

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

JUDICIAL WATCH .  
Plaintiff, .  
vs. . Docket No. CV 16-2369 RDM  
U.S. DEPARTMENT OF JUSTICE . Washington, D.C.  
. January 24, 2017  
Defendant. .  
. . . . .x 2:30 p.m.

TRANSCRIPT OF STATUS CONFERENCE

BEFORE THE HONORABLE SENIOR JUDGE RANDOLPH D. MOSS

UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Official Court Reporter  
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**P R O C E E D I N G S**

THE DEPUTY CLERK: Civil Action 16-2369, Judicial Watch versus the U.S. Department of Justice. Counsel, please approach the podium and identify yourself for the record.

MR. BEKESHA: Good afternoon, your Honor. Michael Bekesha on behalf of Judicial Watch. Along with me at counsel table is Tom Fenton, president of Judicial Watch.

THE COURT: Good afternoon, Mr. Bekesha.

MR. LOPEZ-MORALES: Good afternoon, your Honor, my name is Cesar Lopez-Morales on behalf of defendant, U.S. Department of Justice. And with me at counsel's table is Marcy Berman also the U.S. Department of Justice and Christian Ellis of the FBI.

THE COURT: Thank you. So Mr. Bekesha, why don't we start with you. And just let me know where things stand from your prospective.

MR. BEKESHA: Sure. So as you know the Judicial Watch submitted a FOIA request in October. It had two parts to it. One was asking for all records that were discovered, retrieved, found on Datto device which is our understanding it was one of the devices that the FBI collected during its investigation of Secretary Clinton's email usage. The second part of the request is for records related to that collection and related to that device.

1           An answer has been filed. No response from the  
2 agency yet about if there are any responsive records. Let  
3 me say no formal or official response. Counsel we spoke  
4 yesterday briefly about where the process is. It looks as  
5 though probably make more sense for the government's  
6 attorney to explain what their position is and then have me  
7 come back and talk about it.

8           THE COURT: Okay. That sounds good. So  
9 Mr. Lopez-Morales.

10           MR. LOPEZ-MORALES: So your Honor, as opposing  
11 counsel mentioned there are two parts to the request that  
12 was submitted by Judicial Watch in October. And our  
13 position is somewhat similar with respect to each part even  
14 though the source or the location where the responsive  
15 records are different with respect to each part.

16           With respect to the first part, I informed  
17 opposing counsel yesterday that any responsive records to  
18 this part of the request is located in the materials that  
19 were transferred to the Department of State for processing  
20 for FOIA purposes, and is being governed by the production  
21 schedule agreed in your case as you're familiar Leopold  
22 versus Department of Justice. And in that, those materials  
23 are being processed pursuant to your October 3, 2016 order,  
24 which is in Docket 26.

25           So that any responsive records to that first part

1 of the request are part of those materials the Department of  
2 State has been processing them. The Department of Justice  
3 filed a status report the beginning of January, so you may  
4 be well aware in the Leopold case forming the status of that  
5 production.

6 And as part of those, as part of that production  
7 there have been some records that could have been retrieved  
8 from the Datto device which is what plaintiff is interested  
9 in. I don't have any numbers of what has been released  
10 already and what is remaining, but what we know is that  
11 anything that was recovered, retrieved from the Datto device  
12 is in the materials that were transferred to the State  
13 Department.

14 THE COURT: Remind me in Leopold is the State  
15 Department then posting the materials that it's releasing in  
16 response to Leopold's request on the Internet somehow  
17 generally accessible?

18 MR. LOPEZ-MORALES: Yes, your Honor, they are  
19 being released to the public in the electronic FOIA library,  
20 and not just to Mr. Leopold's request but also to the  
21 hundreds of requests that the State Department is handling.  
22 And so that's how Judicial Watch would have access to the  
23 responsive records as well.

24 THE COURT: Okay. Does that cover everything then  
25 in one, everything -- well, you may not know this, but maybe

1 you do. Does the Leopold request encompass everything that  
2 is requested in number one?

3 MR. LOPEZ-MORALES: I'm not sure, your Honor. But  
4 what we do know is that anything that would be responsive is  
5 in the materials in the State Department. And regardless of  
6 whether it's responsive to the Leopold request it will be  
7 processed in accordance with the processing schedule.

8 THE COURT: Okay. Anything that is responsive to  
9 question number one that is not subject to a FOIA exemption  
10 will be posted by the State Department on public library,  
11 electronic library?

12 MR. LOPEZ-MORALES: Exactly, yes, your Honor.

13 THE COURT: Request number two?

14 MR. LOPEZ-MORALES: Request number two as opposing  
15 counsel is very familiar we heavily discussed and litigated  
16 this issue before Judge Chutkan in another lawsuit that was  
17 filed Judicial Watch against the Department of Justice.  
18 That case is number 16-2046. And as we discussed then we  
19 told Judge Chutkan and Judge Chutkan agreed with us. She  
20 approved our processing schedule of 500 pages per month on  
21 the Clinton investigative files.

22 What I should emphasize about the second part of  
23 the request is that any, to the extent that there are any  
24 responsive records to that part of the request which relates  
25 to the FBI's efforts in retrieving or recovering or

1 discovering the information in the Datto device that is in  
2 the FBI's possession, and that is in the FBI's investigative  
3 file. The FBI has received hundreds of requests for records  
4 in the Clinton investigative file. And as we informed Judge  
5 Chutkan in that case Judicial Watch was requesting 302  
6 forms. They were also requesting correspondence and  
7 communications between officials at the FBI, between the FBI  
8 and the White House, et cetera.

9           So what we said long before plaintiff filed a  
10 lawsuit and even before they filed this request the FBI had  
11 already stated its commitment to handle the requests that it  
12 was receiving and to release all nonexempt portions of the  
13 Clinton investigative file. It has been doing so for  
14 several months. The last release was Friday, January 6th,  
15 2016. And the FBI will continue pursuant to Judge Chutkan's  
16 order and our policy of, for complex FOIA requests. It will  
17 continue to process 500 pages a month the Clinton  
18 investigative file. And that's what we litigated in that  
19 case.

20           And also I forgot to mention that the FBI has  
21 received at least nine requests for the whole Clinton  
22 investigative file, and they were received long before  
23 plaintiff had filed this request. So in accordance with our  
24 policy for complex requests and the first in, first out  
25 policy we have been processing the requests accordingly and

1 the FBI has released all nonexempt portions of that file as  
2 it goes on in that process.

3 THE COURT: Are those also being processed to some  
4 publicly available --

5 MR. LOPEZ-MORALES: Yes, your Honor, yes.

6 THE COURT: Thank you. Mr. Bekesha.

7 MR. BEKESHA: Thank you, your Honor. I'll briefly  
8 talk about the second part of the request first. You know,  
9 first I would disagree with the characterization that it was  
10 litigated before Judge Chutkan this idea of 500 pages a  
11 month being produced. We filed a status report. We each  
12 had positions. There was a status conference about it.  
13 There was a discussion.

14 Judge Chutkan at that time has agreed to go along  
15 with the production schedule that the State Department, or  
16 that the Department of Justice proposed, but it wasn't  
17 litigated. I think Judge Chutkan it's fair to say may  
18 reevaluate her decision at that time depending on how the  
19 production goes. What counsel also didn't say --

20 THE COURT: Before you move off that, are you  
21 asking that I do anything different? Or do we just leave  
22 that to Judge Chutkan and if she changes the schedule there  
23 that would affect --

24 MR. BEKESHA: I'm asking for something different  
25 here, your Honor. So the Clinton investigative file is a

1 little over 10,000 pages. What we've asked for -- so at 500  
2 pages a month the Justice Department, the government has  
3 said would be between 20 and 24 months for all the material  
4 to be produced. What we've asked for is a very limited set  
5 of records. Records only about the Datto device. And so  
6 unlike in the case that we had in front of Judge Chutkan  
7 where we asked for types of documents, Form 302s and  
8 communications which may be different, may be difficult to  
9 separate out from the full 10,000 pages.

10 In this instance all the material, the 10,000  
11 pages are already posted, are already online or not online  
12 but on an electronic database. It can be key word searched.  
13 So our proposal in this case is for the government first  
14 part two to search the word Datto of the 10,000 pages, see  
15 how many potentially responsive pages there are and then we  
16 can meet and confer and discuss a production schedule.

17 If Datto only appears on ten pages it makes sense  
18 for the agency to review and produce those ten pages instead  
19 of requiring us to wait 24 months to have an entire  
20 investigative file that we then need to go through and  
21 figure out where those ten instances are on 10,000 plus  
22 pages, or those ten pages could be withheld in full and then  
23 or not the 10,000 but parts of the 10,000 pages, so then we  
24 wouldn't even know where Datto appeared on those records.

25 THE COURT: What is the relevance of the Datto



1 device? How is that distinct from everything else?

2 MR. BEKESHA: So when the FBI was conducting its  
3 investigation they gathered several laptops, several  
4 Blackberries from Secretary Clinton. They also collected  
5 other devices from third parties, other former government  
6 officials. These are, the Datto device is one of the  
7 devices that they collected from a company that had a  
8 contract with Secretary Clinton for, to back up information.

9 And so we're looking for in the second part  
10 records about what the FBI did with respect to this specific  
11 device. So we're not talking about the entire investigative  
12 file. We just want the government to type in Datto into  
13 their database and lets see how many hits there are.

14 THE COURT: Are you content to live with that as  
15 the scope of the search?

16 MR. BEKESHA: Yes, your Honor. I think it's a  
17 fair interpretation, a reasonable interpretation of our  
18 request without searching on the word Datto it would be  
19 difficult to figure out what's responsive and what's not  
20 quite honestly. So we think that would be fair. It would  
21 be a relatively easy solution. I suggested and proposed  
22 that to counsel yesterday hoping that maybe they could have  
23 conducted the search and provided us with a number.

24 I mean if it shows up on 10,000 pages then there  
25 may be a problem. But if it shows up only ten times there

1 could be an easy solution to this case.

2 THE COURT: Okay.

3 MR. BEKESHA: With respect to the first part, we  
4 still don't know and I asked this of counsel yesterday,  
5 where the materials from the Datto device exists in the  
6 materials transferred to the FBI, sorry to the State  
7 Department. I believe the FBI transferred six disks to the  
8 State Department. And right now in the Leopold case it's my  
9 understanding that the State Department is processing the  
10 first disk.

11 And so the question is, is all the material from  
12 the Datto device on one of the six disks? Or is it spread  
13 out throughout the disks? Also our request asked for more  
14 than just emails. It asked for Blackberry messages, text  
15 message, I-messages. And so to date the material posted in  
16 the Leopold case has only been emails, so you know, we want  
17 to ensure all records are being looked at and produced not  
18 just emails in the Leopold case. You know, whether or not  
19 it makes sense for the State Department to continue  
20 processing the case in response to Leopold as well as  
21 another Judicial Watch case really depends where the  
22 materials exists in the materials transferred to the State  
23 Department.

24 One last point to note the State Department as  
25 they're reviewing the materials transferred from the FBI may

1 determine some of those records are not State Department  
2 records. And so how is that going to be dealt with because  
3 in this case we sued the Justice Department and not the  
4 State Department. And so there seems to be potential for  
5 records that may get lost because we sued one agency and  
6 they want another agency to respond to us.

7 THE COURT: It does seem to the Court unlikely  
8 that just given the number of lawsuits that have been  
9 brought that some records are going to get lost in this  
10 process because presumedly the State Department has requests  
11 for everything. And I understand from counsel the State  
12 Department has requests for everything covered by your  
13 requests. It's true that it may turn out when the State  
14 Department does it review that it concludes it's some of the  
15 records are, records of third party agencies in which case I  
16 assume they would handle that in the way they do is that  
17 they would then presumedly send that out to the third party  
18 agencies to get the position of the third party agency.

19 MR. BEKESHA: Right. The defendant in this case  
20 is, the agency is the Justice Department. And so how that  
21 plays out, do we wait 24 months or as long as it's going to  
22 take to process the six disks, and then what happens is the  
23 State Department transfers that material back to the Justice  
24 Department to then review the records and see if they're  
25 Justice Department records? I mean just figuring out the

1 logistics of that there's nothing in place now to ensure  
2 that --

3 THE COURT: So what are you proposing?

4 MR. BEKESHA: Well, I think the first thing is are  
5 all the materials that were recovered from the Datto device  
6 in one place. It would be helpful to know are they on one  
7 disk. Are they in one database at the FBI?

8 THE COURT: You told that request one goes beyond  
9 the Datto device; is that right or not?

10 MR. BEKESHA: No, it's everything, everything of  
11 the Datto device, that was found on the Datto device. And  
12 that may be included in the material transferred from the  
13 FBI to the State Department. But is it all on one disk?  
14 Does the FBI have the Datto device materials all in one  
15 file? I mean how is, I think we need to know more about  
16 where these records exists before we can even try to agree  
17 on what makes sense and what a fair production schedule may  
18 be.

19 THE COURT: Let me hear again from  
20 Mr. Lopez-Morales.

21 MR. LOPEZ-MORALES: Well, your Honor, first of  
22 all, we did look at where in the sixth disks some of the  
23 potential responsive records would be located. The problem  
24 is once again today Judicial Watch has taken the position  
25 that it took last week before Judge Chutkan and was

1 rejected. And it's this death by a thousand cuts piecemeal  
2 litigation approach. The agency and FOIA guarantees  
3 multitasking processing \*\*\*queues as well as a first in,  
4 first out policy. That is what the agency has been doing  
5 which is why Judge Chutkan rejected that approach, and just  
6 because obviously Judicial Watch has a right to file a  
7 lawsuit with respect to its FOIA requests, but it has to  
8 wait its turn in line.

9           And we, the Department of State with respect to  
10 the materials that were transferred there and the FBI with  
11 respect to the Clinton investigative file both agencies have  
12 received hundreds of requests for the same records. And  
13 just because Judicial Watch has the inclination or the  
14 resources to file a lawsuit it does not merit preferential  
15 treatment over all the other requestors.

16           There is a process in place in accordance with  
17 your order in the Leopold case. It provides for the  
18 Department of State to first identify which records are not  
19 responsive to the Leopold request. Second, to transfer as  
20 you said anything that would be processed by a third party  
21 agency; and third, to release to Mr. Leopold or to the  
22 public as the Department of State has been doing, anything  
23 that is responsive. And the Department of State has been  
24 doing that not only with respect to Mr. Leopold's request,  
25 but anything that is nonexempt that is located in the

1 materials.

2           So what we found we would have either provide this  
3 information to the Court and to opposing counsel, our  
4 position still is that Judicial Watch has to wait in line.  
5 Judicial Watch did not request expedition in the FOIA case,  
6 and they have not identified any reasons why their requests  
7 should be prioritized over the hundreds of other requestors.

8           With that being said, we have identified that in  
9 the materials transferred to the Department of State  
10 anything that was retrieved from the Datto device would be  
11 in disk one, which is what your order in the Leopold case  
12 provided which is currently being processed. And we think  
13 that the Department of State will be done in the next couple  
14 of months processing that disk and then they will proceed to  
15 disk four and five. And the information from the Datto  
16 device, the Datto materials are in disk one and disk five.

17           So Judicial Watch is going to get anything that's  
18 not exempted that are Datto materials. And just want to  
19 correct something for the record. The Leopold request is  
20 not limited to emails. The Leopold request clearly asks for  
21 emails and other records that were retrieved from the  
22 server. And the same applies to the second part of the  
23 request, your Honor, which is why Judge Chutkan approved the  
24 FBI's proposed 500 page per month schedule.

25           We could run a search of the word Datto, but that

1 creates an incentive which is precisely what Judicial Watch  
2 has been doing in this instance by filing another lawsuit  
3 for records in the Clinton investigative file. We will  
4 continue to do so if we allow Judicial Watch to, if we  
5 process these requests and favor and reallocate resources  
6 that are being used right now by the agency to process the  
7 whole Clinton investigative file we would have to pull out  
8 specific records requested by Judicial Watch in the recent  
9 FOIA request, pull those records out, process them and pull  
10 them back in the file.

11           And to the extent, for example, with the second  
12 part of the request they are asking for records of the FBI's  
13 efforts in retrieving the Datto material. That could well  
14 be in the 302s forms or in the correspondence that were the  
15 subject of the requests in the case before Judge Chutkan.  
16 So then we would have this messy situation in which we would  
17 have a different processing schedule. We would have to pull  
18 out specific records. And it does not really make sense to  
19 create this distinction that opposing counsel is mentioning  
20 of types of documents versus type of content. If anything,  
21 it would be easier to pull out specific types of categories  
22 of documents like the 302 forms and instead of looking  
23 throughout the entire file for references to Datto.

24           And Datto search along doesn't really mean that  
25 we're going to get all the potential responsive records to

1 that request. So that's our position, your Honor.

2 THE COURT: Do you have any sense of the quantity  
3 of records subject to the request number two that relate to  
4 the Datto device?

5 MR. LOPEZ-MORALES: So, your Honor, we did look,  
6 we ran a search and we found 35 documents throughout the  
7 file and in subfiles including the top secret file. We have  
8 35 documents that have the word Datto in it that could be  
9 under inclusive, over inclusive. It's unclear that these  
10 records are to the extent that they're 302 forms, to the  
11 extent that they're correspondence or any other sorts of  
12 document.

13 THE COURT: The plaintiffs indicated that they  
14 would be happy to live by a search just for the word Datto,  
15 so I don't think it would be under inclusive.

16 MR. LOPEZ-MORALES: Right. So if they're happy  
17 with that it wouldn't be under inclusive or over inclusive  
18 because they would stipulate to the adequacy of the search  
19 in that instance. Our concern, your Honor, is that it would  
20 just incentivize further lawsuits. And it could be 35  
21 documents now. It could be 50 then and so on. And that  
22 would just be a very chaotic and inefficient process while  
23 the agencies try to figure out a way to allocate resources  
24 effectively and handle this in a very equitable manner for  
25 everyone.



1           THE COURT:  And if we don't adopt some process to  
2 expedite search for the Datto device how long would it take  
3 for the FBI to respond to Judicial Watch's request number  
4 two?

5           MR. LOPEZ-MORALES:  I don't have that information,  
6 your Honor, but if you give me a minute I can confer with my  
7 client.

8           THE COURT:  Yes.

9           [Brief pause.]

10          MR. LOPEZ-MORALES:  Thank you, your Honor.  So  
11 the, I think opposing counsel mentioned this.  The process  
12 would take 20 to 24 months at the pace of 500 pages per  
13 month for the entire Clinton investigative file.  And  
14 plaintiff could look for the word Datto in these documents  
15 including the ones that have already been released to the  
16 public.  And they could do so as the FBI releases the  
17 documents to Leopold.

18          THE COURT:  Does Judicial Watch have a one or more  
19 additional requests pending that are broader and more  
20 encompassing?  What I'm responding to is your comment that  
21 it interferes with the process for someone to be able to  
22 serve a broad request.  And say well, there's some parts  
23 that we'd like to get sooner, so let's do another request so  
24 we're going to ask you to get a search for that.  And two  
25 weeks later they decide there's some subset we want so let's

1 do another request now. We're going to ask you to do a  
2 search for that in way that it just interferes with the  
3 orderly production of records.

4 So my question is in fact is that what Judicial  
5 Watch is doing here? Have they served a broader request on  
6 the FBI and this is just a subset where they're seeking to  
7 sort of expedite as to some subset of the documents?

8 MR. LOPEZ-MORALES: Your Honor, I don't have the  
9 information that they've searched a broad request. What  
10 they have is filed several small requests for substantive  
11 documents despite the broad requests filed by other groups  
12 or individuals before Judicial Watch had filed a request.

13 THE COURT: Does Judicial Watch have other  
14 requests that are pending right now that you're working on?

15 MR. LOPEZ-MORALES: If you'd give me one second.

16 THE COURT: Judicial Watch may be more easily able  
17 to answer that question.

18 MR. BEKESHA: I don't know, your Honor. I mean  
19 I'm standing here today and this isn't -- we're not here  
20 trying to harass the agency. We're not filing a larger  
21 request, found out we couldn't, we weren't going to get  
22 those records for 24 months and now we're filing a more  
23 target request. That just didn't happen. If you look at  
24 the timing of these requests, we sent a request for the 302s  
25 and the communications after Director Comey announced during

1 his testimony to the, I believe it was a House committee  
2 that he was going to make all the 302s available to  
3 Congress. And so we sent a request for 302s after that  
4 because it sounded as though the FBI was processing the 302s  
5 for release to Congress, so we were going to piggyback on  
6 the work they were already doing.

7 We found out in October we've come to understand  
8 there's this Datto device, so we were interested in that so  
9 we sent a request. This isn't, this is the second time that  
10 counsel in the past two weeks has talked about why,  
11 suggesting reasons why Judicial Watch is suing and other  
12 requestors aren't. We're just trying to get the  
13 information. We're not, this isn't, you know, we're not  
14 trying to abuse the system at all.

15 THE COURT: The reason I posed the question which  
16 was not actually to try to get a back question. What I was  
17 going to asks is if there are other requests that the FBI is  
18 currently processing for Judicial Watch. And you think this  
19 is more pressing and the concern is about queue jumping.  
20 And that there are third parties out there who are going to  
21 get their records less quickly as a result of this someone  
22 at the FBI has to stop -- and it's not a matter of someone  
23 at the FBI just saying let me push the button and we'll  
24 generate this 35 documents and hand them to you.

25 Presumably someone has to do a first layer review

1 for FOIA exemptions. If there are 302s I'm assuming there  
2 would be a need to go through and redact those. I assume  
3 then there's a second level review. I assume what we're  
4 talking about here is something that would involve not an  
5 hour or a half hours of work, but something that would  
6 involve even though it's 35 documents, many hours of work  
7 for somebody which does create an equity issue about whether  
8 other people's request get pushed back.

9 So my question really was is Judicial Watch in a  
10 position if the FBI is working on another Judicial Watch  
11 request at this point to say we're happy to put that request  
12 on hold while you do this one?

13 MR. BEKESHA: It could be, but the FBI hasn't  
14 identified any other Judicial Watch requests that would be  
15 interfering with them processing --

16 THE COURT: You would know more than they would  
17 right now whether there are other Judicial Watch. I mean  
18 the lawyers handling this case may not be handling the other  
19 cases, so you would know better than they would whether  
20 there are other pending cases directed at the FBI by  
21 Judicial Watch.

22 MR. BEKESHA: I don't that off the top of my head.  
23 We have several attorneys that handle different cases.

24 THE COURT: You've got the president of Judicial  
25 Watch right here.

1           MR. BEKESHA: We do. I just don't have a list  
2 currently. We don't have a list of our current litigation.

3           THE COURT: Let me ask you the question then, if  
4 there are other requests would Judicial Watch prefer to say  
5 fine, you can put this on hold while the FBI looks for  
6 these?

7           MR. BEKESHA: Potentially, your Honor, we would --  
8 I would want the opportunity to take a look at our requests  
9 before we made a judgment, deciding, depending on what our  
10 other requests are that's pending with the FBI, where they  
11 are in any litigation process. If they're towards the end  
12 it may not make sense.

13           We're here, we finally heard that it was 35  
14 documents. Now counsel wasn't willing to give out that  
15 information. I asked yesterday about it. He had the  
16 information when he first spoke to your Honor. He didn't  
17 mention it. He came back up, it wasn't until you asked  
18 specifically if the search had run that he was willing to  
19 share this information. It's 35 documents.

20           I understand that there may be several layers of  
21 review and there may be a few documents if that's required,  
22 but we don't know. We don't know what the 35 documents are.  
23 Some may be two sentences long.

24           THE COURT: That's the problem though is because  
25 for someone to know someone is going to have to drop doing

1 what they're doing on behalf of some other FOIA requestor  
2 and spend time going and figuring that out. The question is  
3 sort of what urgent need or more pressing need do you have  
4 to say let's get them all in the room here together and we  
5 would have a robust discussion if Mr. Leopold and some of  
6 the other FOIA requestors were all in the room here we said  
7 okay, let's decide who goes first.

8 I assume we probably would come away from that  
9 with a decision where I just let's come in order. Because I  
10 assume the other FOIA requestors are going to say to me I  
11 don't want to have to wait extra time to get mine while  
12 Judicial Watch jumps ahead in the queue. I need some other  
13 reason, some particular reason why it's important here to do  
14 it in this case, or some way that it can be done in a way  
15 that doesn't unfairly penalize other FOIA requestors.

16 MR. BEKESHA: But this is penalizing FOIA request  
17 to send a narrow request. What the agency wants is they  
18 would have preferred we send a broad request for all  
19 records.

20 THE COURT: I'm not sure that's true.

21 MR. BEKESHA: But that's how they are processing  
22 it. They want us to wait 24 months for them to review 35  
23 documents because they want to do all of them instead of the  
24 narrow.

25 THE COURT: Put yourself in the position because I

1 know Judicial Watch is in this position. Put yourself in a  
2 position now where you've got other cases out there where  
3 you have broader requests. And then I and the other judges  
4 in this Court are going to get other FOIA requestors who are  
5 going to be coming in and saying put aside Judicial Watch's  
6 request because theirs is broader than mine. Mine is a  
7 narrower, more targeted one, do mine first and then turn  
8 back to Judicial Watch's. And in fact if we did that you  
9 know there could be such a series of those things that your  
10 broader request may get delayed substantially, because it's  
11 not just going to be one, but a series of people coming and  
12 saying I've got a narrower one do my first.

13 MR. BEKESHA: But that's why they have the track,  
14 the different tracks for complex and simple requests. A  
15 broad request are clearly complex because they're a lot more  
16 records. Here it's a simple request. It's run a key word  
17 search which they have done. They've identified 35  
18 documents. We don't know how many pages those documents  
19 are. Somebody can look at them. That wouldn't take that  
20 much time to look, to gather. It could be a total of 70  
21 pages. And so those 70 pages could be reviewed in a  
22 relatively short period of time probably in an afternoon.

23 THE COURT: I'm not sure that's true.

24 MR. BEKESHA: But the agency hasn't shown that  
25 that's not true. They haven't shown --

1           THE COURT: Is that the way it works? Is that  
2 they need to go and if you file a request and come in here  
3 and press on it that they then need to go and figure out how  
4 much time it's going to take for them to respond to it and  
5 what's there, you know, out of queue in order to then come  
6 back and say well, actually this is how many hours it would  
7 take us because it would take them a lot of hours to do  
8 that.

9           MR. BEKESHA: Well, I think there's some  
10 obligation on their behalf to process the requests in a  
11 timely and efficient manner. They're just not doing that in  
12 this case. They're processing the entire file, 10,000 pages  
13 that are very complicated because it's an entire  
14 investigative file. All we're asking for here is for  
15 records about one small issue, one discrete issues, 35  
16 documents. That's all we're talking about, 35 documents.

17           And what their response is you have to wait two  
18 year and oh, Judicial Watch can search the records for the  
19 key word themselves.

20           THE COURT: Two things, one is is that I'm not  
21 sure they're saying you need to wait two years because it's  
22 produced on the rolling basis. And it may be that you get  
23 your last document two years from now. Your first document  
24 is probably I suspect already available. I wouldn't be  
25 surprised it's already available because they've been



1 producing documents already.

2 MR. BEKESHA: At a minimum they should be required  
3 to identify that such records have been produced. We don't  
4 know if --

5 THE COURT: Is the library not searchable that  
6 exist?

7 MR. BEKESHA: It's not an OCR, so I guess you  
8 could scroll every page and read every page and look for  
9 Datto. It's not OCR-ed. It's not electronically  
10 searchable. I mean they're almost putting the obligation on  
11 the FOIA requestor to conduct their own FOIA search. The  
12 agency doesn't want to do it, so Judicial Watch you go ahead  
13 and conduct your own searches. Tell us if you find anything  
14 and then we can discuss it in a couple of years after we're  
15 done processing the whole file. This isn't how FOIA is  
16 supposed to work.

17 We appreciate the fact that they have a lot of  
18 FOIA requests for the Hillary Clinton investigative file,  
19 but they haven't identified that anybody else is asking  
20 specifically for the records we are. We're not asking for  
21 the whole file here. We're just asking for these 35  
22 documents to be reviewed and produced in a timely fashion.  
23 Now we can argue what a timely fashion is, but I think we  
24 would be comfortable with a three month period. Have the  
25 agency in three months start processing the records, and if

1 they hit some snags because the records are more complicated  
2 and need 15 layers of review we can come back and we can  
3 talk about that.

4 But we shouldn't have to wait until the end of the  
5 entire production for the agency to identify the 35 pages.  
6 Let us know those 35 pages and then talk about if there are  
7 any withholdings -- sorry, 35 records. If there are  
8 withholdings on the 35 records brief the issue. I mean  
9 we're talking --

10 THE COURT: Is Judicial Watch prepared to sort of  
11 live by this in your other cases then too so if other FOIA  
12 requestors come in that you don't have a problem with the  
13 Court putting aside or the agency putting aside your  
14 requests while they do more narrower ones?

15 MR. BEKESHA: I'm not sure the department has  
16 identified or stated specifically that they would have to  
17 stop producing other work.

18 THE COURT: They would have to slow down. There's  
19 only so many hours in the day, right?

20 MR. BEKESHA: Again, we don't know how long this  
21 is going to take. I mean if we're talking about --

22 THE COURT: It's not going to take an hour I can  
23 tell you that. It's not going to take three hours.

24 MR. BEKESHA: It could though, your Honor, we  
25 don't know where these documents --

1           THE COURT: It's not going to take three hours  
2 that's not a reasonable presumption.

3           MR. BEKESHA: But over a reasonable period of  
4 time. We're asking for a review of 10 documents a month.

5           THE COURT: So that's my question for you, is  
6 Judicial Watch prepared for the Court to enter an order  
7 saying that Judicial Watch concedes that in other cases in  
8 which it has brought a request it does not object to its  
9 request being delayed while more narrower searches are  
10 conducted?

11          MR. BEKESHA: Well, no, your Honor, because every  
12 FOIA lawsuit is different. If we have a lawsuit against the  
13 FBI where they've been producing records for three years and  
14 there's one month left of production it doesn't make sense  
15 for the agency to stop working on the last month production  
16 when they could just pick up something else once that  
17 production is complete. Everything is very specific to  
18 circumstance situation.

19          Now I understand and I appreciate what the Court's  
20 concerns are, but right now we're just talking about this  
21 one FOIA request. We're talking about one set of 35  
22 records. And you know if the agency wants you know if we  
23 want to, the agency wants to identify other FOIA lawsuits  
24 that are preventing them from reviewing these 35 records as  
25 I said Judicial Watch would be happy to take a look and work

1 something out if we think it's in our best interest.

2 THE COURT: Let me do this let me put the burden  
3 on you to start with because Judicial Watch has got a lot of  
4 cases pending and a lot of FOIA requests pending. Go back  
5 and look and see what you have pending with the FBI, if you  
6 have anything pending with the FBI. If there's something  
7 that where Judicial Watch is going to say you know what  
8 we're happy to shift resources. And if you want to take  
9 some resources away from this other request that we have,  
10 and to devote it instead to moving forward with the request  
11 we're discussing today, I would request that you meet and  
12 confer with Mr. Lopez-Morales and see if the parties can  
13 work out something, okay, on that. And I can set a status  
14 conference for six weeks from now just to check in just to  
15 see where we're standing.

16 MR. BEKESHA: We can have a status conference a  
17 lot shorter than that, your Honor. We can probably do it in  
18 two weeks time. We can go back to the office, we can look  
19 at the other requests and see if there's any way. That's  
20 still, you know, I think that still doesn't address the  
21 first part of the FOIA request that deals with the second.

22 THE COURT: The first part you got in a partial  
23 answer which is that it sounds like a good portion of the  
24 materials which is being searched first. I was told that  
25 that should be done in the next couple of months.

1           MR. BEKESHA: Right, but we still don't know the  
2 extent how many records are on disk five. Total records on  
3 disk five. I don't believe there's been an assessment of  
4 disk five. We'd just like more information about you know  
5 are they going to process disk one and then disk five? Is  
6 disk five going to be the last one to be processed? Again,  
7 we don't know how the agency is deciding when to choose to  
8 process Judicial Watch's FOIA requests.

9           It seems as though we're almost being punished,  
10 because we take it, because we use the laws that are  
11 available to us to make information available to the public.

12           THE COURT: I think that as I see it here it's not  
13 a question of the FBI seeking to punish Judicial Watch. I  
14 think it's a question of just making sure that all FOIA  
15 requestors are treated in a fair way. Because as I  
16 understand the FBI has limited resources for producing the  
17 FOIA requests. And although it may just be a matter of a  
18 day perhaps for someone to be able to go through, find the  
19 files, pull them, do an initial review of them, and then do  
20 a second level review for, with respect to exemptions and  
21 then presumably, I'll set up prepare a log. Maybe you can  
22 get that done in a day I don't know.

23           Some of us who've taken time away from records,  
24 and the question is just being fair to everybody whose got  
25 the requests pending in the process.

1           MR. BEKESHA: But the FBI isn't even processing  
2 the first request the State Department is.

3           THE COURT: I know, but the FBI has gone -- I know  
4 from my own calendar they've got an overwhelming number of  
5 FOIA requests.

6           MR. BEKESHA: But with respect to the first part  
7 of the request the FBI isn't doing any work the State  
8 Department is doing it. And so --

9           THE COURT: So are you asking then maybe I'm --  
10 well, I thought we were talking about the second part, but  
11 with respect to the first part of your request are you  
12 asking that the State Department or the FBI do an assessment  
13 of disk five?

14           MR. BEKESHA: I believe the FBI should do it  
15 because they're the agency that received the FOIA request.  
16 That's the agency we sued. However, if the FBI's position  
17 is that the State Department is, that they've referred the  
18 material to the State Department, and the State Department  
19 is in a better position to do that assessment than the State  
20 Department has to do it and should be required to do it.  
21 That's only because the FBI seems to suggest the State  
22 Department is in a better position.

23           THE COURT: Let's see what Mr. Lopez-Morales says  
24 about just the assessment you've described.

25           MR. BEKESHA: Thank you, your Honor.

1 MR. LOPEZ-MORALES: One second, your Honor.

2 THE COURT: Sure.

3 [Brief pause.]

4 MR. LOPEZ-MORALES: Well, your Honor, you want me  
5 to respond to the volume of the materials in disk five,  
6 right?

7 THE COURT: The question is where we stand with  
8 respect to the assessment of disk five. Do we know what's  
9 on it with the binding records are? Do we know what  
10 percentage of the records that the plaintiffs are seeking  
11 are on disk five? Are they equally on disk five? Do you  
12 have some sense of what's there at this point?

13 MR. LOPEZ-MORALES: So I don't have the  
14 information of what's the volume of disk five. I do, and as  
15 I were told I can't provide a percentage of the number of  
16 responsive records to plaintiff's request in relation to the  
17 volume of the disk. I do have very rough estimates of the  
18 number of documents that could be potentially responsive in  
19 disk five and I could provide those.

20 Your Honor, before I do I just want to mention  
21 opposing counsel said that we were withholding information  
22 to the Court and to Judicial Watch about the, what's the  
23 number of responsive records. Our position I think which is  
24 totally reasonable and I think you articulated it in terms  
25 of trying to allocate resources effectively in an equitable

1 manner. Is that Judicial Watch is not entitled to know at  
2 this time in accordance with the agency's complex processing  
3 queue and first in first out policy which has been validated  
4 a number of times by the DC Circuit and the DDC. Judicial  
5 Watch simply has to wait its turn. It's not a matter of  
6 well, it's 35 documents we want them now. And same with  
7 respect to the State Department and the materials that were  
8 transferred there.

9 But with respect to the total number of responsive  
10 records in disk five, there are two data sets of Datto  
11 materials on disk five that contain the first Datto set,  
12 contains 1,741 documents, and the second Datto set contains  
13 8,435, sorry 37 retrieved documents. So there are two data  
14 sets of Datto materials which are potentially responsive and  
15 these are very rough estimates. I want to emphasize that on  
16 disk five. So that's the information that we can provide at  
17 this point.

18 And I would just want to emphasize again that in  
19 the words of opposing counsel we would be penalizing other  
20 requestors by very narrow requests. That is exactly what we  
21 mean by death by a thousand cuts and piecemeal litigation  
22 approach, and that is simply inconsistent with DC Circuit's  
23 decision in Open America and even after the congressional  
24 amendments to the FOIA statute in 1996.

25 THE COURT: Do we know when the State Department



1 is likely to have processed disk five?

2 MR. LOPEZ-MORALES: I am not personally familiar.  
3 What I do know is that as I said in the next couple months  
4 they will be done processing disk one, and the next step  
5 would be to process disk four and disk five. And since the  
6 State Department is processing these documents I'm at this  
7 time not familiar with the information of where they stand  
8 with respect to the next two disks.

9 THE COURT: And would the FBI be open somewhere  
10 along the lines of what I was suggesting of negotiating a  
11 resolution with Judicial Watch in a way in which third party  
12 requestors wouldn't be penalized, but it might be possible  
13 to move Judicial Watch's request to the FBI here up in the  
14 queue through some negotiated agreement?

15 MR. LOPEZ-MORALES: I think your Honor we would be  
16 open to hear what Judicial Watch has to say at least with  
17 respect to the second part of the requests where FBI is  
18 involved, yes.

19 THE COURT: Okay. Thank you.

20 MR. LOPEZ-MORALES: Thank you, your Honor.

21 THE COURT: Mr. Bekesha, I don't know if you  
22 wanted to respond to any of that?

23 MR. BEKESHA: May I have a moment, your Honor.

24 THE COURT: Of course.

25 [Brief pause.]

1 MR. BEKESHA: Your Honor, the only concern we  
2 still have is, you know, as the agency counsel said you know  
3 the DC Circuit has come away you know Open America. They  
4 could ask for an Open America stay in this case if they  
5 don't think they have the capacity to respond to these FOIA  
6 requests. They haven't done so. That's a legal mechanism,  
7 that they could seek and get approval of this Court. If  
8 they don't believe they can properly search and respond to  
9 these FOIA requests then that's what they should do but they  
10 haven't done so. And so again, we will go back and take a  
11 look at what our other litigation is. We don't believe  
12 there is much litigation against the FBI.

13 THE COURT: It's not really so much litigation I  
14 think it's FOIA requests?

15 MR. BEKESHA: We have FOIA requests that are  
16 pending probably for I want to say almost ten years with the  
17 FBI.

18 THE COURT: Right. All I'm suggesting --

19 MR. BEKESHA: And so I mean we have a lot of FOIA  
20 requests, but you know, we don't even know if they're  
21 processing most of our FOIA requests because we don't, no  
22 one will talk to us until we sue. And so I mean one thing I  
23 guess we would have to do is we could print out a list of  
24 all our FOIA requests to the FBI for say the past ten years  
25 that haven't been responded to, and ask the FBI which ones

1 are you actively responding to. I mean is that, that  
2 doesn't seem to make sense either. I mean --

3 THE COURT: Why don't I do this, I can't really, I  
4 don't have any -- I know even less about this than all of  
5 you do about what requests are pending and what's being  
6 worked on. Why don't I at least give you the opportunity to  
7 go back and look at what you have, have a conversation with  
8 Mr. Lopez-Morales to see if there's some accommodation that  
9 can be reached. If there can't be we'll come back in a  
10 couple of weeks and talk about what to do then and under  
11 those circumstances.

12 But I do think that sort of more generally and as  
13 you probably gathered the Court's concern is just making  
14 sure we're not giving preferences to one FOIA requestor over  
15 another with respect to getting their responses and that  
16 everyone is treated in an equal fashion with respect to the  
17 expeditious handling. There are times in which expedition  
18 is required. And if you were to come in and say here this  
19 is actually something that's very pressing you know where  
20 there's some world event that's getting ready to occur, we  
21 need this information with respect to that world event.  
22 That's one matter.

23 But I would need to have some reason to think  
24 well, we should put aside sort of the normal, treat everyone  
25 alike standard and have a different standard that would

1 apply here, so if you come back that's --

2 MR. BEKESHA: Sure, but there is a strong public  
3 interest in investigative materials.

4 THE COURT: I know there is. I think that's  
5 probably what a big portion of what the FBI's backlog is  
6 about.

7 MR. BEKESHA: Or if that's the case then the FBI  
8 should follow what the State Department did which was add  
9 additional people to conducting the reviews.

10 THE COURT: You know one of the things I'm not  
11 sure that they can do that right now, you know. Maybe there  
12 is some way to bring people over on detail, I don't know.

13 MR. BEKESHA: I mean what the State Department was  
14 they didn't go out and hire new people. They brought people  
15 over to detail to conduct reviews because they had numerous  
16 court orders. Again, that would seem appropriate in a case  
17 that the FBI hasn't sought in an Open America stay. They  
18 haven't said that they can't process these FOIA requests.  
19 Until they do so they have --

20 THE COURT: Did the State Department seek a stay?

21 MR. BEKESHA: The State Department I don't believe  
22 sought a stay. They just start hiring more, they had people  
23 detailed and they start reviewing records, and were able to  
24 review at one point I think it was over 3,000 pages a month.  
25 The FBI is only reviewing 500 pages a month.

1           THE COURT: My impression in this there is a  
2 separate conversation we can take up next. My impression is  
3 it's a fairly substantial staff already at the FBI that is  
4 reviewing FOIA requests. I could be mistaken. I seem to  
5 recall that from other cases and having looked at  
6 declarations from the FBI with respect to their mechanisms.  
7 I hear you and I understand your concern. Everyone wants to  
8 get the records and I understand that you view this as sort  
9 of a fairly targeted search they can respond to quickly.

10           Why don't we see if there is a way they can have a  
11 conversation with government's counsel. You can work  
12 something out. And if not, we can take it up next time. I  
13 would say Mr. Lopez-Morales, next time I guess one question  
14 I might have for you is if you're unable to work something  
15 out is whether you have some sense of how much time it would  
16 actually take the FBI to review and produce these files.  
17 Are we're talking about something that is, you know, an hour  
18 which seems improbable or is it something that is more  
19 substantial than that.

20           Okay. Anything further today?

21           MR. BEKESHA: No, your Honor.

22           THE COURT: Okay. I'll set another status  
23 conference in about two weeks from now.

24           MR. BEKESHA: Thank you, your Honor.

25           THE COURT: We're done.

1           [Thereupon, the proceedings adjourned at 3:21  
2           p.m.]

3   CERTIFICATE

4           I, Cathryn J. Jones, an Official Court Reporter  
5 for the United States District Court of the District of  
6 Columbia, do hereby certify that I reported, by machine  
7 shorthand, the proceedings had and testimony adduced in the  
8 above case.

9           I further certify that the foregoing 37 pages  
10 constitute the official transcript of said proceedings as  
11 transcribed from my machine shorthand notes.

12           In witness whereof, I have hereto subscribed my  
13 name, this the 6th day of February, 2017.

14  
15   /s/\_Cathryn J. Jones  
16   Cathryn J. Jones, RPR  
17   Official Court Reporter  
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