UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC. **Plaintiff,** **v.** **U.S. DEPARTMENT OF STATE,** **Defendant.**	**Civil Action No. 1:12-cv-2034 (RBW)**

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR DISCOVERY PURSUANT TO RULE 56(D)

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INTRODUCTION

Plaintiff Judicial Watch's renewed motion for discovery should be swiftly rejected. In the almost four years since this case was stayed, Judicial Watch has conducted extensive discovery in two similar FOIA cases, and has the benefit of the facts and conclusions reached in investigations by the Federal Bureau of Investigation ("FBI"), the Department of Justice Office of the Inspector General ("DOJ OIG", the Department of State ("State") Office of Inspector General, and Congress, into former Secretary Clinton's email practices. Nevertheless, Plaintiff continues to claim, just as it did in its last discovery motion, that it still needs "[d]iscovery into Secretary Clinton's email practices and those of some of her key aides . . . to determine whether any of the agency's searches were reasonable under the circumstances." *See* Plaintiff's Motion for Discovery Pursuant to Rule 56(d) of the Federal Rules of Civil Procedure at 1-2, ECF No. 67 ("Pl.'s Mot."). In fact, Plaintiff's proposed discovery plan is almost identical to the plan it previously proposed, and rather than seeking more limited or targeted discovery, Plaintiff instead has added two new discovery topics, an additional deposition request, and an additional document request to its proposed discovery plan. *See* Pl.'s Mot. at 14-15; Ex. 2, ECF No. 67-1.

The entirety of the requested discovery is unnecessary because there are no factual issues in dispute regarding the adequacy of State's search, the only issue that remains in this FOIA case. It is undisputed that no documents responsive to the FOIA request were found in the Offices of the Secretary or Executive Secretariat during the initial search for documents, and no responsive documents have been found in any of the supplemental searches conducted since the case was reopened. And the D.C. Circuit has already determined that there is no reasonable likelihood of additional emails left for State to recover. *See Judicial Watch v. Pompeo*, 744 F. App'x 3, 4-5 (D.C. Cir. 2018) (affirming district court's finding "that there are no remaining emails for State to

recover" and finding that "the Government has already taken every reasonable action to retrieve any remaining emails"). It follows, therefore, that there is nothing left for State to search in this case. Judicial Watch's oft-repeated mantra, *see* Pl.'s Mot, at 1, 4, 5, 12, that former Secretary Clinton "took with her all of the emails she sent or received during her 4-year tenure at the agency . . . before they could be searched" is nonsensical; Judicial Watch is fully aware that, during her tenure at State, the Secretary's emails were *always* stored on a privately owned server located at her home in New York. *See* "Office of the Secretary: Evaluation of Email Records Management and Cybersecurity Requirements," at 3, May, 2016 (*available at* https://www.stateoig.gov/system/files/esp-16-03.pdf) ("OIG report 16-03"). Regardless, State has now searched those (and other) emails for responsive documents since the case was re-opened, and found no responsive documents.

Moreover, despite Plaintiff's assertion that it has proposed a "narrowly tailored discovery plan" for *this* particular FOIA case, the requested discovery (1) either goes to record preservation issues that are simply not relevant in this FOIA case; (2) is largely duplicative of the other discovery Plaintiff has already taken; or (3) seeks information that is readily available to Plaintiff in the public reports of the multiple investigations into the former Secretary's email usage. Because Judicial Watch has all the facts it needs, this Court should deny Judicial Watch's unnecessary, duplicative, and burdensome motion for discovery, and order it to respond to State's pending motion for summary judgment.

BACKGROUND

This lawsuit involves a narrow FOIA request seeking "[a]ll records concerning, regarding or related to the advertisement produced by the U.S. Embassy in Islamabad, entitled 'A Message from the President of the United States Barack Obama and Secretary of State Hillary Clinton'

intended to air in Pakistan." Complaint ¶ 5, ECF No. 1. After Plaintiff filed this lawsuit, State searched twelve State components for responsive records in offices it identified as reasonably likely to contain records responsive to the FOIA request, including the Offices of the Secretary and the Executive Secretariat. *See* Declaration of Eric F. Stein ¶ 6, ECF No. 66-2 ("Stein Decl."). No responsive documents were found in the Offices of the Secretary and Executive Secretariat. ECF No. 38-1. Following production of 700 pages of responsive documents, on November 7, 2014, Judicial Watch voluntarily dismissed the case with prejudice. *See* ECF Nos. 17, 19.

In December 2014, in response to a request from State, *see* Ex. 5, ECF No. 28-1; Stein Decl. ¶ 8 and n.1, former Secretary Clinton provided State with approximately 55,000 pages of emails sent or received by her while she was Secretary of State (the "Clinton email collection").[1] *See* Ex, 6, ECF No. 28-1; Stein Decl. ¶ 8 and n.1. Former Secretary Clinton subsequently stated in a sworn declaration that she directed that all her emails on clintonemail.com in her custody that were, or potentially were, federal records be provided to State and that, on information and belief, this had been done. *See* Ex. 8, ECF No. 28-1.

Based on State's acquisition of the Clinton email collection, the parties jointly agreed to re-open the case under Rule 60(b)(2) for the limited purpose of conducting a search of the new emails.[2] ECF No. 21 and Minute Order dated May 8, 2015. Since the case was re-opened, State

[1] The number of pages provided by former Secretary Clinton was originally estimated as approximately 55,000. However, once the digitizing process was complete, State was able to provide a more precise count. Former Secretary Clinton provided 53,988 pages, of which approximately 1,533 were identified, in consultation with the NARA, as entirely personal correspondence, that is, documents that are not federal records, leaving approximately 52,455 pages. Stein Decl. ¶ 8, n.1.

[2] During the negotiations prior to the joint filing of the Motion to Reopen, the parties specifically agreed that the motion would be filed under subsection (b)(2) that pertains to "newly discovered evidence," and not under subsection (b)(3), which permits relief from judgment due to "fraud (whether previously called intrinsic or extrinsic), misrepresentation or misconduct by an opposing party." Fed. R. Civ. P. 60. The language in the motion itself is clear that the purpose of re-opening

has not only searched the Clinton email collection for records responsive to Judicial Watch's request, but in addition, State has voluntarily searched: (1) electronic records retired by the Executive Secretariat, which consist of shared electronic office folders that were available to employees within the Office of the Secretary during former Secretary Clinton's tenure, as well as individual electronic folders of files belonging to other high level staff including Cheryl Mills, Huma Abedin, and Jacob Sullivan; (2) the state.gov emails of Philippe Reines; (3) the non-state.gov emails provided to the Department by Ms. Mills, Ms. Abedin, Mr. Sullivan, and Mr. Reines[3]; and (4) the documents the FBI provided to State in July and August, 2016. Stein Decl. ¶¶ 9, 12, 17-18. No responsive documents were located in any of these searches. *Id*. ¶¶ 10, 18.

In May 2016, after completing all but one of the supplemental searches detailed above,[4] State moved for summary judgment. ECF No. 35. In lieu of responding to the merits of State's motion, Plaintiff filed a motion for discovery under Rule 56(d) asserting that it needed discovery of former Secretary Clinton's email practices, record preservation issues and possible misstatements to the court regarding the search. *See* ECF No. 37; ¶ 5, ECF No. 37-1. This Court denied, without prejudice, both parties' motions and stayed the case pending completion of similar

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this case was limited to conducting a search of the new set of Clinton emails for responsive documents. *See* ECF No. 21 at 2-3. ("*Based on the receipt of former Secretary Clinton's emails,* the Department agreed to jointly file this motion to reopen the case. . . . Once the Department has publicly *posted the full set of agency records from the emails provided to the Department by former Secretary Clinton,* Defendant will *search the set* for any records responsive to Plaintiff's FOIA request." (emphasis added).

[3] Cheryl Mills held the positions of Chief of Staff and Counselor. Huma Abedin held several positions including, Deputy Chief of Staff, Deputy Chief of Staff for Operations and Senior Adviser. Jake Sullivan was a Deputy Chief of Staff and Director of Policy Planning, and Philippe Reines was a Senior Communications Adviser and Deputy Assistant Secretary of State for Strategic Communications.

[4] State did not yet have possession of the documents provided by the FBI at the time it filed its first motion for summary judgment.

discovery in two other FOIA cases relating to former Secretary Clinton's emails. *See* ECF No. 40 (ordering case stayed pending completion of discovery in Civil Action Nos. 13-1363 and 14-1242). Importantly, in denying Plaintiff's discovery motion, this Court noted that it had "concluded that the discovery already ordered [in the other two cases] encompasses the discovery sought in this case," and further, that any future discovery motion would specifically need to "explain[] why discovery already ordered in the other FOIA cases does not encompass what is being requested. . . ." *Id*. n.3. Plaintiff has not complied with this Court's instruction.

Plaintiff has already been permitted to take an extraordinary amount of discovery relating to Secretary Clinton's email practices. In Civil Action No. 13-1363, Judge Sullivan held that the scope of permissible discovery would include: "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 and State's processing of the FOIA request that is the subject of this action." Civ. Act. No. 13-1363, ECF No. 73 at 12. Judicial Watch served document requests and interrogatories, including interrogatories to former Secretary Clinton, and took eight depositions, including a deposition of the State Department pursuant to Fed. R. Civ. P. 30(b)(6). *See id*, ECF Nos. 73, 94 and 124. In Civil Action No. 14-1242, Judge Lamberth permitted discovery on three topics: "(1) whether [former Secretary of State Hillary] Clinton intentionally attempted to evade FOIA by using a private email 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." *See* Civ. Acti. No. 14-1242, ECF Nos. 65, 135. In that case, Judicial Watch *has* taken 18 depositions, including a second expansive Rule 30(b)(6) deposition of the State Department and depositions of two State

Department attorneys; served over a hundred interrogatories, including discrete subparts; and received thousands of pages of documents in response to broad document requests.[5] *Id.*, ECF No. 154. Recently, on March 2, 2020, Judge Lamberth authorized a third wave of discovery, ordering four additional depositions, including the deposition of former Secretary Clinton and a second deposition of her former Chief of Staff, Cheryl Mills. Judge Lamberth also authorized the issuance of a third-party subpoena to Google. *See id*., ECF No. 161.[6]

In the instant case, in January 2020, the parties agreed that, based on the status of Civil Actions 13-1363 and 14-1242, the "stay should be lifted, so that the case can proceed towards judgment." ECF No. 64. Thus, on January 31, 2020, three and a half years after the stay was entered, this Court lifted the stay so that State could refile its summary judgment motion. *See* ECF No. 65. State then filed a second motion for summary judgment, detailing all of the supplemental searches conducted since the case had been re-opened (including one since its prior motion for summary judgment), none of which yielded responsive documents. ECF No. 66.

Rather than move this case towards judgment, Plaintiff once again asks this Court to order the same discovery it previously sought in 2016, plus some additional discovery. *See generally*, Pl.'s Mot., ECF No. 67; Ex. 1 ¶5, ECF No. 67-1 (seeking discovery about former Secretary Clinton's email practices, record preservation issues and possible alleged misstatements regarding the search); Ex. 2, ECF No. 67-1 (detailing requested discovery). Judicial Watch's current

[5] In addition to this discovery, Judicial Watch has information from the many other non-litigation inquiries conducted in connection with former Secretary Clinton's email practices, including public reports of investigations by the State Department's Office of Inspector General and the Department of Justice's Office of Inspector General; an exhaustive criminal investigation by the FBI; and multiple congressional investigations. *See* Civ. Act. No. 14-1242, ECF No. 154.

[6] A petition for mandamus seeking to block the recently ordered depositions of former Secretary Clinton and Cheryl Mills is currently pending in the D.C Circuit. *See In re Hillary Rodham Clinton and Cheryl Mills*, Case No. 20-5056 (D.C. Cir. 2020).

discovery motion fails to explain, however—contrary to this Court's explicit direction—why the extensive discovery already conducted in the other two FOIA cases does not encompass these discovery requests. *See* ECF No. 40 n.3. Judicial Watch's declaration supporting its motion fails to mention, let alone discuss, any facts learned in the extensive discovery it has already taken. *See* Ex. 1, ECF No. 67-1. Most importantly, Judicial Watch fails to reconcile the D.C. Circuit's finding that "the Government has already taken every reasonable action to retrieve any remaining emails" with its alleged "need" for discovery in this case. *See Pompeo*, 744 Fed. Appx. at 4-5. Accordingly, because there is no reasonable likelihood of locating additional responsive documents, Plaintiff's discovery motion should be denied.

STANDARD OF REVIEW

A court may issue relief pursuant to Rule 56(d) "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition." Fed. R. Civ. P. 56(d). To prevail, a Rule 56(d) movant must establish a reasonable basis to believe that discovery would reveal triable issues of fact, *see Messina v. Krakower*, 439 F.3d 755, 762 (D.C. Cir. 2006), and must "submit an affidavit which states with sufficient particularity why additional discovery is necessary." *U.S. ex rel. Folliard v. Government Acquisitions, Inc.*, 764 F.3d 19, 26 (D.C. Cir. 2014) (quoting *Convertino v. U.S. Dep't of Justice*, 684 F.3d 93, 99 (D.C. Cir. 2012)). Speculation and conjecture are not sufficient to obtain discovery under Rule 56(d). *See, e.g.*, *Messina*, 439 F.3d at 762 (affirming denial of request for Rule 56(d) discovery "where the requesting party has offered only a 'conclusory assertion without any supporting facts' to justify the proposition that the discovery sought will produce the evidence required." Discovery in a FOIA case is not permissible when it "would only . . . afford[] [the plaintiff] an opportunity to pursue a 'bare hope of falling upon something that might impugn the [agency] affidavits.'"

Military Audit Project v. Casey, 656 F.2d 724, 751-52 (D.C. Cir. 1981) (quoting *Founding Church of Scientology v. NSA*, 610 F.2d 824, 836-37 n.101 (D.C. Cir. 1979)); *see also, e.g.*, *Kay v. FCC*, 976 F. Supp. 23, 34 n.35 (D.D.C. 1997) (denying a plaintiff's request for discovery in a FOIA case where the plaintiff "impermissibly [sought] discovery as a means to discredit the [agency's] declarations"), *aff'd*, 172 F.3d 919 (D.C. Cir. 1998) (per curiam).

Under Rule 56(d) and otherwise, as the D.C. Circuit has repeatedly recognized, "[d]iscovery in FOIA is rare and should be denied where an agency's declarations are reasonably detailed, submitted in good faith and the court is satisfied that no factual dispute remains." *Baker & Hostetler, LLP v. Dep't of Commerce*, 473 F.3d 312, 318 (D.C. Cir. 2006); *see also, e.g.*, *Military Audit Project*, 656 F.2d at 751-52; *Thomas v. Dep't of Health & Human Servs.*, 587 F. Supp. 2d 114, 115 n.2 (D.D.C. 2008); *Canning v. DOJ*, No. 11-cv-1295, 2013 WL 1333422, at *1 (D.D.C. Apr. 2, 2013); *Asarco, Inc. v. EPA*, No. 08-cv-1332, 2009 WL 1138830, at *1 (D.D.C. Apr. 28, 2009) (citing "the consistent holding in case after case that discovery is not favored in . . . [FOIA] cases and only allowed under rare circumstances."). Moreover, some courts have additionally limited discovery in FOIA cases to those instances in which the plaintiff can demonstrate some bad faith or malfeasance by the government. *See, e.g.*, *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994) (finding that in order to justify discovery in a FOIA case, "the plaintiff must make a showing of bad faith on the part of the agency sufficient to impugn the agency's affidavits or declarations, or provide some tangible evidence that an exemption claimed by the agency should not apply or summary judgment is otherwise inappropriate") (citing, *inter alia*, *Wash. Post Co. v. U.S. Dep't of State*, 840 F.2d 26, 28 (D.C. Cir. 1988)); *Judicial Watch v. U.S. Dep't of Commerce*, 34 F. Supp. 2d 28, 32-33 (D.D.C. 1998) (ordering discovery on the issue of the adequacy of the agency's search when evidence was uncovered that the government

destroyed and removed from its custody responsive documents in an attempt to circumvent FOIA disclosure requirements).

ARGUMENT

PLAINTIFF'S DISCOVERY MOTION SHOULD BE DENIED

I. The Discovery Plaintiff Seeks is Unnecessary, Duplicative, Burdensome, and Sought for an Improper Purpose

A. Discovery Regarding the Adequacy of the Initial Searches is No Longer Relevant or Necessary

The sole issue currently before this Court in this FOIA case is whether State's additional searches for responsive documents, since the case was re-opened, were adequate. *See* ECF No. 21 (detailing basis for re-opening case). In support, State provided a detailed declaration setting forth each supplemental search State conducted, and the result of each supplemental search, *i.e.*, that none located any responsive documents. *See generally* Stein Decl., ECF No. 66-2. Plaintiff apparently disagrees about the scope of this case. Plaintiff's discovery motion does not purport to challenge the adequacy of the supplemental searches as detailed in the declaration; instead, Plaintiff asserts that it needs discovery about "record preservation obligations" and State's "initial search efforts." Pl.'s Mot. at 1-2 (emphasis added). The adequacy of the initial searches, however, was finally resolved in November 2014, when this case was dismissed with prejudice. ECF No. 19. Even if that were not the case, this requested discovery is certainly no longer "relevant to any party's claim," *see* Fed. R. Civ. P. 26(b)(1), because the D.C. Circuit's *Pompeo* decision has rendered the issue moot.[7] In this FOIA case, where no redactions are at issue, the only relief

[7] Federal courts do not have the power "to decide questions that cannot affect the rights of litigants in the case before them." *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). Even if a controversy was live at an earlier point in litigation, courts may not decide that controversy if "events have so transpired that the decision will [not] presently affect the parties' rights." *Clarke v. United States*, 915 F.2d 699, 701(D.C. Cir. 1990) (en banc).

available is a remand to the agency to cure an inadequate search. *See e.g., Campbell v. U.S. Dep't of Justice,* 164 F.3d 20, 37 (D.C.Cir.1998) (remanding to the district court so it could order the agency to conduct a more adequate search). The D.C. Circuit's binding decision, however, makes clear that any such effort would be futile, and therefore is not required. *Pompeo,* 744 Fed. App'x at 4-5.

In *Pompeo,* a Federal Records Act case Judicial Watch brought to compel State to request from the Attorney General an enforcement action to recover former Secretary Clinton's emails, the D.C. Circuit held that "the Government has already taken every reasonable action to retrieve any remaining emails" from former Secretary Clinton." *Id*. "No imaginable enforcement action," the Court continued, "could lead to recovery of missing emails." *Id*. Here, Plaintiff is not seeking discovery regarding the records that State has already searched. Rather, Plaintiff continues to seek discovery relating to emails that were not initially searched—those on the former Secretary's private server. *See generally* Pl.'s Mot. However, because State has now searched the emails from the former Secretary's private server, any discovery regarding State's failure to initially search the former Secretary's private server is completely unnecessary to resolve this case.[8]

B. Plaintiff's Request for Discovery Is Meritless and Should Be Denied

Plaintiff concedes that "some" of the discovery it requests has been conducted in the other two FOIA cases, including discovery regarding State's alleged violation of its record preservation

[8] Judicial Watch in other cases has challenged the *Pompeo* Court's conclusion that there are no additional records left to review, citing the fact that in a different FOIA case, State recently processed and produced "new" former Clinton emails that were provided to State from the FBI. But these emails do not support Plaintiff's request for discovery. As an initial matter, binding D.C. Circuit precedent makes clear that that the reasonableness of a FOIA search does not turn on "whether it actually uncovered every document extant." *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991). "That a few responsive documents may have slipped through the cracks does not, without more, call into question the search's overall adequacy." *Reporters Comm. for Freedom of Press v. FBI*, 877 F.3d 399, 408 (D.C. Cir. 2017). Regardless, however,

obligations, State's alleged false or misleading representations about its initial search efforts, and Secretary Clinton's and her key aides' email practices. Pl.'s Mot. at 1-2. But Plaintiff fails to explain why it needs more discovery on these issues, or how the requested discovery is "narrowly tailored" to this case. Plaintiff's efforts to rationalize the requested discovery under the guise of a "case specific" need are wholly unconvincing. For the reasons explained below, each of the three reasons Plaintiff gives as justification for further discovery is neither specific to this case nor a legitimate justification for seeking discovery.

1. Timing of the FOIA Request: Plaintiff claims this case is unique because the FOIA request here was initiated before former Secretary Clinton left office in February 2013, whereas in the other two cases where discovery occurred, the FOIA requests were submitted after she had left office. Pl.'s Mot. at 7-8. This distinction is not relevant here and does not support Judicial Watch's discovery request. Both Judges Sullivan and Lamberth permitted discovery in their cases *notwithstanding* the fact that those requests post-dated Secretary's Clinton's tenure, and allowed Plaintiff to take extensive discovery regarding the processing of FOIA requests for former Secretary Clinton's emails *both during Secretary Clinton's tenure and after*. *See* discovery orders in Civ. Act. No. 13-1363, ECF Nos. 73, 94, 124 and Civ. Act No. 14-1242, ECF Nos. 65, 135. The scope of that discovery included "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," *see* Civ. Act No. 13-1363, ECF No. 73 at 12, as well as, "whether [former Secretary of State Hillary]

these emails are not "new" at all. State confirmed to Judicial Watch months ago that all the documents had always been contained within state.gov systems. *See* Ex. A. (Email dated February 28, 2020 to Judicial Watch confirming the records were previously in State's possession).

Clinton intentionally attempted to evade FOIA by using a private email while Secretary of State." Civ. Act No. 14-1242, ECF No. 65. Thus, there is little question that Plaintiff's request for discovery on "Secretary Clinton's departure from the agency with her 'clintonemail.com' email system" is duplicative and unnecessary. *See* Pl.'s Mot. at 8.[9]

Plaintiff's reliance on *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980), is unavailing. Pl.'s Mot. at 7-8. The footnote on which Plaintiff relies notes the possibility that an agency may be required to obtain and search records not in its possession if "an agency official purposefully routed a document out of agency possession in order to circumvent a FOIA request" or if the records were "wrongfully removed by an individual after a request is filed." *Id.* at 155 n.9. But this so-called "exception" is irrelevant here because, whether or not it had any legal obligation to do so, State has *already* obtained and searched all of Secretary Clinton's emails. *See Pompeo*, 744 Fed. Appx. 3. Likewise, the Court's holding in *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145 (D.C. Cir. 2016) does not lend support to Plaintiff's discovery motion. In that case, the D.C. Circuit required the agency to search agency records stored in a private e-mail account at the time the FOIA request was served. *Id.* at 149-50. Here, State has

[9] The requested discovery topics listed in bullet points 3-6, Pl.'s Mot. at 14, have been probed as part of the discovery allowed in the other two cases. And discovery similar to the requested discovery in bullet points 7 and 8 was recently requested (and partially allowed) in Civ. Action No. 14-1242. *See* Civ. Action No. 14-1242, ECF No. 161. For the reasons expressed in the government's opposition to that request, *see* Civ. Act. No. 14-1242, ECF No.154, such discovery is improper, particularly because any information Plaintiff "needs" regarding Mr. Combetta and Google is already contained in a DOJ OIG Report. *See* Department of Justice Office of Inspector General, A Review of Various Actions by the Federal Bureau of Investigation and Department of Justice in Advance of the 2016 Election, at 79-80, June 2018, *available at* https://www.justice.gov/file/1071991/download (last visited April 29, 2020). Judge Lamberth has already denied Judicial Watch's request to depose Mr. Combetta (an IT specialist involved with former Secretary Clinton's private email server) as "an exercise in futility" after learning that Mr. Combetta would assert his Fifth Amendment rights in response to any subpoena. *See* Civ. Act. No. 14-1242, ECF No. 161. This Court should likewise reject this discovery request.

already done exactly that—it has already searched for responsive documents in numerous non-state.gov email accounts including from the clintonemail.com server.

2. Record Preservation Discovery: Plaintiff's assertion that it needs discovery on record preservation should be summarily rejected. Pl.'s Mot. at 9-10.[10] First, the Federal Records Act ("FRA"), 44 U.S.C. §§ 3101 *et seq*., not FOIA, "governs the creation, management and disposal of federal records." *Armstrong v. Bush*, 924 F.2d 282, 284 (D.C. Cir. 1991); *see also Kissinger*, 445 U.S. at 154 ("It is . . . clear that Congress never intended when it enacted the FOIA, to displace the statutory scheme embodied in the Federal Records Act and the Federal Records Disposal Act providing for administrative remedies to safeguard against wrongful removal of agency records as well as to retrieve wrongfully removed records.").

Second, discovery is unnecessary because there is no factual dispute as to what was or was not searched with respect to the emails provided to State from the clintonemail.com server and other former employees' non-state.gov emails. Plaintiff's repeated assertion that former Secretary Clinton "took" her emails with her when she "left" the State Department is both untrue and nonsensical. *See, e.g*., Pl.'s Mot at 1, 4, 5, 12. There is no dispute that her emails while she was Secretary were *always* stored on a privately owned server located at her home in New York. *See* OIG Report 16-03 at 3. (Finding as a factual matter that, throughout former Secretary Clinton's tenure, the clintonemail.com server was located in her New York residence, not at the State Department). Thus, the Clinton emails that were not initially searched were not within State's record systems (and thus could never have been removed from State's systems), until she produced them to State years later at State's request.

[10] The discovery topics relating to record preservation (bullet points 1, 2, and 6) are unnecessary and improper as they relate to FRA, not FOIA. Pl.'s Mot. at 14; *see also* Ex. 2, ECF No. 67-1, Document. Requests 3-6, Interrogatories 4-5 and deposition topics 2(b) and (c).

Finally, the requested discovery is completely unnecessary because, as explained *supra*, the D.C. Circuit has already rejected Plaintiff's FRA claims, finding that "the Government has already taken every reasonable action to retrieve any remaining emails" from former Secretary Clinton and "no imaginable enforcement action . . . could lead to recovery of the missing emails." *Pompeo*, 744 Fed. App'x at 4-5. Thus, the D.C. Circuit has already determined that further efforts to find new repositories of emails would be futile.

3. Possible Misstatements/Candor: Without any evidence (and despite facts to the contrary), Plaintiff continues to impugn the integrity of every State Department lawyer and FOIA analyst, as well as every Department of Justice lawyer representing State in cases involving Secretary Clinton's emails.[11] Plaintiff strains in its effort to manufacture bad faith. Plaintiff extrapolates, based on a small number of emails between the State Department's Legal Adviser Harold Koh and the former Secretary, that knowledge of the Secretary's "email practices" was known to everyone in the Office of the Legal Adviser, including the lawyers and analysts who worked on this (and every) case in litigation. This purported knowledge, according to Plaintiff, indicates a lack of candor to Plaintiff and the Court when representations were made regarding the initial searches in this case. [12] Pl.'s Mot. 10-12.

[11] The only possible explanation for plaintiff citing to *Texas v. United States*, Case No. B-14-254 (S.D. Tex. May 19, 2016) is to tacitly suggest to this Court that Department of Justice attorneys have acted in bad faith. Such a suggestion is wholly unsupported. Moreover, the Department of Justice provided the Texas court with sufficient evidence of its good faith in that case, such that the Court subsequently withdrew its order for sanctions. *See Texas v. United States*, Case No. B-14-254 (S.D. Tex. January 19, 2017) at ECF No. 424.

[12] Plaintiff attaches 12 pages of emails, but asserts that there are 67. Even were that true, 67 emails over the course of four years (approximately 1-2 emails per month) hardly demonstrates that Mr. Koh "communicated regularly" with former Secretary Clinton on this account. Pl.'s Mot. at 8. It also provides no evidence that Mr. Koh, who was sworn in as Legal Adviser on June 26, 2009, months after former Secretary Clinton assumed office, was aware that this was the former Secretary's only email account. Additionally, all of the attached emails include messages sent to

But Plaintiff has already had ample opportunity to explore when various State Department officials became aware of Secretary Clinton's private email use. In Civil Action No. 14-1242, Plaintiff was permitted to conduct a broad Rule 30(b)(6) deposition on the State Department that included, among other topics, State's "initial discovery of and reaction to, Hillary Clinton's private email use." Civ. Act. No.14-1242, ECF 154-2. Judicial Watch asked State's Rule 30(b)(6) designee numerous questions on this topic, and the designee was fully prepared to provide responsive information. *See, e.g., id*., ECF 154-3. Plaintiff provides no reason why it should be permitted to conduct even more discovery on this already-exhausted topic. To the extent Plaintiff believes the government acted in bad faith based on the purported knowledge and timing of State and DOJ lawyers—which they did not—Plaintiff has already had sufficient opportunity for discovery and can present its supposed evidence in response to State's pending motion for summary judgment.

Plaintiff's attempt to argue bad faith based on State's supposed failure to inform Plaintiff that the former Secretary exclusively used a private server, or that "she took the account with her when she left the department," Pl.'s Mot. at 12, similarly fails.[13] Again, as stated above, former Secretary Clinton's private server never resided at the State Department during her tenure, and

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or from Mr. Koh's state.gov account, all of which would have been captured by State's records system.

[13] Plaintiff's argument and requested discovery in this regard is again not unique to this case. *See*, *e.g.*, Ex. 2, ECF No. 67-1, Document Requests 1-2, Interrogatories 1-3 and Deposition topic 2(a). It has argued bad faith in every case for which it has sought discovery, and thus even if credited – which this Court should not – it still provides no basis to order discovery beyond the extensive discovery that has already been conducted. *See, e.g.*, Civ. Act. No. 14-1242, ECF No. 65 (allowing discovery into bad faith); Civ. Act. No. 13-1363, ECF No. 73 at 9-10 ("Judicial Watch raises significant questions in its Motion for Discovery about whether the State Department processed documents in good faith in response to Judicial Watch's FOIA request.").

thus, the former Secretary could not have taken it with her when she left the Department. Moreover, State's Inspector General found that senior State Department officials "stated that they were unaware of the scope or extent of Secretary Clinton's use of a personal email account, though many of them sent emails to the Secretary on this account." *See* OIG Report 16-03 at 37.[14]

Indeed, State's actions in this case demonstrate good faith rather than the contrary. Once State obtained the Clinton email collection, State voluntarily agreed to re-open this case (and other cases) for the purpose of conducting additional searches of these documents. The fact that State supplemented its prior search demonstrates good faith efforts to ensure that State fully and completely responded to the FOIA request. *See e.g., Nat'l Inst. of Military Justice v. U.S. Dep't of Def.*, 404 F. Supp. 2d 325, 333 (D.D.C. 2005) ("[I]t is well-settled in this Circuit that subsequent disclosure of documents initially withheld does not alone establish bad faith."); *W. Ctr. for Journalism v. IRS*, 116 F. Supp. 2d 1, 10 (D.D.C. 2000) (rejecting plaintiff's claim that the IRS's initial failure to turn over additional responsive documents demonstrated bad faith and explaining that "what is expected of a law-abiding agency is that the agency admit and correct error when error is revealed"); *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 489 (2d Cir. 1999) (explaining that the presumption of good faith accorded to agency affidavits should not be overturned where "some documents were not discovered until a second, more exhaustive, search was conducted."); *Cf., Fischer v. U.S. Dep't of Justice*, 723 F. Supp. 2d 104, 108-09 (D.D.C. 2010)

[14] Plaintiff's assertion that it needs to discover "whether and to what extent other State Department officials . . . condoned Secretary Clinton's actions," Pl.'s Mot. at 4, is similarly specious. That is not a proper subject for discovery in this FOIA case, which is about the reasonableness of State's search for records responsive to Plaintiff's FOIA request. Moreover, the OIG has already "found no evidence that the Secretary requested or obtained guidance or approval to conduct official business via a personal email account on her private server" and that "DS [Bureau of Diplomatic Security] and IRM [Bureau of Information Resource Management] did not—and would not – approve her exclusive reliance on a personal email account to conduct Department business." OIG Report 16-03 at 37.

("[M]istakes do not imply bad faith. In fact, the agency's cooperative behavior of notifying the Court and Plaintiff that it had discovered a mistake, if anything, shows good faith.").

A mere assertion of bad faith, without more, is not sufficient to overcome a motion for summary judgment or to embark on duplicative discovery. *Freedom Watch, Inc. v. NSA*, 783 F.3d 1340, 1345-46 (D.C. Cir. 2015) (quoting *Baker & Hoestetler LLP*, 473 F.3d at 318). Plaintiff has provided no evidence that either State lawyers or any DOJ attorney acted in bad faith in handling this or any other of the similar pending cases. Plaintiff's request for additional discovery on this basis should be denied as duplicative, improper and unwarranted.

II. There Are No Genuine Factual Disputes And Plaintiff Should Be Ordered to Respond to State's Motion for Summary Judgment

For all the reasons explained above, Plaintiff's request for discovery in this case should be rejected as unnecessary, duplicative, burdensome, improper and unwarranted. This case is ready for prompt resolution and this Court should order Plaintiff to respond to State's motion for summary judgment.

First, this case was re-opened for a limited purpose, which was to conduct searches of the newly acquired emails. The clear language of the parties' Joint Motion to Reopen fully supports this limited purpose. The joint motion states that, "*[b]ased on the receipt of former Secretary Clinton's emails*, the Department agreed to jointly file this motion to reopen the case. . . . Once the Department has publicly *posted the full set of agency records from the emails* provided to the Department *by former Secretary Clinton*, Defendant will *search the set* for any records responsive to Plaintiff's FOIA request. The parties will then discuss the records and the search and will determine if the matter can once again be informally resolved or if summary judgment briefing regarding the documents or the search is required." ECF No. 21 (emphasis added). Thus, the

entire purpose of re-opening the case was to enable State to conduct the additional searches (which Plaintiff is not challenging) to remedy any alleged defect in the initial searches.

Defendant has completed its search of the Clinton email collection, and has also voluntarily searched several other records systems, and no responsive records have been found. Accordingly, State properly moved for Summary Judgment on the adequacy of the search for responsive documents *since* the case was re-opened in May, 2015. ECF No. 66. If Plaintiff wants to challenge the searches that were conducted since the case was re-opened, it is in a position to do so now. A search declaration detailing these searches accompanied State's motion for summary judgment. *See* Stein Decl., ECF No. 66-2.

The facts regarding the initial searches of State's records prior to the re-opening of the case are not only beyond scope of the re-opened proceedings, but they are entirely uncontested.[15] In its production letters to Plaintiff, State identified the components where searches retrieved responsive documents and Plaintiff has never raised, nor currently raises, any complaint about the conduct of those searches. State also notified Plaintiff that it had conducted searches in the Office of Secretary; the Office of Executive Secretariat; the Office of the Counselor, and the Consulate General in Peshawar, and that no responsive records were found. Again, Plaintiff contests not what documents were actually searched, but what documents *were not* searched, *i.e*., Secretary Clinton's private email server, a fact that is not in dispute, and has since been rectified.

[15] Plaintiff complains that State's motion contains a single sentence regarding what transpired before the case was reopened. Pl.'s Mot. at 13. As State explained in its motion, however, given the dismissal with prejudice and the narrow basis for the reopening, State took the reasonable position that Plaintiff could not challenge the adequacy of the initial search, and focused on the searches after the case was reopened. *See* Defendant's Motion for Summary Judgment at 7 n.3, ECF No. 66. Even if this Court were to question the sufficiency of State's declaration, that would not be sufficient to show that the agency acted in bad faith warranting discovery. *See, e.g.*, *Campbell v. U.S. Dep't of Justice*, 164 F.3d at 31-32); *Judicial Watch v. U.S. Dep't of Justice*, 185 F. Supp. 2d 54, 65 (D.D.C. 2002).

Accordingly, there is simply no reason that Plaintiff cannot now respond to State's motion for summary judgment.

Second, as noted throughout, in addition to the extensive discovery in the other FOIA cases, there have also been several investigations into former Secretary Clinton's email practices including by the FBI, DOJ's OIG, and State's OIG. The discovery and the public reports of the investigations provide Judicial Watch with more than enough information on which it can base its opposition to summary judgment. Plaintiff should not be permitted to use this FOIA suit as a pretext for acting as a roving investigator to cover all the same ground as the other investigations. Importantly, Plaintiff never identifies what litigation relief it hopes this Court—or any other court from which it has sought discovery—can provide. And the only relief to which Plaintiff is entitled in this FOIA case is a remand to State to conduct an adequate search—which the DC Circuit has already determined would be futile. Because Plaintiff has sufficient information now to oppose summary judgment, this Court should not permit the duplicative, burdensome and unwarranted additional discovery Plaintiff seeks as part of its own shadow investigation.

This Court should therefore deny Plaintiff's discovery request and allow summary judgment to proceed.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the Court deny Plaintiff's Rule 56(d) Motion and order Plaintiff to respond to Defendant's Motion for Summary Judgment.

Date: April 30, 2020

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

ELIZABETH J. SHAPRIO
Deputy Branch Director

/s/ Marsha Stelson Edney
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Counsel for Defendant

EXHIBIT A

From: Pezzi, Stephen (CIV)
To: Lauren Burke
Cc: Chris Fedeli
Subject: RE: Feb. 2020 Document Production - 15-687-JEB
Date: Friday, February 28, 2020 3:30:00 PM

Lauren,
In response to your questions, the documents produced to you in January and February were sent to State by the FBI in connection with other litigation the FBI is handling. State has confirmed that these records were previously in its possession.
Have a great weekend.
Best,
Stephen M. Pezzi
Trial Attorney
United States Department of Justice
Civil Division - Federal Programs Branch
1100 L Street NW
Washington, DC 20005
(202) 305-8576 | stephen.pezzi@usdoj.gov

From: Pezzi, Stephen (CIV)
Sent: Tuesday, February 25, 2020 8:09 PM
To: Lauren Burke <lburke@judicialwatch.org>
Cc: Chris Fedeli <CFedeli@judicialwatch.org>
Subject: Re: Feb. 2020 Document Production - 15-687-JEB
Lauren - I will get back to you with a response to your inquiry promptly.

Stephen M. Pezzi
Trial Attorney
United States Department of Justice
Civil Division - Federal Programs Branch

> On Feb 25, 2020, at 5:55 PM, Lauren Burke <lburke@judicialwatch.org> wrote:
>
> Steve – just to confirm, these are documents that State received from the FBI in connection with other litigation the FBI is handling? State was not previously in possession of these records that are relevant in our case?
> Do I have that right?
> Lauren M. Burke
> Attorney
> Judicial Watch
> 425 Third St., SW, Ste. 800
> Washington, D.C. 20024
> 202-646-5194
> lburke@judicialwatch.org
>
> **From:** Pezzi, Stephen (CIV) <Stephen.Pezzi@usdoj.gov>

Sent: Tuesday, February 25, 2020 5:08 PM
To: Lauren Burke <lburke@JUDICIALWATCH.ORG>
Cc: Chris Fedeli <CFedeli@JUDICIALWATCH.ORG>
Subject: Feb. 2020 Document Production - 15-687-JEB

Lauren,
Please see attached. These documents will also be posted online.
Best,

Stephen M. Pezzi
Trial Attorney
United States Department of Justice
Civil Division - Federal Programs Branch
1100 L Street NW
Washington, DC 20005
(202) 305-8576 | stephen.pezzi@usdoj.gov