IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Judicial Watch, Inc., Plaintiff,	Civil Action No. 13-CA-1363
vs.	MOTION HEARING
U.S. Department of State, Defendant.	Washington, DC November 14, 2018 Time: 2:00 p.m.

TRANSCRIPT OF MOTION HEARING
HELD BEFORE
THE HONORABLE JUDGE EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S

For Plaintiff: Michael Bekesha
Judicial Watch, INC.

Steven A. Myers
Marcia Berman
United States Department of Justice
Civil Division, Federal Programs Branch

For Defendant:

Brian L. Stekloff
WILKINSON WALSH ESKOVITZ, PLLC

Interested Parties:

Cheryl Mills

Hillary Clinton	David Evan Kendall Stephen L. Wohlgemuth
	Kyle Aaron Clark Jamie R. Lynn BAKER BOTTS, LLP
John A. Bentel	William Covington Jackson BOIES, SCHILLER & FLEXNER LLP 1401 New
Huma Abedin	

Court Reporter:	Janice E. Dickman, RMR, CRR Official Court Reporter United States Courthouse, Room 6523

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THE COURTROOM DEPUTY: Your Honor, this is civil action 13-1363 Judicial Watch, Inc., versus U.S. Department of State. Will the parties please come forward to the lectern and identify yourselves for the record.

MR. BEKESHA: Good afternoon, Your Honor, Michael Bekesha on behalf of Judicial Watch. Along with me is Tom Fitton, president of Judicial Watch.

THE COURT: Good afternoon to you both.

MR. MYERS: Good afternoon, Your Honor. Stephen Myers with the Department of Justice on behalf of the Department of State. And I'm joined by my colleague Marcia Berman.

THE COURT: Ms. Berman, Mr. Myers.

MR. STEKLOFF: Good afternoon, Your Honor. Brian Stekloff from Wilkinson, Walsh on behalf of non-party Cheryl Mills.

THE COURT: All right. Counsel, good afternoon.

MR. KENDALL: Good afternoon, Your Honor. David Kendall, with my colleague Steve Wohlgemuth, representing non-party former Secretary of State Clinton.

THE COURT: Gentlemen, good afternoon.

MR. CLARK: Good afternoon, Your Honor. Kyle Clark from Baker Botts, along with my colleague, Jamie Lynn representing non-party John Bentel.

THE COURT: Good afternoon, Counsel.

MR. JACKSON: Good afternoon, Your Honor. William Jackson from Boies, Schiller and Flexner on behalf of non-party Huma Abedin.

THE COURT: All right, counsel. Good afternoon.

Let me provide a little background, maybe it will shorten the amount of time counsel will need to provide their own background. But I'll provide the Court's background.

With respect to the motion to compel the testimony of John Bentel, Judicial Watch moves to compel Mr. Bentel's testimony after he invoked the Fifth Amendment for every question in his deposition. And Judicial Watch argues that Mr. Bentel did not demonstrate a reasonable fear of prosecution, especially because the FBI investigation is over.

The Court found that the record demonstrated Mr. Bentel may have lied under oath before the House of Representatives Select Committee on Benghazi, which exposes Mr. Bentel to the possibility of perjury charges. The testimony was taken in 2015, the statute of limitations I believe for perjury is five years. So query whether or not there's a fear of prosecution or whether it's fanciful or speculative.

I mean, query whether he can answer the questions of answering his job title could endanger Mr. Bentel as questions are relevant to his knowledge approval of the private server and especially in fact Mr. Bentel told Congress he was not

aware of the private server until 2-15 which may have been belied by the record in this case. That's one motion.

The motion to unseal audio visual records of depositions and New Media Coalition's motion to intervene to seek reconsideration. In May 2016 the Court issued a minute order requiring that all audio visual recordings of depositions sealed to protect nonparty deponent from quote annoyance, embarrassment, oppression, or undue burden or expense, in quote. Because the transcripts of the depositions were released, the court was of the opinion that it was -- the Court's words -- unnecessary at that time to make public the recordings.

In July 2016 the New Media Coalition filed a motion to intervene. To seek reconsideration of the Court's minute order. The coalition argues that access to the videos will provide the public with a quote more accurate and complete record, end quote because videos provide more context than substance including nonverbal information. The coalition also argues there's a strong public interest in allowing the public to have quote unfettered access, end quote to Court proceedings especially proceedings involving government officials.

I guess that means we'll have cameras in the courtroom soon, maybe not. Just kidding.

Disregard that comment. It has nothing to do with this issue.

Finally, the coalition argues that the potential video manipulation does not establish good cause. The State Department, Mr. Pagliano, and Miss Mills opposed the motion, arguing that the Court adequately accounted for public interest by releasing the transcripts.

In December 2016, after the election, Judicial Watch filed a motion to unsealed the audio visual recordings of the deposition. JW argues that the seal is unnecessary because the campaign is over and, therefore, the video is not likely to be used for political gain, as Miss Mills had originally argued in her motion to seal. Therefore, Judicial Watch argues that there's no longer good cause to seal the videos.

State Department, Miss Abedin, Miss Mills, Mr. Bentel, and Mr. Pagliano all oppose the motion.

State Department's opposition argues that the Court's rationale for sealing the audiovisual depositions remains valid. State Department seeks to ensure that its employees are not presented out of context and cites potential for misuse. It also argues that discovery is not entitled to the same public presumption as judicial records, such as videos presented to a jury.

Miss Mills and Miss Abedin also oppose the motion, arguing that political manipulation was only one of the concerns, privacy was another. They argue that publicly releasing the depositions would cause undue burden because the

tapes could be easily manipulated and presented without context. Moreover, they argue that the common law right to inspect judicial records does not encompass depositions.

The Court also ordered that any deponent who sought to keep a deposition sealed, to file supplemental briefing at specific parts of the deposition that would cause embarrassment. Miss Abedin responded, arguing that she's been subjected to racism, delusional attacks for years, and that the recordings will be manipulated. Counsel stated that there's no specific part of the video that would be used more than others. The point is that the entire deposition would cause undue burden if released.

Miss Mills also responded, making many of the same points. She reiterated that dissemination of the pertinent information to the public has been well served by release of the transcripts. She also says the parties are not required to point to specific portions that would be damaging if released. She argues that good cause still exists because the video could be used for improper purposes.

The State Department also responded, arguing that unsealing the depositions could negatively impact the State's ability to represent the United States abroad because the tapes could be manipulated. Mr. Lukens is currently serving abroad. However, the State Department also says that it would not object if the Court finds that its original rationale for

sealing the depositions is no longer pertinent.

And the final motion before the Court has to do with interrogatory answers.

The Judicial Watch moves to compel Secretary Clinton to answer three interrogatories, questions 1, 14 and 24. Secretary Clinton and the State Department oppose, arguing that Nos. 1 and 14 are outside the scope of discovery. Secretary Clinton also argues that the answer to question No. 24 is protected by the attorney-client privilege.

In terms of background, on May 4th, 2016 the Court granted Judicial Watch's motion for 56(d) discovery, finding that Judicial Watch could not respond to the adequacy of State's search without narrowly tailored discovery related to the creation, purpose, and use of the clintonemail.com server. Court found Judicial Watch raised sufficient questions about whether its FOIA request was processed in good faith.

Therefore, the Court held that the scope of permissible discovery shall include, quote, the creation and operation of clintonemail.com for State Department business, as well as the State Department's approach and practice for processing FOIA requests that potentially implicated former Secretary Clinton's and Miss Abedin's e-mails and the State's processing of the FOIA request that's the subject of this lawsuit.

On August 19, 2016 the Court granted in part Judicial

Watch's motion to depose additional people, including Secretary Clinton, by way of the interrogatories. The Court reiterated the purpose of discovery was to resolve whether there was a deliberate intent to thwart FOIA. The Court found that Secretary Clinton's answers were, quote, necessary to enable her to explain on the record the purpose for the creation and operation of a clintonemail.com system for State Department business.

Now, Judicial Watch -- with respect to interrogatory No. 1, Judicial Watch asks Secretary Clinton to, quote, describe the creation of clintonemail.com's system, including who decided to create the system, the date it was decided to create the system, why it was created, who set it up, and when it became operational. Secretary Clinton and the State both object, arguing this question is beyond the scope, pointing to the narrow scope of discovery, quote, the creation and operation of clintonemail.com was State Department business, end quote.

Because the system was created prior to Secretary Clinton becoming the Secretary of State, the creation of the system by President Clinton's staff has, quote, no bearing on Secretary Clinton's use of clintonemail.com for State Department business. Judicial Watch responds that the clintonemail.com domain was registered shortly before Secretary Clinton became secretary of state. Therefore, it is plausible

that the system was created for State Department business with the intent to thwart FOIA, which is squarely within the scope of discovery.

The Court permitted discovery to determine whether Secretary Clinton's use of a private email account to conduct State Department business was done with, quote, deliberate intent to thwart FOIA, end quote. And the Court's opinion granted discovery. It does point to the fact that the server was established eight days prior to Secretary Clinton being sworn in as the secretary of state. The government was -- words of the Court -- not in a position to dispute that at the Court's February 2015 motion hearing. Thereafter Judicial Watch represented, at the second motion hearing, the domain was set up in January -- set up on January 13, 2009.

It's raises the question about the creation of the system so close to Secretary Clinton's confirmation as secretary of state, whether that's relevant to the key question, whether there was intent to thwart FOIA.

The interrogatory No. 14, that question references an, quote, information memo, end quote, sent by Eric Boswell to Cheryl Mills. The memo warns that unclassified BlackBerries are vulnerable. The questions refers to an email that says HR -- that Secretary Clinton approached Mr. Boswell and said she read the memo and she, quote, gets it, end quote.

Judicial Watch asked whether Secretary Clinton read

the memo and, if so, quote, why did she continue using an unclassified BlackBerry to access her clintonemail.com email account and official State Department visits? end quote.

Both Secretary Clinton and the State Department object to this question as outside of the scope of discovery because of concerns of cybersecurity and the risk of using the clintonemail.com system. Judicial Watch argues this question is relevant because it concerns the operation of Secretary Clinton's clintonemail.com system for State Department business. It also argues that the question seeks information, quote, about the secretary's motivation and intent, end quote in using a Blackberry to conduct State Department business after being advised of the risk of doing so.

The question is clearly aimed at understanding why Secretary Clinton continued to use her personal email BlackBerry when she knew there were vulnerability risks. And query whether this question is relevant or not to the purpose for discovery; to learn whether a FOIA search was adequate, that is, if there was an attempt to thwart FOIA. Indeed, the Court explicitly excluded discovery related to the, quote, storage, handling, transmission or prosecution of classified information, including cybersecurity issues.

Judicial Watch seeks to understand and to learn why Secretary Clinton continued to use the BlackBerry to access State Department e-mails when she knew there was -- obviously

there was some cybersecurity risk involved, and query whether the question is unrelated to whether the State conducted an adequate search in response to plaintiff's FOIA request. Query whether Judicial Watch is entitled, or not, to discovery on this topic.

The last one is probably the most difficult question for the Court to consider. Interrogatory 24 references Secretary Clinton's October 2015 appearance before the U.S. House of Representatives Select Committee on Benghazi, during which she testified 90 to 95 percent of her e-mails were within the -- were within the State Department system.

Judicial Watch asks for, quote, the basis of this statement, including all facts in which you relied in support of the statement, how and when you became aware of these facts -- not opinions, these facts -- and if you were made aware of these facts by or through another person, identify the person who made you aware of these facts. So it's fact discovery that plaintiff is seeking.

Secretary Clinton objects to the question, arguing that the question calls for information protected by the attorney-client privilege. The State Department has taken no position. Secretary Clinton argues that the information was provided to her by her attorneys for the purpose of providing legal advice in advance of her Benghazi committee testimony. She argues that she cannot disclose how and by whom she was

made aware of the fact that the State Department had 90 to 95 percent of her e-mails in their system.

Now, Mr. Kendall -- it's a matter of public record that Mr. Kendall sent a letter to Representative Gowdy after Gowdy asked for the source of Secretary Clinton's figure. The letter, which is set forth in the pleadings in this case, states that Secretary Clinton sent to the State Department about 30,000 e-mails and of those about 27,000 had a recipient-slash-sender with a government email address. State Departmental also informed Mr. Kendall that over 1,000 of the 30,000 were not deemed, quote, federal records, end quote, because they were personal in nature.

The plaintiff argues that Secretary Clinton has not met her burden to show the information is covered by the privilege. The question merely seeks the factual basis for a specific representation made to Congress. Now, query whether Secretary Clinton has met her burden. Now, I'll hear from Mr. Kendall, I'm sure, about that, and maybe his answer will provide more insight.

Also query whether the privilege, if there is one, was waived by virtue of the letter that was sent by Mr. Kendall, which is public information. At a minimum, seems to me, that the secretary needs to proffer more about how the information -- who told her, when and how, constitutes a communication provided or received for the purpose of legal

representation. That's the distinction here. The attorney-client privilege only protects disclosure of communications, does not protect disclosure of the underlying facts of those who communicate with the attorney, end quote.

You know, query whether there's an ex parte medium that's necessary. I don't know. Query whether any of this is relevant, given the fact that Mr. Kendall's letter is on the website. I don't know. I'll hear from -- in other words, who cares at this point? But, I'm not making light of it, but it's a very interesting question. But, how much time do we want to spend on trying to respond to this? So it's about fact discovery, not opinion. That's a fine line. At some point I'll hear from Mr. Kendall about that.

So I've spent 15 minutes or so talking about what the background is, hoping to cut down on hearing about the background from every attorney in the well of the court. But I want you to make your principal point, I'm not going to deprive you of doing that. And if I misstated something, please tell me. And that's -- really, I don't want to misstate anything. I think that's a fair and accurate statement of the background for each of the remaining issues.

Let me hear from plaintiff first, if you'd like to emphasize your principal points that will persuade me to grant you the relief that you're seeking.

MR. BEKESHA: Thank you, Your Honor. I think you

summarized the facts pretty accurately. I think the one small point was, I think, Mr. Bentel hasn't taken a position on the audiovisual tapes. I'm not sure if Mr. Pagliano still has an interest. I know early on he did. But I think those were the only two points that were inaccurate.

One thing I wanted to do when I first came up here, and you have already kind of done, is reiterate why we're here. During -- in that May 4th 2016 order where you approved of the discovery plan that the parties agreed to, Your Honor said questions surrounding the creation, purpose, and use of the clintonemail.com server must be explored through limited discovery before the Court can decide as a matter of law whether the government has conducted an adequate search in response of Judicial Watch's FOIA request. That's still the same. So even though the election is over, a lot has happened in the past two years. That question, that issue still remains, and that's why we're here.

Why it's still important, similarly, is because, you know, it's still, to our knowledge, the first time that a secretary of state created a nongovernmental email system to use for her and her deputy chief of staff to conduct government business and State Department officials knew about and used that system to email with the individuals.

So we have extraordinary, exceptional circumstances here. And there was and continues to be great public interest

in the case and in those issues. And so I want to just cite out why we're here and why it's still important, because a lot of time has passed.

Is there a particular order you want me to address the issues in?

THE COURT: Why don't you use the order that I used. I'm sorry, I didn't want to minimize the reasons why anyone is here. Look, I'm a strong believer that the public has a right to know what its government is doing, subject to, of course, appropriate exemptions for that. So that's where we are at.

MR. BEKESHA: Absolutely, Your Honor. I just wanted to make it clear --

THE COURT: We're here because of the public's strong right to know what the government is up to. You know what? That right gets stronger every day in this courthouse because we're inundated with lawsuits, more FOIA lawsuits probably than any other jurisdiction.

MR. BEKESHA: I heard the numbers are drastically up this year. I imagine the Justice Department can talk at length about how many cases they have.

But, you know, with respect to Mr. Bentel, we asked 87 questions. He asserted his Fifth Amendment right, which is --

THE COURT: It's a five-year statute of limitations, so he's still within that five years.

MR. BEKESHA: There is. Nowhere in their briefing or at any point did they talk about the concern of Congress and perjury charges brought against him for that. That's the first time we've --

THE COURT: I think my brilliant law clerk may have found that out. It's kind of implied, yeah. So it is five years, I think. I don't think I'm wrong on that. Just assuming I'm correct on that, so he's still within the five years.

MR. BEKESHA: But I'm not sure there's a reasonable basis to believe that Congress would refer an action to the U.S. attorney, the U. S. Attorney would --

THE COURT: Really? You don't think so?

MR. BEKESHA: I have no reasonable basis to believe that. I mean, it is possible, but it is highly speculative. Mr. Bentel and his attorneys haven't stated that, so I guess they don't even believe there's a reasonable basis for that. If there were, they would have cited it to Your Honor, and they didn't.

I think there's also a chance that -- you know, we never said that he lied to the committee, it just said there seemed to be a discrepancy based on what other employees said and what the inspector general found. But, you know, it's two people thinking about matters and discussing matters differently, and they may have different perspectives or

different points of views or misremembered something. And so it may not lead to the -- a finding or a potential finding that there was perjury charges. That would be helpful to have such a record, to know what he did know, what he didn't know.

He was the IT specialist. He was in charge of information technology for the secretary's office. So he would have been -- his office would have been the office to handle her email systems, her Blackberries, if every was filed in the normal case. It was also his office that handled some of the questions related to difficulties Secretary Clinton had at times with receiving or sending messages to State Department employees.

So, it was important, when we asked you for his deposition initially, and still important today, to find out what he knew and what I didn't know. And I guess that perjury issue may be out there, but I just don't see that any evidence has been provided to show that there's a reasonable basis to believe that something like that would happen.

That's it with respect to Mr. Bentel at this time, unless you have any other questions. I think the briefs address the issues pretty well, so I just had a few points on each issue.

THE COURT: What about the video, the video recordings? You have all the transcripts, what would that add to the topic?

MR. BEKESHA: I think videos are important. I think, as the Media -- Coalition of Media Organizations said, there's a lot of value in videos instead of written word. You can learn a lot from body language, from --

THE COURT: That can be manipulated, too, you know, which troubles the Court; they can be. There's no way the Court can control them once they're out there. Anyone -- some kid with a Xbox can manipulate it. Maybe I'm wrong about the Xbox. Some kid, some kid could probably manipulate them.

MR. BEKESHA: I mean, there's possibility that manipulation could happen. Manipulation could have happened with the transcripts. Your Honor, they could be read out of context, certain words can be pulled out. Everything -- all information, there's a chance for manipulation. But I don't think that outweighs the significant public and even historical value --

THE COURT: That's a good point. Do you put video manipulation in the same category that you would put, say, the insert of ellipses into a transcript?

MR. BEKESHA: Well, I mean, not everybody puts ellipses into a transcript.

THE COURT: They put them in pleadings, though.

MR. BEKESHA: Well, you put them in pleadings, yes, but I'm talking about --

THE COURT: It's the first thing, Counsel, that

judges look for, the ellipses.

MR. BEKESHA: But, I mean, at the same time we would put the video in their entirety on our website, so it would be the same as us filing a brief. You know, the manipulation wouldn't happen there. And we don't know what other people can do, but other people could have manipulated, they could have taken out of context the transcript. You have the same concern there. And, therefore, you're always going to have that concern with information. You have that concern with the Freedom of Information Act and every record that's made public could be taken out of context.

But there's still a strong public interest, especially in this case where we're talking about senior level State Department officials talking about their official duties. You know, this isn't a personal matter, or a personnel matter, for that matter. It's, you know, we're talking about transparency, we're talking about what these government officials did or didn't do when it came to the Freedom of Information Act, the Federal Records Act, and transparency more generally.

THE COURT: What's actually added to the testimony itself by watching someone conscientiously, maybe, on occasion, struggling with how to properly answer the question? What's added?

MR. BEKESHA: I mean, I think it paints a fuller

picture. It shows how these individuals are, how they're answering the questions, whether or not they want to be there or they don't want to be there, if they're hostile, if they're not --

THE COURT: No one wants to be deposed. No one wants to be deposed.

MR. BEKESHA: They don't. I mean, some are -- you cannot want to be there and also be respectful. And I think, in this instance, a lot of the deponents were, and I think that's important to set the record and make that clear as well.

I mean, I think it's important to realize that a lot of media organizations are focused more on video these days than on print word, and I think it's because human nature, as humans, we like to see video, we like to, you know, experience something that way, different than just a written word.

And, so, I thought it was also telling that in your recent order you asked the deponents to point out specific instances where the release of that particular part of the video would harass, embarrass, be offensive, be harmful, and the deponents couldn't do that. There wasn't a particular instance that they're concerned about, it's just the general nature of it.

Ms. Abedin's concern is that, well, if it's posted, it will be another opportunity for people to post comments on a website; not that the video itself would lead to that, but

people would take the opportunity of another posting to go ahead and do that. To me, that doesn't outweigh the substantial interest that the public has and that history will have for these videos.

And, so, I don't think -- you know, I don't think there's been a showing of substantial harm that would really prevent the videos from being disclosed. And I think Your Honor has addressed some of these issues. I think it was a little over ten years ago in the *Crew* matter, you were -- some of the similar arguments were made about whether or not the videos could be distorted or manipulated. And you found there wasn't good cause, that wasn't enough to have those videos of those depositions being withheld, and I think that still applies today.

THE COURT: All right. And the videos -- the Court posted the videos in that case, in the *Crew* case?

MR. BEKESHA: I forget exactly how they were posted. I don't recall that.

THE COURT: Is that the *Cheney* case?

MR. BEKESHA: I think that was cigarette -- it was cigarette companies related or something. It was 05-2078. Of course, I wrote down the information except for what the case was about. I apologize for that.

THE COURT: That's all right.

MR. BEKESHA: If you have nothing else on that, I'll

move on to the interrogatories.

THE COURT: Yes.

MR. BEKESHA: I think the first part I would quote from, which Your Honor did a few minutes ago, from the supplementary discovery order where you said, The Court is persuaded that Secretary Clinton's testimony is necessary to enable her to explain on the record the purpose for the creation and operation of the clintonemail.com system. That's what the first interrogatory asks. I'm not sure how that -- we have no idea how that's outside the scope, when it's directly what your Court -- directly what the Court thought was at issue in this case. That's what I have on interrogatory 1. We think that's absolutely clear.

With respect to interrogatory 14, we're not asking any questions about cybersecurity concerns or issues. The cybersecurity memo is available to the public. We're not asking whether Secretary Clinton believed what was in the memo, we're not asking whether Secretary Clinton can expound on what the cybersecurity questions were concerned. Our questions were, Did she read the memo? I think we found out in -- after we asked the question, that she had read the memo, or at least another email suggests that she did.

So the question is, why did she continue to use her BlackBerry? And, you know, that directly goes to this idea of her motivation, her purpose. Why she was using the system?

Was it for convenience or was it for another reason? And I think when presented with facts on why this-may-not-be-the-best-method-to-use email came to her attention, did she just decide not to follow the guidelines because of convenience or because of something else?

So we think that question also squarely falls well within what the scope of discovery and the questions that the Court had at the time when the Court granted or authorized us the opportunity to submit interrogatories to Secretary Clinton during that -- I think it was an August hearing in 2016. We had a long discussion. A lot of what I talked about was how we had questions about motivation. And it wasn't just motivation at the beginning, but also motivation during and then at the end of her term. And this is just one of those questions, what was the motivation? What was the purpose for using the email -- the system she was using, which was the server or the clintonemail.com system, the email address, and then the BlackBerry to use it, which was all not State Department systems or property or technology. And so we think that falls directly within, squarely within the scope of what the parties agreed to and what the Court authorized with the granting, allowing us to submit interrogatories to Secretary Clinton.

With regard to the third one, interrogatory 24, you know, I think the Court summarized the fact that we think it's-- we're asking for fact-based information, we're not

asking for opinion that it would not be protected by attorney-client privilege. The question of -- I guess the question that the Court asked at the end, why does it still matter or why is it important, since Mr. Kendall put on the record the letter? I don't that fully answers the question. I think there's still some information out there about when Secretary Clinton first learned of it. It's not clear if Mr. Kendall was saying, well, this is what we think the read -- or, this is where we think it came from, or this is why Secretary --

THE COURT: You're not asking for the advice or the recommendations or the opinion about any facts that the attorney may have shared with the attorney's client, you're asking for discovery of what facts were learned?

MR. BEKESHA: Yeah, what facts, how she knew and why she said 90 to 95 percent of the emails were preserved and available on the State Department system. We asked Ms. Lang, the 30(b)(6) witness, about the accuracy of that statement and Ms. Lang said that -- that was over simplification, that just because Secretary Clinton may have emailed individuals on their State Department system didn't mean that they were easily accessible, or accessible at all.

And, so, our question really goes to is that something that Secretary Clinton thought about and knew during her four years that she was secretary? Is that something that

she learned afterwards? Is it something that she created out of thin air while preparing for her Senate testimony? We're just trying to figure out what the basis was and how she knew it and why she knew it.

THE COURT: So if the basis is my attorney told me what the facts were that he learned as a result of his investigation, why isn't that protected?

MR. BEKESHA: It's not protected because the attorney-client -- the privilege protects facts provided to the attorney from the client. And so if the attorney went out and conducted investigation on her own and provided that factual information to the client, maybe it's protected by attorney work product but not by attorney-client privilege because it didn't start from the client.

So attorney-client privilege is really to protect the client. It's to protect the client, to share all the information that the client needs to provide to the attorney, and the attorney to provide opinion based on those facts. And so if Mr. Kendall is arguing that Secretary Clinton provided this information to him and then he provided an opinion to her, then that opinion would be protected. It may even be protected, the fact that she provided the information to him. But the underlying information isn't protected.

The client provides -- hands a newspaper article to an attorney, that newspaper article isn't going to be

protected. Only the communication between the attorney -- only the client and the attorney is protected and any opinion that the attorney provides as a result of her relying on that newspaper article.

THE COURT: And Judicial Watch has precisely asked for -- it appears to be a quote -- the basis of this statement, including all facts in which you relied to support this statement, how and when you became aware of these facts. So it's fact discovery that you're asking for, which can be, I guess, according to the plaintiff, separated out from the opinion or recommendations.

MR. BEKESHA: That's correct, especially if -- I mean, and then to go one step further, if the opinion or recommendation from the attorney came from facts that didn't come from the client, it's not necessarily attorney-client privilege. It may be attorney work product. And if it's really opinion and certain circumstances apply --

THE COURT: So if I allow that question to be answered, then will we get assertion of another privilege and be back here in two more weeks or so?

MR. BEKESHA: I assume, if Mr. Kendall thought it was protected by attorney work product --

THE COURT: He would have asked for it, right?

MR. BEKESHA: He would have claimed it already. I imagine he knows the different privileges in and out. So, I

don't think we would be back in the same circumstance. So I don't think attorney work product would necessarily apply. But all I'm saying is it's not attorney-client privilege. We're just asking for the facts and where she gathered the facts from.

THE COURT: Anything more on 24?

MR. BEKESHA: I don't think so, Your Honor.

THE COURT: Let's go back to 14 for a second.

MR. BEKESHA: Sure.

THE COURT: So the question refers to why the former secretary continued to use BlackBerry. What does that have to do with discovery, though? The underlying discovery of a FOIA case, why is that relevant?

MR. BEKESHA: Because the BlackBerry was how she accessed the clintonemail.com email address. It's all part of the system she was using. She didn't use a desktop. She -- until the very end of her tenure didn't use an iPad. She never used an iPhone. So she used the BlackBerry and so the only way she was able to access the Clinton email account was through the BlackBerry. And so this is about her purpose. And, I mean, she's even said -- I forget exactly where she said it, but, you know, when talking about the convenience, it was so she didn't have to carry two separate Blackberries. And so, to her, the BlackBerry and the email account were one. And so that's why the question is relevant and within scope.

THE COURT: All right. Thank you.

MR. BEKESHA: Thank you, Your Honor.

THE COURT: Anyone? I don't know what your order -- discussed an order among yourselves?

MR. MYERS: Your Honor, we haven't, but I'm happy to go forward with the State Department.

I think Your Honor has accurately summarized the State Department's position as to the various motions, which is to say we don't take one on the Bentel motion.

On the unsealing motion, our position is as stated in our filing of, I think, October 22nd. And so I really just have two very brief points on the interrogatories.

With respect to interrogatory 1, the scope of discovery, including as stated in the order granting additional discovery, has always been clear, that it is limited to the operation and the creation and use or operation for State Department business. And so I don't think Judicial Watch has explained, and I think it's their burden to explain, why the creation of a server and infrastructure for, you know, other individuals prior to former Secretary Clinton using an account on the system is within the scope of discovery. We don't think they've made that showing yet.

With respect to interrogatory 14, again, plaintiffs were entitled to ask why she decided to use the clintonemail.com account and have asked that question. But to

the extent they're asking why did you use it even after you were warned about all these cybersecurity issues, they're just tacking on a cybersecurity question to the question they have already asked. And it's that additional question, that cybersecurity question that's specifically excluded from the scope of discovery.

That's all I have, Your Honor, unless you have any questions.

THE COURT: No position on 24 then?

MR. MYERS: We've taken no position on 24.

THE COURT: Thank you, Counsel.

MR. MYERS: Thank you, Your Honor.

MR. STEKLOFF: Thank you, Your Honor.

I'm just addressing the videotape issue on behalf of Miss Mills. I think Your Honor accurately summarized the background there as well and our position on the videotape. But I think that background is relevant even still today, given where we are. In 2016 Your Honor found that the public release of the transcripts was sufficient to provide information to the public about what was taking place during those depositions but, nonetheless, sealed the videos, I think due -- under Rule 26 due to the potential for Miss Mills and others to suffer annoyance, embarrassment, oppression, or undue burden or expense. And nothing has changed now.

I think we hear on the one hand that the reason why

you should unseal the videos is that the election is over, but on the other hand we hear, even this afternoon, that there's continued special and unique interest in these issues. And I think it's that continued special and unique interest in these issues, which we all know from the news every day is occurring, whether it's chats at rallies or tweets that are occurring by the President or others, or other potential manipulation of this in the political atmosphere, that there is unique interest in these issues. And so that same potential that Your Honor found in 2016 for undue harassment or burden or embarrassment exists today, just like it existed in May 2016.

THE COURT: The transcripts are, nonetheless, public. But as counsel -- as opposing counsel indicated, transcripts can be -- you know, they can be tampered with.

MR. STEKLOFF: That's, of course, true, that anything can be tampered with, but I think there's a difference between tampering with videos and tampering with transcripts.

THE COURT: What's the difference?

MR. STEKLOFF: Well, Your Honor, commented on ellipses. I mean, as lawyers, and judges and others, we can deal with ellipses. But I don't think that that's, you know, for a news story or political ad or other things necessarily. The written word doesn't necessarily have the same impact as a potential video, where you're trying to take an image of someone or out-of-context snippet of a video where someone

might be using certain words. You can piece together different words that someone's saying in a video and create a different type of manipulated image or manipulated video than you can, you know, just by trying to take words in a transcript.

So I think videos are much more ripe for manipulation, especially in this political environment, than a transcript. I'm not denying that a transcript, you can take a sentence and then not put the next sentence or you can take three sentences and cut out some words to try to change the meaning --

THE COURT: If everything can be manipulated to accomplish some goal, why not let everything be out there in the public domain?

MR. STEKLOFF: Well, I know Your Honor said this and then took it back, but I actually think there is relevance to the fact that there aren't cameras allowed in here. I was going to raise that before Your Honor said anything about it. I mean, there are transcripts of proceedings that are put out in the federal judiciary every day for the public to have information; there aren't videotape recordings of what happens in our federal courts around the country. I think that that is because it can lead to -- the judiciary, at least, in that context decided it can lead to problems.

I think, similarly, here, we just know that videos and political ads in other contexts can be manipulated

differently than transcripts. It's one thing if I have a transcript to try to piece together words that have nothing to do with each other. I mean, you could take different words of things that Mrs. Mills said or other people here who are subject to this motion that were -- that weren't even said at the same time, said at different hours, and then, you know, make little cuts, or you can mock them more easily, or you can make, I think, more easily racial attacks or other attacks on these people --

THE COURT: Maybe the answer is we need to rethink all of this and not post transcripts because they can be manipulated also, just make people come to the courthouse or get a PACER system or something to plug into the PDF document on file, just not publish anything. Is that the answer?

MR. STEKLOFF: I'm not suggesting that's the answer. But I think Your Honor has drawn a line, and I think you did so appropriately in 2016 where you decided -- and we did not fight the release of information in transcript form so the public would have that. But we did think and still think today that there's a difference between videotapes and written word. And that is recognized, again, by the lack of cameras here. That concern still exists today for a non-party who is a private citizen, who is not a party to this lawsuit, who has been attacked politically before.

THE COURT: Don't give me too much credit. I just

dodged a very difficult issue two years ago, and just said, look, take the videos and we'll lock them up for the time being. So don't give me too much credit.

MR. STEKLOFF: It's good practice to give Your Honor a lot of credit. But I also think it's been a good solution in the sense that the public --

THE COURT: If you insist, I'll accept the credit.

MR. STEKLOFF: Exactly. Sometimes -- I've learned things, you know, where to give credit when credit is due, Your Honor.

But I think that it's worked. Right? The public has the information. It is fortunate -- I don't know if manipulation has occurred. But I think that the political climate, if anything, things are exacerbated. I think that a video is almost more likely to become manipulated in the political climate. We just saw manipulation of videos last week and it's happening in a courthouse, you know, down the hall.

THE COURT: What happened?

MR. STEKLOFF: Alleged manipulation of -- you know, the CNN issue, where a reporter in the White House briefing, you know, and there's alleged -- there's alleged manipulation of the video to try to make it seem like one thing happened or another. I have my view of the allegations, but we don't have to get into that here.

But I think that videos -- we just know in this society, where Your Honor is commenting -- I mean, teenagers -- there's a lot of technology that allows for video manipulation; happens all the time, it is ripe. And I think, given -- nothing has changed. I know the election is over, but in this context we think that the burden, if anything, is on them to say what's changed.

They've argued that the election is over. That's not enough. And when you have nonparties like Miss Mills, private citizens who, unfortunately, have been at the forefront of attacks in a political context, why, why subject them to what Rule 26 says to avoid: Annoyance, embarrassment, oppression or undue burden, where there has been a public release of information about what Miss Mills testified to.

THE COURT: All right. Thank you, Counsel.

MR. JACKSON: Good afternoon, Your Honor. William Jackson on behalf of Miss Abedin. So I apologize. I filed my notice of appearance this morning. This was actually supposed to be argued by my colleague Martha Goodman, but she's at home with a relatively nasty stomach flu, so she asked me to step in in her stead.

THE COURT: Give her our regards. We miss her. All right.

MR. JACKSON: Thank you. So I want to reiterate what my colleague just said on behalf of Miss Mills. We share

exactly the same views. As we also identified in the pleadings, we identified the specific undue burden, annoyance, or embarrassment and harassment that Miss Abedin has faced as a result of the events in question, including the fact that her deposition -- sections of her deposition have been read on the YouTube by actors. And those, there have been comments and inappropriate things done with that. So, as -- just as a for example --

THE COURT: Inappropriate things such as what?

MR. JACKSON: So there's -- if you look at all the comments and all the commentary about -- on that -- with that video, there are racist statements and critical statements of her and suggestions of physical harm to her and her family in those comments. That's the exact kind of thing that is the annoyance, embarrassment, and undue burden that would result from the videotapes here, the videotapes themselves being released.

And as my colleague on behalf of Ms. Mills already said, the transcripts themselves are out there. Like, if -- to the degree the purpose is FOIA and getting information about what the government is doing, which is a very valid, legitimate concern, the transcripts are out there. They already exist and are already available, both on Judicial Watch's website and other places, including *New York Times*, etcetera. So we don't see there's any benefit to actually having videotapes in

addition, and there's substantial risk of the harassment I just referenced.

THE COURT: All right.

MR. JACKSON: Thank you, Your Honor.

MR. CLARK: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. CLARK: Kyle Clark on behalf of non-party John Bentel.

So taking us back to the beginning of where the Court started today, we agree with the summary. We think the summary was accurate. And just working from how plaintiffs have addressed Mr. Bentel's Fifth Amendment rights and the questions raised, I did want to correct one thing for the record. The suggestion that we did not discuss any reasonable fear or concern in the briefing is incorrect.

If you look to our opposition, pages 4 through 6 of the opposition speak directly to that. And as Your Honor has recognized, it was using argument and using quotations from the memorandum opinion, pointing out that the Court recognized the reasonable fear, that it was self-evident. We quoted that, we went on to speak about it. So we have raised it to the Court, to the extent there's any concern about what's in the record.

And what we raised to the Court was what the Court observed in the order from August of 2016, that one reasonable fear, one concern is based on the characterizations of record,

that the record appeared to contradict sworn testimony. And as the Court has noted and as the Court's clerk has noted, there is a five-year statute of limitations. We are within that statute of limitations. The way that we've argued it, the way we believe the law sets out, is once you have a reasonable fear, the question is, is prosecution possible? Not is it likely. That gets to be very dangerous. Who is to say whether it's likely? Who is to say whether someone would refer a case to the U.S. attorney's office?

The question, and what the D.C. Circuit has looked at before, including the *In re: Corrugated Container* case, is is there an absolute bar to prosecution? Was there statutory immunity granted? That would be an absolute bar. That is not true in this case. Are all statutes of limitations that could apply, have they all run? And in this case, as Your Honor has noted, no, they have not. In that situation prosecution is possible. And it is not for us and, respectfully, not for the plaintiffs to guess as to how likely or unlikely that would be when it remains possible.

Which brings us to the last point the Court raised, which is on a question-by-question basis the Court has to address whether Mr. Bentel had a reasonable fear of prosecution, whether prosecution is possible. That's easier in this situation than it might be in a regular civil suit or in another case involving a deposition. Because this deposition

involved a sole subject. And the Court addressed this in its opinion as well, where it spoke to what Mr. Bentel was going to be asked to speak about. He was asked to speak about one topic. Those questions either were directly on that topic or foundational. Can I get this email? Can I get foundation for it to ask the next question? It was not only the appropriate thing for Mr. Bentel to do, to assert his Fifth Amendment right in response to those questions, it was what he needed to do in order to protect his privilege.

Again, the D.C. Circuit has, spoken on this issue. *In re: Corrugated Container*, yet again, speaks about how you can't talk about generalities and then assert a privilege to the particulars.

Your Honor, respectfully, if he had tried to draw that line in a single subject deposition, I believe we would be here arguing whether he had waived his Fifth Amendment privilege, whether he had waived his right by attempting to pick and choose. He didn't do that, he didn't do it intentionally. It was the correct decision and we don't believe that there is any basis for upholding or granting the motion to compel, given the reasonable fear of prosecution and the possibility of prosecution in this matter.

THE COURT: If the Court were inclined to deny the motion, would it be more appropriate for the Court just to take it under advisement and let the statute run and then rule on

it?

MR. JACKSON: Your Honor, I think -- it's a good question. We would need to think about whether there are other potential charges that have longer statutes of limitations. Taking it under advisement, 2015 statement in a lawsuit filed in 2013 and holding it until after 2020, respectfully, doesn't seem like a good use of the Court's resources.

THE COURT: I wouldn't be doing anything. It would just be sitting there collecting dust.

MR. JACKSON: You would be holding the cases open longer. And I suspect the ladies and gentlemen to the left wouldn't like that either.

THE COURT: I would be keeping your part of the case open.

MR. JACKSON: You would. As a non-party, Your Honor, to the case, that would be extraordinary, to have plaintiff versus no one plus non-party. Would be strange if we let our friends at the Justice Department leave.

So, I don't think that's the right approach, Your Honor. I think that in this case --

THE COURT: They're your friends now, the Justice Department.

MR. JACKSON: They are today. They are today.

THE COURT: Right. Make sure you get that portion of the transcript there.

MR. JACKSON: They're going to frame it.

But, Your Honor, we think this is a straightforward situation, it's why we alerted plaintiffs in advance to the deposition that was our intention, we wanted to preserve court resources, and we feel that this was the appropriate approach.

THE COURT: All right, thank you.

MR. JACKSON: Thank you, Your Honor.

THE COURT: Mr. Kendall.

Before you start, you know what, how are you today? Do you want a short recess? He talks a lot.

THE COURT REPORTER: I'm fine.

THE COURT: Would you please let me know, if and when you need a break.

How are you today?

MR. KENDALL: Very well. Thank you, Your Honor. And I do think Your Honor's summary was accurate of the issues here. It does behoove us just for a moment to look back at how this case began. It's a FOIA case about employment documents of Ms. Huma Abedin at the State Department. Complicated history of the search, but the State Department made a search. The question then was the adequacy of the search, and that's what brings us here and that's what sparked the discovery the Court has authorized.

Now, the Court recognized that discovery in FOIA cases is rare. It took pains to emphasize the limited nature

of that discovery. It was very specific about that, both in the May 4th order and in the August 19th order.

That's the context in which the interrogatory answers that the Secretary has propounded arise. I think it's well to recall that 25 interrogatories, we answered 22 of them without any problems. We gave answers, we gave the facts we could. We're just here on three answers. And I would like to take the last one, interrogatory 24.

THE COURT: I'm glad you're starting with the last one, that's the most difficult one.

MR. KENDALL: Your Honor, it's funny, I remember this situation very well. It was October the 22nd, 2015 we reported the Benghazi committee. We began at 10 o'clock in the morning. We went until a little after 9 o'clock at night. And in our Appendix C we have a page as to how this question came up. It came up in an interesting way. Chairman Gowdy says, I have one more question. And Mrs. Clinton had said, you know, lawyers are expensive, they take up a lot of time. He says, well, one more, one more, and I will pay Mr. Kendall's fee for the last question, how's that? Mrs. Clinton, oh, I don't think you want to do that, Mr. Chairman.

THE COURT: That never happened, did it?

MR. KENDALL: No, it didn't. But anyway, but the -- the session finally ends with Chairman Gowdy asking for the source of the Secretary's statement about 90 to 95 percent of

the e-mails were actually in government retained accounts.

Now, what happened then was sometime later, November the 13th, 2015, I wrote Chairman Gowdy back a letter answering that question. The math is there in the letter. I didn't -- there's not a syllable in that letter about communications with the client or how the client -- it's just answering the chairman's question.

I think the Court is right to emphasize that there's -- sometimes facts are not presented -- protected by the privilege. However, lawyers talk to clients very often about facts. And it's an essential role of the attorney-client relationship to make sure the client understands the facts. So simply saying something is factual does not necessarily mean that it's not protected by the privilege. They've not given a single reason to invade the privilege of attorney-client here.

The information they seek is set out here. As information, they've got that. That's what they're entitled to. How this relates, again, we -- the Court said once information -- information about the creation and operation of the clintonemail.com system for State Department business is what can be asked about.

So I think on this one, the answer insofar -- and I would just refer the Court to the exact interrogatory question: Identify the basis for this statement, including all facts on which you relied to support the statement, how and when you

became aware of these facts, and if you were made aware of those facts by and through another person, identify that person.

THE COURT: That's a fact inquiry.

MR. KENDALL: That's a fact inquiry and that's answered in my letter. But in terms of how the client thinks about -- I mean, if she can answer that without divulging attorney-client privilege information, then she can answer it. But our point here is that that is privileged. Except for the letter here, which is not privileged, we claim privilege over the response.

THE COURT: Does the letter waive privilege?

MR. KENDALL: It does not because it does not refer in any way to communications with the client. Gowdy asked the question, she had consented earlier, it's going into the 11th -- let's see, no, it's in the 11th hour, we're going into the 12th hour, and basically he says all right, just get me the information. So he got the information.

THE COURT: Let me ask you this: Suppose you had conducted an independent investigation to learn what the facts were on behalf of your client and you had five pages of facts, you said, you know what? this is what we found. These are facts that we believe we can rely upon. But then you shift gears and get to your recommendation and your opinions about how those facts should apply to a case. Isn't there a fine

line between those two scenarios, the gathering of facts and then the focusing on those facts and advice to your client about what those facts mean insofar as maybe her exposure to whatever it is? Isn't there a fine line between that?

All they want is the facts. They're not concerned -- I mean, they'd love to have your recommendation and your opinion, but they're not going to get that and they know that. But they want to know, what is the basis for that statement? What is the factual basis for that?

MR. KENDALL: They've got the facts here. Again, Your Honor, again, it's all in Appendix D. I'll go through the math. You know we've gotten X number of e-mails, we turned them over. State Department said some of them are -- 1200 or so are not, in fact -- you didn't have it turn those over. We're trying to err on the side of completeness. And then when you sort those, you get so many that went to the State Department address and so many that went to another government address. Now, those, she believed, were obtainable. I mean, they should have been. We can't speak to how the IT operations in the State Department work.

THE COURT: But if the facts, thought -- the facts are not protected by the attorney-client privilege, correct?

MR. KENDALL: Correct. And the facts here are what the facts are to prove the math. So, but what they want is something more. They want to know the communications that led

her to make the statements she did. The facts are here, but insofar -- and insofar as somebody else, a news reporter said I'm working on a story, here are the facts, she can answer that question. But once you start getting into the attorney-client relationship, the interchanges are protected. And they're often about facts, Your Honor. They're often you advise a client, you're often talking about facts. So simply saying, well, there's a fact here is not enough to pry open the relationship.

Now, I just want to basically adopt what Mr. Myers said about interrogatory 1 and 14. Interrogatory 1 has nothing about the Clinton email system in it. If you look at interrogatory 2, which we answered completely, that talks about why she set up her account on clintonemail.com. And as -- the testimony that we cite from her FBI interview, she knows -- she knows a great deal about many things, but setting up a server and an email system and registering it is not within her knowledge, and she's said that much to the FBI.

So that one, I think, is both outside the realm of discovery and it's also simply they've got the answer to that. She knows nothing about her husband setting up the email account to which she later added her own account.

In terms of 14, I really don't have much more to say about that. That's a 2009 memo. It says nothing whatsoever about clintonemail.com. The point there is that you couldn't

use a BlackBerry in a SCIF, sensitive compartment information facility. And her testimony was I didn't do that. I was grumpy about it, I didn't like it, but I left my BlackBerry outside. And that's all that is. Nothing to do with email accounts. So we would respectfully submit that the Court should not move to compel further answers to interrogatories 1, 14, and 24.

THE COURT: All right. Thank you, Counsel. Let me hear briefly from plaintiff's counsel. I just have a couple questions to ask you, and I'll give you time to respond.

With respect to question 1, do you concede or not that the clintonemail.com system was created before Secretary Clinton was confirmed as secretary of state? And if the answer is yes, then how is the creation of that system relevant to State Department business, if it was created before she was confirmed?

MR. BEKESHA: It was created eight days before, while she was in the subcommittee giving testimony before the vote, it was created. So, Mr. Kendall talked about how it was her husband's system. Her husband's system wasn't clintonemail.com, it was wjcoffice.com and presidentclinton.com. President Clinton didn't have an email account on that system. The email account on that system was Secretary Clinton, Chelsea Clinton, and Huma Abedin, who is deputy chief of staff. It wasn't Bill Clinton's email system.

Bill Clinton's email system is wjcoffice.com and presidentclinton.com. I mean, clintonemail was Hillary Clinton's email system. That's what we're asking about, the creation of that. It was created for her.

THE COURT: So there's no dispute about when it was created. So the question then, why isn't it reasonable to believe it was created in an effort to conduct State Department --

MR. BEKESHA: It was created eight days before, while the process in the Senate started, which means it wasn't created in the summer before President Obama won and she knew she was going to the secretary of state. It wasn't created in that two-week period between the 2008 election and when President Obama asked her to be secretary of state. It wasn't created in December of that year. It was created when she started the confirmation process. And she then used that email account for her entire four years.

And so we ask not only about the creation of the specific email account, but also about the system. Why was the system put in place? The system was put in place not for -- not for President Clinton's use, President Clinton didn't use that account, he didn't use that system, he didn't use clintonemail.com. Neither did his staff. It was her staff, it was Huma Abedin, deputy chief of staff, that used it and Secretary Clinton.

It wasn't Bill Clinton, it wasn't anybody in the foundation, it wasn't anybody in his post-presidential staff. And he had a lot of people there. They had their own email account. And the record is clear that they did -- I don't think there's a dispute that -- I mean, maybe we don't know, maybe Mr. Kendall is saying that Bill Clinton had an email address on that account, on that system, on clintonemail.com. But that hasn't been in the what is it? two, three-and-a-half years, four years since we've learned about this system. No one has said that this was Bill Clinton's email system. It was Hillary Clinton's email system for her and Huma Abedin and that was used to conduct their official State Department business.

THE COURT: As far as 14 is concerned, in your reply brief you state the purpose for question 14 is to understand Secretary Clinton's, quote, motivation and intent in using a personal BlackBerry to conduct State Department business after allegedly being advised of the risk of doing so. Just to be clear, what does this question have to do with the adequacy of the State Department FOIA search? In other words, assume Secretary Clinton did continue to use her BlackBerry, knowing it would create security risk, what does that have to do --

MR. BEKESHA: It's another step to the ultimate question, as whether or not Secretary Clinton sought to deliberately thwart FOIA. Did she use up her BlackBerry bearing a personal email account to deliberately thwart FOIA so

that her records weren't available? That's ultimately --

THE COURT: So it would not be official?

MR. BEKESHA: So it wouldn't be official. Judicial Watch, other transparency organizations that saw emails of Secretary Clinton for four years didn't get it. And one of the questions that will be addressed at the end of discovery is whether or not that was Secretary Clinton's intent. And so there was a memo that said don't use a personal BlackBerry. She continued using it. She said that she used it for convenience, that was her reason why she set it up at the beginning.

You would think -- I'm not -- you know, we want to know, well, if it was still convenient and you're told that this is going to be a security risk, does convenience overweigh security risks? I don't know. I haven't been secretary of state, I can't make that decision. But that's what the motivation, the purpose is for why she used the BlackBerry, why she used the email system. That's just another piece to whether or not she deliberately thwarted FOIA. And, you know, that's a question that hasn't been answered and won't be answered until after discovery is done. Ultimately, that's what all this discovery is leading toward.

THE COURT: 24, I'm still troubled by 24. If the basis for Secretary Clinton's statement was provided to Congress and Mr. Kendall's letter, and it's publicly available,

then what else can be accomplished by requiring further answers to that question?

MR. BEKESHA: Well, he stated what the facts were, but he didn't state what the basis of -- I mean, he says the 90, 95 percent is -- I guess, the letter talks about the different percentages and the number of emails. But where does that information -- where did she get that basis, that information when she made the statement to Congress? You know, I think we ask, Identify the basis for this statement, including all facts on which you relied in support of the statement, how and when you became aware of these facts. If you are made aware of these facts by or through another person, identify the person who made you aware of the facts.

That's a complete fact inquiry. Now, I -- maybe Mr. Kendall has issue with the very last part, Identify the person who made you aware of those facts. And the question is her stating she was made aware of it by her attorney, Mr. Kendall. I could see how maybe that's a little bit close of an issue.

THE COURT: But factual discovery being related to a client, I don't think anyone would disagree that that's not protected by the attorney-client privilege.

MR. BEKESHA: Right. But the first part of that question about --

THE COURT: That's why I separated my question out

from the gathering of the facts, relying the facts, and then, you know, spinning the facts or whatever, or offering that opinion about the implication of those facts, vis-a-vis a client's jeopardy or rights, etcetera, etcetera.

MR. BEKESHA: Right. I think the question -- and I don't think Mr. Kendall asked the question about when you talked about an investigation that her attorneys do, they write a five-page report laying out the facts and then there's opinion. I don't think he answered whether or not that five-page report would be available in discovery and not protected by attorney-client. It wouldn't be. If it didn't rely on any facts by the client, then the attorney-client privilege doesn't apply.

As I said, attorney work product maybe applies if it was prepared in preparation for litigation, you know, and follows, you know, those prongs. But, a fact-based report created by counsel not based on anything discussed by the client isn't protected by attorney-client privilege.

THE COURT: Suppose the Court were to modify that question then and then allow you to propound the question of: Tell us what the basis for the facts were, who told you those facts. And, I mean, I would have to give it some thought about the protections of the attorney-client privilege, but essentially, just give us the facts. Just the facts.

MR. BEKESHA: That's all we're asking for. We just

want to know the basis of the statement.

THE COURT: You never heard of Joe Friday?

MR. BEKESHA: No.

THE COURT: Only Mr. Kendall has. He's the only one old enough. Anyone else --

MR. JACKSON: (Nods head.)

MS. BERMAN: (Nods head.)

THE COURT: Oh, you have. Maybe they don't want to say how old they are. My law clerk doesn't know who I'm talking about.

Just the facts. Just the facts. That's all you want, right?

MR. BEKESHA: That's all we're looking for.

Other questions on that?

THE COURT: I don't think so. You wanted to say, so I didn't want to cut you off.

MR. BEKESHA: No, I was just looking at some of the -- I wasn't expecting everybody to go on all issues at once.

I think, you know, going back to the audiovisual recordings, you know, I thought it was telling that the attorney representing the first one -- now I'm forgetting who represented who. I think it was Ms. Mills -- said that they're not aware of any manipulation that has occurred when it -- in respect to the transcripts. Well, if no manipulation has

occurred already, why is it reasonable and not highly speculative that it's going to occur in the future.

If we're talking about video being something completely different, there are a lot of publicly available photos of Ms. Mills. If you wanted to make a campaign ad -- I'm not sure, I don't think she's running for office, so I don't know what the campaign ad would be. And we don't know if Secretary Clinton is running for president again. So I'm not sure where this campaign ad concern is. But if you wanted a campaign ad, you could have the picture of Ms. Mills and you could have the words under it completely manipulated and out of order and pieced together.

THE COURT: The bottom line is anything can be manipulated, unfortunately. PDF format, that doesn't mean anything, that can still be manipulated.

MR. BEKESHA: No, I think teenagers know how to manipulate that these days. You know, when counsel talked about the video with the CNN incident, that was a C-SPAN video. I mean, so does that mean we should not have C-SPAN? I think the media is the one that wants all of press briefings televised. Maybe we should stop televising all press briefings because there's a chance that may be manipulated.

With respect to court proceedings, the Ninth Circuit, some other courts in the Ninth Circuit also videotape their proceedings. So it's being done.

The Supreme Court puts transcripts, as well as audio versions of their oral arguments, those can be manipulated. Maybe we should take all of those down. And then PDFs. So maybe we should get rid of FOIA because those can be manipulated.

You know, I appreciate that some of these former government officials are now private citizens. But this is a case about what was conducted when they were senior-level State Department officials and how they went about their day-to-day responsibilities. It's not about their personal life, it's not about what they've done as a private citizen. It's about what they did or didn't do with respect to transparency when they were senior government officials.

THE COURT: Would it be a compelling reason to allow the videos to be posted because the videos themselves would enable a person to formulate an opinion about credibility?

MR. BEKESHA: Absolutely. I mean, there are all sorts of different reasons why a video is more powerful than the written word. And I think that's important for the public, there's a strong public interest. I think everybody today has talked about that there's a public interest in this case and transparency and what happened. And then as we go farther and farther into the future, there's going to be a significant historical interest in what happened and how this case played out, how -- what happened at the State Department with

Secretary Clinton's email, what it did, what it didn't do, whether it was good, whether it was bad, whether it was nefarious or an honest mistake. Those are all questions that, you know, people can judge for themselves when they see the demeanor, they see the tone of the person, they see how they responded. And I think all of that is significant, important, and I think the Coalition of Media Organizations talked a lot about that.

I think you see that in a lot of instances, especially, you know, with us, being a transparency organization, we want to just put everything out there and have the public able to look at it and, you know, decide on its own on the credibility of what happened. And so I think it's important. I think manipulation is bad, it shouldn't happen, but it can happen on everything, and every medium, every type of record it can happen, and the possibility of it, that's going to happen, just doesn't outweigh the significant public interest that there is in making these videotapes public.

Ms. Mills, the reason I talked about the campaign was because Ms. Mills focused primarily, initially, when she sought the protective order or the sealing order, was talking about how this would be used during the campaign season because we were getting pretty close to the 2016 presidential election where Secretary Clinton was presumptive -- well, I think she wasn't quit the nominee, but presumptive nominee at first, then

the democratic nominee.

So, you know, those interests are now gone. She's no longer running for president. Huma Abedin at the time was senior level in the campaign. So, you know, we disagreed with Your Honor's opinion, but it's also why, when the media organization filed their brief two months later, their motion two months later, we remained silent. You know, we didn't ask you to reconsider at that point. We waited until the election was over, until the process, for the most part, was over, and we then asked for the records to be unsealed because there's a strong public interest in it and the potential harm or effect it would have had on the presidential campaign no longer existed.

THE COURT: All right.

MR. BEKESHA: That was it on that. If you have no other questions, I think I probably covered everything.

THE COURT: Okay. Excuse me one second.

(Pause.)

THE COURT: Mr. Kendall, just a couple of questions, remaining questions.

MR. KENDALL: Your Honor, may I make -- at the end of that, may I make one point about interrogatory 1?

THE COURT: Sure. Go ahead. Go ahead.

MR. KENDALL: With regard to interrogatory 1, we disagree with what the plaintiffs say about the Clinton email

system. We objected to their definition. And it's their interrogatory 1. Because, you know, as they define it, they don't recognize that the main server consisted of equipment set up, host email for President Clinton's staff. That's still true. Better to talk about the server than the various accounts on it. The server was set up by President Clinton's office located in the house of Chappaqua, and clintonemail.com, unlike their definition, was simply an account on it. That's all I have to say.

THE COURT: I keep going back to 24, that's the more difficult question. You argue that Judicial Watch has all the facts from the letter, but Judicial Watch argues it doesn't have all the facts. For example, the letter does not say who told Secretary Clinton the facts and when. And how are those facts protected from -- how are those facts part of the attorney-client communication?

MR. KENDALL: Well, Your Honor, very often attorneys talk about facts to clients. The fact that they're doing that does not make the privilege inapplicable.

THE COURT: That's why I separated my question out from relating what the facts were as a result of an investigation; this is what we found, 1 through 100, this is what we found. Then let's discuss the implication of those facts, vis-à-vis, you know, jeopardy to you, your rights, how they impact your rights, how they help you. That's a little

different, but it's separated -- that's the opinion part of it and the recommendation part, as distinguish from relating what the facts are.

MR. KENDALL: And, Your Honor, what we've tried to do is give them that, because she was asked a question by Chairman Gowdy, answered the question. He later then says, What's the basis for your answer? So, it's the end of the hearing, she says we'll get back to you. I get back. Again, just speaking about the facts, not anything I've communicated to her, and give them the facts.

So there's nothing about any separate investigation or anything like that. But how she learned something, again, if you don't learn that from your lawyer, you can testify to it. What we've said here is this is covered by the attorney-client privilege.

THE COURT: So, if the question were: What are the additional facts not otherwise covered by attorney-client privilege, the answer would be none?

MR. KENDALL: Well, in terms of their interrogatory --

THE COURT: I mean, suppose there was a new question, suppose the Court said, Having heard all the arguments, here's the question that I will allow to be answered: State what the additional facts are not otherwise covered by the attorney-client privilege.

MR. KENDALL: I think the answer would be any facts in her mind, as long as she doesn't have to disclose where they came from, would probably be discoverable simply as facts. But not what your attorney told you, not what you said to your attorney.

THE COURT: That's all they want. All right. All right. Maybe I'll revise the question, I don't know. I'll hear from plaintiff's counsel in just a second. But that's all they want is the facts. But if the attorneys told the client what the facts are, why isn't that discoverable? It has nothing to do with --

MR. KENDALL: But, Your Honor, if you talk to a client, very often you will be talking about facts. And that -- the privilege protects an exploration of the facts. You can't just -- your hypothetical was do you prepare a report, or something in that form. I do believe that's protected by the work product privilege, at the very least.

Now, insofar as the client tells you something that would inform your report, then it might be protected by the attorney-client --

THE COURT: Stock information.

MR. KENDALL: I'm sorry?

THE COURT: No, no, nothing. We were just talking about that privilege, it would just be a matter of time before I heard that.

MR. KENDALL: But I do know who Joe Friday is, Your Honor.

THE COURT: I thought you said Judicial Watch hasn't shown why the privilege should be overcome. Isn't that your burden to --

MR. KENDALL: No. When we established the privilege -- I don't think there's going to be a doubt that there is a client, there is an attorney, the attorney, as we know from the client herself, charges fees. I think that that -- you know, we've said we can't answer because of attorney-client privilege. Now they've got to show -- there's a crime fraud exception, you published it to third-party, you know, some way to defeat the privilege.

THE COURT: Right. But that's your initial burden though, to show the privilege attaches, correct?

MR. KENDALL: Correct.

THE COURT: That's the *In re*, right, exactly, *In re: Sealed Case* from our circuit. It is the claimant's burden to present to the Court sufficient facts to establish the privilege. But I think there's a fine line between the facts establishing the privilege and the facts. And that's all they're seeking, the facts not otherwise protected by the privilege.

MR. KENDALL: Right. And, again, this is about her testimony of a certain date, what are the facts behind that. I

think we've given those.

THE COURT: Right. Okay. The last question I have, for the time being, with respect to No. 1, and I've asked this to other attorneys, because the system was created eight days before Mrs. Clinton was confirmed, why isn't that reasonable --

MR. KENDALL: Your Honor, with all respect, I think I disagree there. The system was created over a period of time. The system was created relying on a server that was freed up by the Hillary for President Campaign of 2008. It took months to do it. It wasn't created just -- I don't know where their date comes from. We've tried to say in here that that is the President's system, it is the server and everything else. We've answered the questions about her account. And, again, we object to their definition of clintonemail.com, of what that is. That's just an account on the bigger system.

THE COURT: All right. All right. Did you have anything else, Counsel?

MR. KENDALL: No. Thank you, Your Honor.

THE COURT: All right. I thought government counsel -- how about that last question there? Do you object to the argument about the statement that the system was created eight days before she was confirmed as secretary?

MR. MYERS: I think, Your Honor, it's important to very carefully parse the word "system" as defined by plaintiff in their definitions in the interrogatories. It refers to the

email systems, servers, providers, and infrastructure that hosted any email account with the domain name clintonemail.com. I think the FBI report suggests that the domain name clintonemail.com was registered in -- you know, on or about January 13th of 2009.

But the point that we have made is that the server and the infrastructure and all of that is the same server and infrastructure that was hosting presidentclinton.com, wjcoffice.com. And again, we don't think Judicial Watch has explained why information about those servers is relevant. The creation of the clintonemail.com account is. But again, that's the subject of a separate interrogatory. Thank you, Your Honor.

THE COURT: All right. Anyone else?

Yes, counsel.

MR. BEKESHA: One point on there. The creation of the clintonemail.com system, we're not asking about the server that had wjcoffice.com and presidentclinton.com on it, when it didn't have clintonemail.com on it. The creation of that system was registering of the domain name, then the decision to place that system on the server; who did that, you know, why that was done and, you know, that is the creation of the system.

THE COURT: You're not interested about the origin of the server from day one?

MR. BEKESHA: No. We're just interested in when it became --

THE COURT: When this particular server as identified by the secretary was created.

MR. BEKESHA: Absolutely, Your Honor.

THE COURT: The server domain name.

MR. BEKESHA: The domain name and then the domain name was placed -- the system was placed on that server. We're not asking for details about what else was on the server. We just want to know, you know, was it set up eight days before? Was it set up the day of? Why was it set up? Why was that domain name registered? Who registered that domain name? All those questions, you know, whom Abedin said during her deposition that -- I think -- I forget if she said it was Justin Cooper or someone else created, decided on the name, the domain name, and placed it on the server. I think it was Justin Cooper.

Justin Cooper, during his Congressional testimony, which was under oath, said that it was Huma Abedin's decision about what the domain name was. And so we're just trying to figure out the basic facts of the creation of that system, the system being the domain name that was placed on the server, you know. Not about the details about President Clinton's server, if that was set up ten years before, five years before. You know, that's not relevant to anything, you know. This is a

bunch of smoke and mirrors so they don't have to answer the basic question, which is: When was all this set up and why?

I mean, this is the fundamental question that leads to the deliberate thwarting of FOIA. And, you know, as -- once we get closer to, you know, when we get to summary judgment, you know, we have Secretary Clinton, or then Senator Clinton's statement in 2000, when somebody asked her about using email. You know, she made a statement, she said, when asked about email and a paper trail in 2000, then Senator Clinton said: As much as I've been investigated in all that, you know, why would I? I don't even want -- why would I ever want to do email? Can you imagine?

And so part of what we're trying to piece together is that idea in her head that she doesn't want to use email because there would be a paper trail, that she said in 2000 -- when she became Secretary of State in 2008 -- or I guess it would have been January 21st, 2009, first time ever she was subject to the Freedom of Information Act and the Federal Records Act did she decide to use a system that wasn't going -- to make sure that she didn't leave a paper trail that media organizations like us could find.

And that's the ultimate question before the Court. This question, all questions that we proposed and submitted to her focus on that particular issue. It's been our focus from the beginning, as we've talked about over -- I guess it's

almost four years at this point.

THE COURT: All right.

MR. BEKESHA: Thank you, Your Honor.

THE COURT: This is what I would like to do: I'm actually prepared to rule on these matters today, but I need to take a short recess to give some thought to a couple of points that have come up. So I would like to recess until 4 o'clock. But I'm not going to write any more, for the time being, on this case. I'm going to rule from the bench on these matters at 4 p.m.

So there's no need to stand. You don't have to stay in the courtroom. But the court will stand in recess until 4 p.m. thank you.

(Recess.)

THE COURT: All right. I may go in a different order. There are two motions to unseal the audiovisual recordings of the depositions taken in this case. The first, the New Media Coalition's motion to intervene to seek reconsideration of the Court's order sealing the audiovisual recordings. The second is Judicial Watch's motion to unseal. The Court will consider each motion in turn.

First, the Court will grant the New Media Coalition's motion to intervene. It's well settled that, quote, third parties may be allowed to permissively intervene under Rule 24(b) for the limited purpose of seeking access to material

that have been shielded from public view either by seal or by protective order, end quote, replying upon *E.E.O.C. versus National Children's Center, Incorporated*, 146 F.3d 1042.

Therefore, the Court will allow the New Media Coalition to intervene for the limited purpose of moving for reconsideration to unseal the audiovisual recordings. In that regard see *New York versus Microsoft Corporation*, 206 F.R.D. 19.

Second, the Court will deny both the New Media Coalition's substantive motion for reconsideration and Judicial Watch's motion to unseal the audiovisual recordings.

On May 26, 2016 the Court ordered all audiovisual recordings of depositions sealed to protect the non-party deponents from, quote, the annoyance, embarrassment, oppression or undue burden, end quote, pursuant to Federal Rule of Civil Procedure 26(c). The Court then found that the public had a right to know about the substance of the depositions and, therefore, it released the transcripts. However, in light of the publicly available transcripts, the Court found that it was, quote, unnecessary, end quote, to make the audiovisual recordings public as well.

In its motion for reconsideration, the New Media Coalition argues that the audiovisual recordings are necessary to provide the public with a, quote, more accurate and complete record, end quote, because they provide more context and

substance. In its motion to unseal Judicial Watch argues that the seal is no longer necessary because the 2016 Presidential election concluded. Judicial Watch, therefore, argues that any good cause to keep the depositions sealed no longer exists. These two motions are opposed by the State Department and several of the deponents, including Miss Cheryl Mills and Miss Huma Abedin. The opponents argue that the Court's rationale for sealing the audiovisual recordings remains valid.

Pursuant to Federal Rule of Civil Procedure 26, the Court may, for good cause, issue an order to protect a party or person for annoyance, embarrassment, oppression, or undue burden or expense. In determining whether to do so, the Court has broad discretion. Because the Court, quote, is in the best position to weigh fairly the competing needs and interest of parties affected by discovery, end quote, it must have, quote, substantial latitude to fashion protective orders, end quote. Relying upon *Seattle Times Company versus Rhinehart*, 467 U.S. 20.

Ultimately, the Court must, quote, balance the public's interest in open proceedings against an individual's private interest in avoiding annoyance, embarrassment, oppression, or undue burden or expense, end quote. Again, relying upon *New York versus Microsoft Corporation*, 206 F.R.D. 19.

In granting Miss Mills' motion for a protective

order, the Court found that Miss Mills met her burden by articulating specific facts to show, quote, a clearly defined and serious injury, end quote. See -- I'll spell it, *A-V-I-R-G-A-N versus Hull*, 118 F.R.D. 252. After carefully considering the briefing, the Court concludes that good cause remains to keep the audiovisual recordings under seal.

First, a pretrial deposition is not a judicial record falling within the common law right to inspect judicial records. Indeed, quote, pretrial depositions and interrogatories are not public opponents of a civil trial, end quote. Relying upon *Seattle Times Company*, 467 U.S. 33. Audiovisual depositions were permitted, quote, as a means of presenting deposition testimony to juries that is superior to readings from cold, printed records, end quote. They were, quote, not intend to be a vehicle generating content for broadcast and other media, end quote. Relying upon *Paisley Park Enterprises, Inc., versus Uptown Products*, 54 F.Supp.2d 347 and 349.

Indeed, audiovisual recordings are, quote, subject to a higher degree of potential abuse than transcripts. They can be cut and spliced and used as sound-bites, end quote. *Felling versus Knight*, 2001 Westlaw 1782360.

Second, the proceedings in this case have been subject to a high degree of public scrutiny and the nonparty deponents have convinced the Court they will be unduly burdened

and subjected to harassment if the deposition recordings were unsealed. It's inevitable segments of the depositions would be edited and taken out of context solely for the purpose of harassing or embarrassing the deponents. Indeed, the, quote, specific harm, end quote, to the non-party deponents derives from the nature of the video medium itself. *Low versus Trump University, LLC*, 2016 Westlaw 4098195, at 5.

The Court, therefore, finds that particularized harm will result if the Court grants the two motions and unseals the recordings.

And, finally, the fact that the 2016 Presidential election is over does not change the Court's conclusion. Indeed, the Court's order sealing the depositions did not reference the presidential election at all. Rather, it found that the availability of the deposition transcripts served the public's rights to know and obviated the need for disclosure of the audiovisual recordings. That reasoning remains entirely valid today. The public's interest in gaining access to the deposition recordings is marginal, especially because the transcripts have been widely distributed and publicized for over two years. Relying upon *Apple iPad iTunes Antitrust Litigation*, 75 F.Supp.3d 1271.

Therefore, the Court denies the New Media Coalition's motion for reconsideration and Judicial Watch's motion to unseal the audiovisual deposition recordings.

With respect to Mr. Bentel's testimony, on November 1, 2016 plaintiff Judicial Watch filed a motion to compel non-party deponent John A. Bentel's testimony. After considering Judicial Watch's motion, Mr. Bentel's opposition and Judicial Watch's reply, the Court denies the motion to compel.

On October the 24th, 2016 Judicial Watch deposed Mr. Bentel, a former State Department employee. On advice from his attorney, Mr. Bentel invoked his Fifth Amendment right in answering all 87 of Judicial Watch's questions. Judicial Watch now moves to compel his testimony pursuant to Federal Rule of Civil Procedure 37, arguing that Mr. Bentel did not identify a legitimate fear of prosecution and that he is unlikely to be prosecuted in any event. Mr. Bentel responds that he had a reasonable basis for invoking his Fifth Amendment privilege.

The Fifth Amendment of the Constitution mandates that, quote, No person shall be compelled in any criminal case to be a witness against himself, end quote. The privilege against compulsory self-incrimination, quote, can be asserted in any proceeding, civil or criminal, administrative or judicial, investigative or adjudicatory, end quote. Relying upon *Kastigar versus United States*, 406 U.S. 441, 444.

Indeed, quote, a witness may properly invoke the privilege when he reasonably apprehends a risk of self-incrimination, though no criminal charges are pending

against him. Relying upon *In re: Corrugated Container Antitrust Litigation*, 662 F.2d, 875, 882.

In determining whether the Fifth Amendment was properly invoked, the Court must accord, quote, liberal construction in favor of the right it was intended to secure, end quote. Relying upon *Hoffman versus United States*, 341 U.S. 479. The Court must, therefore, only order an individual to answer if it, quote, clearly appears to the Court that the individual's mistaken, end quote, in invoking his Fifth Amendment privilege.

The Court cannot find that Mr. Bentel was clearly mistaken in invoking the Fifth Amendment. In moving to depose Mr. Bentel, Judicial Watch argued that the record included contradictory evidence regarding Mr. Bentel's knowledge of Secretary Clinton's private server and email practices. See the Court's memorandum opinion, ECF No. 124 at 24.

Indeed, in granting Judicial Watch's motion, the Court found that, quote, the record in this case appears to contradict Mr. Bentel's sworn testimony before the Benghazi Committee, end quote. Accordingly, Mr. Bentel has a, quote, reasonable basis for believing a danger might exist in answering particular questions because his sworn testimony before Congress may have been untruthful. Relying upon *Anton versus Prospect Café Milano, Inc.*, 233 F.R.D. 216.

Moreover, the Court has reviewed each of the 87

questions posed to Mr. Bentel and concludes answering any of the 87 questions could either, quote, support a conviction under a federal criminal statute, end quote, or could, quote, furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime, end quote. Relying upon *Hoffman*, 341 U.S. at 486. It is, therefore, quote, evident from the implications of the questions that a responsive answer might be dangerous because injurious disclosure could result, end quote. *Hoffman* at 486, page 87.

And finally, such danger is not, quote, fanciful or merely speculative, end quote, as Judicial Watch contends. Relying upon *In re: Corrugated Container Antitrust Litigation*, 662 F.2d at 883. The fact that the FBI has closed its investigation into Secretary Clinton's use of a private email server does not, quote, guarantee that a criminal action would not be started, end quote. It is, therefore, inappropriate to conclude that the possibility of prosecution is, quote, too remote, end quote, to allow Mr. Bentel to invoke his right to remain silent.

The Court, therefore, sustains Mr. Bentel's invocation of his Fifth Amendment privilege and denies Judicial Watch's motion to compel.

With respect to interrogatories, on November 6th -- strike that, November the 3rd, 2016, plaintiff Judicial Watch filed a motion to compel former Secretary Clinton to answer

three unanswered interrogatory questions. Specifically, Judicial Watch moves to compel Secretary Clinton to answer interrogatory Nos. 1, 14 and 24. Secretary Clinton opposes the motion as to all three questions, while the State Department opposes the motion as to questions 1 and 14. The Court has carefully considered the motion, the responses, and the reply thereto and grants in part and denies in part Judicial Watch's motion. The Court will address each question separately after briefly providing contextual background.

On May 4, 2016 the Court granted Judicial Watch's motion for Rule 56(d) discovery. In the Court's memorandum opinion at ECF No. 73, the Court found that Judicial Watch raised sufficient questions as to whether its FOIA request was processed in good faith. Therefore, the Court concluded that Judicial Watch could not respond to the -- as to the adequacy of the State Department's search without narrowly tailored discovery related to the creation, purpose and use of the clintonemail.com server.

In granting the motion the Court allowed discovery within a limited scope, including, quote, the creation and operation of clintonemail.com for State Department business, as well as the State Department's approach and practice for processing FOIA requests that potentially implicated former Secretary Clinton's and Miss Abedin's emails and the State's processing of the FOIA request that's the subject of the

action, end quote.

On August 19th, 2016 the Court granted in part Judicial Watch's motion to depose additional people. And in so doing, allowed Judicial Watch to send Secretary Clinton interrogatories. In reiterating that the purpose of the limited discovery was to resolve whether there was any deliberate intent to thwart FOIA, the Court found that Secretary Clinton's testimony was necessary to enable her to explain on the record the purpose for the creation and operation of the clintonemail.com system for State Department business.

With respect to question 1, in that question Judicial Watch asked Secretary Clinton to, quote, describe the creation of the clintonemail.com system, including who decided to create the system, the date it was decided to create the system, why it was created, who set it up, and when it became operational, end quote.

Secretary Clinton and the State Department object to the question, arguing it is outside the scope of permitted discovery. They contend that the system was set up by President Clinton's staff before Secretary Clinton became Secretary of State. Therefore, they argued that the question is irrelevant, Secretary Clinton's creation and operation of clintonemail.com for State Department business. The Court disagrees.

In granting Judicial Watch's motion for Rule 56(d) discovery, the Court permitted limited discovery to determine whether Secretary Clinton used a private email server to conduct State Department business with, quote, deliberate intent to thwart FOIA, end quote. Interrogatory question 1, which asks when the system was created, by whom, and why, is relevant to any intent to thwart FOIA.

In fact, the Court noted in its opinion that the clintonemail.com server had been established just, quote, eight days prior to Mrs. Clinton being sworn in as Secretary of State, end quote. Neither the State Department nor Secretary Clinton disputed that fact. Indeed, the fact that the server had been created after Secretary Clinton had been nominated and mere days before she was confirmed was relevant to the Court's finding that Judicial Watch raised a sufficient question as to the State Department's good faith in responding to its FOIA request.

It is, therefore, reasonable to infer that question is relevant and within the scope of discovery, as the system may have been created and operated in part to conduct State Department business.

Because the Court concludes that interrogatory questions No. 1 is within the scope of limited discovery, it grants Judicial Watch's motion to compel Secretary Clinton's answer. That said, former Secretary Clinton and the State

Department object to Judicial Watch's definition of the, quote, clintonemail.com system as encompassing the server set up by President Clinton many years ago. Based on Judicial Watch's representations made at today's hearing, the Court clarifies that in answering this question, Secretary Clinton need only describe the creation of the clintonemail.com domain name and the decision to set the domain up on the existing server, the date it was decided to create the domain and set it up on the existing server, who made those decisions, and when the domain became operational on the existing server.

With respect to question 14, that question reads as follows, quote, On March 6, 2009 Assistant Secretary of State for Diplomatic Security Eric J. Boswell wrote in an information memo to your Chief of Staff Cheryl Mills that he, quote, cannot stress too strongly, however, that any unclassified BlackBerry is highly vulnerable in any setting to remotely and covertly -- he stated that he, quote, cannot stress too strongly, however, that any unclassified BlackBerry is highly vulnerable in any setting to remotely and covertly monitoring conversations, retrieving email, and exploiting calendars, end quote.

A March 11, 2009 email states that, In a management meeting with the assistant secretaries, you approached Assistant Secretary Boswell and mentioned that you had read the IM and you, quote, unquote, get it. Did you review the March 6, 2009 information memo and, if so, why did you continue using

an unclassified BlackBerry to access your clintonemail.com email account to conduct official State Department business, end quote. Secretary Clinton and the State Department object to the question, arguing that it is outside the scope of discovery because it concerns the cybersecurity risks associated with the use of unclassified BlackBerry phones. The Court agrees.

In granting Judicial Watch's motion for 56(d) discovery, the Court limited the scope of discovery and explicitly held that Judicial Watch, quote, was not entitled to discovery on matters unrelated to whether State conducted an adequate search in response to plaintiff's FOIA request, relying upon the Court's -- as set forth in the Court's memorandum opinion, ECF No. 73, at pages 12 to 13. The Court listed examples of unrelated matters, including the, quote, protection of classified information, end quote, in cyber security issues, quote, unquote.

Interrogatory question 14 first asks Secretary Clinton if she read an information memo concerning cybersecurity risk associated with using a BlackBerry. Assuming she did read the memo, the question then asks why Secretary Clinton decided to continue using the BlackBerry in light of those risks. Plainly, this question seeks information outside of scope of discovery. Whether Secretary Clinton was aware of the cybersecurity risks associated with using a

BlackBerry is irrelevant to whether the State Department conducted an adequate FOIA search. Therefore, the Court denies Judicial Watch's motion as to question 14.

Question 24, the question reads, quote, During your October 22nd, 2015 appearance before the U.S. House of Representatives Select Committee on Benghazi, you testified that 90 to 95 percent of your e-mails, quote, were in the State's system and if they wanted to see them, they would certainly have been able to do so. Identify the basis for this statement, including all facts on which you relied in support of the statement, how and when you became aware of these facts. And if you were made aware of these facts by or through another person, identify the person who made you aware of these facts. Secretary Clinton objects, arguing that the question seeks information protected by the attorney-client privilege. State Department takes no position.

Quote, the attorney-client privilege protects confidential communications from clients to their attorneys made for the purpose of securing legal advice or services, end quote. *Tax Analysis versus I.R.S.*, 117 F.3d 607, 618. It also, quote, protects communications from attorneys to their clients if the communications rest on confidential information obtained from the client, end quote. Citations and quotations omitted.

The privilege, quote, only protects disclosure of

communications, it is does not protect disclosure of the underlying facts by those who communicated with the attorney, end quote. Relying upon *Upjohn Company versus United States*, 449 U.S. 383, 395. It is also not implicated, quote, when an attorney conveys to his or her client facts acquired from other persons or sources, end quote. See *Brinton versus Department of State*, D.C. Circuit opinion 636 F.2d 600, 604.

Because Secretary Clinton claims the privilege, she has the burden, quote, to present to the Court sufficient facts to establish the privilege; the claimant must demonstrate with reasonable certainty that the lawyer's communication rested in significant and inseparable part on the client's confidential disclosure. Again relying upon *In re: Sealed Case*, 737 F.2d 94, 99, another D.C. Circuit opinion.

The Court finds that Secretary Clinton has not presented sufficient facts to establish the privilege. She has not established with reasonable certainty that answering Judicial Watch's question will reveal her confidential communications. What's more, the Court finds that Judicial Watch's question seeks the factual basis for Secretary Clinton's testimony. The interrogatory does not seek the content of any communication between Secretary Clinton and her attorneys, it only seeks the facts.

Therefore, the Court grants Judicial Watch's motion as to question No. 24. However, in an abundance of caution,

the Court will rephrase Judicial Watch's question and compel Secretary Clinton to provide the non-privileged, factual basis for her statement before Congress, including the non-privileged facts on which she relied in support of the statement, how and when she became aware of these non-privileged facts, and if made aware by or through another person, identify the person who made her aware of these non-privileged facts.

And those are the Court's rulings. With respect to date for compliance to provide the answers to these questions, what's your pleasure? I mean, I would say 30 days, but if you have --

MR. KENDALL: Thirty days, Your Honor.

THE COURT: Thirty days from today's date, okay. Let's talk about a motion for -- a summary judgment motion, a summary judgment motion briefing schedule. Might as well use this time today to talk about that. So what makes sense? Plaintiff goes first, to be followed by the defendant? Or how do you wish to -- what are your recommendations?

MR. BEKESHA: Usually defendant goes first in a FOIA case.

THE COURT: Fine with me.

MR. BEKESHA: I see no reason to change that.

THE COURT: Fine with me. Let me invite the principal attorneys up to the microphone, then we can talk about a schedule. What would make sense? Sixty days from

today?

MR. MYERS: Your Honor, I would have a couple of suggestions. One is I think it would make sense to build in a reasonable period of time for the parties to confer to see if there's a possibility --

THE COURT: I think that's right. Suppose they're trying to broker a deal to get her there, right?

MR. MYERS: Say again.

THE COURT: I suppose they're trying to sit here and finalize something today. Give the attorneys an opportunity to talk among themselves. You've worked very reasonably, with a lot of civility in the past.

MR. MYERS: We've tried to. I appreciate that. As a personal matter, Your Honor, I'll be on maternity leave for about six weeks, starting --

THE COURT: Good for you. Starting when?

MR. MYERS: Hopefully around December 11 or so.

THE COURT: Let's make the motions due the 12th. No, I'm just kidding. Congratulations. Enjoy that. That's wonderful.

MR. MYERS: Thank you.

THE COURT: I'll leave it up to the attorneys to work it out. You've worked very well in the past.

MR. BEKESHA: That works.

MR. MYERS: We can perhaps file a joint proposal in

the next few weeks.

THE COURT: Right. So are their serious contentions that the government has not searched sufficiently? I mean, is that where we're going with this?

MR. BEKESHA: It will be, Your Honor. I think there's some issues to be addressed. We're discussing -- I was discussing it with counsel before. It's been two years. I don't want to say that I haven't -- we haven't thought about everything. But, it's also we'll need a little bit of time to go back and look at this case, as well as other cases that involve --

THE COURT: I've noticed with a lot of interest -- and I think that your client deserves some credit as well -- I've noticed with a lot of interest that some of these cases have disappeared from the docket after discovery without any motions. That's brought a great deal of satisfaction to our faces. So I'm just throwing it out there. Is this not one of those cases?

MR. BEKESHA: It could be. I mean, it could be. I'm not in a position to say so yet. I do think that we have potentially identified some searches that haven't been conducted, having approached the Justice Department about whether or not they would --

THE COURT: What's fair? Principal counsel is going to be on leave and I'm not going to interfere with that. So

what makes sense? Do you want to agree on a schedule before your leave or after you come back? Or what do you want to do?

MR. MYERS: I think Mr. Bekesha and I, as you said, have worked cooperatively. My suggestion would be in the next two weeks perhaps we confer and make a joint proposal.

THE COURT: That's definitely reasonable.

MR. BEKESHA: That makes sense.

THE COURT: Enjoy that time with your family. That's precious. Take plenty of photos, too.

MR. MYERS: I can bring them next time, Your Honor.

THE COURT: Mr. Kendall, you're not a part of that briefing schedule, are you?

MR. KENDALL: I'm not, Your Honor, at least not that I know.

THE COURT: Thank you for coming, everyone. I'm sorry for the passage of time, but I wanted to get to these matters and rule on these matters in court today.

So it's great to see everyone. Have a great afternoon. Happy holidays everyone.

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CERTIFICATE OF OFFICIAL COURT REPORTER

I, JANICE DICKMAN, do hereby certify that the above and foregoing constitutes a true and accurate transcript of my stenograph notes and is a full, true and complete transcript of the proceedings to the best of my ability.

Dated this 16th day of November, 2018.

/s/_____

Janice E. Dickman, CRR, RMR
Official Court Reporter
Room 6523