

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

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JUDICIAL WATCH, INC.,

*Plaintiff,*

v.

U.S. DEPARTMENT OF STATE,

*Defendant.*

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Civil Action No. 12-cv-2034-RBW

**PLAINTIFF’S MOTION FOR DISCOVERY PURSUANT TO  
RULE 56(d) OF THE FEDERAL RULES OF CIVIL PROCEDURE**

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Dated: May 27, 2016

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Plaintiff Judicial Watch, Inc. (“Judicial Watch” or “Plaintiff”), by counsel and pursuant to Rule 56(d) of the Federal Rules of Civil Procedure, respectfully submits this motion for discovery in response to Defendant’s motion for summary judgment. As grounds therefor, Plaintiff states as follows:

### **MEMORANDUM OF POINTS AND AUTHORITIES**

#### **I. INTRODUCTION.**

What differentiates this lawsuit from the two other lawsuits in which discovery has been authorized is that this lawsuit was filed six weeks before Secretary Clinton’s departure from the agency.<sup>1</sup> When Secretary Clinton left office on February 1, 2013, the State Department’s search for records responsive to Plaintiff’s Freedom of Information Act (“FOIA”) request was underway, yet the Secretary took with her all of the emails she sent or received during her 4-year tenure at the agency – over 60,000 unique records – before those records could be searched. The State Department’s motion for summary judgment is silent about this most basic failure by the agency to preserve potentially relevant records, as well as on the facts and circumstances surrounding the Secretary’s email practices.

The Court cannot determine whether summary judgment is appropriate on this bare record. Discovery is necessary to determine whether, among other issues, the State Department violated its record preservation obligations and made false or misleading representations to Plaintiff and the Court about its initial search efforts. Discovery into Secretary Clinton’s email practices and those of some of her key aides is also necessary to determine whether any of the agency’s searches were reasonable under the circumstances. Some of that discovery is underway

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<sup>1</sup> See *Judicial Watch, Inc. v. U.S. Dept. of State*, 2016 U.S. Dist. Lexis 41183, Case 14-1242, Memorandum and Order (D.D.C. March 29, 2016) (Lamberth, J.); *Judicial Watch, Inc. v. U.S. Dept. of State*, 2016 U.S. Dist. Lexis 62283, Case 13-1363, Memorandum and Order (D.D.C. May 4, 2016) (Sullivan, J.).

in *Judicial Watch, Inc. v. U.S. Dep't of State*, Case No. 13-1363 (EGS). Other discovery is under consideration in *Judicial Watch, Inc. v. U.S. Dep't of State*, Case No. 14-1242 (RCL). Plaintiff does not wish to duplicate that effort. Instead, Plaintiff is proposing a narrowly-tailored discovery plan directed at the record preservation and the search for records responsive to this particular FOIA request. See Exhibit 1 at ¶ 7 (Declaration of Counsel in Support of Plaintiff's Motion for Discovery Pursuant to Rule 56(d) of the Federal Rules of Civil Procedure) and Exhibit 2 (Plaintiff's Proposed Discovery Plan). Plaintiff's proposed discovery is amply justified under Rule 56, and Plaintiff's motion for discovery should, respectfully, be granted. Fed. R. Civ. P. 56(d)(2).

## **II. STATEMENT OF RELEVANT FACTS.**

In July of 2012, a video purporting to be a trailer for a movie called "The Innocence of Muslims" was uploaded to youtube.com. In September of 2012, public protests over the video occurred in dozens of countries around the world. On September 16, 2012, a State Department spokesperson inaccurately blamed the video for a separate, pre-planned terrorist attack on September 11, 2012 in Benghazi, Libya in which U.S. Ambassador Christopher Stevens and three other Americans were killed. On or about September 20, 2012, the Obama administration began airing a television advertisement in Pakistan entitled "A Message From the President of the United States Barack Obama and Secretary of State Hillary Clinton" explaining that the youtube video was not produced or authorized by the United States government.<sup>2</sup>

On September 24, 2012, Judicial Watch served its FOIA request for all documents related to the production of the advertisement. Dkt. Entry No. 1, ¶ 5. Judicial Watch filed suit on December 19, 2012, after receiving no response to the request. The complaint was served on the

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<sup>2</sup> The advertisement is available at: <https://www.youtube.com/watch?v=6akGIF6g-Zw>.

State Department on December 27, 2012. Dkt. Entry No. 7. In its Answer, filed on January 28, 2013, the State Department “aver[ed] that it is currently conducting a search for records sought by plaintiff.” Dkt. Entry No. 8, at ¶ 4.

Secretary of State Hillary Clinton left office on February 1, 2013. Later it would be revealed that, throughout her entire tenure at the State Department, Secretary Clinton exclusively used a non-”state.gov” email account to conduct official government business. There is no genuine dispute about this material fact. There also is no genuine dispute that, during her tenure at the State Department, Secretary Clinton used her “clintonemail.com” account to send and receive tens of thousands emails to and from persons both inside and outside the agency, including other high level agency officials. The State Department’s top legal advisor, Harold Koh, used Secretary Clinton’s “clintonemail.com” account to communicate with the Secretary about pending litigation against the agency, among other official government business. *See* Exhibit 1 at ¶ 8; Exhibit 2 (Collected examples of email between Secretary Clinton and Legal Advisor Koh). Plaintiff has identified as many as 67 email communications between Secretary Clinton and Mr. Koh either to or from the Secretary’s “clintomemail.com” email account. *See* Exhibit 1 at ¶ 8. Only six days before Secretary Clinton left office, Under Secretary of State for Management Patrick Kennedy, who oversees records management and information technology for the entire agency, emailed the Secretary at her “clintonemail.com” account regarding official government business. *See* Exhibit 1 at ¶ 9; Exhibit 4 (January 25, 2013 Email from Patrick Kennedy to Secretary Clinton). There also is no genuine dispute that, when she left office, Secretary Clinton took all of her emails with her. Among the facts that are not known, however, is whether and to what extent other State Department officials condoned Secretary Clinton’s actions.

In a Joint Scheduling Statement filed on March 14, 2013, the State Department represented to Plaintiff and the Court that it was “in the process of searching for records responsive to the FOIA request that is the subject of this action.” Dkt. Entry No. 10 at 1. The State Department neither disclosed that Secretary Clinton exclusively used a “clintonemail.com” account to conduct official government business nor that she took potentially relevant emails with her when she left the department the previous month. *Id.* In a Supplemental Joint Scheduling Statement filed on May 15, 2013, the State Department represented to Plaintiff and the Court that the agency had completed its searches of the Office of the Secretary, the Executive Secretariat, and several other components. Dkt. Entry No. 12 at 1-2. Again, the agency failed to disclose anything about the Secretary’s email practices or that she took potentially relevant emails with her when she left the department. *Id.* In a Joint Status Report filed on July 2, 2013, the State Department represented to Plaintiff and the Court that it had completed all of its searches. Dkt. Entry No. 13 at 1-2. Again, the agency made no mention of the Secretary’s emails. *Id.* By November 2013, the agency had produced over 700 pages of records to Plaintiff concerning the Pakistan advertisement, including emails from the Secretary’s chief of staff and counsel, Cheryl Mills, and the Secretary’s deputy chief of staff, Jacob Sullivan, and represented to Plaintiff and the Court that its production was complete. Dkt. Entry No. 14 at 2. At no point during this time period did the State Department ever disclose anything to Plaintiff and the Court about the Secretary’s email practices or that she took potentially relevant records with her when she left the department *after* Plaintiff had filed suit and *after* the State Department had appeared in this action and began defending itself.

Crediting Defendant’s representations that it had completed reasonable searches and produced all non-exempt, responsive records, Plaintiff agreed to a voluntary dismissal of this

lawsuit in November 2014. Dkt. Entry No. 19. On November 7, 2014, the Court entered a minute order dismissing Plaintiff's lawsuit with prejudice.

In March of 2015, the New York Times and other media outlets publicly disclosed for the first time that Secretary Clinton exclusively used a "clintonemail.com" account to conduct official government business during her entire tenure at the State Department. The parties jointly moved to reopen this lawsuit on May 1, 2015. Dkt. Entry No. 21. The Court granted the parties' motion in an order entered on May 8, 2015. After conducting several additional searches, the State Department has moved for summary judgment and is again representing to Plaintiff and the Court that it has satisfied its FOIA obligations.

### **III. ARGUMENT.**

#### **A. Discovery Is Needed Before Summary Judgment Can Be Considered.**

Two courts have already found that discovery is necessary before they can consider summary judgment in FOIA cases implicating Secretary Clinton's email practices. In *Judicial Watch, Inc. v. U.S. Dep't of State*, Case No. 13-1363, Judge Sullivan found:

In sum, the circumstances surrounding approval of Mrs. Clinton's use of clintonemail.com for official government business, as well as the manner in which it was operated, are issues that need to be explored in discovery to enable the Court to resolve, as a matter of law, the adequacy of the State Department's search for relevant records in response to Judicial Watch's FOIA request.

U.S. Dist. Lexis 62283 at \*13, Memorandum and Order at 12 (D.D.C. May 4, 2016). In *Judicial Watch, Inc. v. U.S. Dep't of State*, Case No. 14-1242, Judge Lamberth found:

An understanding of the facts and circumstances surrounding Secretary Clinton's extraordinary and exclusive use of her "clintonemail.com" account to conduct official government business, as well as other officials' use of this account and their own personal e-mail accounts to conduct official government business is required before the Court can determine whether the search conducted here reasonably produced all responsive documents.



2016 U.S. Dist. Lexis 41183 at \*2, Memorandum and Order at 1 (D.D.C. March 29, 2016).

Plaintiff respectfully submits that discovery is needed in this FOIA lawsuit for the same reasons Judge Sullivan and Judge Lamberth found discovery is needed in Case Nos. 13-1363 and 14-1241, respectively. At a minimum, summary judgment here should be held in abeyance pending the outcome of discovery in these two other cases.

However, the case at bar is unique because it presents a factual circumstance not present in either of those cases. Both of the above cases involved FOIA requests and lawsuits initiated after Secretary Clinton left office, taking with her the clintonemail.com email system and the tens of thousands of federal records it contains, whereas the present case concerns a FOIA request and lawsuit initiated before the Secretary's departure. The distinction is legally significant. *See Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 155, n. 9 (1980).

In *Kissinger*, the Supreme Court determined a federal agency did not have to search certain notes of telephone calls in response to a FOIA request where the notes had been removed before suit was filed, the departing official had obtained a legal opinion from the agency concluding that the notes were personal and not agency records, and the agency had made some efforts to retrieve the notes. *Kissinger*, 445 U.S. 136, at 140-141, 144. The Supreme Court noted that its decision was limited, however, and that it would not apply to cases where different facts were present, identifying two such examples:

We need not decide whether this standard might be displaced in the event that it was shown that an agency official purposefully routed a document out of agency possession in order to circumvent a FOIA request. No such issue is presented here. We also express no opinion as to whether an agency withholds documents which have been wrongfully removed by an individual after a request is filed.

*Kissinger*, 445 U.S. at 155, n. 9. The first of those two exceptions requires “purposeful evasion” and would apply regardless of whether the removal occurred before or after a FOIA request is filed. The second exception requires only “wrongful removal,” but is limited to removal after a FOIA request is filed. Unlike in Case Nos. 13-1363 and 14-1241, in which the first exception plainly applies, both *Kissinger* exceptions apply here.<sup>3</sup> Accordingly, discovery is needed into the facts and circumstances surrounding the State Department’s processing of this particular request and Secretary Clinton’s departure from the agency with her “clintonemail.com” email system before the Court can consider on summary judgment whether the State Department satisfied its FOIA obligations.

**B. Discovery Is Needed Regarding Record Preservation and Possible Misstatements.**

In addition to having FOIA obligations, the State Department had an undeniable obligation to preserve all records potentially relevant to a lawsuit. *Landmark Legal Found. v. Env’tl. Prot. Agency*, 82 F. Supp.3d 211, 219 (D.D.C. 2015). “A party has a duty to preserve potentially relevant evidence once that party anticipates litigation.” *Chen v. District of Columbia*, 839 F. Supp. 2d 7, 12 (D.D.C. 2011) (internal citations and punctuation omitted). The obligation to ensure evidence is preserved runs to both counsel and the managers of an organizational defendant who are “responsible for conveying to their employees the requirements for preserving evidence.” *Id.* The fact Secretary Clinton left the State Department with her “clintonemail.com” email system containing tens of thousands of federal records – records that obviously were potentially relevant to this litigation and potentially responsive to

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<sup>3</sup> Judge Sullivan found that Secretary Clinton’s emails fall squarely within the *Kissinger* exception. *Judicial Watch, Inc. v. U.S. Dep’t of State*, U.S. Dist. Lexis 62283 at \*11-12, Case No. 13-1363, Memorandum and Order at 11 (D.D.C. May 4, 2016).

Plaintiff's request – raises substantial questions about whether the State Department or its attorneys (or both) violated their preservation obligations.

In a FOIA lawsuit filed only two months before this lawsuit, *Landmark Legal Found. v. Env'tl. Prot. Agency*, Case No. 12-1726 (RCL) (D. District of Columbia), the Environmental Protection Agency ("EPA") sent a formal, detailed "litigation hold" to agency employees directing them to preserve all potentially relevant information materials, including "potentially responsive information stored on personal devices or in personal email accounts." *See* Exhibit 1 at ¶ 10; Exhibit 5 (Litigation Hold in *Landmark Legal Found. v. Env'tl. Prot. Agency*, Case No. 12-1726 (RCL) (D. District of Columbia)). The "hold" included an acknowledgment and request that employees identify any potential custodians of which they were aware. *Id.* The EPA appears to have even tracked employees' acknowledgments. *Id.* No evidence has been provided about any litigation hold or similar preservation notice being issued in this case.

It cannot be disputed, however, that the State Department's top legal advisor, Harold Koh, regularly used Secretary Clinton's "clintonemail.com" email account to communicate with the Secretary – at least 67 times – and that the agency's top records management and information technology official, Under Secretary of State for Management Patrick Kennedy, used the account to email Secretary Clinton only days before she left office. *See* Exhibit 1 at ¶¶ 8-9; Exhibits 3 and 4. Plainly, knowledge of the Secretary's email practices was widespread throughout the State Department, including in the Office of the Legal Advisor, and knowledge of the Secretary's departure from the agency cannot reasonably be denied. Nor can it be reasonably denied that the Secretary's email records were not considered potentially relevant to this lawsuit or potentially responsive to Plaintiff's request at that time because the State Department searched for and produced responsive records from the email of her chief of staff Cheryl Mills, and deputy chief

of staff Jake Sullivan. Under the circumstances, before the Court can consider summary judgment, discovery is necessary to determine whether the State Department satisfied its record preservation obligations.

Discovery also is necessary into the State Department's handling of this particular request. In addition to potential violations of the duty to preserve evidence, the candor of Defendant's representations to Plaintiff and the Court are in question. *See United States v. Spectrum, Inc.*, 113 F. Supp. 3d 238, 244 (D.D.C. 2015) (parties owe "basic duty of candor" to the court); *see also Texas v. United States*, Case No. B-14-254, Memorandum Opinion and Order, at 12, n. 8 (S.D. Tex. May 19, 2016) (finding attorneys had misrepresented facts in violation of Fed. R. Civ. P. 11(b)).<sup>4</sup> In the Answer it filed on January 28, 2013, three days before Secretary Clinton left office, the State Department represented to Plaintiff and the Court that it was in the process of searching for responsive documents. Dkt. Entry No. 8 at ¶ 4. In a Joint Scheduling Statement filed on March 14, 2013, the State Department again represented to Plaintiff and the Court that the agency "is the process of searching for records responsive to the FOIA request that is the subject of this action." Dkt. Entry No. 10 at 1.

Perhaps most crucially, the State Department represented to Plaintiff and the Court that, at some point prior to May 15, 2013, it determined that the Office of the Secretary likely possessed responsive records. Dkt. Entry No. 12 (identifying 12 components searched or to be searched for responsive records, including the Office of the Secretary and the "Executive Secretariat, Office of Correspondence and Records"). On July 2, 2013, the State Department represented that the agency had *completed* "its searches for potentially responsive documents in all components reasonably expected to have responsive records except for [the Bureau of Public

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<sup>4</sup> Opinion available at <http://www.scotusblog.com/wp-content/uploads/2016/05/Judge-Hanen-ethics-ruling-5-19-16.pdf>.

Affairs and the Office of the Counselor].” Dkt. Entry No. 13 at 1-2 (*italics added*). Over the ensuing months, the State Department repeatedly represented that its searches were complete. Dkt. Entry No. 14 (filed Nov. 15, 2013) (“At the time of the parties’ July 2 Report, the State Department had completed its searches for potentially responsive documents in all components reasonably expected to have responsive records”); Dkt. Entry No. No. 15 (filed March 14, 2014) (“As of July 2, 2013, the State Department completed its searches for potentially responsive documents in all components reasonably expected to have responsive records”); Dkt. Entry No. 17 (filed Sept. 8, 2014) (“The State Department searched for potentially responsive documents in all components reasonably expected to have responsive records”).

At no point did the State Department inform Plaintiff or the Court that Secretary Clinton exclusively used her “clintonemail.com” email account to conduct official business or that she took the account with her when she left the department on February 1, 2013. The failure to do so was a material omission, and discovery is necessary to determine whether the omission was intentionally misleading.

**C. Plaintiff’s Discovery Plan For This Particular Lawsuit.**

Pursuant to Rule 56(d) of the Federal Rules of Civil Procedure, “if a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may... allow time to obtain affidavits or declarations or take discovery.” Fed. R. Civ. P. 56(d)(2). The affidavit or declaration must: (1) outline the particular facts that the movant intends to discover and describe why those facts are necessary to the litigation; (2) explain why the movant could not produce the facts in opposition to the motion for summary judgment; and (3) show that the facts sought are discoverable. *Convertino v. U.S. Dep’t of Justice*, 684 F.3d 93, 99-100 (DC Cir. 2015).

Courts have long recognized that, in FOIA litigation, an agency holds all the cards.

“Because of its unique evidentiary configuration, the typical FOIA case distorts the traditional adversary nature of our legal system’s form of dispute resolution.” *Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 146 (D.C. Cir. 2006) (internal quotations and citations omitted).

“When a party submits a FOIA request, it faces an asymmetrical distribution of knowledge where the agency alone possesses, reviews, discloses, and withholds the subject matter of the request.” *Id.* “The agency would therefore have a nearly impregnable defensive position save for the fact that the statute places the burden on the agency to sustain its action.” *Id.*

The State Department fails to provide any information on the critical factual issues raised herein. The agency’s submissions contain little more than the following, single sentence about the events that transpired before the case was reopened: “The Department searched twelve components for potentially responsive records and subsequently produced non-exempt and redacted records, as well as two draft document indexes to Plaintiff.”<sup>5</sup> See Dkt Entry No. 35-2, Declaration of Eric F. Stein at ¶ 4. Because this is a FOIA case and the State Department alone possesses the relevant facts, Plaintiff is unable to “obtain affidavits or declarations” about the agency’s record preservation efforts, the sufficiency of its searches, and the facts behind its searches as represented to Plaintiff and the Court. Likewise, Plaintiff has had no opportunity to conduct discovery into these areas because, as Plaintiff readily acknowledges, discovery is not usually allowed in FOIA cases absent “a sufficient question as to the agency’s good faith in processing documents in response to a FOIA request.” *Judicial Watch v. U.S. Dep’t of State*,

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<sup>5</sup> Plaintiff disputes Defendant’s assertion that “Plaintiff cannot now challenge issues related to adequacy of the initial search since this case was previously dismissed with prejudice.” Def’s Mot. at 5, n.3. By reopening this case on May 8, 2015, the Court granted Plaintiff relief from the November 7, 2014 order of dismissal, which was the point of the parties’ Rule 60(b)(2) motion. Defendant’s assertion also is inconsistent with that motion, in which Plaintiff represented only that it would “not seek to amend the complaint nor will it challenge the [] redactions to previously released documents.” Dkt. Entry No. 21 at 2.

Case 13-1363, U.S. Dist. Lexis 62283 at \*10, Memorandum and Order at 9 (D.D.C. May 4, 2016) (Sullivan, J.).

The required showing plainly exists here. Two courts have so found. Accordingly, discovery is appropriate, and the declaration attached at Exhibit 1 describes the particular facts that Plaintiff seek to discover and why they are necessary to this litigation. The declaration also describes why Plaintiff has not yet been able to discover these facts and why they are discoverable. Specifically, Plaintiff seeks discovery on the following:

- What was the State Department's policy or practice for issuing litigation holds or other notices or efforts to preserve records for pending or reasonably foreseeable litigation?
- Was an internal State Department hold or other preservation notice issued for records potentially relevant to this FOIA litigation? If so, when was it issued, who was it issued to, and who acknowledged it? If not, why not?
- Which records systems within the Office of the Secretary and Executive Secretariat were searched for records responsive to this particular request, who searched them, and when did the searches take place?
- Did the State Department, which searched and produced responsive emails from Secretary Clinton's chief of staff, Cheryl Mills, and deputy chief of staff, Jake Sullivan, deliberately exclude the Secretary's emails from its search?
- Why did the State Department repeatedly represent to Plaintiff and the Court that the agency had completed its searches of the Office of the Secretary and the Executive Secretariat when it never searched the Secretary's email?
- What actions, if any, did the State Department take to secure, inventory, and/or account for Secretary Clinton's email prior to her leaving office on February 1, 2013 and why was she allowed to leave without providing an accounting of and access to her email?

Also attached at Exhibit 2 is detailed plan of the particular discovery Plaintiff seeks.

Again, Plaintiff does not seek to duplicate discovery authorized or requested in other lawsuits,

but instead seeks discovery to focus to the fullest extent possible on the particular issues raised by this FOIA request.

**IV. CONCLUSION.**

The State Department could have responded appropriately to Plaintiff's FOIA request years ago. It could have insisted that Secretary Clinton's official email communications be maintained properly and searched those emails before the Secretary left office. It also could have issued a litigation hold to ensure that potentially relevant records were preserved and readily available for use in this lawsuit. Having failed to satisfy these most basic legal obligations, it could have told the truth about what transpired. Instead, it kept Plaintiff and the Court in the dark, and a massive cache of public records were hidden from FOIA and the public for years. Before summary judgment can be considered, discovery is necessary to determine how and why this happened, not only to ensure that Plaintiff has received all records to which it is entitled under FOIA, but also to determine what accountability is required. The motion should be granted.

Dated: May 27, 2016

Respectfully submitted,

*s/ Chris Fedeli*

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

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Exhibit 2 – Plaintiff’s Proposed Discovery Plan

Exhibit 3 – Selected Emails Between Legal Advisor Harold Koh and Secretary Clinton

Exhibit 4 – Jan. 25, 2013 Email from Undersecretary Patrick Kennedy to Secretary Clinton

Exhibit 5 – EPA’s Litigation Hold in *Landmark Legal v. EPA*, Case No. 12-1726 (D.D.C.)

# Exh. 1

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

---

JUDICIAL WATCH, INC.,

*Plaintiff,*

v.

U.S. DEPARTMENT OF STATE,

*Defendant.*

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Civil Action No. 12-cv-2034-RBW

**DECLARATION OF COUNSEL IN SUPPORT OF  
PLAINTIFF’S MOTION FOR DISCOVERY PURSUANT TO  
RULE 56(d) OF THE FEDERAL RULES OF CIVIL PROCEDURE**

I, Chris Fedeli, declare as follows:

1. I am an attorney for Plaintiff Judicial Watch, Inc., and I represent Plaintiff in this case.

2. I submit this Declaration in support of Plaintiff’s Motion for Discovery Pursuant to Rule 56(d) of the Federal Rules of Civil Procedure.

3. As required by Rule 56(d), this Declaration describes the particular facts that Plaintiff seeks; why these facts are necessary to this litigation; and why they have not been available to Plaintiff. *Convertino v. U.S. Dep’t of State*, 684 F.3d 93, 99-100 (D.C. Cir. 2012). It also shows that the facts are discoverable.

4. Plaintiff filed this action on December 19, 2012 to compel Defendant to comply with the Freedom of Information Act (“FOIA”) after Defendant failed to respond to a FOIA request Plaintiff had served on Defendant on September 24, 2012. Defendant filed an answer to Plaintiff’s complaint on January 28, 2013. U.S. Secretary of State Hillary Rodham Clinton left office on February 1, 2013 and, over the course of the next twenty-two months, Defendant made

repeated representations to Plaintiff and the Court, in numerous court filings, about its searches for records responsive to Plaintiff's FOIA request and the results of those searches. In reliance on Defendant's representations about its search efforts, Plaintiff stipulated to the dismissal of this action on November 7, 2014. That same day, the Court entered a minute order dismissing this case with prejudice. When the New York Times and other media outlets publicly disclosed for the first time in March 2015 that Secretary Clinton exclusively used a "clintonemail.com" email account to conduct official government business during her tenure at the State Department, Plaintiff and Defendant jointly moved, pursuant to Rule 60(b)(2), for an order granting relief from the November 7, 2014 order of dismissal. The Court granted that motion on May 8, 2015. Defendant now moves for summary judgment.

5. Plaintiff seeks discovery on the following issues that remain to be decided in this case: (1) whether Defendant satisfied its FOIA obligations by conducting a search reasonably calculated to uncover all records responsive to Plaintiff's request; (2) whether Defendant or its counsel satisfied its record preservation obligations in this litigation; and (3) whether Defendant or its counsel made intentional, material misrepresentations to Plaintiff and the Court about Defendant's search for responsive records.

6. Admissible evidence concerning these issues is not already available because Defendant has failed to provide any information on these critical issues, and Plaintiff has not yet had the opportunity to conduct discovery in this case.

7. To obtain this evidence, which is essential to Plaintiff's opposition to Defendant's Motion for Summary Judgment, Plaintiff proposes serving a total of five interrogatories, five document requests, and taking at least one deposition. The particular discovery Plaintiff

proposes is set forth in detail in Plaintiff's Proposed Discovery Plan, filed herewith as Exhibit 2. These discovery requests would be served upon Defendant and, to the extent Defendant identifies former employees or officials as possessing the requested information, upon those former employees or officials. All of the information Plaintiff is discoverable from Defendant and/or from former employees or officials of Defendant as it is relevant, reasonably described, not unduly burdensome, and not reasonably subject to any claim of privilege or protection from disclosure.

8. Filed herewith as Exhibit 3 are examples of email communications between the State Department's top legal advisor, Harold Koh, and Secretary Clinton about pending litigation against the agency, among other official government business. During the course of this litigation, my office examined the now publicly-available email exchanges between Secretary Clinton and Mr. Koh and identified as many as 67 such exchanges. These emails are available on the State Department's website, [https://foia.state.gov/Search/Results.aspx?collection=Clinton\\_Email](https://foia.state.gov/Search/Results.aspx?collection=Clinton_Email), and at Wikileaks.org, <https://wikileaks.org/clinton-emails/>.

9. Filed herewith as Exhibit 4 is a January 25, 2013 email that Under Secretary of State for Management Kennedy sent to Secretary Clinton regarding official government business. This particular email also is available on the State Department's website and at Wikileaks.org.

10. Filed herewith as Exhibit 5 is a litigation hold and acknowledgment issued by the Environmental Protection Agency regarding a lawsuit filed against the agency by Landmark Legal Foundation in October 2012, *Landmark Legal Found. v. Environ. Prot. Agency*, Case No.

12-1726 (RCL) (D. District of Columbia). The litigation hold was an exhibit to a motion filed in the case, Docket Entry No. 46-3, filed on July 24, 2015, and is publicly available through Pacer.

I declare under penalty of perjury that the foregoing is true and correct. Executed in Washington, DC on this 27<sup>th</sup> day of May, 2016.



Chris Fedeli

# Exh. 2





Executive Secretariat, whether and how to search Secretary Clinton's email, and any issues, problems, or questions concerning the searches and/or search results.

3. All records concerning any litigation hold or other notice or effort to preserve records potentially relevant to this litigation, including but not limited to any actual litigation hold or preservation notice, any acknowledgment of receipt of any hold or preservation notice, and communications about any hold or preservation notice (this request does not include any notices issued in response to the Court's preservation order dated October 7, 2015).

4. All records concerning any State Department policy, practice, or procedure regarding the issuance of litigation holds or other preservation notices or efforts to preserve records relevant to pending or reasonably foreseeable litigation.

5. All records concerning or relating to the State Department's policies, practices, procedures and/or actions or efforts (or lack thereof) to secure, inventory, and/or account for Secretary Clinton's email prior to her leaving office on February 1, 2013.

### **III. Interrogatories:**

The State Department shall answer the following interrogatories, under oath, within 21 days:

1. The identity and contact information (or last known address) of the "Case Analyst" and any other personnel within the Office of Information Programs and Services who were responsible for, assisted with, or involved in the initial processing of Plaintiff's FOIA request or search(es) for records responsive to Plaintiff's FOIA request.

2. The identity and contact information (or last known address) of the "Point of Contact" and any other personnel within the Office of the Secretary who were responsible for or assisted with or were involved in the initial processing of or search for records responsive to Plaintiff's FOIA request.

3. The identity and contact information (or last known address) of the "Point of Contact" and any other personnel within the Executive Secretariat who were responsible for or assisted with or were involved in the initial processing of or search for records responsive to Plaintiff's FOIA request.

4. The identity and contact information (or last known address) of the person or persons who were responsible for, assisted with, or were involved in the issuance, monitoring, and enforcement of litigation holds or other notices or efforts to preserve records relevant to any pending or reasonably foreseeable litigation, including but not limited to this lawsuit. The time frame for this request is September 2012 through February 2013.

5. The identity and contact information ( or last known address) of any person or persons who were responsible for, assisted with, or were involved in any actions or efforts (or

lack thereof) to secure, inventory, and/or account for Secretary Clinton's email prior to her leaving office on February 1, 2013.

**IV. Depositions:**

1. One or more 30(b)(6) witness(es) to testify about:
  - a. the initial processing of and search for records responsive to Plaintiff's FOIA request in the Office of the Secretary and the Executive Secretariat;
  - b. litigation holds or other notices or efforts used by the State Department between September 2012 and February 2013 to preserve records relevant to pending or reasonably foreseeable litigation, including this lawsuit; and
  - c. the policies, practices, procedures and/or actions or efforts referenced in Document Request No. 5, above.
2. Plaintiff may also wish to depose the person(s) identified in response to Interrogatory Nos. 1-4, to the extent such persons are not produced as 30(b)(6) witnesses.

Dated: May 27, 2016

Respectfully submitted,

s/ Chris Fedeli  
Chris Fedeli  
DC Bar 472919  
**JUDICIAL WATCH, INC.**  
425 Third Street SW, Suite 800  
Washington, DC 20024  
cfedeli@judicialwatch.org  
(202) 646-5172

*Counsel for Plaintiff*

Exh. 3

RELEASE IN PART B5

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**From:** Koh, Harold Hongju <KohHH@state.gov>  
**Sent:** Thursday, May 10, 2012 9:44 AM  
**To:** H  
**Subject:** RE: I wanted to make sure you saw this

As always, an honor and a joy for me

---

**From:** H [mailto:HDR22@clintonemail.com]  
**Sent:** Wednesday, May 09, 2012 9:20 PM  
**To:** Koh, Harold Hongju  
**Subject:** Re: I wanted to make sure you saw this

Thx for this and for everything else.

---

**From:** Koh, Harold Hongju [mailto:KohHH@state.gov]  
**Sent:** Sunday, May 06, 2012 04:05 PM  
**To:** H  
**Subject:** I wanted to make sure you saw this

B5

RELEASE IN PART  
B5,B6

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**From:** Koh, Harold Hongju <KohHH@state.gov>  
**Sent:** Saturday, July 28, 2012 8:31 AM  
**To:** H  
**Subject:** Fw: ATT - so disappointed

Thanks for the call and all you do. We are all so proud to serve under you

Below I am forwarding 2 emails re att- [REDACTED]

Hope you saw opening olympic ceremonies-they were great.  
Harold

---

**From:** Susan Waltz [mailto:[REDACTED]]  
**Sent:** Friday, July 27, 2012 10:00 PM  
**To:** Koh, Harold Hongju  
**Subject:** ATT - so disappointed

I hope someone in the Administration can say something to make me feel better about today's outcome on the ATT negotiations.

In 2008 I walked up and down the streets of my rural, mostly Republican community in mid-Michigan, trying to persuade my neighbors to vote for Barack Obama. That won't be happening this year. Though I can't imagine voting for Romney, I'm so upset over the ATT outcome that I may just sit out this election. Unlike Guantanamo and the wars, this one was so easy. And they still managed not to get it right.

Somehow I hope the outcome looks better from where you sit.  
Susan Waltz

--  
Susan Waltz  
Professor  
Gerald R. Ford School of Public Policy  
University of Michigan  
Ann Arbor, MI 48109  
[REDACTED]

**RELEASE IN PART  
B6**

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**From:** Koh, Harold Hongju <KohHH@state.gov>  
**Sent:** Tuesday, October 11, 2011 1:40 PM  
**To:** H  
**Subject:** What we discussed today  
**Attachments:** 2011 koh jonathan soros letter.doc

S

To close the loop on our conversation today in the elevator:



Thanks as always for taking the time to hear my personal news in the middle of the millions of momentous things on your schedule. You are really an extraordinary friend, boss, and client.

Warmly,  
Harold

B6

RELEASE IN PART B5

**From:** H <hrod17@clintonemail.com>  
**Sent:** Saturday, January 2, 2010 10:28 AM  
**To:** 'kohhh@state.gov'  
**Subject:** Re: Blackwater case

Thanks, as always.

B5

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

From: Koh, Harold Hongju <KohHH@state.gov>  
To: H  
Sent: Sat Jan 02 10:24:37 2010  
Subject: RE: Blackwater case

ATTORNEY-CLIENT PRIVILEGE/ATTORNEY WORK-PRODUCT

And Happy New Year to you (and your family) too! I am so thrilled to be in this job and working with you. I am having a great time, and hope to have an even better 2010.

Re Blackwater. I have already put these very questions to our team, and they are working up a memo on the subject. Significantly, the press accounts are all saying that State Department lawyers appropriately warned the DOJ prosecutors, but that the DOJ lawyers chose to take a different route.

My initial reactions to your questions are as follows:

I will keep pressing and give you an oral report at Monday's 8:45, and we can get the promised memo to you soon thereafter.

Please let me know if you need more.

Best

Harold

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

From: H [mailto:HDR22@clintonemail.com]

Sent: Saturday, January 02, 2010 8:53 AM

To: Koh, Harold Hongju

Subject: Blackwater case

Harold---

First, Happy New Year to you and your family and thank you for all of your great work this past year. I am looking forward to the year ahead.

Second, what can we do about Judge Urbina's ruling  For example, what is the likelihood of success on appeal? Can the US file a civil action against the company? Pay compensation to the victims? What other options do we have?

B5

All the best, H



RELEASE IN PART B6
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**From:** Koh, Harold Hongju <KohHH@state.gov>  
**Sent:** Sunday, September 30, 2012 10:53 PM  
**To:** H  
**Subject:** Re: OMAR KHADR: Omar Khadr is going home to Canada from Guantánamo

So glad we got this done. After spending the last 10 years on GTMO, at least this young man finally has another chance.

---

**From:** H [mailto:HDR22@clintonemail.com]  
**Sent:** Sunday, September 30, 2012 09:41 PM  
**To:** Koh, Harold Hongju  
**Subject:** Re: OMAR KHADR: Omar Khadr is going home to Canada from Guantánamo

And, thank you for all you did to get this resolved.

---

**From:** Koh, Harold Hongju [mailto:KohHH@state.gov]  
**Sent:** Saturday, September 29, 2012 08:47 AM  
**To:** Sullivan, Jacob J <SullivanJJ@state.gov>; H; Mills, Cheryl D <MillsCD@state.gov>  
**Subject:** Fw: OMAR KHADR: Omar Khadr is going home to Canada from Guantánamo

Hooray! Thanks for the call to FM Baird!

---

**From:** Fried, Daniel  
**Sent:** Saturday, September 29, 2012 08:46 AM  
**To:** Koh, Harold Hongju; Conklin, Maegan L; Gahan, Kimberly A; Bridgeman, Theresa; Perina, Alexandra H; McLeod, Mary; ringber [redacted] <ringber [redacted]>  
**Subject:** Re: OMAR KHADR: Omar Khadr is going home to Canada from Guantánamo

B6

Good work all around.

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**From:** Koh, Harold Hongju  
**Sent:** Saturday, September 29, 2012 08:43 AM  
**To:** Conklin, Maegan L; Gahan, Kimberly A; Bridgeman, Theresa; Perina, Alexandra H; McLeod, Mary; 'ringber [redacted] <ringber [redacted]> Fried, Daniel  
**Subject:** Fw: OMAR KHADR: Omar Khadr is going home to Canada from Guantánamo

Gtmo is 1 down!! Yayy!

---

**From:** Alan.Kessel [redacted]  
**Sent:** Saturday, September 29, 2012 08:40 AM  
**To:** Koh, Harold Hongju  
**Subject:** Fw: OMAR KHADR: Omar Khadr is going home to Canada from Guantánamo

Alan H. Kessel  
The Legal Adviser/  
Le Jurisconsulte (JFM)  
Department of Foreign Affairs and International Trade/  
Ministère des Affaires étrangères et du Commerce international  
125 Sussex Drive  
Ottawa, Ontario K1A 0G2

RELEASE IN PART  
B5

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**From:** Koh, Harold Hongju <KohHH@state.gov>  
**Sent:** Sunday, June 24, 2012 6:50 PM  
**To:** H; Sullivan, Jacob J  
**Subject:** Meeting tomw

Attorney-Client Privilege/Deliberative Process/Attorney Work-Product

Madame Secretary:

B5

Harold

RELEASE IN FULL

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**From:** Koh, Harold Hongju <KohHH@state.gov>  
**Sent:** Monday, December 10, 2012 6:07 PM  
**To:** H  
**Subject:** FW: Renomination of Joan Donoghue as US Judge on the ICJ

**Madame Secretary:**

**I hope you are feeling ok. As usual, you have done amazing things on your travels.**

**As Jake will mention to you, USUN is planning to launch a campaign for Joan Donoghue's re-election to the International Court of Justice with a January 16 lunch in New York (paid for with the funds set aside for the Sixth Committee reception that was cancelled). Do you agree that we should renominate Joan? Assuming that you do, we would proceed to consult with the National Group and get them to re-nominate her before I leave on Jan 22.**

**Frankly, this seems like a no-brainer. Joan is serving out the last three years of Tom Buergenthal's term and if reelected, which should happen easily (she was overwhelmingly voted in the first time) she would have a nine year term of her own right. At the end of that (12 years), she would still be under 70 and could become the first woman (and only the second American) president of the ICJ by running for President. By all accounts she has been a huge success. She has impressed everyone, made great friends on the Court, written good opinions, done great outreach (she speaks Arabic and Russian), and is best friends with the Chinese judge (also a woman). Nominating her would be one of your signal contributions to international law, which may last for another 18 years.**

**Please let me know if you have any concerns. I can provide further documentation on each of these points if you wish, but Joan has done everything well, as you might have expected.**

**Best,  
Harold**

RELEASE IN PART  
B1,1.4(B),1.4(D),B5,B6

**From:** Koh, Harold Hongju <KohHH@state.gov>  
**Sent:** Friday, February 17, 2012 10:20 AM  
**To:** H  
**Subject:** Fw: PRIVILEGED AND CONFIDENTIAL

Classified by DAS, A/GIS, DoS on 12/31/2015 ~ Class: CONFIDENTIAL ~ Reason: 1.4(B), 1.4(D)  
~ Declassify on: 02/17/2027

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

**From:** Harold Koh [mailto: ]  
**Sent:** Friday, February 17, 2012 10:10 AM  
**To:** McLeod, Mary; Gahan, Kimberly A; Koh, Harold Hongju  
**Subject:** PRIVILEGED AND CONFIDENTIAL

B6

PRIVILEGED AND CONFIDENTIAL/ATTORNEY-CLIENT PRIVILEGE/DELIBERATIVE PROCESS/ATTORNEY WORK PRODUCT

At the invitation of the Egyptian Government, [ ] and I went to Cairo from February 14-16, 2012 to seek a solution to the impasse over NGO activities that has caused nearly two dozen NGO workers to be criminally charged and six Amcits from NDI and IRI to take refuge in Amembassy Cairo. Accompanied by Ambassador Anne Patterson, we spent Feb. 15 seeing Foreign Minister Amr (twice); General Muwafi of the Egypt General Intelligence Service (EGIS) (for 3+ hours); Minister of Justice Abdallah; and the IRI/NDI personnel at the Embassy as well as their lawyers. Amr and Muwafi earnestly claimed to be eager to resolve the crisis in a way that mitigates the harm to the bilateral strategic relationship between our countries.

B5

1.4(B)  
1.4(D)  
B1  
B5

Thereafter, we met with the NDI/IRI staff, who were frustrated and emotionally conflicted about whether to stay at the embassy. They feel that they have abandoned their co-workers who are still outside, and that the legal strategies are a waste of time. Still, we seemed to connect with them and urged them to stay the course, which we hope that they will do, and not leave the embassy or engage in other kinds of provocative press behavior. I am now here at Heathrow lounge, waiting for my connecting flight to Dulles. I just briefed Senator Blumenthal for about 25 mins about the current

RELEASE IN FULL

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**From:** Koh, Harold Hongju <KohHH@state.gov>  
**Sent:** Thursday, April 5, 2012 2:57 PM  
**To:** H  
**Subject:** Letter to the Fifth Circuit

Following up on my email of yesterday, here is the letter that DOJ filed in the Fifth Circuit today in response to their order: <http://blog.pacificlegal.org/wordpress/wp-content/uploads/2012/04/Obamaletterbrief.pdf>

RELEASE IN FULL

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**From:** Koh, Harold Hongju <KohHH@state.gov>  
**Sent:** Monday, July 2, 2012 7:26 AM  
**To:** H  
**Subject:** Health care ruling

If you have not seen this is fascinating. [http://www.cbsnews.com/8301-3460\\_162-57464549/roberts-switched-views-to-uphold-health-care-law/](http://www.cbsnews.com/8301-3460_162-57464549/roberts-switched-views-to-uphold-health-care-law/)  
Harold

RELEASE IN PART  
B6

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**From:** Koh, Harold Hongju <KohHH@state.gov>  
**Sent:** Tuesday, January 24, 2012 6:57 AM  
**To:** H  
**Subject:** Fw: United States v. Antoine Jones

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

**From:** Harold Koh [redacted]  
**Sent:** Tuesday, January 24, 2012 06:34 AM  
**To:** Koh, Harold Hongju  
**Subject:** United States v. Antoine Jones

B6

As you probably heard, in a landmark case for the digital era, *United States v. Jones*, the Supreme Court yesterday ruled unanimously that the police violated the Fourth Amendment when it conducts a warrantless placement of a GPS (Global Positioning System) tracking device on a suspect's car and monitors its movements for 28 days. Curiously, there were essentially two overlapping majority opinions.

In the unusual lead majority opinion, Justice Scalia, joined by Roberts, Kennedy, Thomas and Sotomayor, JJ.) held that the Government's attachment of the GPS device to the vehicle, and its use of that device to monitor the vehicle's movements, constitutes a search under the Fourth Amendment. Curiously, the majority opinion seemed fixated on the notion of a physical government trespass on private property: "The government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted." Justice Sotomayor agreed, in her separate concurrence, arguing that a search within the meaning of the Fourth Amendment occurs, at a minimum, where, as here, the Government obtains information by physically intruding on a constitutionally protected area," in this case private property.

In his concurrence for four justices, Justice Alito (joined by Ginsburg, Breyer and Kagan JJ.) criticized the physical invasion approach, saying that what matters is that "the use of longer-term GPS monitoring in investigations of most offenses,... [This] 'impinges on expectations of privacy' which rose to the level of a search some time before the search went four weeks. Significantly, although Justice Sotomayor joined the majority, she effectively made clear that she would have joined Justice Alito's analysis had there been no physical intrusion, adding "it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties.... I, for one, doubt that people would accept without complaint the warrantless disclosure to the government of a list of every Web site they had visited in the last week, or month, or year."

This odd alignment of Justices leaves two questions unanswered.

First, does the "search" caused by installing a GPS device require a warrant? The answer may be no, given that no member of the Court squarely concludes it does and the four members of the Court who joined the Alito concurrence declined to hold that it constitutes a search at all. And second, assuming no warrant is required for installation, is a warrant required for short-term monitoring of the GPS device? Justice Alito's opinion said a warrant was required well before 28 days, but did not indicate when the constitutional requirement was triggered. Because five justices expressed discomfort with the government's use of or access to modern technologies to gather information in more public places, including video surveillance, EZ pass systems on highways, location data from cellphone towers and records kept by online vendors, Monday's decision will require significant reevaluation of many currently used law enforcement surveillance techniques, though the authorities remain free to seek warrants from judges authorizing the surveillance.

Exh. 4



RELEASE IN FULL

**From:** Kennedy, Patrick F <KennedyPF@state.gov>  
**Sent:** Friday, January 25, 2013 7:34 AM  
**To:** H; Mills, Cheryl D; Sullivan, Jacob J; Reines, Philippe I  
**Subject:** FW: Tripoli, Libya, 1/24/2013 Emergency Message

Madam Secretary

Not sure where NPR getting its info

H/W next of Emergency Message issued by Embassy Tripoli and posted to its website [yesterday, Thursday, the 24<sup>th</sup>] as well as sent individually to all AmCits who have registered with the Embassy

As the message notes, we already have a published Travel Warning against travel to Benghazi.  
The Emergency Message below has a hyperlink to our earlier warning. The relevant text of that warning is:

## **Libya**

### **January 02, 2013**

The Department of State warns U.S. citizens of the risks of traveling to Libya and strongly advises against all but essential travel to Tripoli and all travel to Benghazi, Bani Walid, and southern Libya, including border areas and the regions of Sabha and Kufra.

Will make sure that CA provides Press Guidance to PA

Regards

pat

**Embassy of the United States of America  
Tripoli, Libya  
Emergency Message for U.S. Citizens  
January 24, 2013**

The United States continues to advise against all travel to Benghazi. At least two other diplomatic missions have advised their citizens to leave Benghazi immediately. Although there is no specific information pointing to specific, imminent threats against U.S. citizens, the potential for violence and kidnappings targeting Westerners in Benghazi is significant. We refer all U.S. citizens to the travel warning for Libya issued January 2, 2013, advising against all travel to Benghazi. Because of ongoing instability and violence, the Department's ability to provide consular services to U.S. citizens in Benghazi and other regions referenced in the travel warning is extremely limited. We strongly encourage all U.S. citizens to take appropriate precautions as the security situation in Libya is volatile. Review your personal safety plans,

remain aware of your surroundings, including local events, and monitor local news stations for updates. Maintain a high level of vigilance and take appropriate steps to enhance your personal security.

We also recommend that U.S. citizens traveling to or living in Libya enroll in the Department's Smart Traveler Enrollment Program (STEP) website. STEP enrollment ensures you receive updated information on travel and security within Libya, and makes it easier for the U.S. embassy or nearest U.S. consulate to contact you in an emergency.

For further information, U.S. citizens should consult the Department of State's Country Specific Information for Libya. Stay up to date by bookmarking our Bureau of Consular Affairs website, which contains the current Travel Warnings and Travel Alerts as well as the Worldwide Caution.

You can also follow the Bureau of Consular Affairs on Twitter and on Facebook, and download our free Smart Traveler App available through iTunes and the Android market to have travel information at your fingertips. You may also follow U.S. Embassy Tripoli on Twitter and on Facebook for information for U.S. citizens.

Up-to-date information on security can also be obtained by calling 1-888-407-4747 toll-free in the United States and Canada, or, for callers outside of the United States and Canada, on a regular toll-line at 1-202-501-4444. These numbers are available from 8:00 a.m. to 8:00 p.m. Eastern Time, Monday through Friday (except U.S. federal holidays).

U.S. citizens in need of emergency assistance should call 091-379-4560 between 0900 and 1500 Sunday to Thursday. The number for after-hours emergencies is 091-220-5203. The Embassy's e-mail address is Tripoliconsular@state.gov.

This email is UNCLASSIFIED.

# Exh. 5

EPA PROD1\_0539

**From:** [Jennifer Hammitt/DC/USEPA/US@EPA](mailto:Jennifer.Hammitt/DC/USEPA/US@EPA)  
**Reply To:** [Jennifer Hammitt/DC/USEPA/US@EPA](mailto:Jennifer.Hammitt/DC/USEPA/US@EPA)  
**To:** [Jennifer Hammitt/DC/USEPA/US@EPA](mailto:Jennifer.Hammitt/DC/USEPA/US@EPA)  
**Subject:** Litigation Hold Notice regarding Landmark Legal Foundation's litigation against EPA on claims related to EPA's denial of expedited FOIA processing (HQ-FOI-01861-12)  
**Date:** 10/23/2012 05:01 PM

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The United States Environmental Protection Agency ("EPA" or "Agency") is implementing a litigation hold because of litigation with **Landmark Legal Foundation** pursuant to the FOIA.

Landmark has brought suit to contest EPA's denial of expedited processing for a FOIA request for information relating to communications about proposed rules and regulations that have not been finalized between January 1, 2012 and August 17, 2012, including any "records indicating an order, direction or suggestion that the issuance of regulations, the announcements of regulations and/or public comment of regulations should be slowed or delayed until after November 2012 or the presidential elections of 2012." This request was narrowed by EPA's Office of the Administrator to documents from Program Administrators, Deputy Administrators, and Chiefs of Staff that would be responsive to this FOIA request.

**All Agency employees with possession, custody or control over any materials, whether paper, electronic, or otherwise, that are potentially relevant to this matter are directed to preserve those materials until further notice.**

Please click the link below to view the entire litigation hold notice and questions pertaining to this matter. NOTE: You must be logged into the EPA Network to access this link.

Failure to respond to the questions found at the end of the litigation hold notice will result in automatic reminders to your email account until compliance is obtained.

DO NOT DELETE THIS EMAIL- YOU WILL NEED THIS LINK TO ACCESS THE LITIGATION HOLD NOTICE FOR FUTURE REFERENCE.

We recognize that your time is valuable and appreciate your cooperation - the legal team is also expending considerable time and resources to support this matter and appreciates your continued support.

This email contains material that is confidential, privileged and/or work product for the sole use of the intended recipient. Any review, reliance, distribution by others, or forwarding without express permission is strictly prohibited. If you are not the intended recipient please contact the sender and delete all copies.

Please go to "<http://V18H1N-RELDDB2/responses?Case='D71782CD846D594085B82216C4E3B7DF'&Guid='692CB090E0174F4983535B3319621355'>" to accept notice.

EPA PROD1\_0540

**Notice****DATE:** October 23, 2012**FROM:** Jennifer Hammitt, Office of General Counsel, General Law Office**RE:** Landmark Legal Foundation Suit against EPA for Denial of Expedited FOIA Processing

The United States Environmental Protection Agency ("EPA" or "Agency") is implementing a litigation hold due to a suit from Landmark Legal Foundation.

This suit is regarding EPA's denial of expedited processing for a FOIA request for information relating to communications about proposed rules and regulations that have not been finalized between January 1, 2012 and August 17, 2012, including any "records indicating an order, direction or suggestion that the issuance of regulations, the announcements of regulations and/or public comment of regulations should be slowed or delayed until after November 2012 or the presidential elections of 2012." This request was narrowed by EPA's Office of the Administrator to documents from Program Administrators, Deputy Administrators, and Chiefs of Staff that would be responsive to this FOIA request.

**All Agency employees with possession, custody or control over any materials, whether paper, electronic, or tangible things, such as laboratory samples or other physical evidence, that are potentially relevant to this matter are directed to preserve those materials until written notice is received that the litigation hold has been lifted or released.** This litigation hold supersedes any applicable record retention schedule; you must preserve the materials covered by the litigation hold even if a record retention schedule would normally direct you to destroy them.

Failure to meet this obligation could not only jeopardize the successful litigation of this matter, it could result in court sanctions against the Agency or individual employees, such as:

- Personal sanctions against individual government employees (e.g., potential personal liability) or the U.S. Department of Justice ("DOJ") or Agency attorneys (e.g., fines and/or professional sanctions, including disbarment); and/or
- Sanctions against the United States including adverse inferences against the Agency, monetary sanctions, and/or exclusion of evidence.

Please review the following instructions carefully and comply with them to ensure that you fulfill your preservation obligation. If you have any questions about any aspect of these instructions, please contact the attorney identified at the end of this litigation hold notice.

**Distribution and Confidentiality**

Please review the distribution list for this notification (sent via separate email) and contact the attorney identified below immediately if you believe there may be additional people, agencies, contractors, or other entities with possession, custody, or control of potentially relevant information ("PRI"). Notify the attorney listed below if there are any staffing changes in your office, such as the departure of people who have done work related to the case or hiring of new or additional people doing work relating to the case. This litigation hold notice should not be forwarded directly to anyone, as the attorney identified below must track who receives this notice.

You should not discuss this litigation hold or the Agency's interest in litigation with anyone outside the EPA or DOJ. These instructions constitute legal advice provided to the Agency by its counsel. Treat this memorandum as a privileged attorney-client communication and keep it confidential.

## **The Duty to Preserve Potentially Relevant Information**

Under federal law, EPA has an obligation to preserve all information within its possession, custody, or control that may be relevant to reasonably anticipated or actual litigation.

### **I. What Should You Keep/Preserve?**

The obligation to preserve materials for litigation can be broad. As discussed in more detail below, it includes all PRI, including electronically stored information ("ESI"), documents, and tangible things. Unless specified otherwise herein or in a subsequent notice, PRI should be preserved regardless of whether it may be privileged, or may later be determined to be unreasonably burdensome to produce. The obligation extends beyond official agency records and includes all your work-related files and materials, even if you are keeping them at home or on an electronic device that you personally own. The obligation may extend beyond the EPA to other federal agencies and to contractors. On the other hand, the obligation is not without limits. The instructions below reflect the judgment of EPA counsel and managers regarding the appropriate extent of the obligation in this particular case. Please do not attempt to substitute your own judgment. If there is any question as to whether something should be preserved, please seek guidance from the attorney identified below.

#### **A. Subject Matter and Time Frame**

For this matter, you must preserve information potentially relevant to one or more of the following: **information relating to communications about proposed rules and regulations that have not been finalized between January 1, 2012 and August 17, 2012, including any "records indicating an order, direction or suggestion that the issuance of regulations, the announcements of regulations and/or public comment of regulations should be slowed or delayed until after November 2012 or the presidential elections of 2012."** This request was narrowed by EPA's Office of the Administrator to documents from Program Administrators, Deputy Administrators, and Chiefs of Staff that would be responsive to this FOIA request. This hold includes information related to the processing of this request, including EPA's denial of expedited processing.

You are directed to preserve all materials listed in this Section. You must preserve these materials, even if you find that your materials appear identical to those of your co-workers. Your materials may contain embedded data commonly referred to as "metadata" Which is unique to your materials and must be preserved in addition to the as actual materials.

1. Electronically stored information ("ESI"). You must preserve all ESI including, but not limited to:

- emails,
- word processing files,
- spreadsheets,
- presentations,
- databases,
- Geographic Information System ("GIS") maps,

- computer-aided design files,
- scanned or digital photos, and
- scanned document images.

It does not matter whether the ESI is stored on optical disks (e.g., DVDs and CDs), flash memory (e.g., "thumb," "flash," or other USB drives), PDAs or mobile/smart phones (e.g., BlackBerry), network drives (e.g., F, G, H, J, R and Z drives), your EPA-issued desktop and/or laptop computer, privately owned computers or other devices, or in personal email accounts.

Unless ordered by a Court, EPA does not normally need to preserve disaster recovery backups, copies of email on an EPA-issued BlackBerry that automatically synchs with the EPA email system, deleted computer files, data stored in your computer's RAM, cache memory, or temporary or cache files (including internet browsing history, web browser cache and cookie files), data stored in photocopiers, scanners, and fax machines, and data temporarily stored on scientific or laboratory equipment that is not normally part of a lab report.

2. Documents. You must preserve all written materials, whether in final or draft form, and regardless of whether they were printed from a computer or written by hand. Documents include, but are not limited to memoranda, reports, publications, notes, notices, calendar entries, appointment books, logbooks, photographs (other than digital photos), charts or maps. These items are considered documents regardless of whether they are on paper, microfilm, microfiche, or photographic film.

3. Tangible things. You must preserve tangible things that are relevant to the subject matters described above. This might include samples, specimens, or pieces of equipment. Such things require special treatment, and counsel must be aware of their existence or special handling requirements. Please contact the attorney identified below if you have, or know of, relevant tangible things.

## II. What Should You Do to Keep/Preserve PRI?

You must take the following steps to preserve the above-described PRI. Please contact the attorney identified below if you need assistance with any of these steps.

### A. General Instructions

1. In the event that your computer, hard drive or electronic system containing PRI is to be retired, upgraded or reimaged, contact the attorney listed below, to ensure that the PRI is preserved and accessible in its native format after the retirement or upgrade.
2. In the event you plan to depart EPA while this litigation hold is pending, you must notify the attorney identified below to discuss how your documents will be preserved. This requirement also applies should you plan to participate in a detail or take an extended absence and you will not maintain possession or control of your documents and ESI during such period.
3. Confidential Business Information. If you are preserving ESI containing Confidential Business Information ("CBI") in response to this hold, consult with the case attorney below if you have questions regarding compliance with Agency CBI

Policies during the duration of the litigation hold.

4. If any PRI has not been preserved, please contact the attorney identified below immediately.

**B. How to Store and Work with PRI on Government Furnished Equipment**

**1. Email**

a. You should maintain potentially relevant emails in their native format for the purposes of this litigation hold. This means you should keep them in the email system. Printing email or placing a copy in an agency electronic recordkeeping system to follow agency recordkeeping requirements as necessary for agency record material extends the hold to those copies. For litigation hold purposes, printing or filing in an Agency electronic recording keeping system does not allow you to delete the original email.

b. Do not delete any emails, or attachments within, that are potentially relevant to the topics listed above, whether they are in your inbox or sent mail box. This may mean that you have to move them to an archive folder in order to avoid exceeding your email storage quota.

c. If you are not already doing so, please start saving potentially relevant emails in a folder or folders separate from other irrelevant emails. This generally means creating a folder in your email archive and dragging emails from your inbox and sent mail box to this folder. After performing this act, do not delete the email from your sent box as it will also delete it from the folder.

d. Do not preserve emails by forwarding them to someone else or to another mailbox. A forwarded email is a new email, not a copy of the original. You may move emails by dragging and dropping.

**2. Computer Files (other than email)**

a. Do not delete any electronic files containing PRI. If you have deleted any PRI in the past 30 days, attempt to recover it from your recycle bin. If you cannot, please contact counsel below to determine whether the materials will need to be recovered from backup tapes.

b. Preserve a copy of your files in their original, native format. For example, if you create a document in Word and then convert it to PDF, you must save the original Word document in addition to the PDF. Similarly, if you create a document in Word and then have an official copy loaded into the Superfund Document Management System ("SDMS"), you must preserve the original, native Word file.

c. If you need to work with any information subject to this hold, do not alter the original version of any document that has been shared with anyone else. In that case, you must preserve the original, create a copy of it, and work from the copy. You may continue to work with and revise draft documents, working copies, personal notes, and similar materials without creating new copies, as long as these documents have not been shared with other persons.

d. Keep backup copies of your files. You can do this by storing your files on one of the Agency's network drives, which are automatically backed up.



### 3. Databases

a. National databases, such as ECHO or ICIS, can be updated in the ordinary course of business. However, the Agency may need to run reports to preserve certain database information. If you are aware of data in a large database that may be overwritten or deleted, please contact the attorney identified below.

b. Desktop database files, such as Microsoft Access, or spreadsheet applications like Excel, should be treated just like any other electronic file as described above.

c. Geospatial databases, such as ArcGIS, may require special treatment. Please contact the attorney identified below if you know of any such maps.

4. Digital Photos and Videos. EPA has guidance for preserving and handling digital photographs available at <http://epa.gov/oecaerth/resources/policies/monitoring/digitalcameraguide.pdf>. You should follow this guidance and apply it to video recordings to the extent possible. If you have existing photographs or video recordings to which this policy cannot be applied, please contact the attorney identified below.

### 5. Voicemail, IM, Texts and Other Forms of Electronic Communication

a. Refrain from leaving substantive voicemails regarding the topics covered by this notice. EPA is not preserving voicemail through the voicemail system as part of this litigation hold. A voicemail that contains your name and number and requests a call back or asks the recipient to check his or her email is probably not relevant. A voicemail that includes a detailed discussion of one of the topics identified above may be relevant. In the event you receive a substantive voicemail, please consult the Agency's verbal communications' guidance at <http://www.epa.gov/records/faqs/verbal.htm>.

b. Avoid using transient forms of electronic communication such instant messages or text messages regarding the topics covered by this notice. If you do use them, you may need to preserve the content of the communication. You may contact the attorney identified below for instructions.

### 6. Paper documents

a. Do not recycle, throw out, shred, or destroy any paper documents containing PRI, regardless of whether they are official agency files.

b. You may continue to work on paper documents, but you must save a copy of any version that you have shown to someone else. It is a good practice to write on such drafts the word "Draft," the date, and the name of the persons to whom it was shown.

c. If any PRI has been sent to a federal records center, please contact your records officer to obtain the accession number and to put a hold on the files so that they are not destroyed pursuant to the applicable records schedule. Once that is complete, please contact the attorney identified below with the appropriate the accession numbers.

d. Do not send any PRI to a federal records center without first contacting the attorney identified below. The records may be needed in their current location for the litigation.

e. If you have sent any files to an EPA file room, contact your records officer to place a hold on those files to make sure that they are not destroyed or sent to a records center.

#### C. PRI on Personal Equipment

1. Please refrain from using your home computer or personally owned electronic devices for ESI that may be PRI unless necessary to perform your job. If you do have agency data on your home computer or personally owned device, you must protect the data with up-to-date antivirus and firewall software as this PRI may be subject to search and/or seizure.

2. Do not delete PRI from any devices you personally own. If you have any PRI on personally owned electronic devices, that information may be the property of the Agency, even if the device is not. You may not delete the information without first seeking guidance from the attorney identified below. You also must notify the attorney if you plan to reimage, sell or dispose of any personally-owned electronic devices that may contain PRI, so that such files can be identified and properly preserved by the Agency ahead of time.

3. Refrain from using your personal email account for Agency business. If you use or have used your personal email account for Agency business, do not delete any PRI from your personal email account. You may have to intervene in order to prevent such emails from being automatically deleted. Forwarding emails from your personal email account to your agency account will not relieve you of the responsibility for preserving the emails in your personal account.

#### D. Other tangible things

If there is PRI that is not ESI or documents, gather any inventories or records cataloging such PRI along with any applicable policies or guidance documents concerning EPA's ordinary handling of them, and contact the attorney identified below for instructions.

### III. **How to Acknowledge Receipt of a Litigation Hold Notice/Answer Questions**

Once you have read this litigation hold notice, you must answer the questions below certifying that you have read, received and understand these instructions. Please answer the questions to the best of your knowledge and belief. Failure to answer the questionnaire will result in repeat reminders to your inbox until the required information is submitted.

You will also receive periodic reminders that the litigation hold continues to be effective however, you are **not** required to acknowledge receipt of the reminder notifications.

### IV. **Conclusion**

You are instructed to preserve all PRI until further notice. You will receive a written release notice when this PRI no longer needs to be preserved pursuant to this litigation hold or if the universe of PRI changes. However, even when the litigation hold is lifted or released, you may still have preservation obligations under the applicable records schedule. You should contact your records officer prior to destroying any materials that were the subject of this litigation hold. Please contact the attorney identified below if you have any questions concerning this litigation hold.

**V. Case Attorney**

The lead case attorney to whom all questions should be directed is:

Jennifer Hammitt, Attorney-Advisor  
 United States Environmental Protection Agency, Office of General Counsel, General Law  
 Office  
 1200 Pennsylvania Ave, NW, MC 2377A, Washington, D.C. 20460  
 (202) 564-5097  
[Hammitt.Jennifer@epa.gov](mailto:Hammitt.Jennifer@epa.gov)

**Questions**

Have you read the litigation hold notice?

- ☐ Yes  
☐ No

Do you understand the meaning and scope of the litigation hold notice?

- ☐ Yes  
☐ No

Do you understand what your obligations are under the litigation hold notice?

- ☐ Yes  
☐ No

Please review the distribution list below and indicate if you are aware of other individuals who may potentially be custodians of documents relevant to this matter. If you are aware of additional custodians, please list their names and offices below. If there are no additional custodians, please write N/A.

**Distribution List**

Nancy Stoner, Office of Water (AA)  
 Mike Shapiro, Office of Water  
 Gregory Peck, Office of Water  
 Gina McCarthy, Office of Air and Radiation (AA)  
 Don Zinger, Office of Air and Radiation  
 Amit Srivastava, Office of Air and Radiation  
 Eric Watchter, Office of the Administrator  
 Jonathan Newton, Office of the Administrator  
 Larry Gottesman, Chief FOIA Officer, Office of Environmental Information  
 Kevin Minoli, EPA OGC-GLO  
 Kevin Miller, EPA OGC-GLO  
 Jennifer Hammitt, EPA OGC-GLO  
 Mindy Kairis, EPA OGC-GLO

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### Questionnaire Details Report

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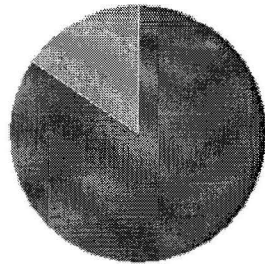
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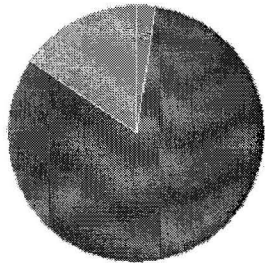
### Answer Statistics

#### Have you read the litigation hold notice



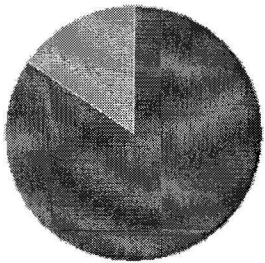
■ No (0) (0%)  
■ Yes (38) (84%)  
■ Not Answered: (7) (16%)

#### Do you understand the meaning and scope



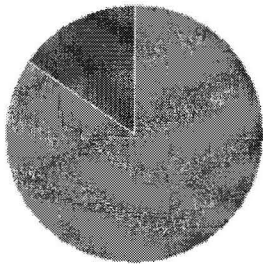
■ No (1) (2%)  
■ Yes (37) (82%)  
■ Not Answered: (7) (16%)

#### Do you understand what your obligations



■ No (0) (0%)  
■ Yes (38) (84%)  
■ Not Answered: (7) (16%)

#### Do you know of any other custodians?



■ Answered: (38) (84%)  
■ Not Answered: (7) (16%)

### Question Name and Question Text Table

Have you read the litigation hold notice	Have you read the litigation hold notice?
Do you understand the meaning and scope	Do you understand the meaning and scope of the litigation hold notice?

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Do you understand what your obligations are under the litigation hold notice? Do you know of any other custodians? Please review the distribution list below and indicate if you are aware of other individuals who may potentially be custodians of documents relevant to this matter. If you are aware of additional custodians, please list their names and offices below. If there are no additional custodians, please write N/A.

Row	Custodian	Have you read the litigation hold notice	Do you understand the meaning and scope	Do you understand what your obligations	Do you know of any other custodians?	GUID
1	Bathersfield-Nizanna	Yes	Yes	Yes	N/A	1A69C67D9235C04896DD023962701FA5
2	Bergman-Shawna	Yes	Yes	Yes	OSWER Mathy Stanislaus, Barry Breen, Lisa Feldt	61F067F722A4C04A880125E53B07CD5A
3	BREEN-BARRY	Yes	Yes	Yes	N/A	DE1752EF9F5115498ED098194C4DD1E9
4	Brooks-Becky	Yes	Yes	Yes	Lisa Feldt (OSWER) -- she has already received this email, but is not on your list above.	741212187F28DD4BA478D933E96F5467
5	Corman-Bicky	Yes	Yes	Yes	N/A	74AD64AA4E69A5428E61AE6EB7FD0DF7
6	Dickerson-Aaron					D532A1F895CB1D4DA96D17AB61FD6B43
7	Feldt-Elisabeth	Yes	Yes	Yes	N/A	778F46F1C2385047AA9F4CDE5AA0DBB6
8	Fulton-Scott	Yes	Yes	Yes	n/a	BA27A9A82BCBE34998A58E675F4C7B84
9	Goo-Michael	Yes	Yes	Yes	N/A	9D91F02645D9A741A17F525E8CCEFD2D0
10	Gottesman-Larry	Yes	Yes	Yes	n/a	8AF3F5E71343CD4992D0EDA55C81418D
11	Gutshall-Renee	Yes	Yes	Yes	n/a	61955BF6FF306B46A9246EBE85993841
12	Hammitt-Jennifer	Yes	Yes	Yes	N/A -- added new names as they came in from others	9A7ECCBE8F5B534ABB97628B459DAEB8
13	Hofmann-Angela	Yes	No	Yes	If the scope is intended to also cover OCSPP's rules, this list should include OCSPP's AA, DAA, ODs, COS, and senior staff in OP.	287F9E1F433AD745896A10FE6E22E416
14	Hopkins-Daniel	Yes	Yes	Yes	N/A	F1293795273A4F4D96FED561F586E982
15	Jones-Jim	Yes	Yes	Yes	Louise Wise	0B052FE9C6763A488C53BBCC3441D63D
16	Kairis-Mindy	Yes	Yes	Yes	Marna McDermott, OGC	813898E9B4657E419EDA5E97C6E56C60
17	Kenny-Shannon	Yes	Yes	Yes	N/A	5EFB9C565BAD754586722D122B9133EC
18	Kime-Robin	Yes	Yes	Yes	N/A	CDEA2D77B802A847A1B547C189BEB381
19	Klasen-Matthew	Yes	Yes	Yes	Mahri Monson and Nizanna Bathersfield (both OW). I've already passed their names along, together with my own.	6C55C6BBD7E44B419B122A2892F00E40
20	Krevitz-Ellyn	Yes	Yes	Yes	Baary Breen, Mathy Stanislaus, Lisa Feldt (OSWER)	3254770AEE79514BA1D79F81E233A8EF
21	McCabe-Janet	Yes	Yes	Yes	NA	EE294DE90B9D6140BB1A44D404C3589E
22	Mccarthy-Regina	Yes	Yes	Yes	N/A	35886935D634794F8AD30B72DE9D1B25
23	McDermott-Marna	Yes	Yes	Yes	Should other Program Managers be included? Like OSWER and OCSPP?	31AB186588C5A34BA3DC906D57259A4
24	Milhouse-Gloria					5363B1648FEC564C9

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						0B3E6571E2F3DC0
25	MILLER-KEVIN	Yes	Yes	Yes	N/A	A45CF640D98B5246A 7AE5B3DA4D455D0
26	MINOLI-KEVIN	Yes	Yes	Yes	Marna McDermott, Scott Fulton	17D65645503C0C40A 340A566EC890E20
27	Monger-Jon	Yes	Yes	Yes	Diane Thompson, Office of the Administrator	55DF411678BA6E42A F515A9C3D5CA921
28	Monson-Mahri					8F2BF2FCDAD01E4C A0B30AE8DCF7877
29	Morley-Nancy					D0AC8AB88317C848 A2C6826834B2733A
30	Newton-Jonathan	Yes	Yes	Yes	Robin Kime, Office of the Administrator Nancy Morley, Office of the Administrator Michael Goo, Office of the Administrator	EE0AB48570BBAE48 9EBD1D852110998F
31	Nguyen-Quoc	Yes	Yes	Yes	n/a	319675C9EFD2DF4E BDE1D68E65334445
32	Peck-Greg	Yes	Yes	Yes	n/a	692CFA16338A8F488 9768E2B676DC410
33	Perciasepe-Bob	Yes	Yes	Yes	N/A	6A99B8A1E98B2444A 73E85C3B9F8B5A7
34	Porterfield-Teri					6A76008E3486FA479 51DC1BCDC6C893C
35	Shapiro-Mike	Yes	Yes	Yes	N/A	BECFFF7CECB62147 ACE3BE59B632A5B0
36	Shaw-Nena					9D8BD1B6D1339B40 A8E195E9688A1543
37	Smith-Kelley	Yes	Yes	Yes	Diane Thompson, EPA COS (left Agency a few months back) Also- Chris Busch (departed Agency), Jon Monger, and I are responsible for creating the cabinet report which details when policy and other actions are potentially expected to occur. These documents may be responsive to the FOIA/pending litigation.	C458C26F39DC8A4D A731980FE045EFE9
38	Srivastava-Amit					D7224CC86C315447 AF457F39A768E265
39	Stanislaus-Mathy	Yes	Yes	Yes	N/A	3D6FFA03D4BE2D48 867ABB28512AB13E
40	Sterling-Sherry	Yes	Yes	Yes	Jim Jones, OCSP AA (acting) Louise Wise, OCSP DAA Gloria Milhouse, OCSP	91CC5A777167844B9 6B8363FC9ECD1F8
41	Stoner-Nancy	Yes	Yes	Yes	Michael Goo, Office of Policy Ken Kopocis, Office of Water Ellen Gilinsky, Office of Water	A9628E869391B84EA A53E9325A42A135
42	Wachter-Eric	Yes	Yes	Yes	My name is misspelled. It is Wachter. Thank you.	D9C20B9CFBE52647 9E6A5378B5824C12
43	Williams-Larke	Yes	Yes	Yes	NA	9294ABC81B129344A 675BC89385EFE44
44	Wise-Louise	Yes	Yes	Yes	NA	C6BAB790025A52468 9D0DC332DCCEBF9
45	Zinger-Donald	Yes	Yes	Yes	Janet McCabe, OAR	3C581C346568BA41A 7FCB6D52C8AC5B3

