UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC., Plaintiff, v. U.S. DEPARTMENT OF STATE, Defendant.	Case No. 14-cv-1242 (RCL)

DEFENDANT'S RESPONSES AND OBJECTIONS TO PLAINTIFF'S SUPPLEMENTAL REQUESTS FOR PRODUCTION OF DOCUMENTS

Pursuant to Rule 34 of the Federal Rules of Civil Procedure, and subject to and without waiving its continued objection to the propriety of any discovery in this matter, Defendant United States Department of State hereby responds to Plaintiff Judicial Watch, Inc.'s ("Judicial Watch") Supplemental Requests for Production of Documents ("Supplemental Requests") to the United States Department of State ("State" or "the Department" or "the State Department"):

OBJECTIONS TO INSTRUCTIONS AND DEFINITIONS

1. Defendant objects to Plaintiff's definitions of the terms "concerning" and "relating to" as unreasonably vague, overly broad, unduly burdensome, and disproportionate to the needs of the case to the extent the Supplemental Requests define those terms to include items that do not directly pertain to the topics at issue but instead merely are "connected with" or "referring to" or "respecting" such topics.

2. Defendant objects to Plaintiff's definition of the term "record" as unreasonably vague, overly broad, unduly burdensome, and disproportionate to the needs of the case to the extent the Supplemental Requests define that term to include "any file folder in which the record is

maintained." Judicial Watch's definition of "record" seeks to impose obligations on Defendant that exceed the obligations set forth in Federal Rule of Civil Procedure 34, and would include documents that have nothing to do with the three topics on which the Court has permitted discovery—even assuming that State was able to identify all of the "file folders" in which any responsive record at issue in this case was maintained, which it could not do without undertaking unreasonably burdensome efforts that are disproportionate to the needs of this case.

3. Defendant objects to the "Instructions" included in the Supplemental Requests to the extent they purport to obligate Defendant to duties different and beyond those required by: (a) Federal Rule of Civil Procedure 26, which contains general provisions governing discovery; (b) Federal Rule of Civil Procedure 34, which governs the production of documents, electronically stored information, and tangible things; (c) relevant Local Rules in the United States District Court for the District of Columbia, and (d) this Court's orders in the above-captioned matter. By purporting to obligate Defendant to additional duties not contained in these rules, the Supplemental Requests are overly broad, unduly burdensome, and disproportionate to the needs of this case.

4. In particular, Defendant objects to Instruction 1 to the extent it seeks to require Defendant to produce documents that are not in its possession, custody, or control. Defendant will limit the scope of its search and production to non-privileged, responsive documents in its possession, custody, or control.

5. Defendant objects to Instruction 3 to the extent it seeks to require Defendant, with respect to any portion of a request that is overly broad and burdensome, to nonetheless "identify the nature, quality, quantity, or volume of the withheld records and the effort that would be required to provide the withheld records." This Instruction is, essentially, an interrogatory, and an unduly burdensome one. Neither Rule 26 nor Rule 34 nor any Local Rule requires Defendant to

compile and provide comprehensive details regarding documents that would be responsive only to overly broad and burdensome document requests. Accordingly, Defendant will not provide such information in response to a Rule 34 document production request.

6. Defendant objects to Instruction 4 to the extent it seeks to require a privilege log in excess of the requirements contained in Rule 26. Any privilege log or privilege logs that Defendant produces in responses to the Supplemental Requests will conform to the requirements contained in Rule 26 and the Court's orders in this case.

7. Defendant objects to Instruction 5 to the extent it requests that Defendant state, for any "record once in [Defendant's] possession or control" that would be "responsive to a request" but for the fact that "the record is no longer in [Defendant's] possession or control": (1) "when the record was most recently in [State's] possession or control and what disposition was made of the record, including the identity of the person or entity now in possession of or exercising control over the record"; and (2) "[i]f the record has been destroyed, . . . when and where it was destroyed and" "the person who directed its destruction." This Instruction is, essentially, an interrogatory, and an unduly burdensome one. Neither Rule 26 nor Rule 34 nor any Local Rule requires Defendant to compile and provide comprehensive "details concerning the loss" or destruction of any document. Accordingly, Defendant will not provide such information in response to a Rule 34 document production request.

OBJECTIONS TO ALL REQUESTS FOR PRODUCTION

The objections set forth below apply to each and every discovery request discussed below. In asserting Defendant's objections to specific discovery requests, Defendant may assert an objection that is the same as or substantially similar to one or more of these objections. Defendant may do so because the language of the discovery request itself may signal particular and specific

concerns that the discovery request at issue may be objectionable based on the grounds stated. The fact that Defendant, in its objections to Plaintiff's individual requests, may specifically reference some of the objections described immediately below, but not others from the same list, does not indicate that Defendant has waived any of these objections as to any of Plaintiff's requests.

1. Defendant objects to Plaintiff's Supplemental Requests as overly broad, not relevant to the claims or defenses in this case, and disproportionate to the needs of this case, and thus not within the scope of discovery permitted under Federal Rule 26(b)(1), especially to the extent they seek information that exceeds the permissible scope of discovery as set forth in the Court's January 15, 2019 Order, ECF No. 65 ("Original Discovery Order'). Unless otherwise specified in response to a specific request, Defendant will not search for or produce any documents other than those that relate to the three topics identified by the Court's Original Discovery Order: "(1) whether [Former Secretary of State Hillary] Clinton intentionally attempted to evade FOIA by using a private email server while Secretary of State; (2) whether State's efforts to settle this case in late 2014 and early 2015 amounted to bad faith; and (3) whether State adequately searched for records responsive to Judicial Watch's FOIA request." *Id.* at 1-2.

2. Defendant objects to Plaintiff's Supplemental Requests to the extent they seek information protected by the attorney-client privilege, the work product doctrine, the deliberative process privilege, the presidential communications privilege, or any other applicable privilege or protection.

RESPONSES AND SPECIFIC OBJECTIONS

Each of the foregoing objections is incorporated by reference into each and every specific objection set forth below, and Defendant's responses below are not a waiver of any of its generally applicable objections.

SUPPLEMENTAL REQUEST FOR PRODUCTION ONE:

An unredacted version of the September 29, 2012 email exchange marked as Hackett Exhibit 17. *See* Ex. 3 attached to Plaintiff's Status Report filed August 21, 2019 (ECF No. 131-3).

Objections: Defendant incorporates by reference the Objections set forth above, and in addition specifically objects to this request on the ground that, to the extent it seeks "[a]n unredacted version" of the email exchange in question, it explicitly seeks information that is protected by the deliberative-process privilege.

As is clear from the unredacted portions of this document that have already been publicly available and in Judicial Watch's possession for several years, *see* ECF No. 131-3, and as has already been explained in a sworn declaration filed with the Court in the summer of 2015, ECF No. 19-2, ¶ 20-21, 30, the redacted portions of this email chain reflect the pre-decisional, deliberative thoughts of two former senior officials at the Department of State: Cheryl Mills (Counselor and Chief of Staff to the former Secretary of State, Hillary Clinton), and Jacob Sullivan (Deputy Chief of Staff for Policy). That information continues to be appropriately withheld pursuant to the deliberative-process privilege.

As is clear from the unredacted portions of this document, at 11:09 a.m. on September 29, 2012, Mr. Sullivan offered his "stab at" draft talking points "for the Senator call." Mr. Sullivan made explicit that the draft talking points were still a work in progress: "Cheryl, I've left the last point blank for you. These are rough but you get the point." Then, in the portion of the email that is redacted, Mr. Sullivan offered draft talking points for Secretary Clinton to use in an upcoming call about the Benghazi attacks with a United States Senator. The draft talking points discuss then-ongoing efforts of senior leaders at State and in the intelligence community to investigate the recent terrorist attacks on the United States's diplomatic facilities in Benghazi, Libya, and

summarize the ongoing efforts to develop a more precise factual understanding about the nature of those attacks. Those draft talking points (for an upcoming call with a U.S. Senator) also included a reference to prior talking points that had been used by U.S. Ambassador to the United Nations Susan Rice in describing the Benghazi attacks to the public through the press. The draft talking points in the redacted portions of this email are pre-decisional, because they were prepared by Mr. Sullivan before the talking points were finalized, and before any call with the Senator in question had actually taken place. And they are deliberative, because they reflect tentative, draft language that had not yet been fully vetted and approved by the relevant decision-makers. They were sent from Mr. Sullivan to Ms. Mills, as well as to Phillipe Reines and Secretary Clinton. *See* July 2015 Hackett Decl. ¶¶ 20-21, 30-31; *see also* Def.'s Mot. for. Summ. J., ECF No. 19, at 12-15.

As is also clear from the unredacted portions of this document, at 1:18 p.m. that same day (September 29, 2012), Ms. Mills responded to Mr. Sullivan's email, offering her own "suggested thoughts" on the draft talking points that had been prepared by Mr. Sullivan for the upcoming call with the Senator. Those "suggested thoughts" are also redacted pursuant to the deliberative-process privilege for the same reasons, as they include Ms. Mills's response to and revised draft of Mr. Sullivan's original proposed language. Ms. Mills's proposed revisions to Mr. Sullivan's draft talking points were emailed only to Mr. Sullivan and Phillipe Reines, but not to Secretary Clinton, further confirming that this is non-final draft language, which was apparently not yet ready to be shared with the Secretary of State for her use in the upcoming call with the Senator. Ms. Mills's email is pre-decisional and deliberative for the same reasons discussed above with respect to the earlier email from Mr. Sullivan (to which she is responding) in the same thread.

Even setting aside Defendant's assertion of the deliberative-process privilege, this Request is improper on its face for a more fundamental reason: it reflects an attempt to effectively moot

the *merits* of this FOIA case—at least with respect to this document, which was processed and produced through FOIA in response to the FOIA request at issue in this case—by circumventing legitimate statutory exemptions to disclosure. Defendant already has briefed the propriety of these FOIA redactions pursuant to Exemption 5, 5 U.S.C. § 552(b)(5), which is a statutory exemption from disclosure for "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency." FOIA Exemption 5 covers the redacted information for all the reasons outlined above with respect to Defendant's assertion of the deliberative-process privilege, and as the agency already explained in a sworn declaration from 2015, to which Judicial Watch has never substantively responded. *See* July 2015 Hackett Decl., ECF No. 19-2, ¶¶ 20-21, 30-31; *see also* Def.'s Mot. for. Summ. J., ECF No. 19, at 12-15. Accordingly, assuming that Plaintiff still disputes the propriety of these redactions, the appropriate course is renewed summary-judgment briefing, and a resolution of the merits of this FOIA case.

Finally, this 2012 email exchange about the underlying subject-matter of the Benghazi attacks and the U.S. Government's response to those attacks has no relevance to any of the three topics for which the Court has permitted discovery: (1) Secretary Clinton's motivations in using a private email server (the email contains no commentary from Secretary Clinton at all, let alone about her email practices); (2) settlement discussions in this FOIA case (a case that was not even filed until several years after this email exchange), or (3) the adequacy of State's search for responsive records (a redacted version of this document was produced to Judicial Watch years ago, and the searches that identified it were already described at length in a sworn declaration). The Court has not authorized free-floating discovery into the underlying subject-matter of the Benghazi attacks, untethered from the three otherwise-authorized discovery topics. *See* Original Discovery

Order at 12 ("The government correctly notes Judicial Watch cannot appoint itself as a freelance Inspector General into the Obama Administration's response to the Benghazi attack."). Accordingly, Defendant also objects to this Request because it seeks irrelevant information that is beyond the scope of the discovery that has been authorized by the Court.[1]

Response: Based on the foregoing objections, Defendant is not producing any documents in response to this request.

SUPPLEMENTAL REQUEST FOR PRODUCTION TWO:

Copies of all emails sent by IPS, IPS Office of Policy and Programs Chief Patrick Scholl, or any other State Department official in the summer of 2013 concerning the directive described by Hackett during his deposition that no further "No Record Located" responses or responses similar to that effect should be issued in response to FOIA requests related to Clinton's emails. See Ex. 1 (Hackett Tr. at pp. 32-34) attached to Plaintiff's Status Report filed August 21, 2019 (ECF No. 131-1).

Objections: Defendant incorporates by reference the Objections set forth above, and in addition specifically objects to this request on the ground that, to the extent it seeks a possible email sent by "any . . . State Department official," it is overly broad, unduly burdensome, and disproportionate to the needs of this case.

[1] The email in question also contains three redactions that were taken pursuant to FOIA Exemption 6, which protect the domain names of the personal email addresses that were then in use by Cheryl Mills, Jacob Sullivan, and Phillippe Reines (as is clear from the unredacted portions of the document). None of that information is "relevant to any party's claim or defense," Fed. R. Civ. P. 26(b)(1), and, in any event, it is already publicly available from other sources. Defendant therefore assumes that Judicial Watch is not requesting that the Department of State lift those (also appropriate) Exemption 6 redactions. Any such request also would be inappropriate for the reasons described above, and Defendant therefore objects for the same reasons. *See* July 2015 Hackett Decl. ¶¶ 30, 30 n.8, 32-33; *see also* Def.'s Mot. for. Summ. J. at 15-17.

Response: Subject to and without waiving the above-stated objections, to the best of Defendant's knowledge and belief, and after conducting a reasonably diligent search for emails that would be responsive to this Request, Defendant has not located any emails responsive to this request and Defendant does not believe that any such emails exist. This is consistent with Mr. Hackett's deposition testimony that such an email "has been searched for in the past and nobody can find it." (Hackett Deposition Tr. at 33). Accordingly, Defendant is not producing any documents in response to this request.

SUPPLEMENTAL REQUEST FOR PRODUCTION THREE:

Copies of all records reviewed in response to the 2013 FOIA request submitted by Gawker Media for "all correspondence, electronic or otherwise, between Hillary Clinton and Sidney Blumenthal, including any traffic to or from any accounts controlled by Hillary Clinton, including the email address hdr22@clintonemail.com" from January 21, 2009 through February 1, 2013. Specifically, Plaintiff seeks all emails reviewed in response to the request in which Clinton is either a sender or recipient or which reference the use of Clinton's "hdr22@clintonemail.com" email account and all emails reviewed in response to the request that stated "remember, you're not supposed to use that e-mail" or used words to that effect. See Ex. 1 (Hackett Tr. at pp. 93-94) attached to Plaintiff's Status Report filed August 21, 2019 (ECF No. 131-1).

Objections: Defendant incorporates by reference the Objections set forth above, and in addition specifically objects to this request on the ground that, to the extent it seeks "all records *reviewed*" in response to a particular six-year-old FOIA request, it is overly broad, unduly burdensome, and disproportionate to the needs of this case, and is also beyond the scope of permissible discovery authorized by the Court. On its face, the request calls for documents that were not responsive to the FOIA request referenced in the request (let alone relevant to the FOIA

request at issue in *this* litigation), and thus sweeps well beyond the scope of the three topics of discovery that have been authorized by the Court.

Response: Subject to and without waiving the above-stated objections, and after conducting a reasonably diligent inquiry, Defendant's best understanding is that no records were reviewed "in response to the 2013 FOIA request submitted by Gawker Media" that is referenced in Supplemental Request Three. Accordingly, Defendant is not producing any documents in response to this request.

Dated: September 12, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2019, I served the foregoing Responses and Objections to Plaintiff's Supplemental Requests for Production of Documents to the United States Department of State by electronic mail on the following:

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