IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.

Plaintiff,

v.

U.S. DEPARTMENT OF STATE,

Defendant.

Civil Action No. 14-cv-1242 (RCL)

DEFENDANT'S PROPOSED DISCOVERY PLAN AND SCHEDULE

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INTRODUCTION

The Government takes with utmost seriousness the concerns expressed in the Court's December 6, 2018, Memorandum Opinion and Order (ECF Nos. 54-55). The Department of State ("State") has proposed a discovery plan, based on requests made by Plaintiff Judicial Watch, Inc. ("Judicial Watch"), geared to addressing all three of the topics on which the Court's Order permits discovery: "(a) whether Hillary Clinton's use of a private email while Secretary of State was an intentional attempt to evade FOIA; (b) whether the State Department's attempts to settle this case in late 2014 and early 2015 amounted to bad faith; and (c) whether State has adequately searched for records responsive to Judicial Watch's request." This plan reflects the Government's intentions that Plaintiff receive all of the State Department records to which it is entitled in response to its FOIA request, and that Plaintiff, and the Court, obtain the information necessary to resolve the issues raised by the Court in its discovery order. The Government is confident that the discovery the Court has permitted will reassure the Court that the Government has acted in this matter in good faith to comply with its legal obligations under FOIA.

Specifically, State proposes a Rule 30(b)(6) deposition on topics proposed by Plaintiff, does not oppose a deposition of third party Jacob Sullivan, and provides for the serving of interrogatories and document requests based on Plaintiff's own proposal. State believes that its discovery proposal will render unnecessary much or all of the additional discovery Plaintiff seeks. Nevertheless, State's plan also allows the parties to seek more discovery later where warranted, and provides a framework for the parties to use information obtained earlier in the process to seek or oppose additional discovery. This approach will allow for a more informed determination should Plaintiff still believe, for example, after it receives the discovery State proposes, that its 15-or-more additional proposed depositions are still necessary.

State's plan also avoids the substantive overreach found throughout Plaintiff's proposal. Plaintiff seeks information far outside the scope of the Court's permitted discovery, including information about the government's response to the September 11, 2012 attacks in Benghazi, Libya that has nothing to do with the adequacy of State's response to the narrow FOIA request at issue in this litigation. Plaintiff also seeks to depose witnesses regarding information that would not only be available during State's proposed Rule 30(b)(6) deposition, but would also duplicate discovery already taken before Judge Sullivan in another case between the same parties. Plaintiff further seeks to depose individuals unlikely to provide new relevant information and, without laying any of the necessary predicate, a State Department attorney-adviser. And Plaintiff seeks all this without providing any justification for exceeding the presumptive limit of 10 depositions in the Federal Rules, or for seeking to circumvent normal discovery procedures as they relate to the timing and manner of responding to document requests and interrogatories.

For these reasons, State's plan is better suited than Plaintiff's to eliciting efficiently the further information needed to explore and resolve the three issues of concern to the Court, without licensing gratuitous and duplicative inquiries that would shed no light on these important issues.

PROPOSED DISCOVERY PLAN AND SCHEDULE

I. STATE'S PROPOSED DISCOVERY PLAN

State proposes the following discovery plan, which was created in response to a draft of Plaintiff's proposed discovery plan that turned out to be identical to what Plaintiff filed earlier this evening.

1. Discovery shall be conducted pursuant to the Federal Rules of Civil Procedure, subject to the scope and limitations herein, including but not limited to the presumptive limit on

numbers of depositions (ten) pursuant to Fed. R. Civ. P. 34, and the presumptive time limits for responses to interrogatories, Fed. R. Civ. P. 33, and document discovery, Fed. R. Civ. P. 34.

2. The scope of discovery shall be limited to the following issues: "(a) whether Hillary Clinton's use of a private email while Secretary of State was an intentional attempt to evade FOIA; (b) whether the State Department's attempts to settle this case in late 2014 and early 2015 amounted to bad faith; and (c) whether State has adequately searched for records responsive to Judicial Watch's request." Order (Dec. 6, 2018) (ECF No. 55). The scope of discovery is further limited to the extent any such discovery would duplicate discovery ordered in *Judicial Watch v. U.S. Dep't of State*, Civil No. 13-1363-RGS. *See* Mem. Op. at 12 (Dec. 6, 2018) (ECF No. 54) (noting that "the parties must avoid duplicating the discovery already taken before Judge Sullivan into Clinton's motives").

3. Discovery shall be completed within 16 weeks of the Court's order.[1] The Parties reserve the right to seek additional time if necessary and reserve the right to object to requests for additional time. Parties must seek the Court's permission to conduct discovery beyond that listed here and reserve the right to object to additional discovery.

4. State shall respond or provide written objections to Plaintiff's interrogatories within 30 days after being served with the interrogatories, Fed. R. Civ. P. 33(b)(2), but in no event earlier than January 31, 2018. State shall provide written responses and objections to document requests in the time and manner specified in Fed. R. Civ. P. 34(b)(2), but in no event earlier than January 31, 2018. State will begin its rolling productions of documents in response to Plaintiff's document requests on or before January 31, 2018, and will produce a privilege log along with its final rolling production by the end of the 16-week discovery period.

5. Discovery is limited to the depositions, interrogatories, and document requests described in Sections I.A, I.B, and I.C below. But to the extent additional individuals are

[1] Plaintiff seeks 16 weeks to conduct its depositions.

identified during discovery as having relevant information, a party may request permission from the Court to seek depositions or interrogatories from such individuals, if that party determines their testimony to be necessary. The other party may exercise its right to oppose and raise objections to such requests.

6. The Court's permission for Plaintiff to conduct depositions, request documents from State, or serve interrogatories on State does not limit State's right to assert any privileges with respect to requested documents or to raise objections to specific questions for any reason, including but not limited to objections based on the form of a question, whether the topic of a question is beyond the scope of the approved discovery or duplicates earlier discovery, or whether a question implicates one or more privileges.

7. At the conclusion of a deposition State may elect in good faith on the record to have a period of three business days following the time that a deposition transcript or audiovisual recording is made available to the parties within which to review those portions of the transcript or audiovisual recording that may contain classified information, information specifically exempted from disclosure by statute, or information about any pending FBI or law enforcement investigations, and, if necessary, to seek an order precluding public release, quotation or paraphrase of any inadvertently disclosed classified information, information specifically exempted from disclosure by statute, or information about any pending FBI or law enforcement investigations. The decision to elect the three-business-day period is in State's sole discretion and may not be challenged.[2]

8. The parties may agree, pursuant to Federal Rule of Evidence 502(d)-(e), that they may provide certain information to each other subject to a party agreement such that the effect of disclosure of certain information will not waive attorney-client privilege or work-product

[2] The parties agreed to a similar provision in *Judicial Watch v. State*, Civ. No. 13-1363-EGS.

protection. Such an agreement would not waive either party's right to assert such privilege or protection over all or part of information subject to the agreement with respect to Plaintiff, nor would it waive either party's right to object to such assertions of privilege or protection. Such an agreement would not take effect unless and until it is adopted by the Court and incorporated into an appropriate Court order, pursuant to Fed. R. Evid. 502(d)-(e).

A. Depositions

DEP1. State proposes that Plaintiff be authorized to conduct a Rule 30(b)(6) deposition of State on the following topics Plaintiff also proposed:

1. The processing of the FOIA request at issue in this case.

2. The discovery over the summer of 2014 by State officials with responsibilities for federal recordkeeping of Secretary Clinton's use of non-state.gov email to conduct government business.

3. The November 12, 2014 letter from State's counsel to Plaintiff's counsel discussing possible settlement as well as the February 2, 2015 and December 31, 2014 Joint Status Reports.

4. The processing of the CREW FOIA request.

DEP2. State does not object to Plaintiff serving a subpoena to depose Jacob Sullivan (Secretary Clinton's senior advisor and Deputy Chief of Staff throughout her tenure) on the following topics, but notes that State cannot waive Mr. Sullivan's own right to raise objections:[3]

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[3]Counsel for State contacted the counsel of some third parties that Plaintiff originally included in its draft discovery proposal to obtain their client's position on being deposed.

Counsel for Mr. Sullivan has asked that the following statement be added to this filing: "The Defendant informed counsel for Jacob Sullivan of Plaintiff's proposal to depose Mr. Sullivan during the course of discovery in this case. Counsel for Mr. Sullivan met and conferred with Plaintiff but was unable to reach an agreement to remove Mr. Sullivan from its proposed discovery or narrow the scope of discovery sought from him. Counsel for Mr. Sullivan asked each party to include a statement of Mr. Sullivan's position in their proposed discovery plans to the Court, but the Plaintiff denied this request. Counsel for Mr. Sullivan submits, via the Defendant's proposed discovery plan, the following statement for the Court's consideration:

'Mr. Sullivan opposes his deposition by the Judicial Watch. Judicial Watch has identified Mr. Sullivan as a potential witness for the first and third discovery topics. Mr. Sullivan had no involvement in the set up or administration of the private email system. As

1. Whether Secretary Clinton's use of a private email server was intended to evade FOIA.

2. Whether the State Department has adequately searched for records responsive to Judicial Watch's request.

To the extent Plaintiff seeks information about State's substantive business or policies, State objects to such inquiries as beyond the scope of discovery authorized by the Court, and will also continue to assert appropriate privileges.

B. Interrogatories

Plaintiff may propound the following interrogatories to State, which Plaintiff also proposes:

INT1. Identify by name the "Management Analyst" who performed the initial search of Office of the Secretary records on September 23, 2014. *See* Hackett Declaration at ¶¶ 14-16.

INT2. Identify the date the "subset" of Secretary Clinton's returned email (that is, the approximately 55,000 pages provided to State by former Secretary Clinton) were searched and the identity of the person who performed the search. *See* Hackett Declaration at ¶ 17.

INT3. Identify the number of emails contained within State Department systems of records that were sent to or from or cc-ed or bcc-ed the clintonemail.com domain name for time period from September 11, 2012 to February 2, 2013 (the time limits on Plaintiff's FOIA request) for the following individuals:[4]

1. Alice Wells
2. Andrew Shapiro
3. Anne-Marie Slaughter
4. Caroline Adler
5. Cheryl Mills
6. Claire Coleman
7. Dan Schwerin

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such, he cannot provide testimony based on personal knowledge for the first topic identified by the Court. Mr. Sullivan also left his position at the Department of State in early 2013 and provided all potential government records from his personal email account to the Department of State in the summer of 2015. He therefore does not possess personal knowledge of the searches the Department of State performed in response to Judicial Watch's FOIA request in this case.'"

[4] Plaintiff seeks this information for a much broader timeframe. State's proposal reflects that only emails dated on or after September 11, 2012 can be responsive to the FOIA request at issue.

8. Huma Abedin
9. Jacob Sullivan
10. Joseph MacManus
11. Judith McHale
12. Lauren Jiloty
13. Lona Valmoro
14. Melanne Verveer
15. Maria Sand
16. Monica Hanley
17. Victoria Nuland
18. Patrick Kennedy
19. Philippe Reines
20. Richard Verma
21. Robert Russo
22. Susan Rice
23. Wendy Sherman
24. William Burns

INT4. The identities of all individuals referenced in the first paragraph on page four of the FBI Notes from December 22, 2015 Interview of Bryan Pagliano (ECF No. 50-2).[5]

C. Document Requests

Plaintiff may propound the following document requests to State, which Plaintiff also proposes:

DOC1. August 8, 2014 email exchange between Clarence Finney, Jonathon Wasser, James Bair, Andrew Keller, and Gene Smilansky.

DOC2. May 1, 2013 email exchange between Gene Smilansky, Brett Gittleson, Sheryl Walters, and others.

DOC3. All records that concern or relate to State's discovery, prior to February 2, 2015, that additional searches for record responsive to FOIA Request No. F-2014-08848 were necessary. In this regard, State represented in a February 2, 2015 status report filed in litigation regarding FOIA Request No. F-2014-08848 that: In the course of preparing additional information to provide to Plaintiff for purposes of settlement discussions, Defendant has discovered that additional searches for documents potentially responsive to the FOIA [request] must be conducted. Any records, including communications, regarding this discovery referenced in the February 2, 2015 status report should be considered responsive.

[5] State does not yet know if it possesses this information, and will respond accordingly, including the possible need to assert privilege or to protect the identity of the individuals.

DOC4. All records that concern, relate to, or identify the location(s) or source(s) of potentially responsive records that necessitated the "additional searches" referenced in the February 2, 2015 status report.

DOC5. All internal State communications that concern or relate to the search for records responsive to FOIA Request No. F-2014-08848, including any directions or guidance about how and where to conduct the searches, whether and how to search the emails of U.S. Secretary of State Hillary Rodham Clinton, and any issues, problems, or questions regarding the searches and/or search results.

DOC6. All records documenting State's actions (or lack thereof) to secure, inventory, and/or account for all records, including emails, of Secretary Clinton, Cheryl Mills, Huma Abedin, Jacob Sullivan and other staff within the Office of the Secretary during Secretary Clinton's tenure, prior to their termination of employment with the State Department and afterwards.

DOC7. Records obtained by Plaintiff in response to an unrelated FOIA request to State for records concerning the processing of a FOIA request submitted by Citizens for Responsibility and Ethics in Washington. These records are identified in ECF No. 50-1.

II. STATE'S PROPOSED DISCOVERY PLAN IS DESIGNED TO PROVIDE INFORMATION RELEVANT TO THE THREE TOPICS IDENTIFIED BY THE COURT IN AN ORDERLY MANNER

In contrast to Plaintiff's overbroad discovery proposal, State's proposal does not expand the scope of discovery to topics outside that provided for in the Court's order, such as the aftermath of the Benghazi attacks and the government's response to those attacks. *Cf.* Order at 13, *Judicial Watch*, Civ. No. 13-1363-EGS (May 4, 2016) (ECF No. 73) (forbidding discovery into, among other things, "substantive information sought by Plaintiff in its FOIA request in this case"). Nor does State's proposal include depositions of individuals who are likely to have with little or no knowledge of the topics about which the Court ordered discovery.

State's proposal also allows for the parties to assess the applicability of various privileges and protections in the ordinary course of discovery. For example, Plaintiff has requested unredacted copies of a number of documents that are currently subject to various assertions of privilege (including deliberative process, attorney-client, and attorney work product). State's proposal allows Judicial Watch to serve those document requests, but allows State to determine,

for each assertion of privilege, whether to continue to assert it, to waive it, or, if the parties agree, to provide it pursuant to a party agreement and Court order, under Federal Rule of Evidence 502, that disclosure will not constitute a waiver of privilege. Such a party agreement would open the possibility that State could provide information to Plaintiff that, absent such an agreement, it would seek to protect, allowing the parties to move forward while still retaining the right to challenge or defend individual assertions of privilege. Any such challenges would be better informed by the availability of the information already discovered, as the ability to obtain information via other means is at the heart of many privilege disputes. In any event, such potential disputes should be handled in accordance with normal discovery procedures.

Nor is there any reason to deviate here from the time limits prescribed by the Federal Rules of Civil Procedure. Plaintiff "requests that the Court shorten the time period for Defendant to respond to Plaintiff's interrogatories and document requests to fourteen days to ensure Plaintiff has all relevant information prior to conducting any depositions." That request should be denied as both unnecessary and unduly burdensome. The Federal Rules provide the responding party with 30 days to provide written objections and responses to requests for documents, *see* Fed. R. Civ. P. 34(b)(2)(A), and to provide answers and objections to interrogatories, *see* Fed. R. Civ. P. 33(b)(2), and there is no reason to depart from those standards here. Judicial Watch has requested 16 weeks for discovery, which State does not oppose. To the extent additional time proves to be necessary for either side, the parties can meet and confer to address the issue in the normal course. Moreover, as counsel for Defendant explained to counsel for Plaintiff during the meet-and-confer process, some of the proposed interrogatories call for information that will be difficult to search for (because of technical limitations at State), so fourteen days is simply an insufficient time to prepare complete responses. Finally, even accepting that there is public interest in these proceedings, there is no time-sensitive exigency that justifies speeding past the time limits provided for in the Federal Rules.

Information obtained through the discovery State proposes will also be necessary for Plaintiff to demonstrate its alleged need to depose 17 individuals, well in excess of the presumptive limit of 10 set by Rule 30(a)(2)(A)(i). This limit may only be exceeded by leave of the Court, upon a demonstration that discovery in excess of the presumptive limits is necessary. At a minimum, Judicial Watch's desire to exceed the presumptive limit set by the Federal Rules is premature. As courts in this District have recognized, until a Plaintiff exhausts the originally permitted set of depositions and *then* demonstrates some particular need for specifically identified additional depositions, there is no basis to authorize them. *See, e.g., Donohoe v. Bonneville Int'l Corp.*, 602 F. Supp. 2d 1, 3 (D.D.C. 2009) (agreeing with a Magistrate Judge's decision to deny a motion for leave to take additional depositions as "premature" because the plaintiff "had not exhausted his permitted seven depositions").

State's proposal does not foreclose additional depositions or other discovery if it is found to be necessary. To the contrary, State's proposal expressly allows for the parties to seek additional discovery by seeking leave of the Court. Decisions concerning such additional discovery would be far better informed after State has provided the significant information envisioned by its proposed discovery plan. As discussed more fully below, staging in this manner would allow discovery to proceed in a more orderly fashion. For example, Plaintiff requested a number of depositions of State employees and ex-employees; some or all of those depositions may prove unnecessary after State sits for one or more Rule 30(b)(6) depositions. And the government is confident that the extensive factual record made available under State's proposed discovery plan will dispel the notion that government counsel engaged in anything but good faith and fair dealing in this matter. Information Plaintiff obtains during the proposed Rule 30(b)(6) deposition will undoubtedly inform the need, or lack thereof, for such additional discovery into a topic that, by its very nature, involves a large amount of privileged information.

III. PLAINTIFF SEEKS DISCOVERY FAR IN EXCESS OF THE SCOPE OF PERMITTED DISCOVERY, INCLUDING DUPLICATE DISCOVERY AND OFF-TOPIC DISCOVERY

A. Plaintiff's request for depositions concerning State's response to the Benghazi attacks greatly exceeds the scope of permitted discovery.

Plaintiff seeks a Rule 30(b)(6) deposition far in excess of the topics about which the Court has allowed discovery. Discovery concerning the underlying substance of the Benghazi attacks and State's response, a matter that has been the subject of multiple congressional investigations, is entirely out of place in this FOIA action. Specifically, Plaintiff seeks a deposition of State on the following topics:

- The preparation of the talking points for Susan Rice's appearances on Sunday morning TV shows (9/16/12);
- The dissemination/discussion about talking points in advance of Rice's appearances;
- The follow-up/wrap up of Rice's appearances; and
- What the State Department knew about the attack and when it knew it.

Such discovery is entirely inappropriate. *See* Opinion at 13, *Judicial Watch*, Civ. No. 13-1363-EGS (ECF No. 73) (Plaintiff not entitled to discovery regarding the "substantive information sought by Plaintiff in its FOIA request"). Plaintiff should not be allowed to expand the scope of discovery ordered by the Court into a rehash of multiple congressional investigations, an inquiry that would undoubtedly run into privileged and classified national security information. Plaintiff is entitled to records responsive to its FOIA request. Plaintiff is not entitled to appoint itself as a freelance Inspector General about the underlying subject matter of the records it requested.

Plaintiff also seeks to depose Ben Rhodes, the Deputy National Security Advisor at the time of the Benghazi attacks. Plaintiff asserts that Mr. Rhodes (who was not a State Department employee) wrote the actual talking points that underlie the FOIA request in this case and

therefore allegedly knows where potentially responsive records may be located. But as discussed more fully below, *see* Section II.C, there is strong evidence that additional searches would not uncover records in the form of emails to or from Secretary Clinton that are not in State's possession. Nor is it clear why Mr. Rhodes would have information that could not be uncovered by way of State's proposed discovery plan. And to the extent Plaintiff would seek to question Mr. Rhodes about the substance of the Benghazi attacks and State's response, it would also far exceed the scope of discovery permitted by the Court.

Plaintiff's proposal to depose Susan Rice also appears to be an attempt to get at the underlying issues about Benghazi, rather than issues related to this FOIA case. There is little reason to believe that Ms. Rice's testimony would shed important light on the sufficiency of the Department's searches. Surely the best evidence of who she communicated with concerning the talking points at issue is her own emails on this subject, which have already been searched in response to an identically worded FOIA request Plaintiff made to the United States Mission to the United Nations ("US/UN"). That suit was resolved long ago. *See* Stipulation of Dismissal with Prejudice, *Judicial Watch v. State*, Civ. No. 13-951-EGS (Sep. 12, 2014) (ECF No. 18). Although that request had a narrower time period than the request at issue in this case, it did cover the period September 11-30, 2012, which includes the two weeks following Ms. Rice's appearance on various television shows on September 16, 2012. Even if it were likely that Ms. Rice could provide information about whom in the Office of the Secretary she communicated about the talking points with beyond that provided in response to the FOIA request directed to US/UN—Plaintiff's stated reason for deposing her—an interrogatory would be a more appropriate vehicle to obtain that information.

Finally, as another example of Plaintiff's overreach, Plaintiff proposed that State provide the number of emails sent between the Clinton email server and the state.gov accounts of 24 named employees for the entirety of Secretary Clinton's tenure. State proposes that it provide

that information for the entire period applicable to this FOIA request, but no more. Such a broad overreach suggests Plaintiff has asked for at least some discovery intended for use in other litigation, rather than for use resolving this case.

B. Plaintiff's discovery proposal seeks to duplicate discovery conducted in Civil Action No. 13-1363-EGS or discovery State has proposed in this case.

As the Court is aware, in other litigation in this district between these same parties, Judge Sullivan ordered discovery into whether State, "in good faith, conduct[ed] a search reasonably calculated to uncover all relevant documents." Order at 1, *Judicial Watch*, Civ. No. 13-1363-EGS (ECF No. 73). In particular, the Court authorized discovery related to "the creation, purpose and use of the clintonemail.com server" to determine whether there is evidence substantiating Judicial Watch's assertion that the State Department sought to "thwart" FOIA. *Id.* at 1, 11. This discovery included extensive depositions, interrogatories, and document requests that yielded large amounts of information.

Most significantly, Karin Lang, then the Director of the Executive Secretariat, sat for a Rule 30(b)(6) deposition on June 8, 2016. Among the topics Plaintiff noticed for that deposition was the "processing of FOIA requests that implicate Mrs. Clinton and Ms. Abedin's emails." That topic was not limited to the FOIA request at issue in Civil No. 13-1363-EGS. The transcript of that deposition, available at *Judicial Watch*, Civ. No. 13-1363-EGS (ECF No. 171), runs over 200 pages. Ms. Lang testified, among other things, about the staff of the Executive Secretariat (S/ES) that Judicial Watch raises as relevant here. Specifically, she testified that Clarence Finney was not aware of Secretary Clinton's use of a private email account to conduct government business during her tenure as Secretary (pp. 66-67) and that both Finney and Jonathan Wasser became aware of the possibility of there being responsive documents in a non-state.gov email account when former Secretary Clinton returned the documents in December. *Id.* at 67 (Clarence Finney); *id.* at 161 (Jonathan Wasser).

Plaintiff also deposed then Undersecretary for Management Patrick Kennedy, available at *Judicial Watch*, Civ. No. 13-1363-EGS (ECF No. 130). Among other things, Mr. Kennedy was the Undersecretary supervising the Bureau of Administration, which handles the State Department's compliance with federal record-keeping and transparency laws, as well as the Bureau of Information Resource Management, which supports the Department's use of information technology. Plaintiff asked Mr. Kennedy what he was expecting former Secretary Clinton to return in response to the he letter sent to her and three other former Secretaries of State requesting that they return State Department records they personally held. He responded that he was advised by the Office of the Legal Adviser to send the letter and "had no anticipation one way or the other as to what the responses would be from any of the four Secretaries of State." *Id.* at 89. Mr. Kennedy did not think it odd that Secretary Clinton was using a personal email "because previous Secretaries of State had not used e-mail addresses at all" and "to the best of [his] knowledge and experience" her use of email was "very, very limited in nature." *Id.* at 42.

Plaintiff also conducted several other depositions in Civil No. 13-1363-EGS, including those of Cheryl Mills and Huma Abedin on, among other things, "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 Ms. Abedin's emails." Mem. and Order at 12-13, *Judicial Watch v. State*, Civ. No. 13-1363-EGS (May 4, 2016) (ECF No. 73). Finally, former Secretary Clinton responded to interrogatories regarding whether she set up the server to thwart FOIA.

State has already agreed to a Rule 30(b)(6) deposition regarding the topics Plaintiff seeks: the FOIA request at issue in this case, the FOIA request by CREW for information about the email addresses used by Secretary Clinton, the discovery of the Clinton email issue in Summer 2014, and aspects of the settlement talks between the parties in this case. The only Rule 30(b)(6)

topics Plaintiff proposed that State has rejected are those that relate to State's reaction to the actual Benghazi attacks, including public statements and State's knowledge in the immediate aftermath of those attacks. State has also agreed not to object to Plaintiff serving a subpoena to depose Jacob Sullivan, who was one of four individuals, along with Ms. Mills, Ms. Abedin, and Secretary Clinton, identified by the Office of the Secretary as reasonably likely to have records responsive to the FOIA request. Mr. Sullivan is the only one of those four who has not yet been the subject of a deposition or served with interrogatories by Plaintiff.

This Court's Memorandum Opinion regarding discovery calls for the parties to "avoid duplicating the discovery already taken before Judge Sullivan." And Judge Sullivan has already determined that a deposition of Clarence Finney would be duplicative of the Rule 30(b)(6) deposition in the case before him. Order at 21-22, *Judicial Watch*, Civil No. 13-1336-EGS (ECF No. 124). In addition, Mr. Finney has testified publicly on this matter before Congress. Depositions of many State employees and ex-employees would duplicate both the Rule 30(b)(6) deposition in 13-1363-EGS and the Rule 30(b)(6) deposition proposed here.

At a minimum, the issue of deposing individual State employees should wait until Plaintiff has taken the Rule 30(b)(6) deposition proposed here so that it can attempt to demonstrate that deposing State employees and ex-employees on the same subject matter would not be duplicative, and is proportional to the needs of the case. This is especially so in light of Plaintiff seeking seven depositions in excess of the limit of ten imposed by Federal Rule of Civil Procedure 30(a)(2)(A)(i) without providing any justification for doing so. *See, Donohoe*, 602 F. Supp. 2d at 3 (noting that it is "premature" to seek in an excess number of depositions when the plaintiff "had not exhausted" the depositions permitted under the Civil Rules).

Many of the employees and ex-employees Plaintiff seeks to depose are requested due to their involvement in the processing of FOIA requests, and would likely provide piecemeal, duplicative testimony that would be more efficiently covered by a 30(b)(6) witness. These

include Sheryl Walter, the former Director of IPS, John Hackett, the former Deputy Director of IPS, the IPS analyst assigned to this case once it entered litigation, Clarence Finney, the Deputy Director of S/ES, and Jonathon Wasser, a Management Analyst for S/ES, Heather Samuelson,[6] and the Office of Information Program Services official who stated to the FBI in an interview that State determined Secretary Clinton's emails were not State Department records. As noted above, it is clear from prior testimony that Jonathan Wasser and Clarence Finney are unlikely to have useful additional information to share. It is also unclear to Defendant why the IPS employee who, according to FBI interview notes, appears to have stated that Secretary Clinton's emails were determined not to be Department records, is germane to this discovery. A Rule 30(b)(6) witness would be better able to state authoritatively what determinations were made by the Department regarding the Clinton emails.

In addition, Plaintiff seeks depositions from several former employees, Monica Hanley, Lauren Jiloty, seemingly solely to ask them who they believe former Secretary Clinton communicated with frequently. This inquiry would at most seem to justify directing an

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[6] Counsel for Ms. Samuelson has asked that the following statement be added to this filing: "The Defendant informed counsel for Heather Samuelson of Plaintiff's proposal to depose Ms. Samuelson during the course of discovery in this case. Counsel for Ms. Samuelson met and conferred with Plaintiff but was unable to reach an agreement to remove Ms. Samuelson from its proposed discovery or narrow the scope of discovery sought from her. Counsel for Ms. Samuelson asked each party to include a statement of Ms. Samuelson's position in their proposed discovery plans to the Court, but the Plaintiff denied this request. Counsel for Ms. Samuelson submits, via the Defendant's proposed discovery plan, the following statement for the Court's consideration:

'Ms. Samuelson opposes her deposition by the Judicial Watch. Judicial Watch has identified Ms. Samuelson as a potential witness for all three of the discovery topics. Ms. Samuelson had no involvement in the set up or administration of the private email system. As such, she cannot provide testimony based on personal knowledge for the first topic identified by the Court. Ms. Samuelson also left her position at the Department of State in early 2013, and she was never a part of the any State Department team involved in the resolution or adjudication of this case. She therefore does not possess personal knowledge of the Department of State's attempts to settle this case in late 2014 and early 2015 (topic 2) or the searches the Department of State performed in response to Judicial Watch's FOIA request in this case, which was filed after she left the Department (topic 3).'"

interrogatory to these individuals, and would seem wholly insufficient to justify a deposition. Moreover, State has agreed to an involved interrogatory directed at this same question.

Plaintiff does not seek to depose former Secretary of State Hillary Clinton or her former Chief of Staff Cheryl Mills at this time, but does "anticipate[]" that "it will be necessary" to do so "at the conclusion" of the proposed discovery period. State therefore need not and does not take any position on those (potential) depositions at this time.

C. Plaintiff seeks depositions from people unlikely to provide relevant information.

Plaintiff seeks to depose three individuals that, even accepting Plaintiff's assertions at face value, could not provide information within the Court-prescribed scope of discovery.

Plaintiff's proposed deposition of the FBI Assistant Director of Counterintelligence Division E.W. Priestap, who supervised the FBI's Clinton email investigation, suffers two defects. First, Special Agent Priestap has already provided declarations recounting the "FBI's extensive efforts to locate 'all potentially work-related" emails. Mem. Op. at 13, *Judicial Watch v. Tillerson*, Civ. No. 15-785-JEB (November 9, 2017) (ECF No. 58) (quoting Special Agent Priestap's supplemental declaration). That declaration details the many steps the FBI took to recover emails, including search warrants, grand jury subpoenas, interviews, and forensic examination. *Id.* at 13-14. Both Judge Boasberg and the D.C. Circuit accepted these declarations as credible, including Special Agent Priestap's conclusion "that the FBI has taken 'all reasonable and comprehensive efforts to recover email communications relevant to its investigation' and sees no 'further steps' to take." *Id.* at 15 (quoting Special Agent Priestap's supplemental declaration); Opinion, *Judicial Watch v. Pompeo*, No. 17-5275 (Dec. 4, 2018) (Doc. No. 1762837) (*per curiam*). Thus, Plaintiff has a wealth of information from Special Agent Priestap available to it.

Second, Plaintiff has not offered any explanation as to why it thinks that Special Agent Priestap might know about other places to look for more emails: he has already attested that he

believes there is no place outside State to search. The FBI turned over to State all the Clinton emails it recovered. Op. at 4, *Tillerson* (citing Special Agent Priestap's supplemental declaration). Thus, Plaintiff has the information that might be provided by Mr. Priestap about where additional Clinton emails might reside: at State, because the FBI sent them there. And State's discovery plan is geared to providing information about where additional responsive documents, if any, might be within State.

In addition to Special Agent Priestap's affidavits, the FBI report, *Clinton E-mail Investigation: Mishandling of Classified – Unknown Subject of Country (SIM) Letterhead Memo* and a report by the FBI's Inspector General[7] provide the information requested by Plaintiff. Judicial Watch has provided no explanation for why the information it seeks differs from the extensive information that is already publicly available to the extent that the deposition of a senior government official is warranted.

Plaintiff's proposal to depose Justin Cooper suffers from the same flaw: there is no reason to believe he has information about where Clinton emails might reside at State, because he is not now (and was not at the time of the relevant events here) an employee of the federal government. Therefore, the only possible locations for additional Clinton emails he could reasonably have knowledge of are outside State. Yet, as just discussed, the FBI has taken comprehensive efforts to recover Clinton emails and provided to State all the emails it did recover. Plaintiff's justification for this deposition—that he "would know what emails still exist and where they would be located"—is therefore unpersuasive.

Moreover, a deposition of Mr. Cooper would be duplicative of extensive testimony he has already provided to Congress, under oath, regarding whether use of clintonemail.com was intended to thwart FOIA or other federal records laws. Finally, Plaintiff states, without citation

[7] Available at https://oversight.gov/report/doj/review-various-actions-federal-bureau-investigation-and-department-justice-advance-2016.

and in conclusory fashion, that Mr. Cooper's "testimony to Congress . . . appears to contradict portions of the testimony provided by Huma Abedin," but Plaintiff offers no explanation whatsoever (let alone a citation that State or the Court could review) as to what the alleged inconsistency is.

Finally, Eric Boswell, the former Assistant Secretary for Diplomatic Security is also unlikely to have information relevant to the discovery in this matter. The March 6, 2009 Information Memo and the March 11, 2009 email cited by Plaintiff do not support the argument that Boswell would be able to testify about the purpose behind Secretary Clinton's use of a private email server. The documents do not reference or relate to former Secretary Clinton's use of a private server. Instead, they reflect the Bureau of Diplomatic Security's response to inquiries from the former Secretary's staff regarding the potential use of portable electronic devices (specifically, Blackberries) inside her secure suite. There is no indication in the documents that the former Secretary's staff's inquiries pertained to devices connected to the private server, and the advice of former Assistant Secretary Boswell cited by Plaintiff does not distinguish between personal or Department-issued devices. The context of these documents has been fully explored in other litigation between Judicial Watch and the State Department, including *Judicial Watch v. State*, Civil No. 15-646.

D. Plaintiff inappropriately seeks to depose State counsel.

Judicial Watch seeks to depose Gene Smilansky, an Attorney-Adviser within the State Department's Office of the Legal Advisor. The Court should reject this extraordinary request or, in the alternative, defer consideration of the issue until Judicial Watch has exhausted all other avenues for discovery. That is so for both legal and factual reasons: (1) deposition of a party's attorney is presumptively inappropriate as a matter of law, absent a strong showing by the opposing party that Judicial Watch has not even attempted to make here; (2) as a factual matter, Mr. Smilansky is unlikely to have any relevant, non-privileged information that is unavailable

from other sources, especially given the extensive discovery to which State has already consented in this filing; and (3) State's Inspector General has already investigated the same issue Plaintiff appears to intend to question Mr. Smilansky about, and its conclusion suggests that further discovery on this issue would be fruitless.

As this Court has held on more than one occasion, even in a non-FOIA civil case—in which discovery is the rule, rather than a rare exception—"[w]hen a party seeks to depose opposing counsel, the normally permissive discovery rules become substantially less so." *Coleman v. District of Columbia*, 284 F.R.D. 16, 18 (D.D.C. 2012) (Lamberth, C.J.). And for good reason: "Depositions of opposing counsel undermine attorney-client communications . . . may lead to opposing counsel's disqualification, and may spawn collateral litigation on issues of privilege, scope, and relevancy." *Id.*; *accord Sterne Kessler Goldstein & Fox PLLC v. Eastman Kodak Co.*, 276 F.R.D. 376, 380-81 (D.D.C. 2011) ("Allowing depositions of opposing counsel, even if these depositions were limited to relevant and non-privileged information, may disrupt the effective operation of the adversarial system by chilling the free and truthful exchange of information between attorneys and their clients.").

Courts in this District and around the country "therefore presume that deposing opposing counsel creates an inappropriate burden or hardship, and the burden is on the party seeking the deposition to show otherwise." *Id.* "Thus, when seeking to depose opposing counsel, the cards are stacked against the requesting party from the outset and they must *prove* the deposition's necessity." *Guantanamera Cigar Co. v. Corporacion Habanos, S.A.*, 263 F.R.D. 1, 8 (D.D.C. 2009) (Lamberth, J.) (emphasis added). As this Court has framed the inquiry, "[t]his proof requires a showing that (1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case." *Id.* (citing *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986)).

To be sure, Mr. Smilansky has served as *agency counsel* assigned to certain litigation matters facing the State Department, rather than as trial counsel of record who actually conducts litigation on the Government's behalf. And he has done so in other litigation matters brought by Judicial Watch, related to the Benghazi attacks, and the talking points provided to Susan Rice (rather than under this particular docket number). But that does not get Plaintiff out from under the heavy presumption against deposing a defendant's attorney, particularly where, as here, Mr. Smilansky *has* served as an attorney (and agency counsel for litigation purposes) on closely related matters. *See Sterne Kessler*, 276 F.R.D. at 380 ("Some of the same concerns that animated the *Shelton* test regarding the risks to and burdens on the attorney-client privilege and work-product doctrine are implicated when the proposed deponent is former counsel to a party in pending litigation on matters that are plainly at issue in that litigation, even when the proposed deponent is not currently opposing trial counsel."). Because Mr. Smilansky has provided legal advice regarding requests for emails from Secretary Clinton, FOIA litigation concerning the Benghazi attacks and the talking points at issue in this case, and because virtually all of his knowledge (if any) about the relevant facts would have come to him in his role as an attorney advising a client, rather than as a traditional fact witness, his deposition is inappropriate.

This Court has previously come to a similar conclusion in rejecting the argument that there is a meaningful distinction between a government agency's trial counsel (*e.g.*, an Assistant U.S. Attorney) and that agency's in-house legal counsel, recognizing that there is "no reason" that "agency counsel assigned to the instant litigation" "should be denied the same presumption against being deposed" enjoyed by "litigation or trial counsel" (*i.e.*, those who have actually entered appearances in the litigation or signed filings). *Coleman*, 284 F.R.D. at 18 n.2 (citing *Guantanamera*, 263 F.R.D. at 9 (finding attorney who "filed no documents, [and] never contacted counsel for Plaintiff" entitled to the typical presumption against deposition). In sum, a deposition of Mr. Smilansky is strongly disfavored as a matter of law. Accordingly, Judicial

Watch must offer "proof," *Guantanamera*, 263 F.R.D. at 8, that such an extraordinary deposition is necessary here. They have not and cannot—at least, not before exhausting other more conventional means of obtaining the information they seek.

Further, because Mr. Smilansky never served as agency counsel in this particular case, his personal knowledge of settlement negotiations with respect to this case is likely to be limited or non-existent. In fact, Mr. Smilansky completed his rotation in the office that provides legal advice pertaining to FOIA requests at the end of 2014. In addition, and notwithstanding its overall and continued objection to any discovery in this matter, the government has now consented to significant discovery of the State Department regarding the facts surrounding its response to FOIA requests that concerned Secretary Clinton's emails, including depositions (one of which will be a Rule 30(b)(6) deposition), document requests, and interrogatories. So to the extent Mr. Smilansky *does* turn out to have any relevant and non-privileged information, Judicial Watch can still obtain it through other means.

As a practical matter, the government assumes that Plaintiff desires to depose Mr. Smilansky because he appears on a handful of partially redacted email exchanges already in Judicial Watch's possession from other FOIA requests, unredacted versions of which requested by Judicial Watch in discovery in this case. Although the government cannot make any commitments at this time before it has conducted a full privilege review of all such documents, the government remains open to a negotiated solution in which Judicial Watch could review unredacted (or less redacted) versions of those documents, while protecting against broader waivers of privilege through a Federal Rule of Evidence 502 agreement. This is yet another reason why ordering Mr. Smilansky's deposition now is premature, before the meet-and-confer process has run its course with respect to State's eventual decisions about whether and to what extent it is willing to waive some or all privileges over certain documents Judicial Watch seeks.

Whether or not the parties can enter into a non-waiver party agreement will factor significantly into State's decisions in this regard.

Finally, in January 2016, State's Office of Inspector General (OIG) published a report assessing the processing of FOIA requests involving the Office of the Secretary, including the CREW FOIA request referenced by Judicial Watch as their reason for requesting the deposition of Mr. Smilansky. In preparing that report, OIG conducted extensive interviews and review of relevant documents. With respect to the CREW request, OIG "found no evidence that the S/ES, L, and IPS staff involved in responding to requests for information, searching for records, or drafting the response had knowledge of the Secretary's email usage." (Evaluation of the Department of State's FOIA Processes for Requests Involving the Office of the Secretary, January 2016, at 15).

For these reasons, at least as of today's filings, Judicial Watch has not offered the necessary factual predicate to justify the extraordinary remedy of a deposition of a government lawyer, so the request should be denied as a matter of law. *See Sterne Kessler*, 276 F.R.D. at 385 ("[T]he Court is not persuaded that the opposing party's former counsel should be deposed regarding this information when the information can be obtained elsewhere."). Nevertheless, if legitimate questions remain after the extensive discovery now contemplated by both parties in this case is completed, the Court can consider at a later date, with the benefit of a more fulsome factual record, whether Mr. Smilansky has any significant or unique non-privileged testimony to offer, in whatever form may be appropriate, whether it be through a sworn declaration, a deposition, or other means.

CONCLUSION

For the foregoing reasons, the Court should adopt State's Proposed Discovery Plan and Schedule rather than Plaintiff's.

December 19, 2018

Respectfully submitted,

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