U.S. District Court

District of Columbia

Notice of Electronic Filing

The following transaction was entered by Wolverton, Caroline on 7/15/2016 at 11:59 AM and filed on 7/15/2016

Case Name: JUDICIAL WATCH, INC. v. DEPARTMENT OF STATE
Case Number: 1:13-cv-01363-EGS
Filer: U.S. DEPARTMENT OF STATE
Document Number: 110

Docket Text:
SURREPLY to re [97] MOTION for Order *to Depose Hillary Clinton, Clarence Finney, and John Bentel* filed by U.S. DEPARTMENT OF STATE. (Wolverton, Caroline)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC., Plaintiff, v. UNITED STATES DEPARTMENT OF STATE, Defendant.	)	Civil Action No. 13-CV-1363 (EGS)

DEFENDANT'S SURREPLY IN OPPOSITION TO PLAINTIFF'S MOTION FOR PERMISSION TO DEPOSE HILLARY CLINTON, CLARENCE FINNEY, AND JOHN BENTEL

INTRODUCTION

Plaintiff's Reply to Defendant's Opposition, ECF No. 107 (July 14, 2016) ("Pl.'s Reply"), confirms that Plaintiff seeks to extend the limited discovery authorized by the Court for reasons unrelated to the relief it seeks in this case and on no more than a bare hope of developing evidence of an intent to avoid FOIA. Despite the Court having taken the unusual step of ordering discovery in a FOIA action, and despite the completion of the discovery that the Court ordered, as well as three independent investigations by other entities, Plaintiff has failed to uncover any evidence that former Secretary Clinton sought to deliberately thwart FOIA by using the clintonemail.com system to conduct official government business. Accordingly, the Court should deny Plaintiff's request for leave to take three additional depositions. In the alternative, the Court should defer ruling on Plaintiff's request because it is now quite possible that the FBI's recovery of work-related emails as a result of its investigation into the clintonemail.com server could moot

Plaintiff's claims regarding the adequacy of the search and the professed need for discovery.

ARGUMENT

I. Plaintiff Identifies No Need For Former Secretary Clinton's Deposition.

Plaintiff's Reply asserts four arguments for why former Secretary Clinton's deposition is necessary. None has merit.

A. Plaintiff's Reply first asserts that former Secretary Clinton's deposition is necessary regarding the purpose for creating the clintonemail.com system and the Secretary's use of it. Pl.'s Reply at 3. However, former Secretary Clinton's chief of staff and counselor during her tenure, Cheryl Mills, as well as former Secretary Clinton during her congressional testimony, explained that former Secretary Clinton's clintonemail.com account was added to an existing system that her husband's office used. Mills Resp. to Interrog. No. 3 (she "recall[ed] that Justin Cooper advised [her] that President Clinton's office originally hosted its office staff email on an Apple server, and that in 2009, their email was migrated to a newer server that was acquired from excess equipment available from Secretary Clinton's 2008 presidential campaign"; and she "recall[ed] [Mr. Cooper] advised [her] that Secretary Clinton's clintonemal.com account was later added to this existing server when she transitioned from the email address she had used while she was in the Senate.");[1] Hearing 4 Before the Select Committee on the Events Surrounding the 2012 Terrorist Attacks in Benghazi at 403 (Oct. 22, 2015), *available at* https://www.gpo.gov/fdsys/pkg/CHRG-114hhrg98884/pdf/CHRG-114hhrg98884.pdf ("[T]here was a server . . . [t]hat was already being used by my husband's team, an

[1] Defendant understands that Plaintiff provided copies of the interrogatory responses to the Court.

existing system in our home that I used. And then, later, again, my husband's office decided that they wanted to change their arrangements, and that's when they contracted with the company in Colorado."). The FBI findings are consistent with that explanation. ECF No. 102-3 at 73 (FBI Director Comey's testimony before the House Committee on Oversight and Government Reform: "Our best information is that she set it up as a matter of convenience. It was an already existing system that her husband had and she decided to have a domain on that system.") (July 7, 2016).[2]

That Ms. Mills, as well as former Secretary Clinton's deputy chief of staff during her tenure, Huma Abedin, did not speak with former Secretary Clinton about the purpose of the email system is no basis to believe that a deposition of former Secretary Clinton would provide any more information about the issue, nor do their statements suggest an intent to thwart FOIA. Ms. Mills and Ms. Abedin's explanation that Secretary Clinton simply continued her practice of communicating for personal and work purposes through a single email account when she transitioned from the Senate to the State Department is consistent with the Secretary's public statements on the matter. *See, e.g.*, ECF No. 102-4 at 1 ("Why did Clinton use her own email account? When Clinton got to the [State] Department, she opted to use her personal email account as a matter of convenience. It enabled her to reach people quickly and keep in regular touch with her family and friends more easily given her travel schedule."). Plaintiff identifies no evidence obtained through discovery or otherwise suggesting that a deposition of Secretary Clinton would

[2] Plaintiff's assertion in its Reply to Non-Party Hillary Rodham Clinton's Opposition that Ms. Mills' testimony may conflict with the FBI's findings is baseless. ECF No. 106 at 5. As noted above, both Director Comey and Ms. Mills testified that the email system was that of President Clinton's office and that Secretary Clinton's account was added to it. That the email system was migrated to new equipment in the form of a new server is irrelevant.

provide any more or different information on why she used an email account on an existing system used by her husband's office.

B. Plaintiff's next assertion, that "there is no evidence whatsoever about the creation of the system," Pl.'s Reply at 3, is simply untrue. As described above, the evidence shows that former Secretary Clinton did not create a server or email system but instead simply received an account on the existing system of her husband's office. The details and circumstances of his office's creation of the server and email system are irrelevant to whether former Secretary Clinton or the State Department intended to deliberately thwart FOIA. Plaintiff's speculation that former Secretary Clinton may have instructed Justin Cooper to create the system is pure speculation, built on the mere fact that "[t]here is no evidence showing that Secretary Clinton did not instruct Mr. Cooper to create the system." *Id.*[3] That is not a reason to depose former Secretary Clinton. Nor is there any evidence to support Plaintiff's speculation that former Secretary Clinton instructed Mr. Cooper to provide Ms. Abedin with an email account. Ms. Abedin testified that Mr. Cooper provided her with a clintonemail.com account as she "always had an email account associated with the Clinton family to deal with their – to deal with their personal matters." Abedin Dep. Tr. at 21:4-10.

C. Plaintiff's assertion of a "factual dispute" regarding whether the State Department approved Secretary Clinton's use of personal email for official government business is also baseless. Pl.'s Reply at 4. There is no conflict between the lack of any evidence that State approved the use and the deposition testimony of Ms. Mills and Ms.

[3] Plaintiff mischaracterizes Defendant's Opposition as asserting that Justin Cooper was responsible for creating the email system. Pl.'s Reply at 3. Defendant merely quoted Ms. Abedin's testimony that Mr. Cooper provided her with a clintonemail.com email address. ECF No. 103 at 9 n.3.

Abedin and former Secretary Clinton's congressional testimony that they believed that it was allowed. Secretary Clinton's public statements indicate that the understanding that the use was "allowed" was based on "laws, regulations, and State Department policy," not any specific State Department approval of it. ECF No. 102-4 at 2. Plaintiff again offers nothing but speculation that a deposition of Secretary Clinton would provide any additional information on the matter.[4]

D. Plaintiff's fourth argument, that "Secretary Clinton's testimony is necessary to uncover admissible evidence about what records she returned to the State Department," Pl.'s Reply at 4, can be dismissed as outside the scope of discovery that the Court authorized as it has nothing to do with the creation, purpose and use of the clintonemail.com system. *See* May 4, 2016 Mem. and Order at 12-13 ("The scope of permissible discovery shall be as follows: the creation and operation of clintonemail.com for State Department business, as well as the State Department's approach and practice for processing FOIA requests that potentially implicated former Secretary Clinton's and

[4] Plaintiff incorrectly suggests in its Reply to Non-Party Hillary Rodham Clinton's Opposition that there is evidence that senior State Department officials responsible for records management had reason to "follow up" or "raise [] concerns" with Secretary Clinton or her staff about FOIA obligations in connection with the Secretary's email. ECF No. 106 at 6. State's Inspector General reported that senior Department officials "stated that they were unaware of the scope or extent of Secretary Clinton's use of a personal email account, though many of them sent emails to the Secretary on this account." May 2016 OIG report at 37. And the Department officials with day-to-day responsibility for records searches in response to FOIA requests were unaware of the Secretary's email use. 30(b)(6) Dep. at 53:13-18, 67:4-21, 165:19-166:1. Plaintiff's assertion in its Reply to Non-Party Hillary Rodham Clinton's Opposition that Ms. Mills testified that "Secretary Clinton was in contact with Mr. Finney every day," ECF No. 106 at 7, is incorrect. The testimony cited by Plaintiff, Mills Deposition at 262:7-263:1, shows that Ms. Mills testified that Secretary Clinton engaged daily with her special assistants and the Executive Secretary, who sat outside her office, not Mr. Finney.

Ms. Abedin's emails and State's processing of the FOIA request that is the subject of this action").

Lastly, Plaintiff confuses the limited, narrowly-tailored discovery agreed to by the parties and authorized by the Court with the broader discovery more typically permitted in other types of civil litigation. Pl.'s Reply at 5; *see also* May 4, 2016 Mem. and Order at 8-9 ("Discovery is rare in FOIA cases."). Suffice it to say the Court did not order the latter, and it should not do so now.

II. The Court Should Deny Leave To Depose Clarence Finney And John Bentel.

Plaintiff claims that it should be permitted leave to take Clarence Finney's deposition because Plaintiff did not know about him when it submitted its discovery plan in March, and that it is necessary to take his deposition to discover what he knew and did not know about former Secretary Clinton's email use. Plaintiff is wrong on both counts.

The January 2016 report released by State's Office of Inspector General, on the subject of "the Department of State's FOIA Processes for Requests Involving the Office of the Secretary," refers to Mr. Finney multiple times by title. The report explains that "S/ES employs one FOIA analyst, who reports to the GS-14 Deputy Director of Correspondence, Records, & Staffing (Deputy Director). The Deputy Director serves as the S/ES FOIA coordinator." Jan. 2016 OIG Report at 5. In addition, an entire paragraph of the report discusses the Deputy Director's explanation of S/ES's current practices with respect to conducting searches of email for FOIA requests directed to the Secretary's office. *Id*. at 9. And it states that "[t]he Deputy Director, who has handled FOIA responsibilities for S/ES since 2006, could not recall any instances of emails from

personal accounts being provided to him in response to a search tasked to an S/ES component." *Id*. at 10.

At the time of the January 2016 report, Mr. Finney was, and still is, the Deputy Director of Correspondence, Records, & Staffing. 30(b)(6) Dep. Tr. at 14:16-20.[5] Thus, a document that was widely publicized (including by Judicial Watch) put Judicial Watch on notice of Mr. Finney's existence and role long before it compiled its list of proposed deponents in March 2016. Plaintiff was not limited by knowledge of Mr. Finney's title but not his name: the Rules expressly permit noticing a deposition by referring to title (Rule 30 of the Federal Rules of Civil Procedure allows that if a party wants to depose a person but does not know his or her name, the party may notice the deposition by providing "a general description sufficient to identify the person or the particular class or group to which the person belongs."). And, of course, Judicial Watch always could have asked the State Department for Mr. Finney's name.[6] Plaintiff did none of these things and chose to take a 30(b)(6) deposition rather than depose the individual who "handled FOIA responsibilities for S/ES." Jan. 2016 OIG Report at 10.

Moreover, it is not necessary to take Mr. Finney's deposition now because Plaintiff asked the 30(b)(6) witness a number of questions about what Mr. Finney knew and did not know about Secretary Clinton's use of email, and got answers to those questions. *See* Def.'s Opp. at 20-21. State interpreted questions about Mr. Finney's

[5] As noted in State's opposition brief at 2 n.1, prior to January 21, 2013, Mr. Finney's title was Director of the Office of Correspondence and Records within S/ES. It changed to Deputy Director at that time, due to a merger, without a change in duties. 30(b)(6) Dep. Tr. at 14:10-15:1.

[6] For example, Plaintiff could have asked State for the name of the Deputy Director of Correspondence, Records, & Staffing in the context of the parties' negotiations over their joint proposal for limited discovery. *See* May 4, 2016 Mem. and Order at 4.

awareness of Secretary Clinton's email usage and clintonemail.com as being within the scope of the 30(b)(6) deposition topic ("the processing of FOIA requests, including Plaintiff's FOIA request, for emails of Mrs. Clinton and Ms. Abedin both during Mrs. Clinton's tenure as Secretary of State and after"), as demonstrated by its permitting the 30(b)(6) witness to answer Plaintiff's questions on these topics and the fact that the witness was prepared to, and did, answer them.

Tellingly, Plaintiff did not complain that the 30(b)(6) witness was unprepared to answer questions about Mr. Finney's knowledge or lack of knowledge, because she obviously was prepared. The witness spoke to Mr. Finney for hours in preparation for her deposition, and she answered the questions she was asked about him, including many of the questions Plaintiff now wants to pose to Mr. Finney directly. For example, the fact that Mr. Finney was unaware of Secretary Clinton's use of a personal email account for official government business, as the 30(b)(6) witness testified to, *see* Def.'s Opp. at 20-21, necessarily means that he was not told about it. *See* Pl.'s Reply at 7-8.[7] Deposing Mr. Finney would in fact be cumulative of the 30(b)(6) deposition. *See* Pl.'s Reply at 7.[8] While it is true that, as Plaintiff notes, Rule 30(b)(6) itself "does not preclude a

[7] Plaintiff is also facially inconsistent about whether it has evidence that Mr. Finney lacked knowledge. In its Reply to the State Department, Plaintiff states that it needs to depose Mr. Finney to ask him "whether he knew about the clintonemail.com system," Pl.'s Reply at 7, while in its Reply to Secretary Clinton it asserts with finality that Secretary Clinton must be deposed based on the "striking evidence that Clarence Finney . . . had no knowledge about her use of the clintonemail.com system." ECF No. 106 at 6. Plaintiff cannot have it both ways.

[8] *Sahu v. Union Carbide Corp.*, 528 Fed. Appx. 96, 104 (2d Cir. 2013), cited by Plaintiff, is inapposite. *See* Pl.'s Reply at 7. That case involved a district court's denial of a request to take certain 30(b)(6) depositions. Here, State agreed to a 30(b)(6) deposition, on the topic proposed by Plaintiff, and went to great lengths to prepare its 30(b)(6) witness. And the questions Plaintiff now seeks to ask Mr. Finney were encompassed within the 30(b)(6) topic noticed for deposition.

deposition by any other procedure allowed by these rules," Plaintiff's request to depose Mr. Finney must be considered in the context of the limited, atypical discovery occurring in this FOIA case. The Court should deny that request.

Nor is the deposition of John Bentel "necessary." Pl.'s Reply at 8. Plaintiff faults State for not addressing the evidence regarding Mr. Bentel in the May 2016 OIG report. *Id*. But that evidence does not suggest that Mr. Bentel would know whether or not Secretary Clinton or the State Department used clintonemail.com to deliberately thwart FOIA. *See* Def.'s Opp. at 22. Moreover, Plaintiff omits that the OIG specifically investigated whether "the Secretary had requested or obtained guidance or approval to conduct official business via a personal email account on her private server," May 2016 OIG report at 37, and "found no evidence that staff in the Office of the Legal Adviser reviewed or approved" the system. *Id*. at 40.

III. In The Alternative, The Court Should Defer Ruling On Plaintiff's Motion.

The requested depositions are also not needed or appropriate at this time because State has agreed to search the "several thousand work-related emails" recovered by the FBI during its investigation into Secretary Clinton's email server, for records responsive to Plaintiff's FOIA request. *See* Def.'s Opp. at 24; Federal Bureau of Investigation, Statement by FBI Director James B. Comey on the Investigation of Secretary Hillary Clinton's Use of a Personal Email System, https://www.fbi.gov/news/pressrel/press-releases/statement-by-fbi-director-james-b.-comey-on-the-investigation-of-secretary-hillary-clintons-use-of-a-personal-email-system.

This was the ultimate relief Plaintiff sought when it moved for discovery—a point Judicial Watch does not deny. *See, e.g.*, Feb. 23, 2016 Hearing Transcript at 10-11

("We're asking that [the clintonemail.com system of records] be turned over to the State Department so that the State Department can conduct the search it should have conducted originally."); *id*. at 11 ("[I]f this Court determines [as a result of discovery] that an adequate search was not conducted, we believe that . . . to the extent the system exists, or copies of the system or an archive of the system exists, it should be turned over to the State Department to conduct the searches."); *id*. at 45 ("if a motion for discovery was granted, we conducted discovery, the evidence we believe is there . . . the next step would then be to issue an order . . . requiring the . . . return [of] all those records so that an adequate search could be conducted."). Plaintiff's statement now that "[w]hether the FBI at some time in the future will provide the State Department with additional records is irrelevant," Pl.'s Reply at 10, cannot be reconciled with these previous statements, and strongly suggests that Plaintiff is seeking discovery for discovery's sake.

Plaintiff's argument that the Court needs to determine whether State's search was adequate before "any discussion of remedies," *id*. at 10, overlooks the fact that the Court would not be ordering a search of newly produced records as a remedy; State is voluntarily agreeing to do the search, just as it has consistently done in this case when potentially responsive records were provided to it. Nor would State necessarily need to process all the recovered records and make them available to the public before it could search them for records responsive to Plaintiff's FOIA request, contrary to Plaintiff's suggestion. *See* Pl.'s Reply at 10 n.6. State did not do that with respect to the 55,000 pages of emails Secretary Clinton provided to it, which State searched for this case after

they were in a searchable electronic format. *See* Def.'s Status Report at 2 (ECF No. 17) (July 30, 2015).[9]

CONCLUSION

For all the foregoing reasons, as well as the reasons set forth in Defendant's Opposition to Plaintiff's Motion for Permission to Depose Hillary Clinton, Clarence Finney, and John Bentel, the Court should deny Plaintiff's motion, or in the alternative, defer ruling on it.

Dated: July 15, 2016

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

MARCIA BERMAN
Assistant Director

/s/ Caroline Lewis Wolverton
CAROLINE LEWIS WOLVERTON (DC 496433)
Senior Trial Counsel
STEVEN A. MYERS (NY 4823043)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington, D.C. 20530
Tel.: (202) 514-0265
Fax: (202) 616-8460
Email: caroline.lewis-wolverton@usdoj.gov

Attorneys for Defendant

[9] It is unclear what Plaintiff's contention that "[t]hese records are just another subset of a larger set of records," Pl.'s Reply at 10, means or is based on, or how Plaintiff would know this. Plaintiff provides no citation to any source of information for this statement.