

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

JUDICIAL WATCH, INC.

Plaintiff,

v.

U.S. DEPARTMENT OF STATE,

Defendant.

Civil Action No. 15-cv-692 (APM)

JOINT STATUS REPORT

Plaintiff Judicial Watch, Inc. (“Judicial Watch”) and Defendant United States Department of State (“State”) submit this status report pursuant to the Court’s order of August 30, 2016. In that order, the Court ordered State to report the number of documents potentially responsive to Freedom of Information Act (“FOIA”) Request 1 found in materials transferred from the Federal Bureau of Investigation (“FBI”) that are not duplicative of documents already produced in this case. The Court further ordered the parties to confer regarding a production schedule and report the outcome of those discussions.

1. FOIA Request 1 seeks “[a]ny and all emails of former Secretary of State Hillary Rodham Clinton concerning, regarding, or relating to the September 11, 2012 attack on the U.S. Consulate in Benghazi, Libya.” Complaint ¶ 5 (ECF No. 1). To date, State has produced to Plaintiff, via its FOIA web site and via email, a total of 343 documents responsive to FOIA Request 1, with redactions as appropriate.

2. In previous filings, State reported that the FBI sent a letter to State indicating that the FBI would be providing to State certain information that may include its agency records.

State's Mot. to Vacate Briefing Schedule ¶ 2 (ECF No. 33). State further reported that it had, in the interest of reducing the issues to be litigated, agreed to conduct searches of the information being transferred from the FBI to State for records responsive to FOIA Request 1, notwithstanding that they were not in State's possession and control at the time the FOIA request was made. *Id.* ¶ 3. State further reported that the FBI completed the transfer of information to State on August 5, 2016. Def. Status Report ¶ 3 (ECF No. 34). Finally, State reported that it had searched the material transferred from the FBI that was reasonably likely to contain additional responsive records using key word search terms and the date range specified in the FOIA request. Def. Status Report ¶ 3 (ECF No. 35).

3. At a status conference on August 30, 2016, State reported that it had reduced the number of potentially responsive documents that must be reviewed to approximately 30, but that it had not yet determined how many of those were duplicates or near-duplicates of records contained in the emails already provided by former Secretary Clinton to State in December 2014. State also had not yet determined how many of those documents were responsive to FOIA Request 1.

4. State has determined that there is one responsive record that is not a duplicate of the documents provided by former Secretary Clinton, and two responsive records that are near duplicates of documents provided by former Secretary Clinton.¹ State has determined that the

¹ By the term "near duplicate," State means a document that contains significant overlap with a document provided by former Secretary Clinton. For example, an email chain that contains five messages is a near duplicate of an email chain that contains four of the five messages. The two near duplicate records identified here are duplicates of documents previously provided by former Secretary Clinton but for a top email in each chain stating "Pls print."

Judicial Watch objects to the distinction of "near duplicate." Each of the two records identified is responsive to Plaintiff's FOIA request and each is a separate and distinct record, containing information not previously produced.

remainder of the potentially responsive documents are either non-responsive or are duplicates of documents provided by former Secretary Clinton or Huma Abedin that were already searched in this case.²

5. Undersigned counsel for State informed undersigned counsel for Judicial Watch this morning that, due to uncertainty in the technical steps required to finalize the documents for production, State could not commit to the Court to producing the three records until Thursday, September 8, 2016, but would produce them earlier if it could. On the evening of this filing, after Judicial Watch objected to the nondisclosure of the remaining documents State considers responsive but “duplicates” as described in Paragraph 4 and Footnote 2 below, State produced to Judicial Watch the non-exempt portions of the three responsive records identified in Paragraph 4.

6. In connection with the responsive records identified by State in Paragraph 4 and Footnote 2 below, which it considers “duplicates,” Judicial Watch objects to their nondisclosure and believes the records should be produced promptly as they are not duplicates of the previously produced records. On their face, these records contain information not previously produced and State identified them as responsive to Plaintiff’s FOIA request. Under FOIA, “once the government concludes that a particular record is responsive to a disclosure request, the sole basis on which it may withhold particular information within the record is if the information falls within one of the statutory exemptions from FOIA’s disclosure mandate.” *AILA v.*

The parties do not believe there is any dispute about the term “near duplicate” for the Court to resolve in connection with this filing given that State has produced the documents in question.

² The contents—to, from, CC, date, subject, body text, and signature—of the emails contained in the duplicates are identical to the contents of the documents provided by former Secretary Clinton. Some of the duplicates provided by the FBI are in a format that includes, at the bottom of the documents, printed internal technical metadata that was not printed on the documents in the format in which former Secretary Clinton provided documents to the Department.

Executive Office for Immigration Review, et al. Case No. 15-5201 (D.C. Cir. July 29, 2016). As State does not allege it is withholding the information under any of the permissible exemptions, it must produce all remaining responsive records. Thus, Judicial Watch requests that State produce all remaining responsive records with the included metadata within one week – by Tuesday, September 13, 2016. Judicial Watch believes one week is more than enough time to produce all remaining responsive records considering the small number of records and the fact that State, by its own admissions herein, has already processed these records.

7. State believes that inclusion on printouts of internal technical metadata—information which was not created by any person but rather may or may not be reflected on a document depending on the format in which it is printed—does not convert those duplicative emails identified in Paragraph 4 and Footnote 2 into records that are distinct from the copies of those emails provided by former Secretary Clinton and Ms. Abedin. The parties’ dispute regarding this issue is best resolved on summary judgment, not in a joint status report intended to set a production schedule for records State has determined to be responsive to FOIA Request 1 and non-duplicative of records already searched in this case. In any event, Judicial Watch’s assertion that these duplicates have already been processed and could be produced in one week is incorrect. At a minimum, the printed internal technical metadata would itself have to be reviewed to determine which, if any, portions are exempt from disclosure under the FOIA. Attached to this filing is a copy of the three documents State produced to Judicial Watch today. The type of internal technical metadata at issue here is printed at the bottom of each document.

Date: September 6, 2016

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Respectfully submitted,

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