d. State has to pull together information on the searches before I can meaningfully discuss schedule. As of now, I can be available any time either afternoon.
>
> I have a question about the talking points case (Judicial Watch v. State, 14-1242). Am I right in my understanding that Judicial Watch is only challenging the adequacy of the search, and that it is not challenging the redactions taken on 3 of the 4 documents released in response to the FOIA request?
>
> Thanks,

>
> Rob
>
> Robert Prince
> Trial Attorney
> U.S. Department of Justice, Civil Division Federal Programs Branch
> (202) 305-3654
>
> The information in this transmittal (including attachments, if any) is intended only for the recipient(s) listed above and contains information that is confidential. Any review, use, disclosure, distribution, or copying of this transmittal is prohibited except by or on behalf of the intended recipient. If you have received this transmittal in error, please notify me immediately and destroy all copies of the transmittal. Your cooperation is appreciated.
>
> From: Ramona Cotca [mailto:rcotca@JUDICIALWATCH.ORG]
> Sent: Friday, June 12, 2015 10:57 AM
> To: Prince, Robert (CIV)
> Subject: FW: Activity in Case 1:15-cv-00692-APM JUDICIAL WATCH, INC.
> v. U.S. DEPARTMENT OF STATE Order
>
> Rob,
> Should we schedule a time to confer next week in light of our June 26 deadline in the new State case above? Let me know a few days/times that are good for you. Thanks.
> Ramona
>
> Ramona R. Cotca
> Senior Attorney
> Judicial Watch, Inc.
> 425 Third Street, SW
> Suite 800
> Washington, DC 20024
> (202)646-5172, ext. 328
> (202)646-5199, facsimile
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> U.S. DEPARTMENT OF STATE Order
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> Docket Text:

> ORDER. Both a complaint and an answer are now before the court in this

> FOIA case. It is hereby ordered that the parties shall meet and confer

> and file a Joint Status Report no later than June 26, 2015. Please see

> the attached Order for additional details. Signed by Amit P. Mehta on

> 06/11/2015. (lcapm2)

>

> 1:15-cv-00692-APM Notice has been electronically mailed to:

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> cee938659155f629953688432e24453e003a6614e7bae1fa9fc8359e172c]]

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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)

**DEFENDANT’S STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO GENUINE DISPUTE**

Pursuant to LCvR 7(h), Defendant, the United States Department of State (“the Department”), submits this Statement of Material Facts as to Which There is No Genuine Dispute.

1. The Office of the Secretary is a component of the Department. Declaration of John F. Hackett ¶ 9 (“Hackett Decl’n”).

2. On March 13, 2014, Plaintiff Judicial Watch, Inc. submitted a two-part FOIA request (the “FOIA Request”) to the Office of the Secretary requesting the following:

- 1) Copies of any updates and/or talking points given to Ambassador Rice by the White House or any federal agency concerning, regarding, or related to the September 11, 2012 attack on the U.S. consulate in Benghazi, Libya.
- 2) Any and all records or communications concerning, regarding, or relating to talking points or updates on the Benghazi attack given to Ambassador Rice by the White House or any federal agency.

Complaint ¶ 5 (ECF No. 1); Hackett Decl’n ¶ 4 Ex. A.

3. In correspondence with counsel for the Department, counsel for Judicial Watch clarified that its request does not seek all records relating to the attacks of September 11, 2012 in Benghazi, but rather only “talking points and updates to those talking points, not general

intelligence updates about the Benghazi attacks (unless those updates were sent in furtherance of developing or updating talking points).” Hackett Decl’n ¶ 5 & Ex. B.

4. The FOIA Request used the same wording as an earlier FOIA request dated October 18, 2012, that Judicial Watch had submitted to the Department’s United States Mission to the United Nations (“US/UN”)—the component of the Department at which former Ambassador Rice worked (the “US/UN FOIA Request”).¹ Hackett Decl’n at n. 1 & Ex. C.

5. During the course of previous litigation involving the US/UN FOIA Request, the Department released to Judicial Watch 98 documents, in whole or in part, totaling 1,439 pages. Hackett Decl’n at n.1. The parties executed a settlement agreement and filed a stipulation of dismissal with prejudice on September 12, 2014. *Judicial Watch v. State*, (D.D.C. 13-951), Stipulation of Dismissal with Prejudice (Dkt. No. 18).

6. Because the FOIA Request specified that it sought records only from the Office of the Secretary, the Department’s Office of the Executive Secretariat Staff (“S/ES-S”), which is responsible for coordinating search responses for the Office of the Secretary of State, conducted the searches for responsive records. Hackett Decl’n ¶ 8.

7. S/ES-S identified four electronic records systems or databases reasonably likely to contain responsive records within the Office of the Secretary: Secretariat Tracking and Retrieval System (“STARS”), Secretariat Telegram Processing System (“STePS”), Cable Archiving Retrieval System (“CARS”), and the Top Secret files (“TS”). Hackett Decl’n ¶ 10.

8. STARS is “an automated system used to track, control, and record documents containing substantive foreign policy information passing to, from, and through the offices of the Secretary of State, the Deputy Secretary of State, and other Department principal officers. Original documents are indexed, scanned, and stored as images in STARS. Information in STARS covers the period 1988 to the present.” Hackett Decl’n ¶ 10, n. 3.

¹ The Previous FOIA Request was date-limited to September 11, 2012, through September 30, 2012.

9. Each document in STARS contains a searchable abstract created by a Technical Information Specialist when the document was added to the database; each abstract is designed to capture the subject matter of the document. Hackett Decl’n ¶ 13. For documents from the time period relevant to the FOIA Request, the abstracts are the only portions of STARS whose text may be searched. *Id.*

10. STePS is an electronic system “designed to distribute cables among the Department’s principals.” Hackett Decl’n ¶ 10, n. 4.

11. The full text of the documents in STePS is searchable. Hackett Decl’n ¶ 13.

12. CARS is an electronic system “designed to provide access to a contemporary portion of the Department’s telegram archive deemed to be of general interest.” Hackett Decl’n ¶ 10, n. 5.

13. The full text of the documents in CARS is searchable. Hackett Decl’n ¶ 13.

14. During the TS search, the search terms were applied to an index of TS files. Hackett Decl’n ¶ 13. Each TS index entry, along with key words and a topic description, was added by a Management Analyst into the index. *Id.* This index, rather than the full text of the TS files themselves, can be searched. *Id.*

15. Members of the Office of the Secretary, based on their knowledge of which staff members within the Office of the Secretary during former Secretary Clinton’s tenure worked on issues related to the Benghazi attacks, identified three individuals whose state.gov email accounts were therefore reasonably likely to contain responsive records: Cheryl Mills (Counselor and Chief of Staff to former Secretary Clinton), Jacob Sullivan (Deputy Chief of Staff for Policy to former Secretary Clinton), and Huma Abedin (Deputy Chief of Staff for Operations to former Secretary Clinton) Hackett Decl’n ¶ 11. S/ES-S searched the emails, as well as attachments that contained searchable text, in the state.gov email accounts of those three individuals. *Id.* ¶ 13.

16. A Management Analyst searched these four electronic records systems and the state.gov accounts of Mr. Sullivan, Ms. Mills, and Ms. Abedin using the following search terms:

- Ambassador
- Rice
- USUN/W
- September 11, 2012
- attack
- Benghazi
- Libya
- talking points
- TPs
- updates

Hackett Decl'n ¶ 12.

17. The search terms were used to conduct a disjunctive search (also known as an “or search” because they are created using a Boolean or operator), which means any document (or abstract, in the case of STARS) that contained any one of these words would be returned.

Hackett Decl'n ¶ 14. Thus, the searches returned each record that contained (or whose abstract contained) the word “Ambassador”, as well as each one that contained the word “attack” or “Benghazi” or “Libya,” whether or not that document actually referred to the attacks or had been given to Ambassador Rice. *Id.*

18. The records returned by the text searches were then reviewed for responsiveness. Hackett Decl'n ¶ 14.

19. The Management Analyst reviewed each of the 98 documents, totaling 1,439 pages, that were produced in response to the US/UN FOIA Request. Hackett Decl'n ¶¶ 4, 15. During this review, to guard against the possibility that a record had been overlooked in the

primary searches, the Management Analyst examined each sender and recipient in those documents; any document with a recipient or sender who was in the Office of the Secretary at the time the document was sent was treated as responsive. *Id.* ¶ 15.

20. As a result of the text searches and the additional review of the documents produced in response to the US/UN FOIA Request, the Management Analyst found four responsive documents, all of which had been produced in response to the US/UN FOIA Request. Hackett Decl'n ¶ 16.

21. The Department produced the four responsive documents to Judicial Watch by letter dated November 12, 2014. Hackett Decl'n ¶ 16.

22. After the searches in this case had been completed and the four responsive documents delivered to the Judicial Watch, the Department received approximately 55,000 pages of hard copy emails and attachments to emails from former Secretary Clinton. Hackett Decl'n ¶ 17. Former Secretary Clinton provided these emails in response to an earlier request from the Department of State that, if former Secretaries or their representatives were “aware or [were to] become aware in the future of a federal record, such as an email sent or received on a personal email account while serving as Secretary of State, that a copy of this record be made available to the Department.” *Id.*

23. The Deputy Director of S/ES-S searched the approximately 55,000 pages of emails and attachments to emails provided to the Department by former Secretary Clinton by applying the same search terms used for the other searches, *see* Hackett Decl'n ¶ 12, to two PDFs containing scanned images of those documents that were sent or received on or after September 11, 2012 (the date of the attacks in Benghazi), through the end of former Secretary Clinton's tenure on January 31, 2013. *Id.* ¶ 17. For each PDF, the Deputy Director entered a search term individually into the “Find” command in Adobe Reader and navigated to each occurrence of the search term in the PDF. *Id.* The Deputy Director reviewed for responsiveness

each individual document that contained an occurrence of the search term. This process was repeated for each search term listed above in Paragraph 12. *Id.* No responsive records were found. *Id.*

24. Earlier this year, the Department sent letters to Mr. Sullivan, Ms. Mills, and Ms. Abedin, asking them to make available to the Department any federal records that they may have in their possession, such as emails concerning official government business sent or received on a personal email account while serving in their official capacities with the Department, if there is any reason to believe that those records may not otherwise be preserved in the Department's recordkeeping system. Hackett Decl'n ¶ 18.

25. All three individuals have responded to those letters, through counsel, to inform the Department that they have begun the process of searching for and providing the Department documents in their possession that may potentially be federal records. Hackett Decl'n ¶ 19. That process is ongoing. *Id.*

26. On June 26, 2015, counsel for Ms. Mills and counsel for Mr. Sullivan provided the Department with a number of documents in response to the letters. Hackett Decl'n ¶ 20.

27. An attorney in the Department's Office of the Legal Adviser reviewed these newly received documents and discovered one responsive document among those that had been provided by Mr. Sullivan, a two-message email chain that mentioned the talking points in the course of a larger discussion, which it has determined must be withheld in full pursuant to FOIA Exemption 5. Hackett Decl'n ¶ 20.

28. The earlier message in that email chain is a forward of an email that was sent to, among other people, former Secretary Clinton. Hackett Decl'n ¶ 21. The Department has determined that it was among the 55,000 pages provided to the Department by former Secretary Clinton. *Id.* This message had been reviewed during the review of the documents provided by former Secretary Clinton but deemed unresponsive because the references to "talking points"

contained therein appeared to be about a separate set of talking points being developed within the Office of the Secretary for future use. *Id.* The later message in the email chain, which was not sent to former Secretary Clinton, made it clear that one portion of the earlier message had, indeed, been discussing the talking points given to Ambassador Rice. *Id.* The copy of this message included in the document received from Mr. Sullivan is identical to the copy received from former Secretary Clinton. *Id.*

29. The Department withheld one document in full as exempt from release under FOIA Exemption 5, 5 U.S.C. § 552(b)(5) pursuant to the deliberative process privilege. Hackett Decl’n ¶ 24.

30. Counsel for Judicial Watch has confirmed via email that Judicial Watch is not challenging any of the redactions in the four documents produced to it in response to the FOIA Request. Hackett Decl’n ¶ 24 & Ex. F.

31. The document withheld in full is a three-page intra-agency email exchange consisting of two messages. Hackett Decl’n ¶ 30.

32. The earlier message in that email chain is from Jacob Sullivan to former Secretary Clinton and Cheryl Mills (who is listed on the “Cc” address line) and has the subject “Key Points”; it was sent on September 29, 2012 at 11:09 AM. Hackett Decl’n ¶ 30.

33. The later message is from Cheryl Mills to Jake Sullivan and Philippe Reines (Deputy Assistant Secretary of State for Strategic Communications and Senior Communications Advisor to Secretary Clinton) and has the subject “Fwd: REVISED Key Points”; it was sent on September 29, 2012 at 1:18 PM. Hackett Decl’n ¶ 30.

34. The bodies of the messages in the document withheld in full consist of drafts, composed by advisors to former Secretary Clinton, of a proposed future communication from the former Secretary to a member of the U.S. Senate concerning various issues related to the attacks of September 11, 2012 in Benghazi. Hackett Decl’n ¶ 30. A portion of each draft consisted of a

summary of the talking points that had been sent to Ambassador Rice. *Id.* The Department has withheld this material in full under FOIA Exemption 5 pursuant to the deliberative process privilege. *Id.*

35. As non-final drafts, the bodies of the messages in the document withheld in full consist in their entirety of information that is pre-decisional and deliberative in nature. Hackett Decl'n ¶ 31.

36. Release of the material in the document withheld in full could reasonably be expected to chill the frank deliberations that occur when senior staff are preparing points or other draft remarks for use by senior Department officials in addressing a matter of public controversy. Hackett Decl'n ¶ 31.

37. The Department withheld the domain names associated with the private email addresses of Ms. Mills, Mr. Sullivan, and Mr. Reines under FOIA Exemption 6. Hackett Decl'n ¶ 30.

38. Director Hackett weighed the public interest in disclosure of the domain names against the privacy interests of the individuals whose private email addresses appear in the email chain. Hackett Decl'n ¶ 32-33.

39. Director Hackett found that disclosure of the email addresses could subject the individuals to harassment and would result in a clearly unwarranted invasion of privacy. *Id.* ¶¶ 29, 33. He also determined that the release would shed no light on government operations and thus would not serve the "core purpose" for which Congress enacted FOIA. *Id.* ¶ 29, 33.

40. Director Hackett concluded that the privacy interest clearly outweighs any public interest in disclosure. Hackett Decl'n ¶ 29.

41. Director Hackett concluded that the information was exempt from release under FOIA Exemption 6. Hackett Decl'n ¶ 33.

42. The Department conducted a line-by-line review of the document withheld in full and determined that there was no reasonably segregable, non-exempt material that could be released. Hackett Decl'n ¶ 34.

Dated: July 7, 2015

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

ELIZABETH J. SHAPIRO
Deputy Branch Director

/s/ Robert J. Prince
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**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)

**PROPOSED ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

Upon consideration of Defendant's motion for summary judgment, any response and reply thereto, and the entire record herein, it is hereby:

ORDERED that defendant's motion is **GRANTED**. It is further

ORDERED that judgment is entered in favor of Defendant.

Date

Royce C. Lamberth, United States District Judge