NOT YET SCHEDULED FOR ORAL ARGUMENT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-5170

JUDICIAL WATCH, INC.

Plaintiff-Appellant,

v.

U.S. DEPARTMENT OF STATE

Defendant-Appellee.

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF OF APPELLANT JUDICIAL WATCH, INC.

Chris Fedeli
Lauren M. Burke
JUDICIAL WATCH, INC.
425 Third Street, S.W., Suite 800
Washington, DC 20024
(202) 646-5172
Counsel for Plaintiff-Appellant

Dated: December 9, 2016

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GLOSSARY OF ABBREVIATIONS

FOIA	Freedom of Information Act
JA	Joint Appendix
State	U.S. Department of State

Introduction

The crux of this case is the U.S. Department of State ("State") *knew* or should have known which documents Appellant was seeking, but *chose* not to comply. A review of the record provided in the Joint Appendix demonstrates that State cannot credibly claim that it could not understand which records Appellant Judicial Watch, Inc. ("Judicial Watch" or "Plaintiff") sought. While State should have understood which records Plaintiff sought from the original request, Judicial Watch's clarification of that request – provided at State's insistence – leaves no room for doubt that State should have known. Accordingly, State was obligated to produce. *Yeager v. Drug Enforcement Admin*., 678 F.2d 315, 326 (DC Cir. 1982).

On this fundamental question of whether State was able to determine which records Plaintiff sought, State's responsive brief avoids responding to Judicial Watch's arguments. Instead, State lays out the legal standard for a case which is not before this Court. Judicial Watch's opening brief explained that its FOIA request reasonably described the documents, and therefore State was required to produce them. In its responsive brief, State argues only that FOIA allows agencies to deny requests that are either indecipherable or seek millions of records. Much of State's argument is premised on mischaracterizing Plaintiff's FOIA request (and clarification) as either unintelligible or overbroad. This argument fails, however, upon a simple review of the underlying request and the reformulation.

To advance this argument that it had no obligation to comply with requests that were worded imperfectly, State misinterprets the FOIA statute. FOIA does not impose the stringent requirements on written FOIA requests that State seems to imagine it does. Rather, the statute only requires that a written request "reasonably describe" the documents sought. 5 U.S.C. § 552(a)(3)(A). The statute does not require a perfectly written request. The statute does not permit agencies to engage in grammatical pedantry when reading requests. The statute only mandates reasonableness. State's responsive brief, on the other hand, asks this Court to re-write the statute to allow federal agencies to reject any FOIA request for whatever slight fault an agency may find with how it was written. The Court should reject State's argument.

State's efforts to demonstrate that its search for records was adequate similarly fail. Indeed, had State complied with FOIA's requirements for agencies to conduct sufficient searches, this litigation likely never would have progressed this far. For instance, State could have informed Plaintiff how many potentially responsive records its search turned up in a search declaration. If State informed Plaintiff about the number of potentially responsive documents there were (the number of "hits" from electronic search), any confusion about Plaintiff's FOIA request could have been resolved and those documents could have been produced.

Finally, since this is a *de novo* review, the lower court's reasoning need not be considered. *Sussman v. U.S. Marshals Service*, 494 F.3d 1106, 1111-12 (D.C. Cir. 2007). Nevertheless, State fails to rebut Plaintiff's showing that the trial court erred. The lower court erred by misreading the FOIA statute and by misapplying precedents. Since the record demonstrates that State knew which documents were at issue, the trial court should be reversed.

Argument

1. State Mischaracterizes Judicial Watch's Clarification of its Request

Throughout its brief, State mischaracterizes Plaintiff's gracious attempts to clarify – at State's insistence – that which should have been patently obvious to begin with. State's Responsive Brief ("Resp. Brief") at 22-29. To fully demonstrate how absurd it is for State to claim it did not understand Plaintiff's clarification of the original request, here is Judicial Watch's restated request in full:

> Records sufficient to show whether current and former officials or officers in any Under Secretary Office or higher of the U.S. Department of State used non-"state.gov" email addresses to conduct official State Department business from January 20, 2009 to the present. This includes current and former officials or officers in the following offices: Office of the Secretary, Deputy Secretary, Executive Secretariat, Office of US Foreign Assistance, Counselor, Chief of Staff Under Secretary for Political Affairs, Under Secretary for Economic Growth, Energy and Environment, Under Secretary for Arms Control and International Security Affairs, Under Secretary for Public Diplomacy and Public Affairs, Under Secretary for Management, Under Secretary for Civilian Security, Democracy and Human Rights. Responsive records are not limited to documents listing all officials who used non-"state.gov" addresses, but include

> any documents identifying one or more current or former official or officer using non-"state.gov" email addresses to conduct official State Department business during the above time-frame.

JA 57. A reasonable person would read this and understand which documents it describes. State read it and claimed it said: "produce copies of every single State Department document that contains a yahoo.com or gmail.com email address anywhere on it." *See* JA 44.

In the above reformulation, State badly misinterprets the phrase "records sufficient to show" as requesting "*all* records" that show unofficial email use. Resp. Brief at 7. This is not what the word "sufficient" means. The meaning of "sufficient records" is not close to the meaning of "all records." Rather, sufficient means "enough."[1] Had State produced *some* records discussing unofficial email use by employees (but not all such records), it would have satisfied Plaintiff's reformulated request. It strains credulity for State to tell this Court that it read the words "records sufficient to show" and thought Judicial Watch meant "all such records."

And while State is correct that reformulations of a request are generally irrelevant to whether the original FOIA request "reasonably described" the documents (Resp. Brief at 13), such reformulations are *not* irrelevant to whether an

[1] Merriam-Webster Dictionary, entry for "sufficient," available at http://www.merriam-webster.com/dictionary/sufficient (visited November 30, 2016).

agency knew *or should have known* which documents were sought. *See Yeager v. Drug Enforcement Admin.*, 678 F.2d 315, 326 (DC Cir. 1982) (the "linchpin" of whether an agency is misreading a request to avoid the production of records is whether the "agency is able to determine precisely what records are being requested."). Here, Judicial Watch's extensive clarifying efforts with State – efforts which State *solicited* from Plaintiff, *see* JA 63 – demonstrate that there could have been no doubt which records Plaintiff was seeking. JA 44, JA 49, JA 51, JA 53, JA 57, JA 63. State understood the request (or should have understood it), but instead chose to engage in endless rounds of nitpicking about this word and that word, enabling it to delay and stall and ultimately avoid its obligation to produce records for over a year and half.

Finally, State uses misleading partial quotes from correspondence between counsel to suggest that Judicial Watch was *improperly* asking State to answer questions instead of produce records. *See* Resp. Brief at 4 and 23, *citing* JA 49. But a full review of what Judicial Watch wrote demonstrates that this was actually an offer to resolve a lawsuit, and Plaintiff fully understood that State was under no obligation to provide information instead of records:

> The FOIA specifies that parties seeking public information make a request for "records." In the interest of lightening the burden on DOS and expediting its response to Judicial Watch's request, my client would be satisfied with DOS producing the identity of current and former officials, officers and employees who used non-state.gov addresses in conducting State Department business….

JA 49. As the above language shows, Judicial Watch was offering State a way to resolve claims in litigation so that State could *avoid* searching for and producing records *if it wished*. Judicial Watch did not claim that State was required to provide this information, nor did it claim that Judicial Watch could have asked State to create this information in the first instance. State has mischaracterized the meaning of this communication between counsel.

2. State Mischaracterizes Judicial Watch's Original FOIA Request

State argues that, although Plaintiff's request didn't *literally* pose a question, "[i]n reality, that request posed a question…" Resp. Brief at 1. But State's assessment is not "reality." Rather, it is a departure from reality and a mischaracterization. "In reality," Plaintiff's request asked for documents, and it reasonably described a discrete set of such documents. Only in State's twisting of Plaintiff's words does the actual request ask a question. State did not apply a "natural reading" of Judicial Watch's request (Resp. Brief at 5) but rather applied an unnatural and contrived reading – some might say a pedantic reading – which enabled it to avoid producing the requested records.

State's argument is defeated by a simple reading of the FOIA request, which in its entirety says:

> Any and all records that identify the number and names of all current and former officials, officers, or employees of the U.S. Department of State from January 20, 2009 to the present who used email addresses

> other than their assigned "state.gov" email addresses to conduct official State Department business

Joint Appendix ("JA") 5, at ¶ 5. Obviously, this request seeks records about State employees using unofficial email to conduct government business. Records such as the 2012 and 2015 Office of Inspector General ("OIG") Reports discussing the use of commercial email instead of government email by State employees, as Plaintiff discussed in its opening brief. Opening Brief at 12, *citing* JA 70-71 at ¶ 13. It stands to reason that, if the State OIG discussed this problem twice in three years, more records probably exist discussing the problem. But State avoided producing such records on the argument that Judicial Watch's request was not worded correctly. Resp. Brief at 14-22. This Court should not reward State's gamesmanship.

3. **State Misinterprets the FOIA Statute**

State is correct that the relevant FOIA standard is whether the agency's reading of the request was "reasonable." Resp. Brief at 15, *citing Weisberg v. U.S. Dep't of Justice*, 745 F.2d 1476, 1489 (D.C. Cir. 1984). State is incorrect, however, to argue that its reading of the Judicial Watch FOIA request was reasonable – in fact it was not. Resp. Brief at 14-18. FOIA requires federal agencies to produce records when a requestor "reasonably describes" them. 5 U.S.C. § 552(a)(3)(A). But the statute does not otherwise define the term "reasonable." Accordingly, courts may give the term "reasonable" its ordinary

meaning when analyzing FOIA claims. "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42, (1979). A "reasonable" description of records is therefore one that is "fair and sensible," "fairly or moderately good," or "in accordance with reason."[2]

Judicial Watch's request was a fair, sensible, and "moderately good" description of the records it sought. It was not perfect, but the statute does not require perfection. However, State's reading of the request was not reasonable. State's reading was neither "fair and sensible" nor "in accordance with reason." Accordingly, State has violated the plain meaning of the statute.

To defend its actions, State has advanced a convoluted legal argument calling for courts to apply the "plain meaning" standard to FOIA requests *but not* to the FOIA statute itself. Resp. Brief at 14, 19, 20, 22, 28. State's claim that it gave Judicial Watch's FOIA request its "plain meaning" is not only inaccurate, it misstates the relevant standard. Resp. Brief at 12. The standard is whether the FOIA request "reasonably describes" the records sought. 5 U.S.C. 552(a)(3)(A). This is even more forgiving than a "plain meaning" standard. Rather, the statutory test in FOIA is merely whether a reasonable person would understand what records

[2] Merriam-Webster Dictionary, entry for "reasonable," available at http://www.merriam-webster.com/dictionary/reasonable (visited November 30, 2016).

were being described. *See Yeager v. Drug Enforcement Admin.*, 678 F.2d 315, 326 (DC Cir. 1982). Importing the "plain meaning" standard of statutory textual reading used to interpret acts of Congress is simply the wrong standard to use when reading FOIA requests.

We know this because the "plain meaning" standard *is* the correct one to apply to 5 U.S.C. § 552(a)(3)(A). Congress has already directed State to give FOIA requests a "fair and sensible" interpretation, not a textual "plain meaning" interpretation. Under the statute, a FOIA request must be granted if its description of the records is "fairly or moderately good" and "in accordance with reason." Judicial Watch's FOIA request was "fairly or moderately good," if not better. State's decision to hold Judicial Watch's request to a much higher standard than "fairly or moderately good" was a violation of the statute.

State's focus on the placement of the single noun modifier "all" in the FOIA request violates FOIA. Resp. Brief at 18, 27. The arguments State advances would take the words "reasonably describe" out of the statue. Instead, State appears to be replacing the words "reasonably describe" with the phrase "perfectly accurately describe," or "describes with exact grammatically precision." *See* Resp. Brief at 8, 9, 18, 27. This is not what Congress intended when it passed FOIA, the purpose of which is to ensure the conduct of government business is transparent to its citizens. The irony that State has gone to these lengths to avoid responding to a

FOIA request *about the use of unofficial email accounts* – which is itself a well-known FOIA evasion tactic – should not be lost on this Court.

4. State Fails to Show its Search was Adequate

State describes its search efforts at length, but the only document State was searching for was the mythical "list of names" of all employees using unofficial emails for government business, a document Judicial Watch never asked for and State knows does not exist. Resp. Brief at 6. Naturally, since the document does not exist, a search of multiple offices would not uncover it. *Id.* Accordingly, State's brief only confirms that a search for a document everyone knows does not exist will turn up no records. Resp. Brief at 31-34.

Finally, State argues that there is no reason why its search declaration should have identified how many "hits" its electronic search turned up before State decided no records were responsive. Resp. Brief at 36-37. But State must provide this kind of information to satisfy its burden in FOIA litigation. *Nation Magazine v. U.S. Customs Service*, 71 F.3d 885, 890 (D.C. Cir. 1995). In this case, information about the number of electronic search hits would have further demonstrated that State knew it had responsive records in its possession. If, for example, State's electronic search turned up 100 records discussing employees using private email for government business, and State produced none of those records because none were "lists" of names, this would undercut State's claims that

it was complying with FOIA in good faith. In this hypothetical example, had State informed Plaintiff that it found 100 documents discussing private email usage but no "lists," Plaintiff would have immediately responded that those documents were responsive and precisely what Judicial Watch had asked for. At that point, all remaining arguments about reasonable interpretations and whether State could "determine precisely" what records Plaintiff sought would have been academic. *Yeager v. Drug Enforcement Admin.*, 678 F.2d 315, 326 (DC Cir. 1982) (the "linchpin" of whether an agency is misreading a request to avoid the production of records is whether the "agency is able to determine precisely what records are being requested.").

5. State's Argument that the Trial Court was Correct is Merely a Retread of its Mischaracterizations and Statutory Mistake

This Court's review is *de novo*, so the lower court's reasoning need not be dissected. *Sussman v. U.S. Marshals Service*, 494 F.3d 1106, 1111-12 (D.C. Cir. 2007). Nevertheless, a brief reply to State's efforts to rehabilitate the trial court's decision is warranted. Essentially, State argues that trial court's cited cases were applicable to Judicial Watch's request, and that the cases Judicial Watch cites are inapplicable. Resp. Brief at 29-31. But this argument merely begs the questions of whether State understood which records were sought, and whether Judicial Watch's FOIA request reasonably described the records. As already demonstrated, Judicial Watch did describe the records and State understood the request, so the

trial court misread the statute, applied the wrong line of cases, and ignored the correct lines of case. Opening Brief at 13-16.

The correct application of the facts of this case show the trial court violated certain precedents and misapplied others. The decisions that apply here are those criticizing agencies for making strict interpretations of requests in order to avoid producing records. *Hemenway v. Hughes*, 601 F. Supp. 1002, 1005 (D.D.C. 1985) (an agency "must be careful not to read [a] request so strictly that the requester is denied information the agency well knows exists in its files..."); *LaCedra v. Executive Office for the United States Attorneys*, 317 F.3d 345, 348 (D.C. Cir. 2003) (agencies must "construe a FOIA request liberally"). On the other hand, cases where requestors asked for records about non-existent lawsuits, or where requestors *literally* posed interrogatory-style questions to agencies, do not apply to the case at bar and the trial court erred by citing them. *Kowalczyk v. Dep't of Justice*, 73 F.3d 386, 389 (D.C. Cir. 1996) (agency has no obligation to respond to request asking for documents about a nonexistent lawsuit); *Moore v. Bush*, 601 F. Supp. 2d 6, 11, 15 (D.D.C. 2009) (FOIA does not require agencies to create new documents or answer written interrogatories).

Conclusion

The record shows that Judicial Watch provided State with information sufficient to determine which documents Judicial Watch sought. Accordingly,

State's behavior was unreasonable under FOIA. Judicial Watch submitted a reasonable request for records, and then a clarification of that request. State refused to read those words reasonably, but instead gave them irrational interpretations in violation of the statute. State's unreasonable behavior allowed it to avoid producing records in response to Plaintiff's FOIA request. The trial court erred both by applying the wrong precedent, and by failing to apply the correct precedent. This Court should so find and REVERSE.

Dated: December 9, 2016

Respectfully submitted,

s/ *Chris Fedeli*

Chris Fedeli
Lauren M. Burke
JUDICIAL WATCH, INC.
425 Third Street, SW, Suite 800
Washington, DC 20024
(202) 646-5172
cfedeli@judicialwatch.org
lburke@judicialwatch.org

Counsel for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7). The brief, excluding exempted portions, contains 2,943 words (using Microsoft Word 2010), and has been prepared in a proportional Times New Roman, 14-point font.

s/ Chris Fedeli

CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2016, I filed via the CM/ECF system the foregoing **Reply Brief of Appellant Judicial Watch, Inc.** with the Clerk of the Court. Participants in the case are registered CM/ECF users and service will be accomplished by the Appellate CM/ECF system.

I also certify that I caused eight copies to be delivered to the Clerk of Court via hand delivery.

s/ Chris Fedeli