



3. Based on a separate letter from Mr. Kendall to Defendant, it appears as though Mrs. Clinton believes that she does not have an obligation to return all emails that exist on devices containing official government records. Nor does Mrs. Clinton believe that she has an obligation to preserve such emails. *See* Exhibit C (“Under the FRA and implementing regulations, she had no obligation to include in that set her personal e-mails, or to retain such personal e-mails.”).

4. To Plaintiff’s knowledge, Defendant has not taken any steps to prevent Mrs. Clinton from destroying records potentially responsive to Plaintiff’s FOIA request that are not already in Defendant’s possession. Defendant only has requested that Mrs. Clinton “not delete any federal documents.” *See* Exhibit A to Defendant’s August 12, 2015 Status Report. In addition, Mrs. Clinton has stated that she will only “preserve *federal record emails* in [her] custody.” *See* Exhibit E to Defendant’s August 12, 2015 Status Report (emphasis added). In other words, Mrs. Clinton believes that she has the authority to destroy records that she has unilaterally determined to be “personal.”<sup>1</sup>

5. Any destruction of records potentially responsive to Plaintiff’s FOIA request that are not already in Defendant’s possession disregards the Court’s concerns – as expressed during the August 20, 2015 Status Hearing – of which Mr. Kendall is fully aware.

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<sup>1</sup> Whether Mrs. Clinton as a former employee has the authority to determine whether these records are “personal” or “government records” as well as whether these records are “personal” or “government records” are legal questions not yet resolved by the Court.

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Respectfully submitted,

/s/ Michael Bekesha

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## **Exhibit A**



1 THE COURTROOM DEPUTY: Civil case number 13-1363,  
2 Judicial Watch, Inc., versus Department of State.

3 Counsel, please come forward and identify yourselves  
4 for the record.

5 MR. BEKESHA: Good afternoon, Your Honor. Michael  
6 Bekesha on behalf of Judicial Watch. Along with me is Chris  
7 Farrell, our Director of Investigations.

8 THE COURT: Good afternoon, gentlemen.

9 MR. WECHSLER: Good afternoon, Your Honor. Peter  
10 Wechsler of the Department of Justice. Along with me is  
11 Robert Prince, also of the Department, representing the  
12 State Department.

13 THE COURT: Good afternoon.

14 I've got a few questions. Anything new since the  
15 last filing, before I start asking questions?

16 MR. WECHSLER: (Shakes head.)

17 THE COURT: Let me invite government counsel to  
18 approach. I have a few questions for you.

19 Thank you very much for your reply. Sorry I  
20 couldn't accommodate you on the request, there were just too  
21 many other matters pending right now.

22 What's the -- sometimes it's best to recap, to get  
23 a feel for where we are now and what direction we're heading  
24 with this case. So let me just recap a few things.

25 My understanding is as follows: The Department --

1 State Department continues to review the 55,000 pages of  
2 e-mails already disclosed by Mrs. Clinton. In its August  
3 14th declaration the State identified -- Department of State  
4 identified five offices within State that may also have  
5 records responsive to this case, including the Bureau of  
6 Human Resources, the Office of the Executive Secretariat,  
7 the Office of the Legal Advisor, the Officer of the Under  
8 Secretary for Management, and the fifth one, the Central  
9 Foreign Policy Records. And my understanding is that a  
10 search of those records is underway.

11 MR. WECHSLER: Yes. With respect to the first  
12 issue, the 55,000 pages that were provided by the Secretary  
13 to the Department have been searched using the search terms  
14 agreed by the parties. There were no responsive records.  
15 So that is completed.

16 With respect to the five offices, the searches are  
17 in process. Some additional documents have been --  
18 potentially responsive records have been located and those  
19 will be processed as soon as possible. And so that is  
20 underway. And the Department suggests, perhaps, in 30 days  
21 advising the Court of the status with respect to the  
22 remaining searches.

23 THE COURT: All right. And that would be  
24 remaining searches -- all right. You say as soon as  
25 possible those documents will be provided to plaintiff.

1 What's your timeframe for that?

2 MR. WECHSLER: We are intending to do as much as  
3 possible in the next 30 days and would suggest advising the  
4 Court at that time as to the status.

5 THE COURT: So that's -- the 30 days is your  
6 timeframe for work in progress?

7 MR. WECHSLER: Yes.

8 THE COURT: All right. How many documents were  
9 found that are potentially responsive?

10 MR. WECHSLER: Approximately 200 pages. And there  
11 are some -- there are --

12 THE COURT: Those have to be reviewed now, I assume.

13 MR. WECHSLER: Yes. And there are some  
14 additional -- as noted in the declaration of Mr. Hackett,  
15 there is some -- and Mr. Macmanus, there are some additional  
16 records that are also being searched to complete that process.

17 THE COURT: Can you be a little more enlightening  
18 about those?

19 MR. WECHSLER: There were two additional former  
20 employees, and basically what --

21 THE COURT: Can you identify those people?

22 MR. WECHSLER: I don't have the names with me.  
23 But the Department did not want to publicize their names at  
24 this point, just given the --

25 THE COURT: Even if you had the names, right?



1 MR. WECHSLER: I don't have them in front of me.  
2 I apologize. But that was their preference.

3 THE COURT: Is there a reason for not making --

4 MR. WECHSLER: Just personal privacy. Just under  
5 the Court's redaction orders and under exemption six.

6 The COURT: All right.

7 MR. WECHSLER: And they will make a determination  
8 as to whether their names should be released with respect to  
9 the actual documents. But that was just with this recent  
10 filing.

11 So, with respect to the five offices, most of  
12 those searches have now been conducted and these remaining  
13 aspects are being done diligently by the Department.

14 In addition, the Department, as noted in the most  
15 recent filings, the Department has received documents from  
16 Ms. Mills and Ms. Abedin. Miss Mills represented that those  
17 were the complete production of potential federal records.  
18 Miss Abedin indicated that by August 28th she would have  
19 provided those.

20 So the Department intends to process those, as  
21 well. And it is the Department's position that given the  
22 answers to the Court's further questions and the status  
23 reports that have been filed, that that amounts, in total,  
24 to a reasonable search of records that are in the agency's  
25 possession or control.

1           THE COURT: All right. Let me go back to those  
2 individuals, the unidentified individuals. I'm not trying  
3 to put words in your mouth, I'm just trying to understand.  
4 Are you saying that official documents have been identified  
5 with respect to those individuals?

6           MR. WECHSLER: No. The declaration --

7           THE COURT: Because that would beg the issue of  
8 why don't we know their names, right?

9           MR. WECHSLER: Yeah. The declaration of Mr.  
10 Macmanus, which was filed yesterday, discusses those in  
11 paragraph five. And basically, these are a senior advisor  
12 in the office of the Under Secretary for Management and in --  
13 the Administrative Officer for the S/ES office.

14           So, what happened was in reviewing the potentially  
15 responsive records in some of these other of the five  
16 offices, these names were located. So they are being  
17 diligent and they're following up in trying to determine now  
18 whether those individuals' state.gov files also contain any  
19 potentially responsive documents.

20           So from the Department's standpoint, it is doing  
21 what it can to canvas the entire field, locate any  
22 additional responsive records.

23           THE COURT: All right. Let me ask you this with  
24 respect to the server and the thumb drive: They're in  
25 possession of the Department of Justice, correct?

1 MR. WECHSLER: Well, the report is that they're in  
2 the possession of the FBI. And that was stated in the  
3 letter from the former Secretary's counsel that was filed as  
4 one of the status reports.

5 THE COURT: Right. But you represent the  
6 government, so you know who possesses what. I mean, you're  
7 a Department of Justice attorney, right?

8 MR. WECHSLER: It is a large department --

9 THE COURT: You're the Department of Justice, right?

10 MR. WECHSLER: Correct. The FBI has its own  
11 procedures.

12 THE COURT: The FBI is an agency under the  
13 Department of Justice.

14 MR. WECHSLER: Yes. That is correct.

15 THE COURT: I understand that. That's why I'm  
16 asking. There have been a lot of conflicting reports about  
17 who has these documents. The government is not relying upon  
18 a private attorney to tell the government who possesses  
19 these documents, is it?

20 MR. WECHSLER: Well, we're talking about two  
21 different things, Your Honor; documents and a server.

22 THE COURT: We're talking about server, thumb  
23 drive. The question is: What government entity possesses  
24 those devices?

25 MR. WECHSLER: The State Department's position as

1 to that is contained in --

2 THE COURT: I'm not concerned about the State  
3 Department's position. You're the Department of Justice  
4 attorney. You can tell me whether or not -- my  
5 understanding is that the Department of Justice possesses  
6 those devices, for want of a better word. Is there a better  
7 word for "devices"?

8 MR. WECHSLER: No.

9 THE COURT: All right. Am I correct or wrong?

10 MR. WECHSLER: Yes.

11 THE COURT: Which one? I manage to do both on  
12 occasion, but which one?

13 MR. WECHSLER: I'm sorry?

14 THE COURT: No, that's all right.

15 MR. WECHSLER: The FBI reportedly has possession  
16 of the server. However, the former Secretary has stated,  
17 under oath, in a document that was filed with this court,  
18 that she turned over the actual copies of the e-mails that  
19 are potential federal records. And from the State  
20 Department's vantage point --

21 THE COURT: She turned those over to who?

22 MR. WECHSLER: To the State Department. And those  
23 were the 55,000 pages, and those have been searched. And  
24 the State Department --

25 THE COURT: I'm not talking about them, I'm

1 talking about the server.

2 MR. WECHSLER: To the extent there's something  
3 else that the server, as a tangible thing, or that there's  
4 some information potentially on it, that is not within the  
5 possession or control.

6 THE COURT: I understand that. I understand that.  
7 You're getting ahead of it, though. I'm trying to determine  
8 who has the server, who has the thumb drive. From the  
9 government's perspective, from the Department of Justice's  
10 perspective, who possesses the server and the thumb drive?

11 MR. WECHSLER: As far as we know, the FBI.

12 THE COURT: Is there any doubt about that? I  
13 mean, you know, there shouldn't be any doubt about that.  
14 I'm not trying to --

15 MR. WECHSLER: The FBI is not known for sharing to  
16 other agencies, in the connection with a separate civil FOIA  
17 case, its own affairs. And so those are not, by any stretch  
18 of the imagination, in the possession or control.

19 THE COURT: So you can categorically state then  
20 that the Department of Justice, as a government entity, is  
21 not in possession of either the thumb drive or the server  
22 that's been discussed here?

23 MR. WECHSLER: That the Department of Justice --

24 THE COURT: Right.

25 MR. WECHSLER: I cannot definitively state -- as

1 indicated in paragraph 12 of the Hackett declaration, I  
2 cannot definitively state what the current status is with  
3 respect to items that are not in the possession or control  
4 of the State Department or, in particular, that are in the  
5 custody or control of the --

6 THE COURT: I need to get an answer. I can't get  
7 it today, I think that's clear. But I need -- the Court  
8 needs to get an answer to the question about what entity is  
9 in possession of the thumb drive.

10 You know, the Court should not have to rely upon  
11 media reports -- and the media has reported, and maybe  
12 accurately so, that on various occasions that the -- those  
13 two devices are in the possession -- were turned over to the  
14 FBI. And there have been some references to DOJ. And  
15 contained --

16 Excuse me one second.

17 (Brief pause in proceedings.)

18 THE COURT: Correct me if I'm wrong, did the  
19 government -- did the State Department not say that the  
20 Department of Justice probably has the --

21 MR. WECHSLER: The State Department said that  
22 according to the former Secretary's attorney, Mr. Kendall,  
23 those -- that device, the server was turned over to the FBI  
24 and that is what is the basis of our knowledge. And the FBI  
25 is in the best position to answer any questions. I suspect

1       they're not going to at this stage.

2               THE COURT: Well, have they been asked --

3               MR. WECHSLER: No.

4               THE COURT: -- by the State Department?

5               MR. WECHSLER: No.

6               THE COURT: Does the State Department intend to  
7 ask the FBI?

8               MR. WECHSLER: Subject to Your Honor's guidance,  
9 at this point they do not plan to interfere in the FBI's  
10 operations.

11              THE COURT: I didn't say "interfere," I said just  
12 ask the question.

13              MR. WECHSLER: They do not.

14              THE COURT: Now, State, in its submission, agrees  
15 that Mrs. Clinton's personal server may have responsive  
16 information to the FOIA request at issue in this case.

17              MR. WECHSLER: No, State has not taken that  
18 position. In paragraph 12 of the Hackett declaration, State  
19 has said that it is not in a position to opine as to whether  
20 the server or any other device not in its possession or  
21 control contains any responsive information. And that's  
22 document number 26-1 at page 5, paragraph 12.

23              THE COURT: All right. So you're not in a  
24 position to know that.

25              MR. WECHSLER: However, the Department also notes

1       that the Secretary has declared, under oath, that the  
2       e-mails within that account were turned over to the State  
3       Department. And, as noted, those are the 55,000 pages that  
4       have been processed.

5               THE COURT: So, if the -- let's assume the server  
6       and the thumb drive were in the possession of the State  
7       Department. All right? Would the State Department  
8       undertake an independent search of the server, of the server  
9       and thumb drive in an effort to determine whether there are  
10      documents responsive to the FOIA request?

11             MR. WECHSLER: If, under that hypothetical, the  
12      55,000 pages had been printed out in paper form and there  
13      was a representation such as that under oath here, that  
14      those were the potential federal records, the State  
15      Department would not generally then undertake an independent  
16      forensic investigation of a device to corroborate that. In  
17      terms of a FOIA request, that would seem to be  
18      extraordinary. And so far all we have to base that request  
19      on is plaintiff's speculation and conjecture.

20             I mean, we have a declaration under oath here, the  
21      55,000 pages were provided and that those are the potential  
22      federal records. So I submit that in connection with all  
23      the other searches that have been done, that is a reasonable  
24      search.

25             THE COURT: All right. So your answer is no, you



1 wouldn't do it?

2 MR. WECHSLER: Yes.

3 THE COURT: All right. So suppose the devices  
4 were there and the employee had left the government  
5 employment, and the devices were there and you have this  
6 FOIA request, would the government undertake a search then?

7 MR. WECHSLER: Yes.

8 THE COURT: So the critical difference is what?  
9 The employee is no longer there?

10 MR. WECHSLER: The difference is that that work  
11 has been done by the same employee who created or received  
12 the records. And that is a normal practice in printing out  
13 e-mails, is that that person, if they are available, who  
14 make the selection of potential federal records and personal  
15 records. And FOIA does not seek personal records.

16 THE COURT: All right. So, and because you have a  
17 statement here from a former employee that certain official  
18 documents have either been turned over or don't exist, then  
19 that's the end of the search, insofar as the State  
20 Department is concerned?

21 MR. WECHSLER: I would say it's a matter of  
22 context. There were three categories of records sought  
23 here. One, all notification of personnel action forms for  
24 Ms. Abedin. Those are the SF-50 forms. Those were  
25 provided. Two, any contracts between the Department and

1 Miss Abedin. As far as we know, there are no contracts per se.

2 So, it comes down to the third category; records.  
3 And I'm paraphrasing here. Records related to authorization  
4 from Ms. Abedin to engage in outside employment while  
5 employed by the State Department. So, generally, these are  
6 personnel records. They involve -- if any exist, they would  
7 involve personnel matters of the Department, whether to  
8 authorize outside employment.

9 The State Department has now searched five  
10 different offices, including human resources. They've  
11 sought and received documents from the former Secretary and  
12 two other former employees. They are processing those  
13 diligently. So, under that scenario where the 55,000 pages  
14 that were produced do not contain any responsive records, we  
15 think the concept of reasonable search here has been met.

16 THE COURT: Does the State Department -- has the  
17 State Department established a dialogue with any other  
18 government agency -- and I'm, obviously, referring to the  
19 Department of Justice and/or the FBI -- in an effort to  
20 determine whether, after examination of those devices by  
21 those agencies, documents were found that are, arguably,  
22 responsive to the FOIA request? Will those documents be  
23 brought to the attention of the State Department? Or have  
24 you reached out to determine what will happen if documents  
25 are indeed uncovered? It's a long question. Do you

1 understand that?

2 MR. WECHSLER: Yes, I do. And document number 26,  
3 defendant's status report, responds to the Court's directive  
4 on precisely this issue. And essentially the Department's  
5 response is twofold; that a search is required to be  
6 reasonably calculated to uncover all relevant documents.

7 Given that the 55,000 pages did not contain  
8 irrelevant documents, given that there was a representation,  
9 under oath, that those are the potential federal records,  
10 and given the agency's search of the state.gov files and all  
11 of the other government files in the five agencies and  
12 systems of record, that that does not warrant an effort to  
13 involve itself and potentially interfere with the FBI's work  
14 that is ongoing. There's no suggestion here that that has  
15 been completed.

16 THE COURT: You keep using that word, "interfere."  
17 I'm not talking about anything that would interfere with an  
18 ongoing investigation. I'm just talking about whether or  
19 not there's indeed an obligation on the part of the State  
20 Department to do anything else to preserve potentially -- to  
21 preserve potential government documents?

22 MR. WECHSLER: Well, first of all, with respect to  
23 preservation, those are in the possession of the FBI, so  
24 nothing could be more secure than that. Secondly, the  
25 records, the 55,000 pages have already been preserved and

1 produced.

2 So the question then becomes the legal question of  
3 whether the agency is required to search for or process --  
4 not even documents now, we're talking about devices that are  
5 not in its possession and control. And I would point to  
6 case law directly on point that documents such -- personal  
7 documents such as those in a personal e-mail account are --  
8 an agency is not generally required to undertake that type  
9 of extraordinary remedy.

10 THE COURT: Right. But assuming, though, in that  
11 scenario there wasn't a violation of government policy  
12 either, correct? We're not talking about a search of  
13 anyone's random e-mail accounts. We're talking about a  
14 search of devices that may have contained official  
15 government documents, that's what we're talking about. We  
16 wouldn't be here today had the employee followed government  
17 policy, right?

18 MR. WECHSLER: Well, the answer to that is clear.  
19 And this is a quote from the *Kissinger* case, 445 U.S. at  
20 154, "It is clear that Congress never intended, when it  
21 enacted FOIA, to displace the statutory scheme embodied in  
22 the Federal Records Act and the Federal Records Disposal Act  
23 providing for administrative remedies to safeguard against  
24 wrongful removal of agency records as well as to retrieve  
25 wrongfully removed records."

1           Of course, I point out here, there's no allegation  
2           that these were in the agency's system of records and then  
3           removed. So, it's not wrongful removal in that. But my  
4           point more generally is this FOIA case is not the vehicle  
5           for the plaintiff to address that. They have a separate  
6           Federal Records Act case pending currently in front of Judge  
7           Boasberg on their Federal Records Act claim. And that is  
8           the case to explore any of these issues that are appropriate  
9           at that time.

10           THE COURT: So that case is different from this  
11           case, obviously, because that was the *Library of Congress*  
12           case, right? Kissinger reports, freedom of the press.

13           MR. WECHSLER: Correct. And also the *Competitive*  
14           *Enterprise Institute* case, that's a Westlaw cite, 2015 WL  
15           967549, at page 5, has the same conclusion. And there is a  
16           second -- you know, the point is that FOIA is not used to  
17           resolve a problem of an agency employee's use of personal  
18           e-mail accounts. And the term the Court used there was that  
19           would be misplaced to use FOIA.

20           So there is case law on this. We believe that the  
21           department has gone and met its obligations by requesting  
22           these documents, by obtaining the documents, by agreeing to  
23           search the documents, and that to now request devices would  
24           essentially be the tail wagging the dog.

25           THE COURT: I didn't say request devices. I'm

1 talking about requesting the information that's, arguably,  
2 on the devices that's legitimately responsive to FOIA  
3 requests. That's what I'm talking about. In other words,  
4 we agree, we think that there's some sort of investigation  
5 being conducted by some agency of the government. And my  
6 question is whether or not the State Department has, at the  
7 very least, established a dialogue to at least inquire to  
8 those investigating that during the course of your  
9 investigation, if you need to find documents that are,  
10 arguably, responsive to this FOIA request, at least alert us  
11 so that we can discharge our obligations to the inquirer.  
12 That's the question.

13 I'm not talking about physically removing those  
14 devices and bringing them over to the State. I'm just  
15 saying is there that sort of dialogue that's been  
16 established? Because the State Department still has an  
17 obligation to produce documents. And query whether or not  
18 the FBI has an obligation now, since those devices are  
19 currently in the possession of the FBI, does the FBI have a  
20 FOIA obligation?

21 MR. WECHSLER: Not if they're not a party. But, I  
22 agree with Your Honor's point --

23 THE COURT: Not if they're not a party?

24 MR. WECHSLER: To the case. But I agree with Your  
25 Honor's suggestion that the Department inquire in the manner

1       that Your Honor suggested.

2               THE COURT:   You agree with that?

3               MR. WECHSLER:   I will suggest that the Department  
4       do that.

5               THE COURT:   I'm going to direct it to do it.   It's  
6       a legitimate inquiry, right?

7               MR. WECHSLER:   Yes.

8               THE COURT:   All right.   I'll get a copy of what I  
9       said so I won't forget it.   But that will be the directive,  
10       that the Department of Justice indeed establish that  
11       dialogue with the investigating entity, Department of  
12       Justice or FBI, or whatever agency is doing that.   You agree  
13       that's a legitimate inquiry?

14              MR. WECHSLER:   Yes.   Yes.

15              THE COURT:   Because that would be consistent with  
16       your obligation under the Federal Records Act of 1950,  
17       wouldn't it?

18              MR. WECHSLER:   Well, the laws regarding e-mails  
19       have certainly changed over time.

20              THE COURT:   I understand that.   But that law is  
21       still good law, isn't it?   And this is what you reminded  
22       Miss Mills about in your letter dated November the 12th.  
23       The Federal Records Act of 1950, as amended by Congress,  
24       seeks to ensure the preservation of an authoritative record  
25       of official correspondence, communications, and

1 documentation.

2 So consistent with that then, the State Department  
3 acknowledges that it has an obligation to at least establish  
4 that dialogue with the investigating agency and request to  
5 be informed of documents that are, arguably, responsive to  
6 the plaintiff's FOIA requests. Agree?

7 MR. WECHSLER: Agreed.

8 THE COURT: Thank you. I appreciate the candor in  
9 that regard. Because, I mean, that's consistent with law.  
10 I'm surprised the government -- the State didn't do that,  
11 hasn't done that already though.

12 MR. WECHSLER: Perhaps they're being nudged.

13 THE COURT: Well, all right. I'll gently nudge  
14 the State Department to do it. But I appreciate your  
15 candor. Thank you.

16 I was going to get into another area, but I'm not  
17 so sure I need to right now. Let's see. If any e-mails  
18 pertaining to official government business are found in the  
19 30,000, quote, unquote, personal e-mails through the FBI,  
20 DOJ search, will those documents be returned to State? I  
21 guess that would be the second part of that directive. I  
22 think the State Department should ask they be returned.

23 You know, the thing that makes me feel a little  
24 uncomfortable is -- and I'm not being critical of the FBI,  
25 but the State Department is going to be in the best position



1 to determine whether or not there is information on those  
2 devices that are, arguably, responsive to the plaintiff's  
3 FOIA request. You're going to be in the best position to do  
4 that, aren't you? Right?

5 MR. WECHSLER: Yes.

6 THE COURT: All right. So, how can the Court  
7 nudge anyone to put you in that best position? I'll help  
8 you any way I can.

9 MR. WECHSLER: I think if the dialogue is  
10 established and we report on the results of that in a status  
11 report, that might be helpful to the Court.

12 THE COURT: All right. Okay. But see, the  
13 problem is, I don't have any control over the FBI because  
14 the FBI is not a party to this. Should the FBI be a party?

15 MR. WECHSLER: No.

16 THE COURT: Why not?

17 MR. WECHSLER: We don't think so. This is part of  
18 their duties. This is not part of their recordkeeping.  
19 This would create problems, I think, for them.

20 THE COURT: But they have the devices, though.

21 MR. WECHSLER: Nothing that I'm saying should be  
22 construed as any criticism. They have their own job to do.

23 THE COURT: No one is criticizing the FBI. No.  
24 No.

25 MR. WECHSLER: They have their own job to do. And

1 we will initiate the conversation.

2 THE COURT: I understand that. But you have a job  
3 to do, too. And those documents, those devices are in the  
4 possession of -- we're tiptoeing on the head of a pin here  
5 because there's only one government. I mean, those devices  
6 are in the possession of the Department of Justice.

7 MR. WECHSLER: Perhaps the response will help to  
8 inform any next steps that are required.

9 THE COURT: All right. Let me raise one more  
10 point. And maybe this is the point to be pursued down the  
11 road a little bit. But, I raise it for a reason. I raise  
12 it not to encourage more litigation, but to make the point  
13 that if indeed this dialogue is established and it's  
14 fruitful, there is no need to expand this litigation to  
15 include other entities, like the FBI.

16 MR. WECHSLER: Correct.

17 THE COURT: I think an arguable basis probably  
18 could exist under Rule 19 to -- if the plaintiff or the  
19 defendant wanted to add the FBI as a party, I think there's  
20 probably a basis to do that because if that entity is before  
21 the Court, then the Court's in the best position to accord  
22 complete relief among existing parties. And that's the  
23 importance of Rule -- that's the significance of Rule 19(a).

24 But I think I'm willing to accept your agreement,  
25 that if you can get the information as a result of a

1 dialogue with the FBI, information about what's responsive  
2 to the request and also return of the documents to the State  
3 Department so you can discharge your obligations, I think I  
4 may be satisfied with that, without bringing the FBI in or  
5 without at least allowing a party to bring the FBI in.  
6 Because either side could bring the FBI in in an effort to  
7 enable the Court to, as Rule 19(a) says, accord complete  
8 relief among existing parties. I think that may be a fair  
9 compromise.

10 MR. WECHSLER: Yes, Your Honor.

11 THE COURT: But I would like to have all this --  
12 the other thing is the uncertainty of the length of the  
13 investigation. We don't know. And, you know what? I'm  
14 very sensitive to that. And I think it's -- I think it's  
15 inappropriate, I think, for judges -- well, I think it's  
16 inappropriate. I would feel uncomfortable telling an  
17 entity, especially one not before the Court, or even one  
18 before the Court, that you have X number of days to complete  
19 your investigation. That's not how investigations should be  
20 commenced or completed. It would be nice to try to get a  
21 timeframe for that.

22 All right. I don't think I have any questions  
23 now. Thank you very much, Counsel. Appreciate it.

24 MR. WECHSLER: Thank you, Your Honor.

25 THE COURT: Let me hear from plaintiff's counsel.

1                   What about that? Would you be satisfied with that?

2                   MR. BEKESHA: We shouldn't be, Your Honor. The  
3                   State Department's position appears to be that FOIA isn't  
4                   the proper avenue to search personal e-mail accounts. We  
5                   agree with that. But we're not talking about a personal  
6                   e-mail account here. As we've learned, the State  
7                   Department -- Mrs. Clinton did not use a State Department  
8                   e-mail account. The State Department did not provide her  
9                   the opportunity to use their server. We found out yesterday  
10                  that Mrs. Clinton wasn't even provided a BlackBerry from the  
11                  State Department.

12                  So, this isn't a personal e-mail account, her  
13                  using personal devices. This is no different from many  
14                  other cases this court and the D.C. Circuit has heard about  
15                  government contractors and third-party vendors.

16                  THE COURT: Are you concerned with, though -- not  
17                  to minimize it -- all you're concerned with, though, is  
18                  getting the documents that are responsive to request. I  
19                  don't want to lose sight of that --

20                  MR. BEKESHA: Absolutely, Your Honor.

21                  THE COURT: -- those paragraphs in the complaint.  
22                  And I want to -- and to the extent that it's appropriate for  
23                  you to get that information, to the extent you've not  
24                  already received some information, then we want to make sure  
25                  you get it, recognizing there may be appropriate government

1 exceptions, etcetera. But if the Court has established a  
2 basis for the State Department to get, from an investigating  
3 entity, documents that may be responsive to your request and  
4 also copies of those documents, what's the complaint after  
5 that? Why are you complaining?

6 MR. BEKESHA: Based on reporting, and only  
7 reporting because the State Department hasn't been  
8 necessarily revealing, you know, all the information that  
9 the Court has requested and plaintiff has requested.  
10 Reporting is that the thumb drives have only the 55,000  
11 pages on them and that the server may have been wiped. So,  
12 we're talking about the same records that have been produced  
13 in paper form.

14 THE COURT: Isn't that a next step though? Let's  
15 talk about a couple of scenarios. Let's talk about one  
16 scenario where information is -- and I don't want to get  
17 into too many hypotheticals because we could spend hours  
18 talking about what if, what if, what if. Seems to me that  
19 the investigating entity ought to be able to conclude its  
20 investigation, determine whether or not there are documents  
21 that can be recovered that are responsive, and give those  
22 documents to the Court in the first instance, and to the  
23 government.

24 Another scenario would be an investigation that  
25 doesn't reveal anything because -- for whatever reason, who

1 knows what the reason is. And that may trigger something  
2 else. That may trigger an independent forensic examination  
3 by an outside entity; that may, who knows? But I think it's  
4 inappropriate to focus in on "what if" right now, if indeed  
5 there is a legitimate basis established pursuant to the  
6 Federal Records Act for the government to attempt to  
7 preserve federal records through this process of getting  
8 this information from a federal agency, and then we see, at  
9 the end of the day or the end of the investigation, what  
10 exists and what may not exist, which may trigger additional  
11 relief. I'm not going to sit here and say what's going to  
12 happen then; who knows?

13 I actually applaud the government's concession and  
14 agreement to establish that dialogue and get that  
15 information. Now, what's wrong with that? I'm inviting you  
16 to argue. What's wrong with that? No, I am.

17 MR. BEKESHA: Thank you, Your Honor. I think the  
18 concern is we don't know -- what we've heard in the media,  
19 the thumb drive --

20 THE COURT: That's exactly right. That's  
21 legitimate. You don't know what you're going to find.

22 MR. BEKESHA: However, we do know a third-party  
23 contractor, in this case Mrs. Clinton, had a system of  
24 records for her e-mail so she could conduct official  
25 government business while she was Secretary of State. She

1 had her own BlackBerry, she may have had her own iPad. She  
2 has admitted she used an iPad. There was a server,  
3 Clintonemail.com. Apparently, according to Mrs. Clinton's  
4 statement under oath, Ms. Abedin had an e-mail account that  
5 she used for government business on the server. There's  
6 been no discussion anywhere that the two thumb drives that  
7 Mr. Kendall had and the server that was turned over had Mrs.  
8 Abedin's e-mail. We don't know if there was other.

9 This is a system of records that was being managed  
10 and maintained either by a third-party, Mrs. Clinton, or,  
11 according to the *Washington Post*, an IT specialist within  
12 the State Department traveled up to New York to provide  
13 maintenance to the server. We've sent a FOIA request to get  
14 more information on that. It's only been a week, so we  
15 haven't received a response.

16 But, there was a third party involved. And we  
17 don't know if the FBI has the original server, a copy of the  
18 server, if it has all Miss Abedin's e-mails on it, the  
19 30,000 e-mails that Mrs. Clinton deleted. What we do know,  
20 and based on your line of questioning before, was if this  
21 server, being what appears to be a government server, was  
22 physically in the possession of the State Department, they  
23 would not have called Mrs. Clinton, as a former employee,  
24 said, Can you come back to the office and review those  
25 records? and allowed her to remove or delete 30,000 e-mails.

1 That wouldn't have happened.

2 So just because counsel continues to use  
3 possession and control -- well, as the Circuit has said,  
4 possession isn't everything, especially if it's to a  
5 government contractor or third-party vendor. And that's  
6 what we have in this case.

7 And so what we're looking for is for the system of  
8 records that was used to conduct official government  
9 business to be searched. It hasn't been searched. Mrs.  
10 Clinton directed an unnamed individual to review her records  
11 and turned over those records. Mrs. Clinton didn't say  
12 under oath that all potentially -- all potential federal  
13 records were returned. In fact, she said that she directed  
14 an individual to review the Clintonemail.com. That always  
15 begs the question, Well, how come she didn't say, "all  
16 potential federal records"? Did she limit it to  
17 Clintonemail.com because there were additional accounts? We  
18 don't know that.

19 The State Department doesn't answer the question  
20 that the Court posed of what accounts were used to conduct  
21 official government business. We know at least Miss Abedin  
22 conducted business on this server, and we don't know if  
23 these other two unnamed individuals, whose records are now  
24 being searched, if they may have used the Clintonemail.com  
25 server.



1           So, the State Department may not have physical  
2           possession of it, but they sure had possession, custody and  
3           control of that server, those devices. Mrs. Clinton's  
4           BlackBerry may still be around. State Department says that  
5           they issued BlackBerries to Ms. Abedin and Miss Mills. They  
6           said they can't find them, they believe they were deleted.  
7           You know, that left some room for maybe some interpretation  
8           or questions. But then the State Department spokesperson  
9           yesterday, to the media, said that they were returned and  
10          they were wiped clean. So the spokesperson, it appears,  
11          knew more than the IT specialist that provided a declaration  
12          to this Court.

13                 We continue learning more information from the  
14          media because the State Department refuses to provide us  
15          information. This case was a close case. They told us,  
16          over a year ago, that they conducted a reasonable search.  
17          We believe them. Counsel today says that they're being  
18          diligent now. Well, why weren't they diligent two years ago  
19          when we sent the FOIA request? Why did we have to sue? Why  
20          do we have to reopen the case?

21                 THE COURT: You're going back over spilt milk now.  
22          Let's go forward.

23                 MR. BEKESHA: I'm sorry, Your Honor. We just  
24          don't know. We started asking questions about the accounts,  
25          the servers. Where could, potentially, records be? We

1 started asking them -- I believe it was on June 22nd, they  
2 refused to answer, we had a hearing. Your Honor asked some  
3 of the similar questions during the hearing. The State  
4 Department either could not or refused to answer.

5 You issued a minute order. You asked for four  
6 things to be done. Some of those have been done in part,  
7 some weren't done at all. You know, we're back here in  
8 court. We don't know that much more. All we know -- what  
9 we know is more clear now, is that Mrs. Clinton was not  
10 provided a BlackBerry, she was not provided an e-mail  
11 address, so she used a system she set up. That's a  
12 third-party vendor.

13 The State Department can't wash their hands now  
14 and say we don't have possession, we don't have custody and  
15 control. If that were the case, agencies wouldn't maintain  
16 records at all. They would give it to a third-party, they  
17 would hire a contractor, say will you manage our records, so  
18 then when Judicial Watch or any of the media organizations  
19 that are interested --

20 THE COURT: What are you asking the Court to do?

21 MR. BEKESHA: We are asking the Court to determine  
22 where these records are, where the server -- where this  
23 information is stored. Does Mrs. Clinton, as media reports  
24 are saying, still have a copy of all 60,000 of her e-mails?  
25 Does she have copies or the native original files of Ms.

1       Abedin's e-mails used on this Clintonemail.com server that  
2       Mrs. Clinton was using as Secretary of State? These are  
3       questions we need to know. Whether or not the FBI has a  
4       part of -- you know, a part of this subset, that's great,  
5       it's helpful to know.

6               But again, we're back to that this is the box of  
7       documents and the only thing that's in this box are what  
8       everybody is selecting to be them. They're still  
9       incomplete, they're not the entire story. They're not the  
10      entire system of records.

11             We're looking for the system of records. Mrs.  
12      Clinton may have a BlackBerry that has that system of  
13      records on it, she may have a copy of the server that is  
14      that system of records. And that goes the same for Ms.  
15      Abedin.

16             With respect to Ms. Abedin and Ms. Mills, if they  
17      occasionally used a private e-mail -- a personal e-mail to  
18      conduct official business, most likely by accident, as  
19      counsel said, that's the *CEI* case. That's not really  
20      *Kissinger* because *Kissinger*, those records were created  
21      beforehand. But that's that *CEI* case. And there are  
22      questions there. But what FOIA law is clear about is that  
23      you can't hand off document retention, document management,  
24      document maintenance to a third-party vendor and then have  
25      that agency wipe their hands.

1           So we believe it's essential for the State  
2     Department -- and not the FBI, not the Justice Department --  
3     the State Department to ask Mrs. Clinton, or for this Court  
4     to ask Mrs. Clinton directly, does she have the records that  
5     she created on the server that she was authorized to use as  
6     Secretary of State to conduct official government business?  
7     And that's how we get to the bottom of this. This is how  
8     this ends. If we wait for the FBI to conduct their  
9     investigation, it could be two years later and we're in the  
10    same place.

11           We don't know. We've -- Judicial Watch, the Court  
12    has spent a lot of time on this issue already. We're just  
13    trying to get to the bottom of it and, Your Honor, that's  
14    the only way we can.

15           THE COURT: All right. Thank you. Counsel?

16           MR. WECHSLER: I would like to respond to what I  
17    think are a couple of erroneous statements. The term  
18    "system of records" was just used. And that's agency system  
19    of records. And the term "custody or control." And those  
20    are the operative terms. The fact that the former secretary  
21    had a personal e-mail account does not make that e-mail  
22    account or her a government contractor or third-party  
23    vendor. That is preposterous.

24           THE COURT: The argument is, though, that there  
25    may be official documents on that personal device though.

1           MR. WECHSLER: And we have a declaration, under  
2           oath, that was submitted in this case. So the notion that  
3           this is a third-party vendor or government contractor is  
4           simply wrong. This was the former Secretary using a  
5           personal e-mail account. And that's what those cases are  
6           about. The Department has obtained the 55,000 pages. To  
7           the extent that there are personal e-mails, there is  
8           absolutely no obligation for those to be produced in a FOIA  
9           case because those are not part of the agency system of  
10          records, they're not within the agency's possession or  
11          control.

12          THE COURT: Let me ask you this, though:  
13          Consistent with the government's agreement to inquire of the  
14          investigating entity about documents that may be responsive,  
15          why doesn't the government have an obligation to inquire of  
16          the entity that managed that third-party server?

17          MR. WECHSLER: It would be unclear what the  
18          inquiry would be about.

19          THE COURT: What do you possess? I think you have  
20          to give us a copy of what you have, because I'm sure --  
21          well, I don't know, I'm not an expert in that area. But,  
22          arguably, there were backups of everything that were -- that  
23          were communicated.

24          MR. WECHSLER: There's no evidence of that. Where  
25          the Secretary submitted a declaration --

1 THE COURT: No. The question is: Why doesn't the  
2 government have an obligation consistent with its obligation  
3 to manage, preserve, etcetera, federal records? Why doesn't  
4 the government have an obligation to at least ask the  
5 provider of that server whether or not that provider has a  
6 backup of communications?

7 MR. WECHSLER: Because the correspondence that the  
8 court requested and that was submitted was directly between  
9 the State Department and the former Secretary of State. And  
10 that --

11 THE COURT: I understand. I understand what I  
12 asked. But I'm saying now, why isn't there an obligation  
13 consistent with what the government said its obligation is,  
14 to ensure -- to preserve authoritative record of official  
15 correspondence, communications, and documentation. Why  
16 doesn't the government have an obligation to at least  
17 inquire of the entity that managed that server, or whatever  
18 it is, to provide a copy of the correspondence that was  
19 backed up, if there was correspondence backed up?

20 MR. WECHSLER: Because both the former Secretary  
21 and her attorney, Mr. Kendall, have informed the Court that  
22 these documents have -- these potential federal records have  
23 been turned over directly to the State Department. Neither  
24 of them make any reference to any company. No company was a  
25 contractor, as plaintiff calls it, or third-party vendor to

1 the government. There's no suggestion of that.

2 If that had been the case, if the State Department  
3 had set up an account outside its agency systems of records,  
4 that would be an entirely different matter. But there's no  
5 evidence of that here.

6 THE COURT: Well, suppose the question to the  
7 former Secretary is as follows: If, indeed, it was an  
8 entity that backed up communications made on those devices,  
9 please identify that entity. And if such an entity is  
10 identified by the former employee, would you agree then that  
11 the government has an obligation to at least inquire of the  
12 entity to provide a copy of communications backed up?

13 MR. WECHSLER: I would suggest that the State  
14 Department could inquire the initial question, and then  
15 submit a response for any further --

16 THE COURT: Right. Right. But my question is if  
17 the answer is yes, here it is, it's ABC Corporation, would  
18 you then agree that the government has an obligation,  
19 consistent with its responsibilities under the Federal  
20 Records Act of 1950, to at least inquire and get a copy of  
21 the communications backed up?

22 MR. WECHSLER: I think it's going to depend on  
23 what that response is.

24 THE COURT: Let's assume, hypothetically, the  
25 response is yes and the name is ABC Corporation.

1           MR. WECHSLER: And -- I'm sorry. And the precise  
2 question would be --

3           THE COURT: To the entity or to the --

4           MR. WECHSLER: To the Secretary.

5           THE COURT: Please advise whether or not -- now, I  
6 have to fine-tune this, Counsel. All right? Please advise  
7 whether or not an entity provided a backup server, backup  
8 communication -- backup computer services for personal  
9 devices used by you to conduct government business. Words  
10 to that effect.

11           MR. WECHSLER: Yeah. And I think that's going to  
12 require a discussion with an IT expert to determine the  
13 meaning of "backup." These terms of art are somewhat  
14 difficult for someone such as myself.

15           THE COURT: Let's make it easy; copies.

16           MR. WECHSLER: I think the problem with that is  
17 that --

18           THE COURT: We're just trying to determine whether  
19 or not there is indeed another record of communications.

20           MR. WECHSLER: I don't think a duplicate would be  
21 another record. I think you could create endless copies of  
22 the same piece of paper on a Xerox machine, for example,  
23 that wouldn't create a duty to go to a third party to make  
24 more copies. I mean, you would be talking at that point of  
25 copies of copies.



1           THE COURT: But if you agree, though, that the  
2           government has an obligation to ask the FBI, Tell us what  
3           information may be responsive, it would be the same  
4           directive to this private entity, although the private  
5           entity couldn't provide you with an answer as to whether  
6           their documents response to request -- private entity could  
7           say, You know what? I don't know FOIA from whatever, but  
8           here's a copy of all the communications that we -- that we  
9           preserved.

10          MR. WECHSLER: No. I don't conceive that any  
11          private company would turn over to a third party the former  
12          Secretary's e-mails.

13          THE COURT: If they subpoenaed them they would.

14          MR. WECHSLER: Okay. But all we're talking  
15          about --

16          THE COURT: If you subpoenaed them, they would.

17          MR. WECHSLER: Certainly. All we're talking about  
18          here is the FBI as an agency that is in possession, in  
19          safekeeping of these matters, a letter from another agency  
20          in the government to the FBI.

21          THE COURT: I understand what we're talking about.  
22          All I'm saying is why wouldn't the same inquiry be  
23          appropriate with a company that's backed up communications?

24          MR. WECHSLER: Because the State Department has no  
25          contractual relation to any third party. It's not a vendor

1 of the State Department.

2 THE COURT: I understand that. But you don't have  
3 any contractual relation with the FBI either. It's not  
4 about contracts, it's about inquiries.

5 MR. WECHSLER: I would submit the letter to the  
6 FBI is entirely appropriate, that they have the server, that  
7 that would have or not have whatever the information is  
8 we're talking about and that we go from there.

9 THE COURT: But you don't think that a backup  
10 server or communications copied would be revealing or could  
11 be revealing?

12 MR. WECHSLER: "Backup server," that's another  
13 term of art. And I'm not aware of any evidence --

14 THE COURT: I'm not an expert either. But there's  
15 some way that people preserve e-mails; that's how people are  
16 able to recover them, they're preserved.

17 MR. WECHSLER: Perhaps the answer is that the  
18 letter to the Secretary -- the former Secretary that we  
19 discussed would also include a sentence about whether there  
20 is an additional set of potential federal records. I mean --

21 THE COURT: Or just whether or not -- yeah, all  
22 right. All right. I'll come up with some language. All  
23 right. Anything further?

24 Yes?

25 MR. BEKESHA: Thank you, Your Honor. We're

1 talking not about just any former employee, we're talking  
2 about the Secretary of State, the head of an agency. So  
3 this idea that the State Department doesn't set up her  
4 account, she was Secretary of State. She is the State  
5 Department. She chose to use this account. The State  
6 Department didn't give her another account to use. They  
7 didn't even give her a BlackBerry.

8 According to the declaration filed yesterday, the  
9 State Department didn't provide her with a computer, a  
10 laptop, or a BlackBerry. How did they expect the Secretary  
11 of State to conduct official business?

12 So what we are talking about is a State Department  
13 system of records. We're talking about the server that was  
14 used to conduct official State Department business. We're  
15 talking about laptops, desktops, BlackBerries, because, as  
16 we know, Mrs. Clinton at least used the BlackBerry. And  
17 sending 60,000 e-mails over a four-year period, she probably  
18 used a computer, too, because typing all of that out on a  
19 BlackBerry is probably a little bit difficult.

20 So there are devices out there. The State  
21 Department won't tell us; they say they don't have the  
22 devices. Well, that means Secretary Clinton did. Secretary  
23 Clinton should have returned all official government  
24 property back to the State Department. The State Department  
25 was obligated to collect it. Most employees sign a

1 separation statement when they leave, saying they've  
2 returned all federal property. We have a FOIA request and  
3 FOIA litigation for that. And so far the --

4 THE COURT: That's another lawsuit somewhere.

5 MR. BEKESHA: But they haven't found it. So it  
6 seems the State Department never asked Mrs. Clinton to  
7 return property she was using to conduct official government  
8 business. So, yes, it's important to know --

9 THE COURT: That's why it's important for me to  
10 stay focused on the very discrete inquiry that --

11 MR. BEKESHA: Yes, we're looking for -- yes, we're  
12 looking for very specific records. We're looking for  
13 records about the authorization for Ms. Abedin to stay on at  
14 the State Department, as well as conduct business, you know,  
15 in a different capacity.

16 Senator Grassley has written a letter to Secretary  
17 Kerry stating that he knows there are e-mails out there  
18 where this discussion occurred between Ms. Abedin and Ms.  
19 Mills and it ended in a meeting with Mrs. Clinton.

20 So we believe records exist. Just because the  
21 government hasn't found them doesn't mean they're not out  
22 there. We believe their searches to try to find those  
23 records just haven't been reasonable. There are all these  
24 other potential devices out there that were used by the  
25 Secretary of State as -- in her official capacity. And the

1 State Department didn't provide her with any other equipment  
2 or devices or an e-mail account to use.

3 It doesn't matter if she hired another company. I  
4 mean, these are either State Department systems, because she  
5 had the authorization, or it's some type of vendor  
6 relationship where she's in charge of the vendor. But  
7 whoever she hired, whether it was a company or one person or  
8 herself was managing the server, it doesn't matter. She was  
9 using this server. And also, Ms. Abedin, don't forget, was  
10 using this server to conduct official government business.

11 So, all of the systems related to all the  
12 equipment, the State Department can't say we don't have  
13 possession, we don't have custody and control, because this  
14 is how Mrs. Clinton conducted business. According to the  
15 State Department's declaration, she couldn't have conducted  
16 it anywhere else. If the State Department believes that,  
17 you know, there -- that she was a rogue Secretary in State  
18 and that she was using personal e-mail without anybody in  
19 the State Department knowing about it, one, she e-mailed  
20 people at the State Department, so it's probably pretty  
21 difficult for no one to know.

22 But, let's then take some discovery, let's ask  
23 Patrick Kennedy, the Under Secretary of Management who was  
24 in charge of the people, the systems, the management; was  
25 Mrs. Clinton -- her liaison for all management related

1 issues. Let's get him to discuss, under oath, what the  
2 arrangement was. I think, as we've seen since the last  
3 status hearing, written discovery, written requests don't  
4 seem to work because not all the questions are answered,  
5 there are still more questions; the language is cagey, at  
6 best.

7 So, you know, let's ask some questions, whether  
8 that's a deposition done by Judicial Watch or Your Honor  
9 asking Mr. Kennedy to come and answer a few questions, maybe  
10 we can resolve this even quicker. Maybe he will say  
11 Secretary Clinton had no authority, she was a rogue  
12 employee, we didn't know what she was doing; no one helped  
13 manage, no one helped maintain the server. And maybe the  
14 inquiry ends. Maybe then counsel is right, that FOIA isn't  
15 the proper way to try to find these very specific responsive  
16 records because they weren't agency records.

17 But based on the information we have right now, it  
18 doesn't appear as though nobody knew what Mrs. Clinton was  
19 doing and no one at the State Department -- whatever that  
20 means, because she was Secretary of State -- didn't  
21 authorize it, they didn't give her a BlackBerry. Thank you.

22 THE COURT: Anything else, Counsel?

23 MR. WECHSLER: (Shakes head.)

24 THE COURT: Let me do this: We started about an  
25 hour ago. Let's take a ten-minute recess. There's no need

1 for anyone to stand.

2 The court will stand in recess for ten minutes.

3 Thank you.

4 (Recess.)

5 THE COURT: All right. Counsel, I want to just  
6 raise one point. Early on I asked of government counsel  
7 whether or not the government had determined that the e-mail  
8 accounts were reasonably likely to contain responsive  
9 records. And I thought Mr. Wechsler's response was no. I  
10 just raise that. I mean, I'm not trying to trick you. But  
11 that's in paragraph 12 of your submission. I'll read it,  
12 "The department determined that non-state government e-mail  
13 accounts of former Secretary Clinton, Miss Abedin and Miss  
14 Mills were reasonably likely to contain responsive records."

15 MR. WECHSLER: That those e-mail accounts of which  
16 now the Department has been provided with the copies of  
17 potential federal records.

18 THE COURT: All right. A couple things I want to  
19 ask you about. There's -- among the many investigations,  
20 there's also an Inspector General -- State Department  
21 Inspector General investigation of the e-mail issue, is that  
22 right?

23 MR. WECHSLER: There is an Inspector General.

24 THE COURT: Will that person report to State and  
25 give a progress report to State, or not? Or will that

1 report be made public?

2 MR. WECHSLER: I can inquire. I don't know the  
3 answer to that.

4 THE COURT: The court would like a copy of that.  
5 If -- in camera, maybe, if it's appropriate. If not -- I'm  
6 not familiar with the policies and procedure that the  
7 Inspector General -- I don't want to overstep my authority.  
8 But, I would be interested in what that report -- has that  
9 report been concluded, do you know?

10 MR. WECHSLER: I'm not aware of that. I can inquire.

11 THE COURT: All right. All right. I'm going  
12 to -- here's what I'm going to do: I'm going to post an  
13 order -- and again, I appreciate the government's concession  
14 that dialogue will be established. I'm not going to get  
15 into the details of how that dialogue is established, but  
16 I'm going to direct that the State Department provide the  
17 director of the FBI with a copy of the Court's order that  
18 establishes -- that directs the State Department to  
19 establish a dialogue with the FBI. That's the entity that  
20 the government believes is investigating, correct?

21 MR. WECHSLER: Yes.

22 THE COURT: That establishes a dialogue about  
23 recovery of potential information that may be responsive to  
24 a FOIA request. Now, how you go about identifying that  
25 information or how the FBI goes about sharing information



1 with you, I think at the very least provide the FBI with a  
2 copy of the request.

3 MR. WECHSLER: Yes.

4 THE COURT: And, of course, DOJ attorneys will be  
5 assisting the FBI in discharging its responsibility in that  
6 regard.

7 MR. WECHSLER: Yes.

8 THE COURT: I'll leave the details to the entities  
9 because the last thing I want to do is try to micromanage  
10 some agency. But I'll just direct that a copy be given to  
11 Mr. Comey. The plaintiff -- I was wondering when that word  
12 "discovery" was going to surface. And I can invite you back  
13 to the podium. But you know what? As we all know, what's  
14 complicated in this case is that all the entities, all the  
15 parties, all the principals aren't before the Court. I  
16 think there's a number of lawsuits pending before my  
17 colleagues. We talked about cases before Judge, I think,  
18 Contreras, and other judges. There's probably some overlap  
19 with respect to who's entitled to what, depending on what  
20 the lawsuit is all about.

21 FOIA, the FOIA law, as we all know, frowns upon  
22 discovery, unless there are exceptional circumstances. Are  
23 there exceptional circumstances here? There may be. There  
24 may be, I don't know. There may be. But I think this is  
25 the way to proceed, though.

1 I want to post that minute order today that  
2 establishes that dialogue. Hopefully there's a quick  
3 turnaround with respect to the FBI's investigation and the  
4 FBI will provide the Department of State with the  
5 information that it has an obligation to provide; that is,  
6 with respect to materials that are responsive to the FOIA  
7 request.

8 I think we just need to wait and see what that  
9 response is before the Court determines whether or not  
10 there's any basis for discovery. Plaintiff -- parties can  
11 file anything at any time. But here's my prediction: You  
12 file a motion for discovery now, the Court is not going to  
13 act on it until it sees what's been produced as a result of  
14 the FBI because that's going to inform the Court's decision  
15 as to whether there's a need for discovery.

16 So I'm just asking you to hold off. If you filed  
17 it, that's fine, probably, to give the government more time  
18 within which to respond. So, my suggestion -- and it's  
19 always a suggestion. I'll never dissuade a party from  
20 filing anything that a party believes should be filed. My  
21 suggestion is, though, to hold off for 30 days because I'm  
22 going to direct that this dialogue produce relevant  
23 information, if any, by no later than 30 days from today's  
24 date and that a status report be filed and that we talk again.

25 So, my strong suggestion is hold off. Let's see

1        what the investigation reveals, if anything. And whatever  
2        it reveals, if anything, is probably going to inform the  
3        Court's decision about the need for discovery. All right.

4                MR. BEKESHA: Sounds good, Your Honor. We still  
5        have a scheduled status hearing for September 10th.

6                THE COURT: We do, but I'm wondering just how  
7        fruitful that would be? I mean, the government has asked  
8        for 30 days to provide the Court, the parties, and the  
9        public with information about everything that's in progress  
10       now. And that's fine. That would take us to September  
11       20th. Maybe the end of September? Maybe the 30th or so? I  
12       mean, look, it's great to have everyone in court, it's good  
13       to see the lawyers, but I'm not sure what we could  
14       accomplish on September the 10th. Let's pick a date that  
15       works for everyone now. And I'm going to pick September the  
16       20th for the filing of the government's status report, bring  
17       the court up-to-date with respect to everything.

18               MR. WECHSLER: I'm sorry. September 20th, I  
19       believe, is a Sunday.

20               THE COURT: All right. Let's do the 21st. And  
21       let's see. Suppose we have a status hearing October the 1st  
22       at 10 a.m., Counsel? Is that a good day for everyone?

23               MR. WECHSLER: (Nods head.)

24               MR. BEKESHA: Yes, Your Honor.

25               THE COURT: For the government?

1 MR. WECHSLER: Yes. Yes.

2 THE COURT: All right. Anything else we need to  
3 talk about this afternoon?

4 MR. WECHSLER: No, Your Honor. Thank you.

5 THE COURT: The court also recognizes -- I mention  
6 this, there is a lot of overlap in all these cases and I  
7 want to be mindful of that. Again, there are very discrete  
8 questions in my case. But, you know, the government  
9 recognizes its obligations under the Federal Records  
10 Retention Act and etcetera. And I appreciate that. So  
11 let's see what the investigation reveals, then we'll go from  
12 there.

13 MR. WECHSLER: Thank you, Your Honor.

14 MR. BEKESHA: Thank you, Your Honor.

15 THE COURT: Thank you very much, Counsel.

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CERTIFICATE OF OFFICIAL COURT REPORTER

I, JANICE DICKMAN, do hereby certify that the above and foregoing constitutes a true and accurate transcript of my stenograph notes and is a full, true and complete transcript of the proceedings to the best of my ability.

Dated this 22nd day of August, 2015.

/s/ \_\_\_\_\_

Janice E. Dickman, CRR, RMR  
Official Court Reporter  
Room 6523  
333 Constitution Avenue NW  
Washington, D.C. 20001

## **Exhibit B**

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EDWARD BENNETT WILLIAMS (1920-1966)  
PAUL R. CONNOLLY (1922-1978)

August 12, 2015

**BY HAND**

The Honorable Ron Johnson  
United States Senate  
Committee on Homeland Security and Government Affairs  
Washington, DC 20510

Dear Mr. Chairman:

Thank you for your letter dated July 29, 2015.

On December 5, 2014, in response to an October 28, 2014 letter request from the Department of State for assistance in ensuring its records were complete, attorneys for Secretary Clinton provided the Department with the 30,490 e-mails (approximately 55,000 pages) from the Secretary's [hdr22@clintonemail.com](mailto:hdr22@clintonemail.com) e-mail account that were identified as related or potentially related to Secretary Clinton's work at the Department of State. That set was produced in paper, as provided for in Department guidance, while the electronic copies of the e-mails were preserved on a thumb drive, kept in secure storage. Not a single e-mail was marked as classified. The set of emails provided to the State Department was demonstrably over-inclusive, since we are informed that the Department and the National Archives and Records Administration determined that at least 1246 of the emails we submitted were not in fact federal records.

On March 3, 2015, I received a preservation notice from the House Select Committee on Benghazi concerning the documents relevant to that Committee's work, and I assured the Committee on March 6, 2015, that I would take such measures as were, in my judgment, and in my role as personal counsel to former Secretary Clinton, reasonably necessary to preserve the materials identified. We continued to preserve the original .pst file thumb drive in compliance with subsequent preservation notices we have received, including from the Department of State and the Intelligence Community Inspectors General.

Recently, the Department of State has retroactively classified certain information in the emails we provided to the Department on December 5, 2014. When this information was upgraded to classified on May 22, June 30, and July 31, 2015, we consulted with the State Department and took appropriate measures to ensure the security of the newly classified information.

WILLIAMS & CONNOLLY LLP

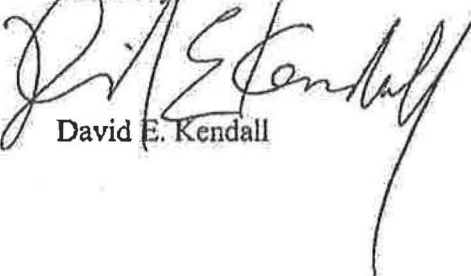
The Honorable Ron Johnson  
August 12, 2015  
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In connection with our preservation of the thumb drive, we consulted with the Department of State concerning appropriate measures to ensure the security of that thumb drive. As a result, the thumb drive was stored in a safe provided by the Department and installed at Williams & Connolly on July 8, 2015, for this purpose. I and my law partner, Katherine M. Turner, who represent former Secretary Clinton, are the only two individuals who were authorized to access the safe. We both hold Top Secret security clearances issued by the Department of State.

As we advised the Department of State's Inspector General in a June 24, 2015 letter, Platte River Networks retained the server equipment that hosted Secretary Clinton's [hdr22@clintonemail.com](mailto:hdr22@clintonemail.com) account during her tenure as Secretary of State and stored it in a secure data center. Neither Ms. Turner nor I have had access to this server equipment. That equipment is no longer active and, we understand, no longer contains data from Secretary Clinton's [hdr22@clintonemail.com](mailto:hdr22@clintonemail.com) account. All preservation notices related to the equipment were shared with the Platte River Networks, which confirmed its acceptance of and compliance with such notices.

In light of the State Department's recent retrospective classification of some of the information in the 55,000 pages, all of which had previously been unclassified, we voluntarily transferred to the Department of Justice on August 6, 2015, the thumb drive containing the .pst file of the 30,490 emails (and two copies) from the State Department-provided safe after receiving from the Department of Justice an assurance that it would maintain this file in an appropriately secure manner and the Department's opinion that such maintenance would satisfy any preservation obligations I am under. Similarly, Platte River Networks is today transferring to the Department of Justice the server and related equipment on which emails to and from Secretary Clinton's [clintonemail.com](mailto:clintonemail.com) account were stored from 2009 to 2013 and which PRN took possession of in 2013. This transfer is occurring after the Department of Justice's assurance to us and counsel for PRN that it would maintain the server equipment in an appropriately secure manner. The Department also gave counsel its opinion that such maintenance would satisfy any preservation obligations we have.

Sincerely,



David E. Kendall

DEK/bb



## **Exhibit C**

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EDWARD BENNETT WILLIAMS (1930-19)  
PAUL R. CONNOLLY (1928-1978)

August 21, 2015

**BY ELECTRONIC MAIL**

The Honorable Patrick F. Kennedy  
Under Secretary of State for Management  
U.S. Department of State  
2201 C Street NW  
Washington, DC 20520

Dear Under Secretary Kennedy:

I write as personal counsel to former Secretary Clinton in regard to *Judicial Watch, Inc. v. U.S. Department of State*, Case No. 13-cv-01363 (D.D.C.), over which the Honorable Emmet G. Sullivan is presiding. In light of the publicity following yesterday's status hearing in that case, we think it is important to reiterate that Secretary Clinton's use of personal e-mail was consistent with the practice of other Secretaries of State and was permissible under State Department policy in place during her tenure.

As former Secretary Colin Powell wrote in his memoir, *It Worked for Me: In Life and Leadership* (Harper 2012), in connection with his work as Secretary, he "installed a personal laptop on a private line," from which he accessed his "personal email account," which he used to send e-mails to his "principal assistants, to individual ambassadors, and increasingly to [his] foreign-minister colleagues . . ." (p. 109). Likewise, Secretary Clinton used a personal e-mail account for communicating during her tenure as Secretary.

Since 1995, the federal regulations issued by the National Archives and Records Administration ("NARA") to implement the Federal Records Act (the "FRA"), 44 U.S.C. § 3101 *et seq.*, have addressed the use of "external electronic email systems" by agency personnel, *see* 36 C.F.R. § 1234.24(a)(4) (1996), thereby recognizing that there are appropriate and legal circumstances in which outside e-mail accounts may be used. In 2009, while NARA made minor modifications to the wording of that provision, referring to e-mail messages on "a system not operated by the agency" (instead of "external electronic email systems"), the policy remained the same: when "[a]gencies . . . allow employees to send and receive official electronic mail messages using a system not operated by the agency," such agency "must ensure that Federal records sent or received on such systems are preserved in the appropriate agency recordkeeping system." 36 C.F.R. § 1236.22(b) (2010).

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Secretary Clinton followed that regulation through her practice of communicating with other Department officials on their state.gov e-mail accounts (which constituted the vast majority of Secretary Clinton's work-related e-mails), contemporaneously forwarding e-mails from non-government parties to Department officials on their state.gov e-mail accounts, copying Department officials on their state.gov accounts in the case of e-mails she sent to non-government parties, and providing her work-related e-mails when supplementation of the Department's records was requested.<sup>1</sup> Through these practices, she preserved her work-related e-mails in the Department's e-mail systems so that they were available to the Department of State.

Indeed, in October 2014, when the State Department requested assistance from the four most recent Secretaries of State to ensure that its records were as complete as possible, Secretary Clinton directed her attorneys to identify her copies of her work-related and potentially work-related e-mails, and provided those 30,490 e-mails in hardcopy (as set forth in 5 FAM 443.3) on December 5, 2014. Further, her attorneys preserved the electronic version of those 30,490 e-mails. Almost all of those e-mails (approximately 90%) already included a state.gov e-mail address as a sender or recipient, or were forwarded to a state.gov e-mail address contemporaneously, such that this production replicated what already would have been available on the state.gov system. NARA and the Department of State have subsequently confirmed that this production was over-inclusive, and have indicated already that at this stage of State's FOIA review, at least 1,246 of those e-mails were in fact personal. While the Department has not yet identified and returned those 1,246 e-mails to Secretary Clinton, we anticipate that many of those personal e-mails fall within the category of the approximately 10% of the set provided to State that was not contemporaneously on the state.gov system (and had no reason to be on such system, given their personal nature).

The fact that this process was conducted by Secretary Clinton's attorneys, at her direction, is also consistent with federal regulations and State Department policy. In the ordinary course, it is the responsibility of individual officers and employees to make judgments about what constitutes a federal record. As NARA has recently recognized with regard to the role of federal employees in e-mail management, "[c]urrently, in many agencies, employees manage their own email accounts and apply their own understanding

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<sup>1</sup> Notably, Secretary Clinton (who did not have her own state.gov account) followed practices that are functionally the same as what is now required under the 2014 amendments to the FRA, enacted after her tenure. Today, pursuant to 44 U.S.C. § 2911(a), in instances in which an officer or employee of an executive agency creates or sends a record using a non-official electronic messaging account, the officer or employee must "cop[y] an official electronic messaging account of the officer or employee in the original creation or transmission of the record" or "forward[] a complete copy of the record to an official electronic messaging account of the officer or employee not later than 20 days after the original creation or transmission of the record."


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of Federal records management. This means all employees are required to review each message, identify its value, and either delete it or move it to a recordkeeping system." NARA Bulletin 2014-06, ¶ 4 (Sept. 15, 2014). Similarly, State Department guidance in place during her tenure required that "[e]-mail message creators and recipients must decide whether a particular message is appropriate for preservation" and that "[i]n making these decisions, all personnel should exercise the same judgment they use for determining whether to retain and file paper records." Department of State, Foreign Affairs Manual, 5 FAM 443.2(b). The Manual further states that "[t]he intention of this guidance is not to require the preservation of every E-mail message. Its purpose is to direct the preservation of those messages that contain information that is necessary to ensure that departmental policies, programs, and activities are adequately documented." *Id.*; see also 36 C.F.R. § 1222.16(b)(3) ("Nonrecord materials should be purged when no longer needed for reference. NARA's approval is not required to destroy such materials."). And as the federal regulations make clear, there is no obligation to preserve personal e-mails, as "[p]ersonal files are excluded from the definition of Federal records and are not owned by the Government." 36 C.F.R. § 1220.18. In giving assistance to the Department to ensure its records were complete, Secretary Clinton took an inclusive approach, providing all e-mails that were work-related or even potentially work-related. Under the FRA and implementing regulations, she had no obligation to include in that set her personal e-mails, or to retain such personal e-mails.

We hope that this letter will be of assistance to the Department in connection with the *Judicial Watch* lawsuit and other, similar lawsuits.

Sincerely,



David H. Kendall