UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC. *Plaintiff,* v. U.S. DEPARTMENT OF STATE, *Defendant*.	Civil Action No. 14-cv-1242 (RCL)

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION TO ALLOW TIME FOR LIMITED DISCOVERY PURSUANT TO RULE 56(D)

INTRODUCTION

A court may issue relief pursuant to Rule 56(d) "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition." Fed. R. Civ. P. 56(d). Plaintiff Judicial Watch's request for "limited" discovery pursuant to Rule 56(d) should be denied because Plaintiff has not met the standard for granting such relief. First, Plaintiff has not submitted an affidavit stating "with sufficient particularity why additional discovery is necessary." *U.S. ex rel. Folliard v. Gov't Acquisitions, Inc.*, 764 F.3d 19, 26 (D.C. Cir. 2014) (quotation omitted). Rather than outlining the "particular facts [it] intends to discover and describe[ing] why those facts are necessary to the litigation" as required, *id*., Plaintiff lists several broad "subject matters of inquiry." Pl.'s Mot. to Allow Time for Limited Discovery Pursuant to Rule 56(d) ("Pl.'s Mot.") at 8, ECF No. 22; Decl. of Counsel in Support of Pl.'s Mot. to Permit Discovery Pursuant to Rule 56(d) ("56(d) Decl.") ¶ 5, ECF No. 22-1. On this basis alone, Plaintiff's request should be denied. By listing broad topics rather than specific facts,

Plaintiff has not limited its request to discovery that is necessary to oppose Defendant's Motion for Summary Judgment.

Moreover, Judicial Watch has not shown, and cannot show, that the information it seeks is necessary to oppose Defendant Department of State's ("State") Motion for Summary Judgment, ECF No. 19, because courts routinely resolve disputes over the adequacy of an agency's search based on summary judgment briefing. Discovery is generally not ordered unless a plaintiff presents evidence that the agency acted in bad faith in the processing of the FOIA request. Despite insinuation and speculation to the contrary, Plaintiff has not made and cannot make that showing here. Finally, Plaintiff's request for discovery should fail because it has not shown that the information it seeks "is in fact discoverable." *U.S. ex rel. Folliard*, 764 F.3d at 26 (citation omitted). Most of the topics Plaintiff identifies are irrelevant to the issues presented by Defendant's Motion for Summary Judgment, and the remainder are based on pure speculation that inquiry into the subject matter will provide the evidence required to create an issue of material fact. For the foregoing reasons, as further discussed below, Plaintiff's motion for Rule 56(d) discovery should be denied.

BACKGROUND

This case involves Plaintiff's FOIA request to the Office of the Secretary of State seeking:

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

Complaint ¶ 5 (ECF No. 1). At the time State filed its Motion for Summary Judgment, on July 7, 2015, it had conducted searches reasonably calculated to uncover responsive records in its possession and control. *See* Def.'s Mot. for Summ. J. at 5-12, ECF No. 19. Those searches included, among other things, searches of emails provided to State by former Secretary of State Hilary Clinton and the state.gov email accounts of Jacob Sullivan, Cheryl Mills, and Huma Abedin. *Id.* at 8.

The searches also covered records that had been provided to State by Mr. Sullivan and Ms. Mills less than two weeks before State filed its Motion for Summary Judgment; in the Motion, and contrary to Plaintiff's allegations, *see* Pl.'s Mot. at 5, State informed the Court and the Plaintiff that State could receive additional documents in the future from Mr. Sullivan, Ms. Mills, and Ms. Abedin. Def.'s Mot. for Summ. J. at 10. State then received additional documents from all three individuals after the Motion for Summary Judgment was filed, and informed the Court and the Plaintiff of that development. *See* Mot. to Stay Pending Resolution of Mot. for Designation of Coordinating Judge ("Mot. to Stay") at 3, ECF No. 25 (Sept. 4, 2015). Despite the fact that it had no obligation under the FOIA to do so, State was willing to stay summary judgment briefing and ask the Court to set a schedule to allow it to search those documents for records responsive to the FOIA request, notwithstanding that those records were not in State's possession and control at the time the FOIA search was conducted. *See Judicial Watch v. FHFA*, 646 F.3d 924, 926 (D.C. Cir. 2011) (citing *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1998)) ("The Supreme Court has held that FOIA reaches only records the agency controls at the time of the request."). The parties were unable to reach agreement regarding a schedule for such a search. Ms. Mills, Mr. Sullivan, and Ms. Abedin have already stated that that they have provided all potential federal records in their possession to State. *See*

Exhibit 1, August 12, 2015 Letter from Beth A. Wilkinson to Patrick F. Kennedy ("we have produced all potential federal records identified in Ms. Mills' possession"); Exhibit 2, August 6, 2015 Letter from Beth A. Wilkinson to Patrick F. Kennedy ("On July 30, 2015, Mr. Sullivan provided an electronic version of all potential federal records in his possession from his tenure at the Department of State from 2009 through 2013 to the Department."); September 1, 2015 Letter from Karen L. Dunn and Miguel E. Rodriguez to Patrick F. Kennedy ("We write in further reply to your request for Ms. Huma Abedin's assistance in preserving any potential federal records in her possession relating to her work with the Department from 2009 to 2013. Enclosed with this letter are documents in Ms. Abedin's possession that we have identified as responsive or potentially responsive to your request.").

On August 21, 2015, Plaintiff filed a motion for discovery pursuant to Rule 56(d). *See* ECF No. 22. In this motion, Plaintiff seeks "[a]t a minimum" an order requiring Defendant "to complete its review of the records from Ms. Mills, Ms. Abedin, Mr. Sullivan and [Phillippe] Reines[1] before Plaintiff can oppose summary judgment." Pl.'s Mot. at 6. Defendant has expressed its willingness to perform searches of the documents provided by Ms. Mills, Ms. Abedin, and Mr. Sullivan, as set forth above. However, Plaintiff also seeks discovery related to the emails of former Secretary Clinton and the other former employees on the following topics:

- How emails and email servers were managed by the Defendant, including, but not limited to the "clintonemail.com" server and backup server;
- How files and file servers were managed by Defendant;
- How Defendant implemented system backups;

[1] Mr. Reines was not employed in the Office of the Secretary; his records, therefore, are outside the bounds of the original FOIA request, which was directed to the Office of the Secretary. *See Kowalczyk v. Dep't of Justice*, 73 F.3d 386, 389 (D.C. Cir. 1996) (the agency's obligation to search is limited to the four corners of the request).

- Information to identify individuals (custodians) outside the Secretary's office who were likely to communicate to and/or from the Secretary's office about the subject matter of Plaintiff's FOIA request;

- Information about former officials use of email accounts and systems outside the "state.gov" servers, including the "clintonemail.com" server and email accounts;

- Information about what electronic and computing devices (BlackBerrys, iPhones, iPads, laptops, desktops, etc.) were used by key officials, their locations and Defendant's ability to search for potentially responsive records; and/or

- What other ad-hoc backups of data or USB devices were used for government business.

Rule 56(d) Decl. ¶ 5; Pl.'s Mot. at 8. Plaintiff does not specify the exact type of discovery it seeks or from whom it would seek it.

On September 2, 2015, Defendant filed a Notice of its Motion for Designation of a Coordinating Judge, and on September 4, 2015, State filed a Motion for a Stay pending resolution of the Motion for Designation of a Coordinating Judge. *See* Def.'s Notice Re Mot. for Designation of Coordinating Judge, ECF No. 23; *In re U.S. Dep't of State FOIA Litig. re Emails of Certain Officials*, Misc. No. 15-1188 (D.D.C. Sept. 2, 2015) ("Coordination Motion"); Mot. to Stay, ECF No. 25. In the Motion to Stay, State sought a stay of the briefing schedule set forth in the Court's order of August 11, 2015 (ECF No. 21) regarding Plaintiff's Motion for Discovery Pursuant to Rule 56(d). *See* ECF No. 25 at 2.[2] On September 4, 2015, Judge Huvelle, on behalf of the Calendar and Case Management Committee, issued an order in Miscellaneous Case 15-

[2] This stay would, if the Coordination Motion is granted, allow the Coordinating Judge to rule on issues raised in Plaintiff's motion that are common across many of the cases, including the discovery sought by Plaintiff, preventing duplicative arguments being made and adjudicated across various cases and avoiding conflicting rulings on such issues. It would also allow the Coordinating Judge to set a schedule for searches of documents that have been received by State since it filed its motion for summary judgment in this case on July 7, 2015. *See* ECF No. 25 at 2-3.

1188 requiring plaintiffs in the various FOIA actions implicated by State's Consolidation Motion to file any opposition to that motion in the miscellaneous case by September 14, 2015. *See* Notice of Order Entered in Misc. No. 15-1188, ECF No. 24. Several plaintiffs filed oppositions to State's Consolidation Motion. *See* Misc. No. 15-1188, ECF Nos. 16, 17, 19, 21, 23, 24, 25, 26, 28. This Court has not ruled on Plaintiff's Motion for a Stay in this case. In the absence of such a ruling, Defendant therefore submits this opposition to Plaintiff's Motion for Discovery.

ARGUMENT

A court may issue relief pursuant to Rule 56(d) "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition." Fed. R. Civ. P. 56(d). To obtain the relief that Plaintiff seeks here – discovery – it must "submit an affidavit which states with sufficient particularity why additional discovery is necessary." *U.S. ex rel. Folliard*, 764 F.3d at 26 (quoting *Convertino v. U.S. Dep't of Justice*, 684 F.3d 93, 99 (D.C. Cir. 2012)).[3] This affidavit must satisfy three criteria: "(1) [I]t must outline the particular facts [plaintiff] intends to discover and describe why those facts are necessary to the litigation; (2) it must explain why [the plaintiff] could not produce the facts in opposition to the motion for summary judgment; and (3) it must show the information is in fact discoverable." *Id.* (quoting *Convertino*, 684 F.3d at 99-100). "District courts should resolve each request based on its application of the *Convertino* criteria to the specific facts and circumstances presented in the request." *Id.* at 26-27. Plaintiff's request for discovery should be denied because its affidavit does not fulfill the criteria for granting the relief requested.

[3] As the Court noted in *U.S. ex rel. Folliard*, 764 F.3d at 27 n.3, *Convertino* discussed what was then Rule 56(f) and is now Rule 56(d). Rule 56(d) "carrie[d] forward without substantial change the provisions of former subdivision (f)." Fed. R. Civ. P. 56 advisory committee's notes to 2010 Amendments.

A. Plaintiff Does Not Set Forth Particular Facts It Intends to Discover

First, Plaintiff's affidavit is insufficient because it does not outline the particular facts that Plaintiff intends to discover, but rather lists several broad topics or "subject matters of inquiry." *See* 56(d) Decl. ¶ 5. Rule 56(d) requires more particularity to demonstrate that the inquiry is necessary to respond to Defendant's Motion for Summary Judgment. *See U.S. ex rel. Folliard*, 764 F.3d at 29 (request to depose two individuals regarding entity's sales to the federal government in the open market "lacked the particularity required by *Convertino*" because the "vague request" did not indicate why the depositions would reveal any information beyond what the relator already had). Plaintiff also does not specify the exact type of discovery it seeks or from whom it would seek it. *See Hudson River Sloop Clearwater, Inc. v. Dep't of Navy*, 891 F.2d 414, 422 (2d Cir. 1989) (holding that affidavit supporting Rule 56(d) discovery must explain "what facts are sought and how they are to be obtained"). This lack of specificity demonstrates that Plaintiff's request is not limited to seeking information that is necessary to oppose Defendant's Motion for Summary Judgment. On this basis alone, Plaintiff's Motion should be denied.

B. Plaintiff Does Not Explain Why the Subject Matters of Inquiry Are Necessary to the Litigation

Even if Plaintiff's affidavit did set forth the particular facts it intends to discover – which it does not – the affidavit does not explain why those facts are necessary to the litigation. *See* 56(d) Decl. The discovery issues raised by Plaintiff in its motion are not specific to the FOIA request at issue in this case. They are, rather, general requests about the information technology practices of State and the specifics of how certain former employees sent, received, and stored email. *See* Pl.'s Mot. at 8; 56(d) Decl. ¶ 5. This is further evidenced by the fact that the

discovery issues raised by Plaintiff in its Motion are virtually identical to information Plaintiff has sought, improperly, by way of status reports in other cases currently pending in this district. *See, e.g.*, Supplemental Joint Status Report at 14-16, *Judicial Watch v. U.S. Dep't of State*, Civil No. 13-772 (D.D.C. Sep. 3, 2015) (seeking discovery with substantial overlap to the discovery sought in Plaintiff's Motion for Discovery here); Joint Status Report at 3-4, *Judicial Watch v. U.S. Dep't of State*, Civil No. 15-688 (D.D.C. June 25, 2015) (outlining questions Judicial Watch had posed to State). The request in Civil Case 15-688 was denied. *See* Scheduling Order, *Judicial Watch v. U.S. Dep't of State*, Civil No. 15-688 (D.D.C. July 9, 2015) (entering scheduling order and not ordering discovery). The Court has not issued an order based on the status report filed by the parties in Civil Case 13-772.

Moreover, "[d]iscovery is generally unavailable in FOIA actions." *Wolf v. CIA*, 569 F. Supp. 2d 1, 9 (D.D.C. 2008) (quotation omitted). Defendant's Motion for Summary Judgment demonstrated that State conducted searches reasonably calculated to uncover responsive documents in its possession and control. *See* ECF No. 19-1 at 2-12. If Plaintiff disagrees with this assertion, the proper way to resolve that dispute is to follow the same course of action that would be undertaken in any FOIA case when the parties find themselves at such an impasse: Plaintiff should file a brief opposing Defendant's Motion for Summary Judgment. In that brief, Plaintiff is free to argue that State should have searched other systems of records in its possession and control, should have searched the records of additional custodians, and should have searched systems outside of its possession and control (even though the law clearly states that State has no such obligation). Defendant will then file a reply brief responding to any arguments raised in Plaintiff's opposition brief, and the Court will decide the issue. Even if the Court were to determine, when deciding Defendant's Motion for Summary Judgment, that the

declaration submitted by State in support of its Motion for Summary Judgment was somehow "deficient" as to the sufficiency of the search, "courts generally will request that an agency supplement its supporting declarations rather than order discovery." *Wolf*, 569 F. Supp. 2d at 10 (quotation omitted).

Generally, a FOIA plaintiff is entitled to discovery only if it has provided evidence that the agency has acted in bad faith in the processing of the request. *See id*. Despite Plaintiff's insinuations and speculation to the contrary, Plaintiff has provided no evidence that State has acted in bad faith. For example, the fact that State did not note that it had not searched former Secretary Clinton's emails when it responded to Plaintiff's FOIA request, *see* Pl.'s Mot. at 2, was neither a misrepresentation nor a material omission, because those documents were not in its possession and control when the original search was completed. *See* Declaration of John F. Hackett in Support of Mot. for Summ. J. ¶ 17, ECF No. 19-2. Once those emails were provided to State and thus entered State's possession and control, State, on its own initiative, searched them for records responsive to the FOIA request. This search is complete. *Id*.

Moreover, State has provided the Court and Plaintiff with current information regarding the documents it has received from Ms. Mills, Mr. Sullivan, and Ms. Abedin. State informed Plaintiff and the Court, in its Motion for Summary Judgment, that respective counsel for Ms. Mills, Ms. Abedin, and Mr. Sullivan had informed State that these individuals might provide a further response to State's request to make available to State any federal records in their possession that may not otherwise be preserved in State's recordkeeping system. *See* ECF No. 19-1 at 10 & n.4. In its Motion to Stay, State told Plaintiff and the Court that it had received additional documents from all three individuals since the Motion for Summary Judgment was filed. *See* ECF No. 25 at 3. As discussed above, State was willing to stay summary judgment

briefing and ask the Court to set a schedule to allow it to search those documents for records responsive to the FOIA request, notwithstanding that those records were not in State's possession and control at the time the FOIA search was conducted, but the parties could not agree on a schedule for these searches.

Therefore, Plaintiff has provided no reason why discovery is necessary, and this Court should assess the sufficiency of State's search at the appropriate time, after Defendant's Motion for Summary Judgment is fully briefed. *See North v. U.S. Dep't of Justice*, 729 F. Supp. 2d 74, 77-78 (D.D.C. 2010) (denying request for discovery until Court considered motion for summary judgment and requiring plaintiff to challenge adequacy of agency's search by way of opposition to the agency's motion); Minute Order, *Judicial Watch v. U.S. Dep't of State*, Civil No. 14-1511 (June 22, 2015) (rejecting Plaintiff's request that State perform certain actions and searches as set forth in the parties' Joint Status Report, *see* ECF No. 13 at 3-4, and granting State's request to set schedule for briefing on its motion for summary judgment because State took the position that its search was adequate).

C. Plaintiff Has Not Shown that the Information It Seeks Is Discoverable

Even if Plaintiff could show that the discovery it seeks is necessary to respond to Defendant's Motion for Summary Judgment, its request should still be denied because Plaintiff has not shown that the information it seeks is discoverable. Much of the information Plaintiff seeks is not relevant to the issue of whether Defendant conducted a reasonable search, and Plaintiff's request for the remaining information is based on nothing more than speculation, rather than facts showing that the discovery sought will provide the evidence required.

First, information regarding custodians outside of the Office of the Secretary, *see* 56(d) Decl. ¶ 5, is irrelevant to the issue of whether Defendant conducted an adequate search because

Plaintiffs' FOIA request sought records only from the Office of the Secretary. *See Kowalczyk v. Dep't of Justice*, 73 F.3d 386, 389 (D.C. Cir. 1996) (The agency "is not obliged to look beyond the four corners of the request. . . . Of course, if the requester discovers leads in the documents he receives from the agency, he may pursue those leads through a second FOIA request.").

Second, Plaintiff's requests for information regarding Defendant's management of emails, email servers, files, file servers, system backups and electronic and computing devices in State's possession and control is based on pure conjecture regarding the existence of information that would demonstrate that Defendant's search was inadequate. State's electronic records systems and accounts, such as state.gov email accounts, are generally housed on State servers. *See* Declaration of Joseph E. Macmanus ¶ 3, *Judicial Watch v. U.S. Dep't of State*, Civil No. 13-1363 (August 19, 2015) (ECF No. 29-1). To respond to Plaintiff's FOIA request, State searched the state.gov email accounts for the relevant custodians.[4] *See* Hackett Decl. ¶ 11, ECF No. 19-2. State also searched those electronic records systems in the Office of the Secretary reasonably likely to contain responsive records. *Id*. ¶ 10. Plaintiff provides no facts to support its assertion that discovery into Defendant's management of emails, Defendant's email servers, file servers, and system backups, or electronic and computing devices issued by State and used by relevant custodians would yield any information relevant to whether State made a "good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested" that was in State's possession and control. *Oglesby v. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990).

[4] Former Secretary Clinton did not use a state.gov email account. *See* Hackett Decl. at 7 n.6, ECF No. 19-2. Thus, to the extent that Plaintiff criticizes State for failing to search that account, its contention is unpersuasive. *See* Declaration of David Sun ¶ 10, ECF 22-2.

Whether certain relevant custodians used non-State systems to conduct official business has no bearing on whether State's search of the systems under its possession and control was reasonable, especially given that Plaintiff's FOIA request was limited to the Office of the Secretary. Yet these are the only "facts" Plaintiff offers to justify its request for discovery. *See* Pl.'s Mot. at 6-8. Speculation and conjecture are not sufficient to grant discovery under Rule 56(d). *See Messina v. Krakower*, 439 F.3d 755, 762 (D.C. Cir. 2006) (affirming denial of request for Rule 56(d) discovery "where the requesting party has offered only a conclusory assertion without any supporting facts to justify the proposition that the discovery sought will produce the evidence required") (internal quotation omitted); *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (citation omitted) (in evaluating the adequacy of a search under FOIA, courts accord agency affidavits a presumption of good faith that cannot be rebutted by a plaintiff's speculation "about the existence and discoverability of other documents").[5]

Third, information regarding custodians' use of email accounts and systems outside the "state.gov" servers is not relevant to whether State conducted a reasonable search. State is not obligated under FOIA to produce documents that State neither possesses nor controls. *See, e.g.*, *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 152, 154-55 (1980); *Nat'l Sec. Archive v. Archivist of the U.S.*, 909 F.2d 541, 545 (D.C. Cir. 1990); *Competitive Enter. Inst. v. Office of Science & Tech. Policy*, -- F. Supp. 2d --, 2015 WL 967549, at * 4-5 (D.D.C. Mar. 3, 2015). State lacks possession and control over servers used by third parties, including former

[5] *See also CareToLive v. FDA*, 631 F.3d 336, 345 (6th Cir. 2011) ("A [FOIA] requester is not entitled to discovery based on its hope that it might find additional documents or its belief that the agency is withholding information."); *Exxon Corp. v. FTC*, 663 F.2d 120, 128 (D.C. Cir. 1980) (upholding denial of FOIA Plaintiff's request for Rule 56(f) discovery because requester provided no evidence that ex parte communications took place, and "[i]t is not the intent of Rule 56 to preserve purely speculative issues of fact"); Wright & Miller, 10B Fed. Prac. & Proc. Civ. § 2741 (3d ed.) ("[T]he 'hope' or 'hunch' that evidence creating an issue of fact will emerge . . . is insufficient.").

Secretary Clinton's server. Therefore, this Court should not order discovery into the management of this or other non-State servers, accounts, hard drives, or devices because State is not in a position to provide that information. *See* Declaration of John F. Hackett ¶ 12, *Judicial Watch v. U.S. Dep't of State*, Civil No. 13-1363 (August 14, 2015) (ECF No. 26-1).

Moreover, even if this information was relevant and could be sought from State, Plaintiff has not met its burden to show that the discovery will provide the evidence required. Former Secretary Clinton has provided an affidavit under penalty of perjury stating that she directed that all of her emails on "clintonemail.com" in her custody that were or potentially were federal records be provided to the State Department. *See* Declaration of Hillary Rodham Clinton, Exhibit A to Supplement to Defendant's August 7, 2015 Status Report, *Judicial Watch v. U.S. Dep't of State*, Civil No. 13-1363 (August 10, 2015) (ECF No. 22-1). Plaintiff provides no reason beyond mere speculation to question this testimony of a non-party. *See Strang v. U.S. Arms Control & Disarmament Agency*, 864 F.2d 859, 861 (D.C. Cir. 1989) (where plaintiff provided no evidence to contradict affidavit, her desire to "test and elaborate" the testimony through deposition was insufficient to require Rule 56(f) discovery). Counsel for Ms. Mills, Ms. Abedin, and Mr. Sullivan have also stated that their clients have provided copies of all potential federal records in their possession to State. *See* Ex. 1 ("we have produced all potential federal records identified in Ms. Mills' possession"); Ex. 2 ("On July 30, 2015, Mr. Sullivan provided an electronic version of all potential federal records in his possession from his tenure at the Department of State from 2009 through 2013 to the Department."); Ex. 3 ("We write in further reply to your request for Ms. Huma Abedin's assistance in preserving any potential federal records in her possession relating to her work with the Department from 2009 to 2013. Enclosed with this letter are documents in Ms. Abedin's possession that we have identified as responsive

or potentially responsive to your request."). Plaintiff provides no evidence to counter these statements by non-parties. Therefore, Plaintiff's request for this discovery should be denied.

D. The Sun Declaration Is Irrelevant and Should Be Disregarded

The Declaration of David Sun, ECF No. 22-2, does not cure any of the deficiencies of Plaintiff's Rule 56(d) affidavit and should be summarily rejected. Mr. Sun does not purport to be an expert in FOIA; he purports to be an expert in computer forensics. *See* Declaration of David Sun ¶¶ 2-6 ("Sun Decl."), ECF No. 22-2 (discussing experience in computer forensics). Plaintiff has presented no evidence that any data in State's possession and control that is responsive to its FOIA request has been lost; therefore Mr. Sun's purported expertise in data recovery is irrelevant to determining the adequacy of Defendant's search. Moreover, because Mr. Sun is not a FOIA expert, he does not analyze State's search efforts under the legal standard governing FOIA actions, which requires a "reasonable" search. When suggesting additional searches that Defendant could run, Mr. Sun also does not account for the fact that, under FOIA, Defendant only has an obligation to search for records in its possession and control. *See, e.g.*, *id.* ¶ 14 (listing potential search locations such as social media accounts). In addition, Mr. Sun does not acknowledge that State cannot be required to broaden Plaintiff's FOIA request by conducting a search of all inboxes at State because Plaintiff limited its FOIA request to the Office of the Secretary. *See id.* ¶¶ 16-20. Without any personal knowledge regarding the subject matter of the FOIA request, Mr. Sun is also ill positioned to question the custodians whose records State searched, *see id.* ¶ 16, an issue that, like all the others raised by Mr. Sun, can be challenged in an

opposition to Defendant's Motion for Summary Judgment in any event.[6] Finally, to the extent Plaintiff and Mr. Sun suggest specific actions that State should take, as opposed to facts Plaintiff intends to discover, *id*. ¶ 25, these "suggestions" are not proper requests for discovery pursuant to Rule 56(d).

E. The Burden of the Discovery Outweighs the Likely Benefit

Even if the Court were to find that Plaintiff had made a sufficient showing under Rule 56(d), it still should deny Plaintiff inquiry into the broad subject matters it outlines because "the burden or expense of the proposed discovery outweighs its likely benefit," particularly considering State's limited resources. *See* Fed. R. Civ. P. 26(b)(2)(C)(iii); Sun Decl. ¶ 15 (stating that his recommendation for additional searches is made based on "[t]he relative ease of searching the location," "[t]he probability of finding responsive information in the location," and "[t]he ability to perform the equivalent searches using easier methods at other locations"); Declaration of John F. Hackett ¶¶ 10-14, *Associated Press v. U.S. Dep't of State*, Civil No. 15-00345, ECF No. 11-1 (July 21, 2015) (discussing State's FOIA caseload, resources, and process). For the reasons described above, Plaintiff has not shown that the broad subject matters of inquiry it outlines in its requests will yield any relevant information. Moreover, the burden involved in providing information on the broad subject matters of inquiry would be extensive, especially given that Plaintiff's request lists broad topics, rather than specific facts, that it intends to discover.

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[6] Mr. Sun also acknowledges that Fed. R. Civ. P. 26(f) does not apply to FOIA actions, but analogizes the type of collaboration that he says should occur in a FOIA case to information exchanged by the parties in a Rule 26(f) report. *See* Sun Decl. ¶ 9. This Court has exempted FOIA actions from the requirements of Rule 26(f), *see* LCvR 16.3(b)(9), and FOIA does not require agencies to answer questions from requesters, *see Landmark Legal Found. v. E.P.A.*, 272 F. Supp. 2d 59, 64 (D.D.C. 2003).

In addition, as explained above, Mr. Sun's suggestions regarding particular actions State could perform do not constitute proper requests for information pursuant to Rule 56(d). Even if they were, however, Plaintiff has not met its burden to show that such actions should be ordered. Mr. Sun states that State should conduct an enterprise-wide search of all email accounts on State's email server for all emails to or from State and external accounts for the key individuals. *See* Sun Decl. ¶¶ 18-20, 25. As a preliminary matter, this suggestion ignores the fact that Plaintiff's FOIA request was limited to the Office of the Secretary, and that State has provided an affidavit stating that it searched the state.gov email accounts of individuals "selected by members of the Office of the Secretary based on their understanding of which staff members within the Office of the Secretary during former Secretary Clinton's tenure worked on issues related to the Benghazi attacks and whose records may therefore reasonably be expected to contain responsive records." Declaration of John F. Hackett ¶ 11, ECF No. 19-2. Plaintiff also has provided no evidence to suggest that a search of all State Department email accounts will yield any responsive records, let alone records sufficient to justify such a search. Searching the email accounts of tens of thousands of employees across State based on speculation that additional responsive records could be located is inconsistent with FOIA and Fed. R. Civ. P. 26 & 56(d).

Mr. Sun also relies on pure speculation that such a search would even be possible. *See* Transcript of Status Hearing 55:22-56:1 (testimony of John F. Hackett), *Associated Press v. U.S. Dep't of State*, Civil No. 15-345 (July 29, 2015) (saying that "we don't have a big central archive of emails where we could do a search across everybody's email account, so it's going to involve searching specific email accounts or former employees and then searching offices"). State has already explained, in this and other cases, the process that it is required to follow to respond to a

FOIA request. *See* Declaration of John F. Hackett ¶¶ 6-8, ECF No. 19-2; Declaration of John F. Hackett ¶¶ 12-14, *Associated Press v. U.S. Dep't of State*, Civil No. 15-00345, ECF No. 11-1 (July 21, 2015) (discussing State's FOIA caseload, resources, and process). To the extent any searches suggested by Plaintiff and Mr. Sun exceed that, this relief should not be granted.

CONCLUSION

For the above-stated reasons, State respectfully submits that Plaintiff's Motion to Allow Time for Limited Discovery Pursuant to Rule 56(d) should be denied.

Date: September 18, 2015

Respectfully submitted,

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