

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

JUDICIAL WATCH, INC.,	)	
	)	
Plaintiff,	)	Civil Action No. 15-cv-684 (BAH)
	)	
v.	)	
	)	
U.S. DEPARTMENT OF STATE,	)	
	)	
Defendant.	)	
	)	

**PLAINTIFF’S CROSS-MOTION FOR SUMMARY JUDGMENT**

Plaintiff Judicial Watch, Inc., by counsel and pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, hereby cross-moves for summary judgment against Defendant U.S. Department of State. As grounds therefor, Plaintiff respectfully refers the Court to the accompanying Plaintiff’s Memorandum of Points and Authorities in Opposition to Defendant’s Motion for Summary Judgment and in Support of Plaintiff’s Cross-Motion for Summary Judgment and Plaintiff’s Statement of Undisputed Material Facts in Support of its Cross-Motion for Summary Judgment.

Dated: May 23, 2018

Respectfully submitted,

/s/ Michael Bekesha  
Michael Bekesha  
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JUDICIAL WATCH, INC.  
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*Counsel for Plaintiff*

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FOR THE DISTRICT OF COLUMBIA**

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Plaintiff,	)	Civil Action No. 15-cv-684 (BAH)
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U.S. DEPARTMENT OF STATE,	)	
	)	
Defendant.	)	
	)	

**PLAINTIFF’S MEMORANDUM OF POINTS AND AUTHORITIES  
IN OPPOSITION TO DEFENDANT’S MOTION FOR SUMMARY JUDGMENT  
AND IN SUPPORT OF PLAINTIFF’S CROSS-MOTION FOR SUMMARY JUDGMENT**

Plaintiff Judicial Watch, Inc., by counsel and pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, respectfully submits this memorandum of points and authorities in opposition to Defendant U.S. Department of State’s Motion for Summary Judgment and in support of Plaintiff’s Cross-Motion for Summary Judgment. As grounds thereof, Plaintiff states as follows:

**I. Introduction.**

The saga of former Secretary of State Hillary Clinton’s email usage and its effect on the Freedom of Information Act is well known. For six years, Defendant repeatedly informed Plaintiff and other FOIA requesters that Defendant conducted searches of its email systems sufficient to locate all records responsive to FOIA requests. We later learned that to be startlingly incorrect. Secretary Clinton’s email system was never searched. After Defendant requested Secretary Clinton return all her work-related emails, we still did not know whether Secretary Clinton provided Defendant with all her work-related emails. Therefore, in one of the dozens of FOIA cases concerning Secretary Clinton’s emails, Judge Sullivan ordered Secretary

Clinton to disclose, under penalty of perjury, whether she had returned all work-related emails to Defendant.

Secretary Clinton testified that she directed all such emails to be returned and that, on information and belief, that had been done. We later learned not all her work-related emails were provided to Defendant. In fact, the Federal Bureau of Investigation subsequently provided Defendant with six discs of Clinton-related emails. Many of those emails had not been previously returned to Defendant by Secretary Clinton, and Defendant continues to produce them to Plaintiff and the public. In addition, the FBI located Clinton-related emails on the laptop of Anthony Weiner, the ex-Congressman and husband of Secretary Clinton's Deputy Chief of Staff Huma Abedin, while it was investigating whether he exchanged sexually explicit communications with teenage girls. The FBI has provided those emails to Defendant, and it is those emails that are at issue in this case.

According to James Comey – the FBI director at the time the emails were located – Weiner's laptop contained “hundreds of thousands” of emails of Secretary Clinton. According to Defendant, only 3,000 of those “hundreds of thousands” of emails were agency records and just 147 of them were “unique agency records.” Defendant remains silent about how many emails it received from the FBI, whether the FBI provided Defendant all of the “hundreds of thousands” of emails found on Weiner's laptop, how many emails Defendant reviewed, how Defendant reviewed the emails, how many emails Defendant determined to be personal or not agency records, and how Defendant made such determinations.

In short, Defendant does not even attempt to explain the discrepancy between the “hundreds of thousands” of emails identified by ex-Director Comey and the mere 3,000 emails

identified by Defendant. Plaintiff has trusted Defendant in the past concerning Secretary Clinton's emails and such trust turned out to be misguided. Defendant has failed to demonstrate it conducted an adequate search of the emails found on Anthony Weiner's laptop.<sup>1</sup> Plaintiff therefore requests that Defendant's Motion for Summary Judgment be denied and that Plaintiff's Cross-Motion for Summary Judgment be granted.

## **II. Factual Background.**

Plaintiff does not dispute Defendant's recitation of facts related to the processing of Plaintiff's FOIA request. *See* Memorandum in Support of Defendant's Motion for Summary Judgment ("Def's Mem.") at 1-3. Defendant however fails to address the most significant fact of this case: the FBI located "hundreds of thousands" of Clinton-related emails on Weiner's laptop.

According to ex-Director Comey's post-FBI book and several media interviews, the FBI located hundreds of thousands of Secretary Clinton's emails on Weiner's laptop. *See* Plaintiff's Statement of Undisputed Material Facts in Support of its Cross-Motion for Summary Judgment at ¶ 1; *see also* Transcript, *James Comey's interview with ABC News chief anchor George Stephanopoulos*, ABC NEWS (Apr. 15, 2018, available at <https://abcnews.go.com/Site/transcript-james-comeys-interview-abc-news-chief-anchor/story?id=54488723>); Transcript, *A Conversation with Former FBI Director James Comey*, THE WASHINGTON POST (May 8, 2018, available at <https://www.washingtonpost.com/blogs/post-live/wp/2018/05/08/transcript-a-conversation-with-former-fbi-director-james-comey/>); Transcript, *James Comey to "Fresh Air": The FBI Isn't "On Anybody's Side,"* NPR (Apr. 17, 2018, <https://www.npr.org/templates/>

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<sup>1</sup> Plaintiff no longer challenges Defendant's withholding of information contained within three records responsive to Plaintiff's FOIA request.

transcript/transcript.php?storyId=602849276); James Comey, *A Higher Loyalty* 192-193 (2018).

In addition, ex-Director Comey informed the public that the FBI located thousands of emails from Secretary Clinton's Blackberry domain on Weiner's laptop. See Plaintiff's Statement at ¶ 2; see also Transcript, *James Comey's interview with ABC News chief anchor George Stephanopoulos*, ABC NEWS (Apr. 15, 2018, available at <https://abcnews.go.com/Site/transcript-james-comeys-interview-abc-news-chief-anchor/story?id=54488723>); Transcript, *James Comey to "Fresh Air": The FBI Isn't "On Anybody's Side,"* NPR (Apr. 17, 2018, <https://www.npr.org/templates/transcript/transcript.php?storyId=602849276>); James Comey, *A Higher Loyalty* 192-193 (2018).

### **III. Legal Standard.**

In FOIA litigation, as in all litigation, summary judgment is appropriate only when the pleadings and declarations demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); Fed. R. Civ. P. 56(c). In reviewing a motion for summary judgment under FOIA, the court must view the facts in the light most favorable to the plaintiff. *Weisberg v. U.S. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

### **IV. Defendant Has Failed to Demonstrate that It Conducted an Adequate Search.**

Defendant has not submitted a "reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched." *Oglesby v. U.S. Department of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). The affidavit "must at least include the agency's 'rationale for searching certain locations and not others.'" *James Madison Project v. U.S. Department of*

*State*, 2017 U.S. Dist. LEXIS 12176, \*6 (D.D.C. Jan. 30, 2017) (quoting *Defenders of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d 83, 92 (D.D.C. 2009)). It must also “describe what records were searched, by whom, and through what processes.” *Defenders of Wildlife*, 623 F. Supp. 2d at 91. In addition, an affidavit containing nothing more than “[c]onclusory assertions about the agency’s thoroughness” is “not sufficient.” *James Madison Project*, 2017 U.S. Dist. LEXIS 12176 at \*6.

Defendant’s supporting declaration is completely silent about how many emails it received from the FBI, whether the FBI provided Defendant all of the “hundreds of thousands” of emails found on Weiner’s laptop, how many emails Defendant reviewed, how Defendant reviewed the emails, how many emails Defendant determined to be personal or not agency records, and how Defendant made such determinations. Each of these questions must be answered for Defendant to satisfy its burden under FOIA.

On at least five occasions, ex-Director Comey has informed the public that the FBI located hundreds of thousands of Clinton-related emails on Weiner’s laptop. However, we do not know how many of those emails the FBI provided to Defendant. Nor do we know if the FBI provided all Clinton-related emails to Defendant. All we know is that “the FBI provided the referenced emails to” Defendant and that Defendant determined that 3,000 of the emails provided to it by the FBI “contained evidence of Department activities.” *See* Declaration of Eric F. Stein at ¶¶ 8 and 9.

The fact Defendant determined that only 3,000 emails “contained evidence of Department activities” also raises additional questions. Specifically, how many emails did Defendant review to arrive at that number, how did Defendant review the emails, how many

emails did Defendant determine to be personal or not agency records, and how did Defendant make such determinations? Again, all we know is that the FBI provided an unspecified number of emails to Defendant, that Defendant reviewed the emails, and that Defendant identified 3,000 emails that contained evidence of Department activities. Defendant has not even attempted to explain the discrepancy between the “hundreds of thousands” of emails identified by ex-Director Comey and the mere 3,000 emails identified by Defendant. At this late point in the Secretary Clinton email saga, Defendant should not get the benefit of the doubt. Because Defendant failed to provide any additional information, it has failed to satisfy its burden. *James Madison Project*, 2017 U.S. Dist. LEXIS 12176 at \*6 (The agency must “describe what records were searched, by whom, and through what processes.”).

**V. Conclusion.**

For the reasons stated above, Plaintiff respectfully requests Defendant’s Motion for Summary Judgment be denied and Plaintiff’s Cross-Motion for Summary Judgment be granted.

Dated: May 23, 2018

Respectfully submitted,

/s/ Michael Bekesha  
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**PLAINTIFF’S RESPONSE TO DEFENDANT’S STATEMENT  
OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE  
AND PLAINTIFF’S STATEMENT OF UNDISPUTED MATERIAL FACTS IN  
SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT**

Plaintiff Judicial Watch, Inc., by counsel and pursuant to Local Civil Rule 7.1(h), respectfully submits this response to Defendant’s Statement of Material Facts as to Which There Is No Genuine Issue and Plaintiff’s Statement of Undisputed Material Facts in Support of its Cross-Motion for Summary Judgment:

**I. Plaintiff’s Response to Defendant’s Statement of Material Facts as to Which There Is No Genuine Issue.**

1. Undisputed.
2. Undisputed.
3. Undisputed.
4. Undisputed.
5. Undisputed.
6. Undisputed.
7. Undisputed.
8. Undisputed.



9. Undisputed.

**II. Plaintiff's Statement of Undisputed Material Facts in Support of its Cross-Motion for Summary Judgment.**

1. The Federal Bureau of Investigation located hundreds of thousands of Hillary Clinton's emails on Anthony Weiner's laptop. *See* Transcript, *James Comey's interview with ABC News chief anchor George Stephanopoulos*, ABC NEWS (Apr. 15, 2018, available at <https://abcnews.go.com/Site/transcript-james-comeys-interview-abc-news-chief-anchor/story?id=54488723>); Transcript, *A Conversation with Former FBI Director James Comey*, THE WASHINGTON POST (May 8, 2018, available at <https://www.washingtonpost.com/blogs/post-live/wp/2018/05/08/transcript-a-conversation-with-former-fbi-director-james-comey/>); Transcript, *James Comey to "Fresh Air": The FBI Isn't "On Anybody's Side,"* NPR (Apr. 17, 2018, <https://www.npr.org/templates/transcript/transcript.php?storyId=602849276>); James Comey, *A Higher Loyalty* 192-193 (2018).

2. The FBI located thousands of emails from Hillary Clinton's Blackberry domain on Anthony Weiner's laptop. *See* Transcript, *James Comey's interview with ABC News chief anchor George Stephanopoulos*, ABC NEWS (Apr. 15, 2018, available at <https://abcnews.go.com/Site/transcript-james-comeys-interview-abc-news-chief-anchor/story?id=54488723>); Transcript, *James Comey to "Fresh Air": The FBI Isn't "On Anybody's Side,"* NPR (Apr. 17, 2018, <https://www.npr.org/templates/transcript/transcript.php?storyId=602849276>); James Comey, *A Higher Loyalty* 192-193 (2018).

Dated: May 23, 2018

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	)	
Defendant.	)	
_____	)	

**[PROPOSED] ORDER**

Upon consideration of Plaintiff’s Opposition to Defendant’s Motion for Summary Judgment and Plaintiff’s Cross-Motion for Summary Judgment and the entire record herein, it is hereby ORDERED that:

1. Defendant’s Motion for Summary Judgment is denied; and
2. Plaintiff’s Cross-Motion for Summary Judgment is granted.

SO ORDERED.

DATE: \_\_\_\_\_

\_\_\_\_\_  
The Hon. Beryl A. Howell, U.S.D.J.