

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

JUDICIAL WATCH, INC.,	)	
	)	
Plaintiff,	)	Civil Action No. 13-cv-1363 (EGS)
	)	
v.	)	
	)	
U.S. DEPARTMENT OF STATE,	)	
	)	
Defendant.	)	

**PLAINTIFF’S RESPONSE TO  
DEFENDANT’S AUGUST 14, 2015 STATUS REPORT**

Plaintiff Judicial Watch, Inc., by counsel, respectfully submits this response to Defendant’s August 14, 2015 Status Report:

1. Like its previous filings, Defendant’s August 14, 2015 Status Report fails to provide the basic information requested by the Court. *See* Plaintiff’s August 10, 2015 Response.
  
2. The Court ordered Defendant to identify any and all servers, accounts, hard drives, or other devices currently in the possession or control of the State Department or otherwise that may contain responsive information. In response, Defendant submitted a declaration by the head of Defendant’s FOIA office in which he testifies that Defendant “is not currently aware of any personal computing devices issued by the Department to former Secretary Clinton, Ms. Abedin, or Ms. Mills that may contain responsive records.” Defendant’s August 14, 2015 Status Report at ¶ 8.
  
3. Taking this sworn statement on its face, it appears as though the declarant made no effort whatsoever to find out what electronic devices the former head of the agency and two

of her closest advisors used to conduct official government business for four years and where these electronic devices may be located or if they are still in existence.

4. Similarly, Defendant offered no evidence whatsoever concerning servers, backups, or other devices in its possession.

5. In addition, Defendant does not identify whether former Secretary Clinton was provided or used a state.gov email address.

6. Moreover, only now – more than 18 months after the initial searches were conducted – does Defendant disclose that it searched the state.gov email accounts of “two other former employees.” August 14, 2015 Status Report at ¶ 7. Defendant does not identify who those employees are or whether they also used former Secretary Clinton’s email server or any other non-state.gov email address to conduct official government business. The mere fact that two other unnamed individuals may have records responsive to Plaintiff’s FOIA request is material, should have been disclosed at the July 31, 2015 Status Hearing, if not sooner, and raises a variety of additional questions.

7. While wholly ignoring the Court’s directive, Defendant dismisses the Court’s concerns as irrelevant by attempting to revive an argument already rejected by the Court.

8. During the July 31, 2015 Status Hearing,<sup>1</sup> Defendant argued that this case is an ordinary FOIA lawsuit and the next step should be dispositive briefing concerning the adequacy of Defendant’s searches. The Court rejected this argument. The Court stated:

But there's one thing about me sending the Government off on a fishing expedition to try and find something. There's another thing though for the Government to ask former government employees tell us whether or not you maintained our files on your private servers and other electronic devices or otherwise. And otherwise would be electronic devices or in that box in their garage or whatever. Tell us that. And if the answer is yes, you must declare under

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<sup>1</sup> The full transcript for the July 31, 2015 Status Hearing is attached as Exhibit A.

penalty whether or not you have provided the Government with copies of all of those materials. *And if you haven't, give us those materials and then we determine whether bases exist for other kinds of discovery.*

Transcript at 21 (emphasis added).

9. Following the July 31, 2015 Status Hearing, the Court gave Defendant the opportunity to provide answers to questions that are fundamental to whether Defendant has satisfied its obligations under FOIA. Defendant did not do so. It has only submitted partial answers with material omissions. Until complete answers are provided to these questions, the Court and Plaintiff cannot even hope to understand – let alone determine – whether Defendant has conducted searches reasonably calculated to uncover all relevant documents.

10. Because Defendant and the three individuals – who apparently are really five individuals – have now failed to comply with the Court's order and to provide complete answers to basic questions, Plaintiff agrees with the Court's assessment that a time may come that "other kinds of discovery" would be appropriate. That time may be now.

11. A Status Hearing is currently scheduled for September 10, 2015. Because two weeks have gone by and the Court and Plaintiff are no closer to knowing where responsive records may exist, Plaintiff requests that the Court advance the scheduled hearing to this week to discuss the possibility of discovery or other means to gather the necessary information.

Dated: August 17, 2015

Respectfully submitted,

/s/ Michael Bekesha  
Michael Bekesha  
JUDICIAL WATCH, INC.  
425 Third Street S.W., Suite 800  
Washington, DC 20024  
(202) 646-5172

*Counsel for Plaintiff Judicial Watch, Inc.*

## **Exhibit A**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,

Plaintiff,

vs.

UNITED STATES DEPARTMENT  
OF STATE,

Defendant.

CA No.  
13-CV-1363 (EGS)  
Washington, DC

July 31, 2015

11:22 a.m.

TRANSCRIPT OF STATUS HEARING  
BEFORE THE HONORABLE EMMET G. SULLIVAN  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: MICHAEL BEKESHA, ATTORNEY  
Judicial Watch, Inc.  
425 Third Street, SW, Suite 800  
Washington, DC 20024  
202-646-5172

For the Defendant: PETER T. WECHSLER, TRIAL ATTORNEY  
U.S. Department of Justice  
Federal Programs Branch - Civil Div.  
20 Massachusetts Avenue, NW  
Washington, DC 20530  
202-514-2705

Court Reporter: JEFF M. HOOK, CSR, RPR  
Official Court Reporter  
U.S. Courthouse, Room 4700-C  
333 Constitution Avenue, NW  
Washington, DC 20001  
202-354-3373

Proceedings recorded by mechanical stenography; transcript  
produced by computer-aided transcription.

1 P R O C E E D I N G S

2 COURTROOM DEPUTY: Calling civil action 13-1363,  
3 Judicial Watch, Inc. versus Department of State. Would  
4 counsel please approach the lecturn and identify themselves  
5 for the record.

6 MR. BEKESHA: Good morning, your Honor. Michael  
7 Bekesha on behalf of Judicial Watch. Along with me is Paul  
8 Orfanedes and Tom Fitton.

9 THE COURT: Alright, good morning.

10 MR. WECHSLER: Good morning, your Honor. Peter  
11 Wechsler from the Department of Justice representing the State  
12 Department. Along with me are Elizabeth Shapiro and Marcia  
13 Berman.

14 THE COURT: Alright, good morning. There was a  
15 document filed last evening that seems to suggest that  
16 whatever disputes there were, they've been resolved, is that  
17 correct? Have you seen that?

18 MR. BEKESHA: Yes, we have, your Honor.

19 THE COURT: Why don't you come forward. Do you  
20 agree?

21 MR. BEKESHA: Thank you, your Honor. With respect  
22 to what was filed yesterday, when we filed the joint status  
23 report on July 1<sup>st</sup>, there were three issues that were  
24 involved: When the State Department would search the 55,000  
25 pages of e-mails; when the State Department would search

1 e-mails provided to them by Ms. Abedin and Ms. Mills; and then  
2 the third issue was whether those additional searches was  
3 sufficient to satisfy the standards of FOIA. So when we filed  
4 it, there were three issues of contention. The Department of  
5 State changed their position. They satisfied now two of our  
6 concerns, the first two issues, but one issue does remain.

7 THE COURT: Alright. And the remaining issue is  
8 which one?

9 MR. BEKESHA: Whether the State Department will  
10 conduct additional searches, because the searches that have  
11 been conducted to date are incomplete.

12 THE COURT: Okay. Does not the last paragraph of  
13 the document, document 17, address that issue, that the  
14 Department will also conduct a revised search of the records  
15 system that were initially searched? Does that not resolve  
16 the third issue?

17 MR. BEKESHA: It does not, your Honor. What that  
18 would be would be searching the same systems of records with  
19 these search terms. Our concern and the issue before the  
20 Court is whether or not that search is sufficient because they  
21 are incomplete systems records. And the State Department has  
22 known for the past three years -- or two years, that those  
23 systems of records are incomplete. Mrs. Clinton, several of  
24 her aides used non State Department e-mail addresses to  
25 conduct official business. Those e-mails will not necessarily

1 be right in the system of records they search.

2 THE COURT: So what do you believe that the  
3 Government should be doing then to address the third issue  
4 that you contend is unresolved?

5 MR. BEKESHA: I think what we had originally asked  
6 for was some information so that we had a better sense of what  
7 systems of records are out there. But for example, there may  
8 be computer equipment, devices within the State Department  
9 that may contain this information. If Mrs. Clinton used a  
10 desktop or a BlackBerry while at the State Department, when  
11 she left that may have went to storage. If it was unplugged  
12 from the internet, it may be sitting in a basement with all of  
13 her e-mails on it. Those records could be searched. There  
14 may be backups of these devices that could be searched. There  
15 may be servers that may be able to be searched. We just don't  
16 know what all the possibilities are because the State  
17 Department is unwilling to work with us and provide us this  
18 very limited, very important information. All we're trying to  
19 do is figure out where else the State Department can look  
20 within the State Department so that they satisfy their  
21 obligations under FOIA.

22 I mean, the other possibility is, you know, it is not at  
23 all clear and there's no evidence that all records -- that the  
24 55,000 pages is all records that Mrs. Clinton has. Judge Leon  
25 on Wednesday held a hearing, asked the head of the FOIA



1 department for the State Department to testify. And during  
2 that hearing Mr. Hackett, who's head of the State Department's  
3 FOIA, said that he does not know if all of the work related  
4 e-mails have been turned over. And he said that about  
5 Mrs. Clinton, Ms. Abedin and Ms. Mills. I have copies of the  
6 transcript. It was a two hour hearing so the court reporter  
7 didn't get it done until 9:00 a.m. this morning. So I brought  
8 copies with me, and I'm happy to add it onto the record after  
9 we're here. I can point the Court to a few places where the  
10 State Department admits that it does not know whether all of  
11 the records that have been returned -- that were taken from  
12 the State Department have actually been returned.

13 THE COURT: Are we addressing the same issue, my  
14 colleague and I, Judge Leon?

15 MR. BEKESHA: Judge Leon's concern is more about the  
16 processing because it's taken place over a four year period of  
17 time. In fact, whether or not there are other additional  
18 searches does not appear to be at issue in that case. That  
19 case is primarily about the searching of the 55,000 pages  
20 which the State Department has done here as well as other  
21 records. But nothing about where else the State Department is  
22 obligated to search to find responsive records.

23 THE COURT: So I want to make sure I understand what  
24 you're saying. You're saying that it's not enough for the  
25 Government to say that it searched its own files, it should be

1 searching something else. And what is the something else?

2 MR. BEKESHA: Well, the something --

3 THE COURT: Are you satisfied with the Government  
4 saying it searched its own files for the relevant time period,  
5 and that it will -- as I understand this status report, will  
6 research some of its own files? What is it that you contend  
7 the Government should be doing in addition to searching its  
8 own files?

9 MR. BEKESHA: Well, like when they searched the  
10 first time around in 2013, they're searching incomplete  
11 systems of records. They're searching places where they know  
12 some records don't exist, and they don't want to go and search  
13 where records could exist. So for example, I'll make it a  
14 little bit easier because when it gets into electronic records  
15 it can be confusing. But if you are storing records in a box,  
16 you know, put paper in a box, and you know that you have a  
17 federal record here and it's not in that box and that it could  
18 be several hundred pages haven't been put in that box. The  
19 Government can't just go search that box and say, "I've done a  
20 reasonable search," because they know that the records that  
21 they're looking for aren't in that box, they're somewhere  
22 else. And that's what we have here, we have an instance  
23 where --

24 THE COURT: So you seem to suggest that the  
25 Government knows that there are records elsewhere that they

1 aren't searching, and they're intentionally not searching  
2 those records elsewhere?

3 MR. BEKESHA: That's correct, your Honor. And I  
4 think the evidence shows that. Secretary Clinton for her four  
5 years used an e-mail address that was not state.gov. She said  
6 she sent e-mails to people in the State Department, so the  
7 State Department knew that her records would not be in the  
8 database they searched. And they didn't tell us that when  
9 they told us they searched her records. They didn't tell us  
10 that before we closed the case, they didn't tell us that after  
11 we closed the case. We read about it in the news, and we  
12 filed the motion to reopen the case.

13 If they had said, you know, this is an incomplete record,  
14 we probably wouldn't have closed the case at that point. We  
15 would have had to, you know, continue discussions and figure  
16 out what the State Department could do to correct that issue.  
17 So they didn't tell us at first, and now they continue not to  
18 tell us where else the records may exist. They could exist as  
19 I said on an old desktop. They could exist on a backup of a  
20 server. And they could exist in this server that Mrs. Clinton  
21 may have and that she used. And all of these places are  
22 possible places that records could be find, and the Agency has  
23 an obligation to conduct these searches because they know the  
24 system of records that they are searching is incomplete.

25 THE COURT: Alright, thank you. Let me hear from

1 Government counsel. Good morning.

2 MR. WECHSLER: Good morning, your Honor. As your  
3 Honor mentioned, in the joint status report that was filed  
4 Plaintiff raised three issues: One, the Clinton e-mails, the  
5 55,000 or so pages; two, any e-mails of Abedin or Mills that  
6 were on a personal e-mail account; and three, assurances that  
7 the searches that had been conducted of other existing  
8 Department documents were satisfactory. So the Department did  
9 the following. They agreed on search terms for the Clinton  
10 e-mails. They searched through electronically those 55,000  
11 pages on the agreed search terms, and they determined there  
12 were no responsive records. Second, they searched the  
13 documents that have been provided to date by Ms. Mills and  
14 Ms. Abedin, and they determined that there were no responsive  
15 records. Again, using the same search terms that had been  
16 agreed upon for the Clinton e-mails. And as to the third  
17 category, the Department agreed to research or conduct a  
18 revised search of all the record systems that it had  
19 determined were reasonably likely to have responsive records.  
20 And those systems of records and offices were identified to  
21 Plaintiff in the initial record, the transmittal letter with  
22 the initial records that were provided.

23 So as a result, the Department is going to research the  
24 Bureau of Human Resources, the Office of the Executive  
25 Secretariat, the Office of the Legal Adviser and the Central

1 Foreign Policy Records. Now, bear in mind that Plaintiff's  
2 FOIA request in this case is extremely limited. One, any and  
3 all notifications of personnel action forms for Ms. Abedin.  
4 Those have been provided through the initial search. Two, any  
5 and all contracts including, but not limited to, personal  
6 services contracts between the Department and Ms. Abedin. As  
7 far as we know, there are no such documents, but again we will  
8 research. So three is really the topic at issue in the  
9 reopening of the case: Records regarding authorization for  
10 Ms. Abedin to represent individual clients or otherwise engage  
11 in outside employment while employed by the Department. That  
12 is a fairly narrow set of personnel records, records for  
13 authorization of outside employment. So it is entirely  
14 reasonable that the Department determined that, for example,  
15 the Human Resources Bureau, the Office of the Executive  
16 Secretariat and the other offices that I mentioned would be  
17 reasonably likely to have responsive records.

18 So at this point my suggestion is that the Department  
19 follow through on the statement in its status report that it  
20 will conduct a revised search of all those systems of records  
21 to find any additional documents, again using the agreed  
22 search terms that the parties had already come to agreement  
23 on. And that if at that point it is necessary, a declaration  
24 be submitted detailing the searches that were conducted and  
25 the processing of any additional responsive records. And only

1 then should Plaintiff be permitted to discuss what seem to be  
2 very far afield items such as discovery of equipment, devices,  
3 technology. Because this is a FOIA request, this is not a  
4 Federal Records Act case. And by the way, Plaintiffs did  
5 bring a Federal Records Act case against the Department  
6 regarding this exact issue of the 55,000 e-mails. That is  
7 before another judge, that is pending. And they can --

8 THE COURT: Which judge is that, is that Judge Leon?

9 MR. WECHSLER: No, that is Judge Boasberg. And by  
10 the way, the number of that is --

11 THE COURT: Shouldn't one judge -- not me, shouldn't  
12 one judge have all these cases? Maybe the three of us should  
13 talk. Any objection to one judge resolving all these issues?

14 MR. WECHSLER: I'm not prepared to respond to that  
15 today, but I will say that the civil action number is 15 --

16 THE COURT: Are there any other lawsuits kicking  
17 around in our court?

18 MR. WECHSLER: Oh yeah, Judicial Watch has many  
19 cases involving these records. That case number is 15-cv-785  
20 (JEB). Now, the other distinction -- so again, we're not on a  
21 Federal Records Act case here.

22 THE COURT: Correct.

23 MR. WECHSLER: The other distinction is the AP case  
24 did not involve these FOIA requests, it was something  
25 completely different. There were five different categories,

1 and the only interrelation is one of them involved Ms. Abedin,  
2 but it involved a very different point. It involved her  
3 employment as a special government employee, not authorization  
4 for outside employment. That's apples and oranges. So  
5 whatever occurred in another hearing in another case brought  
6 by Plaintiff really does not bear upon whether or not the  
7 Department is exercising its reasonable efforts here.

8 THE COURT: So let me see if I understand what  
9 you're saying. You're proposing that the Government research  
10 using terms that have been agreed upon by the parties, and  
11 then produce as appropriate subject to challenge by the  
12 Plaintiff with respect to the adequacy of that search?

13 MR. WECHSLER: Yes, your Honor.

14 THE COURT: I think I agree with that. I mean, I  
15 think I agree with that, that's reasonable. Because you come  
16 back and say this is what we've done, we've used the terms  
17 we've agreed to. This is what we're producing, this is what's  
18 privileged, whatever. Then Plaintiff is in a position to say,  
19 you know what judge, that's inadequate for the following  
20 reasons then. I think, but let me invite Plaintiff's counsel  
21 back. But I'm actually going to talk to my colleagues about  
22 one judge, not me, having all these cases. It seems to me I  
23 think there are too many judges.

24 MR. BEKESHA: Sure, your Honor, I can address that  
25 point first. Judicial Watch does have several cases.

1 THE COURT: That address the 55,000 e-mails?

2 MR. BEKESHA: All different issues, issues relating  
3 to Mrs. Clinton's e-mails, the actual records; some records  
4 related of other aides, their e-mails; FOIA requests about the  
5 fact that Mrs. Clinton had a private e-mail server, so we have  
6 some requests about that. There may be about 10 or so.

7 THE COURT: 10 lawsuits?

8 MR. BEKESHA: About 10 lawsuits on ours. There's --

9 THE COURT: Is there a judge in this court who does  
10 not have one of these cases?

11 MR. BEKESHA: I don't know about that. I do know  
12 that I believe it was Judge Contreras on at least two  
13 occasions, one in one of our cases --

14 THE COURT: I don't know if it would be burdensome  
15 for one judge to have everything.

16 MR. BEKESHA: He asked about consolidation.

17 THE COURT: Which judge was that?

18 MR. BEKESHA: Contreras.

19 THE COURT: Is he interested in that?

20 MR. BEKESHA: I think he may have been. I know the  
21 Government's position -- I don't want to state what their  
22 position is, but I think they pretty much said they didn't  
23 think it was appropriate at that time. You know, after one of  
24 the hearings we reached out to the Government and said do we  
25 want to sit down and talk about all of these cases. We



1 haven't heard back about that. So if you think it makes sense  
2 for one judge to handle all of these cases --

3 THE COURT: You know what, I'm going to send an  
4 e-mail to my colleagues, just raise it, you know. I mean,  
5 we're all independent. But if you're telling me there are 10  
6 lawsuits that are arguably related and grow out of the same  
7 subjected matter, Mrs. Clinton's e-mails, it seems to me one  
8 judge would then -- you know, I don't know.

9 MR. BEKESHA: And then with respect to the Federal  
10 Records Act lawsuit that the Government talked about, that's a  
11 very different lawsuit. That's a lawsuit to compel Secretary  
12 Kerry to recover all e-mails taken from the State Department.

13 THE COURT: That sounds different, right.

14 MR. BEKESHA: Yeah, so that's very different from  
15 the case that's here. The reason I think it's improper to  
16 wait for summary judgment whenever that may occur -- and that  
17 may not occur for quite some time, the Government still hasn't  
18 said when it expects Mrs. Clinton to finish producing all of  
19 the records she may have or if she ever will. And Ms. Abedin  
20 and Mills is the same. We also relied on their statements  
21 that they conducted a search the first time around, and we  
22 learned through the media that we were mistaken in taking  
23 their word for what they did. We don't think we need to wait  
24 more time for them to conduct searches -- which they won't  
25 even say will they go search these other systems of records

1 that would be appropriate to search.

2 THE COURT: It's speculation though, isn't it, about  
3 these other systems that may or may not exist? I mean, what  
4 is the extent to which the Government has an obligation to  
5 search? The Government has an obligation to search its  
6 records, right?

7 MR. BEKESHA: They have an obligation to search  
8 their records using methods that are reasonably expected to  
9 produce responsive records.

10 THE COURT: Right.

11 MR. BEKESHA: It's not reasonably expected to  
12 produce responsive records if you know that the records aren't  
13 going to be where you're looking. The State Department wants  
14 to once again search a system of records that's incomplete.  
15 They're going to search the Office of the Executive  
16 Secretariat. That's supposed to have all the e-mails of the  
17 Office of the Secretary. They're going to search that, but  
18 Ms. Mills, Ms. Abedin and Mrs. Clinton didn't exclusively --  
19 and Mrs. Clinton didn't use at all, the State Department's  
20 e-mail server. So those records aren't going to be there, and  
21 they know they're not going to be there. But they want to go  
22 and search there again.

23 THE COURT: Did Mrs. Clinton admit that she used a  
24 private server?

25 MR. BEKESHA: Mrs. Clinton said that she used a

1 server that was not state.gov. Whether or not that's personal  
2 or private is still unclear. She used it as the head of the  
3 agency for the four years she was the head of the agency.  
4 Arguably she made a decision that the system of records she  
5 was going to use was this server. Maybe that server was  
6 property of the State Department as she was the head of the  
7 agency. We don't know that, that's another issue. You know,  
8 these are all issues that we've tried to discuss with the  
9 Government, and the Government says we're searching the  
10 55,000, you know, trust us, we're going to do the correct  
11 searches, you know, that's good enough under FOIA. Well, it's  
12 not. We did that once and now we're back. We had to reopen  
13 this case a year later, and we have to spend more time in  
14 court trying to figure out what's good enough, what we should  
15 believe the Government is doing and should we take their word  
16 on face value. And we just don't think that's appropriate at  
17 this time. We think we shouldn't have to wait until who knows  
18 when to brief the issue. Let the Court resolve it. I think  
19 the Court can start resolving it today.

20 The first step is to identify places in which information  
21 records may be stored. If there are no desktops or  
22 BlackBerries sitting around in a basement, then they can't  
23 search there. The answer to that question, that issue is off  
24 the table. If the State Department doesn't backup their  
25 systems -- backup computers, backup servers -- then they can't

1 search there. So that question takes that off the table. You  
2 know, that's all we're looking for. And we can go through  
3 that process. If they don't have backups, if they don't keep  
4 the technology, you know, they don't have access to the server  
5 that was used by Mrs. Clinton, Ms. Mills, Ms. Abedin, you  
6 know, all of those issues are then off the table.

7 But the final last issue is if Mrs. Clinton still has  
8 this server that has at least all of her e-mails on it, if she  
9 has the e-mails of Ms. Abedin on it. We at least know that  
10 Ms. Abedin used an e-mail address to conduct official  
11 business. It was huma@clintonemail.com. I attached one of  
12 those e-mails to the joint status report. And then Ms. Mills,  
13 we still don't know what e-mail addresses she was using when  
14 she was not using state.gov because the Government redacted  
15 the domain name. So we don't know if Ms. Mills' e-mail  
16 addresses were on this Clinton e-mail server that was set up  
17 by Mrs. Clinton to conduct official business during her four  
18 years as Secretary of State or if Ms. Mills was using another  
19 e-mail server or another account to conduct official business.

20 So we're just looking for answers so that we can move the  
21 process along, and so that we don't get stuck in the same  
22 position we were. They conduct searches, we say we trust you,  
23 you did a good search and then the New York Times writes a  
24 piece in another year and we have to reopen this case for a  
25 second time. We just don't think that makes a lot of sense.

1 THE COURT: Right. Counsel?

2 MR. WECHSLER: Briefly, your Honor, the Plaintiff  
3 spoke of moving the process along. That's precisely what the  
4 Department has done in the last 30 days. They agreed on  
5 search terms. They conducted a search of 55,000 or so pages  
6 of e-mails. They conducted an additional search of the  
7 e-mails provided to date by Ms. Mills and Ms. Abedin. The  
8 Department is not saying trust us, the Department is saying  
9 here is what we've done, we will complete the process,  
10 research the initial systems of record. If necessary, we will  
11 submit a declaration if the parties can't resolve --

12 THE COURT: But the Plaintiff's not talking about  
13 the initial systems of record, the Plaintiff appears to be  
14 addressing systems of record that may exist outside of the  
15 government agency.

16 MR. WECHSLER: Those are not systems of record then.  
17 The definition of system of record is in the agency. That's  
18 under the definition of the term system of record.

19 THE COURT: So it would not be private servers?

20 MR. WECHSLER: When we say private, what we're  
21 saying is non state.gov. So whether it's owned by a company  
22 or individually is not our concern. But the point is the FOIA  
23 obligation is to search documents in the possession and  
24 control of the Department. There's no question we have done  
25 that, and we are going to research those. We've also agreed,

1 we've sent letters to all of the former --

2 THE COURT: Alright. The Plaintiff, let me just  
3 pick up his argument though. He says Mrs. Clinton or others  
4 may have personal servers, they may have personal BlackBerries  
5 that have government records. Does the Government have an  
6 obligation to attempt to search those potential records?

7 MR. WECHSLER: No, but what the Government did is  
8 send a letter -- two different sets of letters, one to the  
9 former secretaries requesting that they provide all documents  
10 that may be federal records including e-mails on a non  
11 state.gov account. The former secretary provided 55,000  
12 pages.

13 THE COURT: Right.

14 MR. WECHSLER: The Government also sent a letter to  
15 Ms. Mills and Ms. Abedin in particular requesting that they  
16 send all federal records, and they're in the process of doing  
17 that. So they acknowledged the letter, they provided some  
18 documents and that is the --

19 THE COURT: Were they asked -- were any of those  
20 individuals asked whether or not they maintained government  
21 files on private servers, BlackBerries or other electronic  
22 devices?

23 MR. WECHSLER: They were simply asked to provide any  
24 documents that may constitute federal records. In other  
25 words, that were sent during the course of the --

1           THE COURT: I understand what you're saying, but  
2 what about my question though? Were they expressly asked  
3 whether or not they maintained government files on any private  
4 servers, BlackBerries or other electronic devices? And if  
5 not, why shouldn't they be asked that?

6           MR. WECHSLER: They were asked for the actual  
7 documents, the things.

8           THE COURT: I understand that. You just gave me  
9 that answer twice, I understand that. What about my question  
10 though? Were they asked whether or not they maintained  
11 government files on any private -- let's just say electronic  
12 devices or otherwise?

13           MR. WECHSLER: I don't believe that the letters went  
14 to that degree, but again --

15           THE COURT: Why shouldn't they be asked that?

16           MR. WECHSLER: Well, perhaps that would follow, but  
17 I believe the initial --

18           THE COURT: I think I should direct the Government  
19 to ask that question of them. Because if indeed the answer is  
20 yes, then those would be devices that should be searched by  
21 the Government. Wouldn't you agree?

22           MR. WECHSLER: No, I don't. I think that --

23           THE COURT: Let's talk about this for a second.  
24 Alright, suppose the answer is yes, government files were  
25 maintained on a private server, a BlackBerry device and a

1 laptop, and that's the answer. Then what's the Government's  
2 obligation, if any?

3 MR. WECHSLER: The primary FOIA obligation is  
4 documents that are in the possession of the Government,  
5 documents created in the course of business that --

6 THE COURT: I understand that, but I'm saying if in  
7 response to your question the answer is oh yeah, by the way,  
8 government records were maintained on my private iPhone or  
9 Android or whatever it is and that's the answer, then the  
10 Government has no obligation to search those records?

11 MR. WECHSLER: Not to search. The obligation is to  
12 do what they've done which is to say if you have such  
13 documents including personal e-mails, provide them to us.

14 THE COURT: Okay. Alright, we're talking around  
15 this issue though. It seems to me unless there's -- it seems  
16 to me that the Government should be directed to ask those  
17 individuals whether or not they did in fact maintain, keep,  
18 whatever the language is, possess government materials on  
19 private electronic devices or otherwise, just that question,  
20 and get an answer. And then we figure out what the  
21 Government's obligation is at that point.

22 MR. WECHSLER: I believe the answer was given  
23 indirectly. That is, by furnishing e-mails that were sent  
24 from a non state.gov account, the answer is yes presumably.

25 THE COURT: Have they responded that they furnished



1 all the government materials maintained on private servers, et  
2 cetera?

3 MR. WECHSLER: The documents that were --

4 THE COURT: And if not, why shouldn't they?

5 MR. WECHSLER: They are in the process of completing  
6 that -- that initial documents were provided.

7 THE COURT: I understand what Plaintiff's saying,  
8 and I'm just trying to make it easier for everyone to get to  
9 this information if the information exists. I understand what  
10 Plaintiff's saying, he makes a good point. But there's one  
11 thing about me sending the Government off on a fishing  
12 expedition to try and find something. There's another thing  
13 though for the Government to ask former government employees  
14 tell us whether or not you maintained our files on your  
15 private servers and other electronic devices or otherwise.  
16 And otherwise would be electronic devices or in that box in  
17 their garage or whatever. Tell us that. And if the answer is  
18 yes, you must declare under penalty whether or not you have  
19 provided the Government with copies of all of those materials.  
20 And if you haven't, give us those materials and then we  
21 determine whether bases exist for other kinds of discovery.

22 But Counsel makes a good point, and I just think there's  
23 some questions that need to be answered though. You know, I'm  
24 not going to send you off searching here, there and  
25 everywhere. But I think those very precise questions should

1 be directed to those three individuals for the purpose of  
2 identifying whether or not there are other devices and  
3 otherwise that are in existence that have materials that the  
4 Government has that the Government's entitled to get. That's  
5 my point.

6 MR. WECHSLER: Yeah, we submit that the next step  
7 could be that the Government provide copies of the letters  
8 that were sent to the former secretaries and to Ms. Mills and  
9 Ms. Abedin.

10 THE COURT: The Plaintiff's not seen those letters?

11 MR. WECHSLER: They have seen -- they are attached  
12 to some of their pleadings I believe.

13 THE COURT: Well, if they're attached to their  
14 pleadings they've seen them then I guess, right?

15 MR. WECHSLER: Yeah.

16 THE COURT: Wait a minute, I think Counsel --

17 MR. BEKESHA: May I answer, your Honor?

18 THE COURT: Yes.

19 MR. BEKESHA: We asked the Government to provide  
20 those letters, they did not provide them. We have sent FOIA  
21 requests asking for those records because the Government  
22 wouldn't provide them in this case.

23 THE COURT: But you're agreeable to providing those  
24 letters now?

25 MR. WECHSLER: Yes.

1           THE COURT:  Alright, okay.  Forthwith, that's fine.  
2  And we can get to the bottom of this.  Look, I'm not going to  
3  impose any unreasonable barriers on anyone, especially the  
4  Government that's overburdened.  But fair is fair.  All  
5  they're saying is, "You know, Judge, there may be other  
6  devices that have this material."  I don't know that to be the  
7  case, and you don't know.  But at least the question should be  
8  asked.  And maybe the questions have already been asked and  
9  answered.  And if so, the answers should be part of a  
10  declaration from the Government so that the public -- that the  
11  Plaintiffs know that the Government's been duly diligent and  
12  asked the questions that should be asked.  I mean, all they're  
13  trying to get is access to information that they're entitled  
14  to have access to.  I'm not trying to trick you, you know, but  
15  you're going to turn those letters over?

16           MR. WECHSLER:  Yes, your Honor.

17           THE COURT:  And the responses, right?

18           MR. WECHSLER:  Yes, your Honor.

19           THE COURT:  Okay, that's fine.  Do you have copies  
20  today?

21           MR. WECHSLER:  I do not, but I can provide the  
22  substance which was that there were requests to Ms. Mills and  
23  Ms. Abedin that they make available to the Department any  
24  federal records that they may have in their possession such as  
25  e-mails concerning official government business sent or

1 received in a personal e-mail account while serving in their  
2 official capacities with the Department if there is any reason  
3 to believe that those records may not otherwise be preserved  
4 in the Department's recordkeeping systems.

5 THE COURT: Okay. So they've been asked that it  
6 sound like?

7 MR. WECHSLER: Yes.

8 THE COURT: And so all they need is a copy of that  
9 letter to them, to those individuals, and a copy of their  
10 responses, and then we can go from there. I mean, I don't  
11 think we can spend anymore time today. I mean, I would like  
12 to -- I still think what I'm proposing is not unreasonable,  
13 that in the event they've not been asked to they should be  
14 directed to, to tell you whether or not there are any  
15 additional devices that have materials that have not been  
16 heretofore turned over to the Government.

17 MR. WECHSLER: They were asked to provide any such  
18 documents.

19 THE COURT: Alright. I think you need to see the  
20 letters anyway and the responses. I mean, otherwise we're  
21 just speculating about what should be done at this point.

22 MR. BEKESHA: Thank you.

23 THE COURT: But thank you very much, I appreciate  
24 that. Thank you. Yes, Counsel?

25 MR. BEKESHA: Two quick points, your Honor?

1 THE COURT: Yeah, sure.

2 MR. BEKESHA: I don't want to confuse anything more,  
3 but also when I was talking about the BlackBerries and  
4 desktops, I meant the ones that were officially issued by the  
5 State Department. So State Department BlackBerries of  
6 Mrs. Clinton.

7 THE COURT: That's why I said other devices or  
8 otherwise or something like that.

9 MR. BEKESHA: Some of those could be in the State  
10 Department's possession, because arguably when Mrs. Clinton no  
11 longer was Secretary of State she turned over her BlackBerry  
12 that was issued by the State Department.

13 THE COURT: Right.

14 MR. BEKESHA: So the BlackBerry may not be in her  
15 possession, it may be in the State Department's possession.  
16 And that was another one of the questions we had.

17 THE COURT: I see. So then in other words, the  
18 State Department could have that device and not had the  
19 opportunity to search it because it was unaware that it had  
20 it. I mean, that's possible.

21 MR. BEKESHA: Or that it needed to, that they had it  
22 and they needed to because the records weren't in the box.

23 THE COURT: Right. Alright, here's what I'm going  
24 to do. You're going to get those questions -- you'll get a  
25 copy of the letter to those individuals and a copy of the

1 responses from those individuals, you'll get that information.  
2 And what I'm going to do since I don't know what the responses  
3 are -- I have an idea of what the letters say -- I'm going to  
4 issue a minute order that also directs the Government to ask  
5 the questions that I think should be asked at this point.  
6 Now, it may well be that those questions have been answered,  
7 but I don't want to bring you back in a week or two weeks to  
8 talk about okay, where do we go from here. So I'm going to  
9 issue that. To the extent they've already been answered, then  
10 of course the Government does not need to. But I will add  
11 that additional directive that other devices be identified  
12 that may well be in the possession of the Government and have  
13 not been searched by the Government.

14 MR. BEKESHA: Okay, your Honor. One other possible  
15 question to be asked, during the hearing before Judge Leon,  
16 the AP attorney -- that is the Plaintiff in that case, went  
17 through a list of questions about employees that received the  
18 letters that counsel was just referring to. And the answer  
19 is -- and I can submit the transcript, was for Mrs. Clinton,  
20 she turned over 55,000 pages. We don't know if that's  
21 everything. With respect to Mr. Reines, who's not at issue in  
22 this case, he provided 20 boxes of records. When asked is  
23 that everything, the head of the FOIA for the State Department  
24 said, "I don't know what he did." So another question to --  
25 that may be important to be posed to Ms. Mills, Ms. Abedin,

1 Mrs. Clinton is, "Have you produced everything?" Because  
2 right now, the State Department doesn't know if everything has  
3 been produced that's in their possession, they just know that  
4 something has been produced.

5 THE COURT: I think that's fair, I'll do that.

6 MR. BEKESHA: Thank you, your Honor.

7 THE COURT: I'll try to put together a fair minute  
8 order and I'll issue that. I think that's fair. If there are  
9 objections then the Government can object, but I think that's  
10 fair. I'm going to direct that those letters -- was it just  
11 one letter to each of the three individuals, Counsel, or a  
12 series of letters, the letter and the responses?

13 MR. WECHSLER: One letter to Ms. Mills and  
14 Ms. Abedin, a separate letter was sent to former Secretary  
15 Clinton.

16 THE COURT: Alright. And the Government has agreed  
17 to turn over those letters and the responses to Plaintiff's  
18 counsel and post them on the docket, correct?

19 MR. WECHSLER: Yes.

20 THE COURT: Alright, that's fine.

21 MR. BEKESHA: I'm sorry, your Honor, my co-counsel  
22 reminded me of one other small point. As I demonstrated in  
23 the joint status report, Ms. Abedin at least used one e-mail  
24 address that was on clintonemail.com. We don't know what  
25 other e-mail accounts are on the server of Mrs. Clinton. It

1 would be helpful for Mrs. Clinton to identify what -- if  
2 Ms. Mills and Ms. Abedin used her server to conduct official  
3 business. Because Ms. Mills and Ms. Abedin may not have  
4 access to the server, Mrs. Clinton may have it.

5 THE COURT: I'm trying to make it easy for everyone,  
6 that's why I said other devices, et cetera or otherwise. So  
7 we'll figure out some language to use to answer that  
8 legitimate concern.

9 MR. BEKESHA: Thank you, your Honor.

10 THE COURT: Alright, we'll try to do that. Anything  
11 else? Do we have another status hearing date?

12 MR. WECHSLER: No, your Honor.

13 MR. BEKESHA: No, your Honor.

14 THE COURT: I should bring you back maybe after  
15 Labor Day or so. What about that?

16 MR. BEKESHA: That's fine.

17 MR. WECHSLER: That's fine.

18 THE COURT: Alright. Let's pick a date. Counsel,  
19 I'm going to suggest September the 10<sup>th</sup> at 10:00 o'clock.  
20 Is that a bad date or bad time? Good date?

21 MR. BEKESHA: That's okay, your Honor.

22 THE COURT: You sure? Is that a bad date? I mean,  
23 if there's a better date I can give you --

24 MR. BEKESHA: It's fine, your Honor.

25 THE COURT: September the 10<sup>th</sup> at 10:00 a.m., and



1 that will be a status hearing. We'll try to put together an  
2 appropriate minute order that addresses the concerns. Those  
3 are good concerns, you'll get answers. The Government is  
4 going to research.

5 What about producing the results of the research that you  
6 refer to in your status report filed yesterday, how much time  
7 do you need for that?

8 MR. WECHSLER: We suggest that 14 days to actually  
9 do the search, notify Plaintiff of responsive records and then  
10 process thereafter.

11 THE COURT: I think that's fair enough, alright.  
12 Anything else?

13 MR. BEKESHA: No, your Honor.

14 THE COURT: Alright, everyone have a nice weekend.  
15 Good to see everyone.

16 (Proceedings concluded at 11:58 a.m.)

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C E R T I F I C A T E

I, Jeff M. Hook, CSR, RPR, certify that the foregoing is a correct transcript from the record of proceedings in the above-titled matter.

Date: August 4, 2015

Jeff M. Hook

Jeff M. Hook, CSR, RPR



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