UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civ. Action 95-133 (RCL)
	)	
UNITED STATES DEPARTMENT OF COMMERCE,	)	
	)	
	)	
Defendant.	)	
	)	
	)	

MEMORANDUM OPINION

After four years, this case finally offers a light at the end of the tunnel. Currently before the Court is the apparently unprecedented situation in which the defendant Department of Commerce (DOC) has moved for entry of judgment against itself; the plaintiff, Judicial Watch, has vehemently opposed the motion. Unfortunately, this odd posture is not atypical of the extreme positions taken by the litigants in this case. After much deliberation and a thorough review of the extraordinary record in this case, the Court will deny the DOC's motion for entry of judgment, grant partial summary judgment, sua sponte, ordering DOC's proposed search, and allow further discovery under the rigorous supervision of a Magistrate Judge to explore the issue of unlawful destruction and removal of documents by the DOC.

I.FACTUAL AND PROCEDURAL HISTORY

The agency search and subsequent litigation arising from plaintiff's several FOIA requests have, over the past four years, led to allegations of misconduct, minor and severe, both by counsel for the government and by counsel for the plaintiff, and to numerous motions for sanctions and for the initiation of contempt proceedings. For the purposes of today's decision, the Court is primarily concerned with the illegal destruction of documents and the illegal removal of documents from DOC custody in knowing violation of the FOIA and the orders of this Court. These particular actions, however, have not occurred in a vacuum.

To understand how this FOIA litigation could have deteriorated as drastically as it has, it may be helpful to recognize that underlying plaintiff's FOIA requests is a political crusade to uncover what Judicial Watch believes to be a campaign finance scandal tenaciously concealed by the current presidential administration. Judicial Watch revealingly declares in its opposition to the DOC's motion for entry of judgment that "this case continues not only to be the primary, cutting-edge information source for the American people, it is also at the forefront of generating needed change in our political system." P.'s Opp. to Mot. to Enter Judgmt. at 56. Thus, at least in the plaintiff's eyes, the political stakes here are high. Furthermore, plaintiff counsel's fervor in the pursuit of this litigation appears to have been more than the government's attorneys could handle. The animosity, for lack of a better

word, between the attorneys for the DOC and for Judicial Watch has simmered throughout this litigation, and the misconduct of counsel may be understood in part as the boiling over of a personal, as well as political, battle.

Even before this litigation was commenced, however, the DOC appears to have demonstrated a disregard for the law that cannot be explained even by the idiosyncracies of Judicial Watch's counsel. Either out of carelessness or deliberate defiance, the DOC repeatedly and grossly mishandled materials responsive to Judicial Watch's FOIA requests. Whether the agency had political motivations for its misconduct is a question largely irrelevant to this Court's task today.

The DOC has moved the Court to enter judgment in favor of Judicial Watch, essentially conceding that the search it performed in response to the plaintiff's FOIA requests was unreasonable and unlawful. Almost ironically, the DOC's motion must be denied, not because the evidence fails to establish that the government's conduct was unreasonable, but because the record of misconduct in this case is so egregious and so extensive that merely granting the DOC's motion and ordering a new search would fail to hold the agency fully accountable for the serious violations that it appears to have deliberately committed.

Although a full account of the DOC's misconduct in this case will likely be made at some point, it is not necessary to today's decision. Consequently, the following narrative will be limited

to a chronology of Judicial Watch's FOIA requests and the procedural stages of this litigation, as well as more detailed descriptions of events specifically relating to the mishandling of documents. The Court does note that the destruction and discarding of responsive documents comprises just one aspect of the unreasonableness of the DOC's search; however, for reasons explained in detail in Part II, below, this particular misconduct is central to a proper understanding of why merely entering judgment and granting a de novo search, as the DOC requests in its motion, would unjustly prevent the plaintiff from pursuing the full extent of relief available to it under the law.

A. Plaintiff's FOIA Requests

Sometime in 1994, Judicial Watch, a conservative public interest group, began to suspect that the Clinton administration was engaged in illegal campaign fundraising, including the exchange of seats on Department of Commerce foreign trade missions for political donations to the Democratic National Committee (DNC). After obtaining a DNC brochure that purported to offer participation in foreign trade missions as one of several benefits available to Managing Trustees of the DNC, a membership level requiring annual donations of $100,000, Judicial Watch filed two initial FOIA requests with the DOC. On September 12, 1994, Judicial Watch requested the release of all documents relating to Commerce Secretary Ron Brown's 1994 trade missions to

China and South Africa. The following day, September 13, 1994, Judicial Watch filed another request with the DOC, reiterating the September 12 request and expanding it to also include all documents relating to trade missions to the former Soviet Union in March and April of 1994 and to South America in June and July of 1994.

One month later the hostilities began in earnest. On October 18, 1994, counsel for Judicial Watch, Larry Klayman, received a telephone call from Melissa Moss, Director of the DOC Office of Business Liaison. According to Klayman, Moss tried to pressure him into withdrawing or substantially narrowing Judicial Watch's requests, which he refused to do. Upon his refusal, Klayman alleges, Moss angrily hung up on him.

On October 19, 1994, Moss wrote to Klayman to "confirm" their October 18 conversation. Moss claimed in her letter that Klayman had "reformulated" Judicial Watch's request to be somewhat narrower. That same day (the correspondence was by facsimile) Klayman responded that he had agreed to no such reformulation and asked that Moss "refrain from any further misstatements of [Judicial Watch's] position." Moss apparently did not respond.

Also on October 19, 1994, Judicial Watch filed its third FOIA request with DOC, this one relating to a trade mission to

India scheduled for late 1994.[1]

B. Plaintiff's FOIA Action and Defendant's First Motion for Summary Judgment

Having received no response to its initial requests from the DOC, on January 19, 1995, Judicial Watch filed this action to compel the DOC to comply with its FOIA requests. In response, the DOC claimed that Judicial Watch would have to pay some $13,000 in photocopying and processing costs before DOC would release the responsive information. When Judicial Watch requested a public interest fee waiver, the DOC refused until, on May 16, 1995, this Court ordered that the costs be waived and the responsive documents released to Judicial Watch.

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1. Two years later, Judicial Watch would file a fourth request on June 10, 1996, requesting documents related to the 1996 trade mission to Bosnia and Croatia. Later requests in October and November of 1996 would ask for documents relating to trade missions to numerous other countries in the Far East, the Middle East, Europe, Africa, and Latin America. Yet another request in June 1997 would seek all documents produced by DOC at the request of any investigative body from June 1996 to June 1997.

   Although these other FOIA requests are not at issue in this action, the related subjects of the requests suggests that one all-encompassing search might prove more efficient than separate searches. Therefore, although the government is by no means required to conduct a search with all of the safeguards ordered today in every case, the parties are encouraged to explore among themselves the possibility of including these various other requests in the procedure ordered today for the initial three requests and thus resolve other pending actions and disputes. The Court will schedule a status conference in the other pending actions to be conducted promptly after issuance of today's decision.

The next day, May 17, 1995, the DOC released some 28,000 pages of documents responsive to Judicial Watch's requests; it withheld over one thousand other documents in whole or in part, invoking several of the statutory exemptions set forth in the FOIA. Judicial Watch, unsurprisingly, was not satisfied that the 28,000 pages included all responsive documents. In particular, plaintiff noted that the released documents contained no documents from Secretary Brown, nor from the White House or the DNC. According to Judicial Watch, suspiciously little correspondence to and from trade mission participants was included, as well.

Upon the request of the parties, this Court received for in camera inspection all documents withheld pursuant to Exemption 5 of the FOIA. Before the Court had completed it review, however, the DOC filed its first Vaughn index and moved for summary judgment. On February 1, 1996, this Court denied the DOC's motion for summary judgment because the Vaughn index was insufficient to support judgment as a matter of law. The Court also ordered discovery on the issue of the adequacy of the agency's search for documents, and ordered the DOC to submit a revised Vaughn index.

C. Defendant's Second Motion for Summary Judgment

In April of 1996, the DOC submitted a revised Vaughn index and affidavits in support of a second motion for summary

judgment. At a hearing on August 7, 1996, the Court denied the motion for summary judgment as to the adequacy of the DOC's search and ordered further discovery as set forth in a memorandum and order dated August 30, 1996.

On September 5, 1996, the Court issued a decision granting in part and denying in part the remainder of the DOC's motion. The Court found that 153 of the 306 documents withheld under Exemption 5 were improperly withheld in whole or in part, and ordered their release to Judicial Watch. Nevertheless, the Court granted summary judgment in favor of the DOC as to all other withheld documents.[2]

D. Initial Discovery--1996

Meanwhile, Judicial Watch had begun discovery designed to explore the adequacy of the DOC's documents search. Gradually that discovery begin to reveal evidence that the DOC had illegally destroyed and removed from its custody responsive documents, apparently in an attempt to circumvent the disclosure requirements of the FOIA and the orders of this Court.

1. Ron Brown, Secretary of Commerce

On February 27, 1996, Judicial Watch noticed the deposition

2. The Court granted Judicial Watch's motion to reconsider this decision on March 31, 1998. After reviewing in camera all of the withheld materials, the Court will reinstate the September 5 order by separate order issued this date.

of Secretary of Commerce Brown, to be held on March 28, 1996. On March 14, 1996, Secretary Brown, in a sworn declaration, claimed not to be in possession of any documents responsive to plaintiff's FOIA requests, and also claimed to have played no role in determining the scope of the DOC's search, assertions which were cast in doubt by subsequent testimony. The Secretary's deposition was stayed temporarily to permit discovery from other DOC personnel, in an effort to avoid interfering with the Secretary's schedule unless other avenues of discovery proved inadequate. On April 3, 1996, Secretary Brown was killed in a plane crash during the trade mission to Bosnia and Croatia. Had he lived, he may have been able to respond to questions raised by the subsequent testimony of his business partner and confidante Nolanda Hill (discussed below).

In any event, the events that transpired in his office after the news of his untimely death arrived in Washington would themselves later be a focus of Judicial Watch's discovery efforts. Subsequent depositions revealed a flurry of document shredding in the Secretary's office, as well as easy access to the office by the Secretary's family and coworkers, which lend plausibility to Judicial Watch's claims that documents were unlawfully removed and destroyed after the Secretary's death.

The plausibility of Judicial Watch's claim is further strengthened by the deposition testimony of several DOC employees

which confirms that the documents destroyed or removed from the Secretary's office were never searched in response to Judicial Watch's FOIA request. Anthony Das, who was represented as responsible for overseeing the document search in the Secretariat and other offices, testified in his March and October depositions that in fact he had only a minimal role in the DOC's document search and that he never discussed the search with Secretary Brown, nor was he aware of any search for documents in the Secretary's office. Brenda Dolan was similarly represented to have first-hand knowledge of the DOC's document search, and yet at her deposition she also testified that her involvement in the search was minimal; she never discussed the search with Secretary Brown or anyone in his office, nor did she personally search for documents there, nor did she review documents found by others. Barbara Schmitz and Melanie Long, both close assistants to the Secretary, testified that Secretary Brown's office was never searched and that, after his death, various people were allowed access to the Secretary's office and documents from the office were destroyed without being searched for materials responsive to plaintiff's FOIA request. The Secretary's Chief of Staff, Robert Stein, even corroborated the testimony that Secretary Brown's office was never searched for documents. From this evidence, it is indisputable that the DOC destroyed and possibly removed documents that, at best, were not searched in response to Judicial Watch's requests. This alone would likely support a

finding that the agency's document search was unreasonable, but it is just one piece of this unsightly puzzle, and subsequent deposition testimony would uncover actions by the DOC that strongly substantiate the claim that the agency was deliberately destroying and jettisoning documents.

2. Ira Sockowitz, Special Assistant to the DOC General Counsel

At his October 28, 1996 deposition, Ira Sockowitz testified that, when he left the DOC for a job at the Small Business Administration (SBA), he took with him numerous documents, including classified materials and documents responsive to Judicial Watch's FOIA requests. See Sockowitz Video Depo. at 5:01-08. In response to this and other revelations at Sockowitz's deposition, the Court ordered the Inspector General of the SBA to take custody of Sockowitz's computer and safe for an inventory and search. This process revealed not only documents responsive to Judicial Watch's FOIA requests, but also sensitive classified information concerning national security matters, including telecommunications technology information on several countries to which the DOC had sent trade missions. According to the testimony of Sockowitz's supervisor, Ginger Lew, these documents were of no use to Sockowitz in his duties at the SBA, see Lew Video Depo. at 4:14, 4:53-54, and their removal has never been adequately explained.

3. John Huang

John Huang was Deputy Assistant Secretary for International Economic Policy at the DOC under Secretary Brown before leaving to become Vice Chairman of the DNC. In October 1996, when the Court authorized Judicial Watch to take his deposition, Huang literally went into hiding to avoid service of the subpoena. His family, his coworkers at the DNC, and even his attorney claimed not to know his whereabouts, although others claimed to see him regularly. Only when this Court demanded that counsel for the DNC produce Huang for service of process did he finally "resurface" to accept the subpoena.

At his October 29, 1996 deposition, Huang gave what can at best be termed questionable testimony. He testified that he participated in neither trade missions nor fundraising while at the DOC, and he claimed to have kept few records during his tenure there. See Huang Depo. at 182-82, 190-92. He produced no records at the deposition. Subsequent media accounts, however, portray him as a pack-rat who left the DOC with "bulging files." James Bennett, For Democrats, All Kinds of Answers, N.Y. Times, Dec. 30, 1996, at A11. Whether these files contained responsive documents is anyone's guess.

Huang further testified that he played an insignificant role overall at DOC, as little more than a "budget clerk." Subsequent discovery has also made this portrayal incredible. From his own testimony, he appears to have participated in planning trade

missions, see Huang Depo. at 177-78, communicated frequently with businesspeople overseas and in the United States, and participated in policymaking meetings, see id., and he received intelligence briefings on nearly forty occasions. Copies of some of Huang's correspondence, released by the DNC, also appears to support a vision of Huang as something more than merely a "clerk."

Among other discoveries, Judicial Watch later learned that Huang kept a detailed desk diary while at DOC, tracing his activities on a daily, even hourly, basis. See Stewart Video Depo. at 10:59-11:00. When faced with Judicial Watch's demands that this diary be released, the DOC turned over to Klayman a partially illegible copy of the manuscript. Despite ongoing demands, and without reasonable explanation, a legible copy of the diary still has not been made available to Judicial Watch.[3]

In short, John Huang may well have removed responsive documents from the DOC when he left, just as Ira Sockowitz did. His testimony suggesting otherwise is not credible; in fact, little of his deposition testimony is particularly credible, in light of the evidence now available. Plaintiffs are entitled to explore this issue further, and continued discovery on the subject will be authorized in order accompanying this opinion.

[3]The Attorney General, who is now in possession of the desk diary for purposes of an investigation, will be ordered to provide Judicial Watch with a legible copy in another, separate decision issued today.

4. Dalia Traynham

Secretary Brown's scheduler, Dalia Traynham, testified at her November 26, 1996 deposition that she was asked by Barbara Schmitz and Melanie Long to shred documents after Secretary Brown's death in April of 1996, although she had never shredded documents before at DOC. See Traynham Video Depo. at 3:01-07. Judicial Watch speculates that the assignment was intended to "wash the hands" of other DOC employees should questions later be asked.

5. Melinda Yee

Melinda Yee held various positions at the DOC and went on several trade missions. At her deposition on December 2, 1996, she testified that she took notes during the China trade mission. See Yee Depo. at 144, 154-55, 160, 208-212. She also testified to destroying these notes, see id. at 160-61, 168-71, 208-09, 212, many of which were responsive to plaintiff's FOIA requests and had been specifically ordered produced by this Court on August 30, 1996. No adequate explanation has been given as to why these documents were destroyed, and Judicial Watch can hardly be blamed for suspecting a lack of good faith on the part of DOC, particularly given the somewhat amazing fact that this and other improper actions have never been investigated by the Inspector General of the DOC.

At a hearing held February 3, 1997, the DOC urged the Court to limit Judicial Watch's discovery. The Court denied the request as groundless. The Court stated in its February 13, 1997 order that plaintiff's discovery process could hardly be called a "fishing expedition" because so many of the depositions had led to critical discoveries regarding mishandling of documents and other misconduct by the DOC. Seemingly everywhere Judicial Watch looked, there lurked some piece of DOC dirty laundry. Although only later would the Court surmise the probable source of Judicial Watch's "tips," it was apparent by early 1997 that the adequacy of the DOC's search had been cast in serious doubt and that further discovery was warranted to explore to what degree the DOC had failed to reasonably search for responsive documents and whether its inadequate efforts were the result of carelessness or something worse.

E. Further Discovery Revelations--1997

Throughout 1997, Judicial Watch continued to take depositions of DOC employees and former employees. With virtually every question answered, new questions arose, as did more information pointing to illegal destruction and removal of responsive documents by the DOC.

1. David Rothkopf

Former DOC Deputy Undersecretary David Rothkopf was deposed

on April 1, 1997. In yet another display of the DOC's unique approach to FOIA, essentially identical to the actions of Sockowitz and Huang, Rothkopf removed a substantial number of documents from the DOC when he left the Department to return to the private sector, where the documents presumably would be beyond the reach of Judicial Watch or other curious parties. The Court ordered the DOC to retrieve these materials, and responsive documents were in fact found and some produced to Judicial Watch.[4]

2. DNC Minority Donor List

The first "smoking gun" document revealed by Judicial Watch's discovery was uncovered in May 1997. Although this responsive document was eventually disclosed, and there is no compelling evidence that the DOC attempted to destroy or jettison the list, this episode is important as a milestone and as an illustration of the DOC's approach to its duties under the FOIA.

a. Deposition of Graham Whatley

Graham Whatley, assistant to Deputy Assistant Secretary Jude Kearney, was deposed on May 28, 1997. At that deposition,

[4]Incidentally, these and many other documents discovered since the DOC's initial motion for summary judgment have never been the subject of a motion for summary judgment, and responsive documents found but not released have not been accounted for in supplemental Vaughn indices. This is yet another obstacle to granting the DOC's motion for entry of judgment.

Whatley made the dramatic revelation that a list of 139 minority donors to the DNC was kept in the files of Deputy Assistant Secretary Kearney, who was in charge of selecting participants for the trade missions. This statement was in direct contradiction to the deposition testimony of Kearney, who had testified that he was not in contact with the DNC and was unaware that any trade mission participants had made contributions to the DNC. Judicial Watch demanded that the obviously responsive donor list be immediately produced, and within a few hours the Department of Justice sent a copy by facsimile directly to the site of the deposition. Judicial Watch later learned that several of the donors on the list in fact participated in trade missions.

Whatley was apparently demoted after his May 1997 deposition. Although the Court has no evidence of retaliation by the government, the implications of the timing are hard to ignore.

b. Deposition of John Ost

Two days after Whatley's testimony revealing the existence of the DNC minority donor list in Kearney's files, John Ost testified that he had received a facsimile from the Democratic National Committee listing companies that the DNC was recommending for participation in trade missions. See Ost Video

Depo. at 11:08-10. Ost testified that he had turned this document over to his superiors as responsive to Judicial Watch's FOIA request, see id., but the document was never released.

c. Deposition of Christine Sopko

On July 2, 1997, Judicial Watch deposed Christine Sopko, secretary to Jude Kearney. Sopko testified that she had in fact turned over a copy of the DNC minority donor list to DOC lawyers months before the existence of the list was revealed at Graham Whatley's deposition. Ms. Sopko appeared upset at times during her deposition; Judicial Watch suggests that she was afraid that she would be fired as Whatley had been after his deposition, although she denied as much at the deposition.

d. DOJ's Explanation

The DOC and the DOJ do not claim that the DNC minority donor list from Kearney's files is not responsive to Judicial Watch's FOIA request. Moreover, it appears that the document was in fact found and disclosed to AUSA Shoaibi and DOC counsel, including Judith Means of the DOC Office of General Counsel, and yet it was not released to Judicial Watch until after its revelation at the Whatley deposition. Judicial Watch, of course, suggests that the DOC and its attorneys deliberately withheld the list in blatant violation of the FOIA and the orders of this Court.

The DOC and the United States Attorney's Office (USAO-DC),

however, offered their own explanation for the nondisclosure of the minority donor list in papers filed on May 29, 1997 and July 3, 1997. Initially, the May 29, 1997 "notice to the court" stated that the existence of the minority donor list "was a surprise to the USAO-DC and to the agency counsel present at the [Whatley] deposition." The notice, apparently prepared by Assistant United States Attorney Bruce Heygi, represented that the matter was being referred to the Inspector General of the DOC for investigation and also brought to the attention of the Public Integrity division of the DOJ, although the Court has yet to be informed of the results of any investigation, or even notified that one has been opened. Counsel for the DOC repeated essentially this same position at a status conference on June 27, 1997.

However, a little more than one month after the first "notice to the court," and just days after the June 27 status conference, the deposition testimony of Ms. Sopko revealed that she had discussed the existence of the donor list with DOC counsel, including AUSA Shoaibi and Judith Means of the DOC Office of General Counsel, months before the Whatley deposition. In the face of this revelation, the AUSO-DC changed its tune.

In its July 3, 1997 supplemental notice to the Court, the USAO-DC offered a different explanation for its failure to produce the DNC minority donor list. According to the USAO-DC, its admitted failure to disclose the donor list was the result of

oversight and miscommunication, not willful defiance. Due to the burdensome number of depositions scheduled by Judicial Watch around the time of Mr. Whatley's deposition, the USAO-DC assigned another AUSA, Alexander Shoaibi, to assist AUSA Heygi with this litigation. When AUSA Shoaibi met with Christine Sopko on April 1, 1997 to prepare for her deposition, Sopko revealed to him that the minority donor list had been found among Kearney's papers. AUSA Shoaibi apparently did not consider this revelation significant, and he allegedly did not communicate it to AUSA Heygi, who was at that time bogged down in other day-long depositions scheduled by Judicial Watch.

The USAO-DC claims that, when Mr. Whatley disclosed the existence of the donor list at his May 28, 1997 deposition, "AUSA Shoaibi simply did not recall (and AUSA Heygi did not know)" that Sopko had revealed the existence of the list to Shoaibi two months earlier. Sopko's mention of the list did not "reoccur" to Shoaibi, according to the USAO-DC, until the night before Sopko's July 2 deposition, when Shoaibi reviewed his notes from the preparation session. This despite the obvious responsiveness of the document and its clear significance as the most incriminating document that Judicial Watch had found to date in this FOIA litigation. In an attempt to rectify the situation, the DOC waived the attorney-client privilege at Sopko's July 2, 1997 deposition and allowed Judicial Watch to question her regarding her revelation of the donor list at the April 1, 1997 preparation

session.

Even if the behavior of the United States Attorney's Office could be attributed to gross carelessness, no acceptable explanation has been offered for the behavior of the DOC Office of General Counsel. Testimony shows that Judith Means was present when Ms. Sopko revealed the existence of the donor list at her deposition preparation session, and Ms. Means, who apparently has worked on this case from its early stages, could not possibly have been unaware of the importance of the list. Nevertheless, according to the representations of AUSA Heygi, Ms. Means apparently denied any knowledge of the list at the Whatley deposition and allowed the USAO-DC to file a notice with this Court indicating that the list was a "surprise" to both AUSA Heygi and herself. Ms. Means' failure, and the corresponding failure of her office, to reveal the existence of the donor list in the months before Graham Whatley's deposition is certainly among the most egregious abuses that have occurred in this litigation, and Ms. Means' stubborn refusal to admit her complicity in the nondisclosure only aggravates the matter.

In addition to the mishandling of the situation by DOC counsel, which is just one of the many episodes of attorney misconduct in this case that will likely be discussed in subsequent opinions, the nondisclosure of the donor list raises troubling inferences regarding the DOC's conduct of the search.

Apparently, DOC employees in fact discovered the list and another similar document and properly turned the documents over to their supervisors,[5] but the responsive documents were nevertheless illegally withheld. The implication, strengthened by the pattern of abuse in this case, is that those DOC employees responsible for supervising and coordinating the document search were manipulating the search and withholding potentially damaging documents. At this stage, it is still unclear to what extent such illegality occurred, precisely who was responsible, and to what extent the DOC used the destruction and removal of documents to conceal its efforts to thwart the FOIA and circumvent this Court's orders. The supervised discovery authorized in today's order will allow Judicial Watch to explore this latter issue in detail.

F. Continuing Discovery and Responses from the DOC

[5]It appears that the DNC donor list was not found during the DOC's initial document search, but instead was found during a subsequent search undertaken in response to a congressional subpoena. It is not clear, therefore, which employees and officials at the DOC were aware of the list's discovery and also aware that it would be responsive to Judicial Watch's FOIA requests and this Court's orders. In any event, the donor list was found in the files of Deputy Assistant Secretary Kearney, where it clearly should have been found and processed during the FOIA document search, and the document was in fact disclosed to attorneys for the DOC and USAO-DC months before its discovery at the deposition of Mr. Whatley. Had the questioning by counsel for Judicial Watch failed to identify the list at that deposition, the Court can only assume that it would remain unproduced, despite its clear responsiveness to Judicial Watch's requests.

Emboldened by the discovery of the minority donor list, Judicial Watch spent the second half of 1997 taking further depositions to explore the extent to which the DOC search may have been manipulated, and what, if any, other documents were illegally withheld. Through this discovery, it was gradually revealed that classified information had been mishandled by various DOC employees. The DOC, for its part, appeared to be setting a new and encouraging course, but an awards ceremony in December demonstrated that its priorities lay elsewhere.

1. Mishandling of Classified Information

At his deposition on June 10, 1997, Jeffrey May, who replaced Ira Sockowitz as Special Assistant to the DOC General Counsel, testified that he had allowed Sockowitz access to a safe in the Special Assistant's office after Sockowitz left the DOC. See May Video Depo. at 11:30-31. This testimony apparently corroborated testimony from Sockowitz that he had removed classified documents, including responsive documents and other materials relating to satellite technology and national security information, from the office after his departure. See Sockowitz Video Depo. at 5:01-08.

The deposition testimony of Laurie Fitz-Pegado, former DOC Director of the Foreign Commercial Service, was taken on July 18, 1997 and August 1, 1997. That testimony revealed that Fitz-Pegado and a number of other DOC employees with access to top

secret information at the DOC left the Department for positions at a company involved in the development of a global cellular telephone satellite network. See 7/18/98 Fitz-Pegado Video Depo. at 11:02-08. Judicial Watch points out that the company is apparently owned in part by state-owned entities in China, Russia, and India, the very countries which were the subject of classified intelligence data taken by Ira Sockowitz when he left the DOC to go to the SBA. Judicial Watch suggests that this "connection" shows an additional motive for the illegal removal of classified documents from DOC.

2. DOC's Motion for Entry of Judgment

On August 12, 1997, the DOC filed its motion for entry of judgment. As motivation for its unusual motion, the DOC cited the considerable expense already undertaken in defense of this action and a desire "to promote the general public interest of confidence in Government." As amended, the DOC's order proposes a rigorously supervised new search, as well as the award of reasonable attorney's fees and costs to Judicial Watch. At the time, the proposed new search and the reference to promoting confidence in government appeared to the Court to signal a renewed good faith on the part of the DOC, its new Secretary, and its new General Counsel. Nevertheless, Judicial Watch fiercely opposed the motion, which it considered an offer to "sell out." The interesting legal questions raised by the motion and by the

unusual stances of the parties are discussed in Part II of this memorandum opinion.

3. Howard University's "Ron Brown Collection"

On October 16, 1997, the DOC revealed that in February of 1997 it had allowed the removal from DOC headquarters of literally thousands of photographs and video and audio tapes of trade missions led by Secretary Brown. The DOC claimed that the materials were to be made part of a "Ron Brown, Jr. Collection" at Howard University. The University never corroborated those claims, and Judicial Watch alleges that no such collection exists.

The DOC agreed to produce these materials to Judicial Watch and was forced to retrieve them from Howard University because it could not be determined how many of the documents represented the only existing copy. In any event, the materials were eventually made available to Judicial Watch for inspection at the DOC. Although Judicial Watch initially demanded copies of the documents, rather than merely access to them, the Court will decide in a separate decision issued this date that access to the materials satisfied the DOC's obligations with regard to this information. Despite the satisfactory resolution of this matter, the Court fails to understand why the DOC would give away its only copies of materials subject to a court order.

4. DOC Awards

On December 2, 1997, the DOC held an awards program for its employees. In stark contrast to the good faith and reasonableness shown in the agency's motion for entry of judgment, the DOC handed out medals to several of the employees who were instrumental in DOC's document search, which by all indications was ridden with conduct that was grossly careless at best and in blatant violation of the law at worst. The Court invited an explanation from the DOC, but none was offered. The Court is at a loss as to how the DOC could go so far as to reward employees for conduct that in the most forgiving light strongly resembles defiance of federal statutes and the orders of the federal courts.

G. Nolanda Hill

The highest drama in this litigation was supplied by Nolanda Hill, former business partner and confidante of Secretary Brown:

On January 28, 1998, Hill submitted under seal a sworn declaration detailing her knowledge of the Department of Commerce's handling of Judicial Watch's FOIA requests, information that she allegedly obtained through her relationship with Secretary Brown. Stating that she was concerned about retaliatory actions by the government, Hill requested that the Court provide mechanisms for her protection. Pursuant to that request, the Court ordered that the affidavit be initially kept

under seal and saw to it that her attorney was made aware of the situation and was willing to represent and protect her interests in this matter. An evidentiary hearing was then scheduled for March 23, 1998.

On March 14, 1998, Hill was indicted on criminal charges. Although an investigation had been underway before Hill offered to testify in this case, Judicial Watch claims that the government had represented to Hill that charges would not be filed, and that the March 14, 1998 indictment was in retaliation for her cooperation with Judicial Watch.

On March 23, 1998, Hill appeared before this Court and gave extensive testimony as to her knowledge, gained from communications with Secretary Brown, relating to this action.[6] Upon examination by Mr. Klayman, Hill testified that the Secretary told her that White House officials had actually instructed him to delay the production of documents responsive to Judicial Watch's requests and to come up with a way to avoid compliance with this Court's orders. See Transcript of March 23, 1998 Hearing at 85. Hill vividly recalled the Secretary's comment that Leon Panetta (then White House Chief of Staff) had

[6]Hill's testimony included some information directly relating to the involvement of White House, DNC, and DOC officials in the alleged sale of trade mission seats as part of Democratic fundraising, which is of course the ultimate target of Judicial Watch in this case. However, these larger issues are not before the Court, and therefore this narration of Hill's testimony will focus solely on that information relating to DOC's response to plaintiff's FOIA requests.

urged him to "slow pedal" the document search. See id. at 85-86. According to Hill, this message was conveyed to Secretary Brown by Panetta and by John Podesta (then White House Deputy Chief of Staff) on several occasions. See id. at 85-88.

In her role as personal advisor and confidante to Secretary Brown, Hill allegedly offered to review the most sensitive documents responsive to Judicial Watch's request, for the purpose of finding out precisely what was involved and, according to Hill, to encourage the Secretary to turn over all responsive documents. See id. at 88. Hill never did review the material, however, and she was unable to testify as to whether such a collection of "the most sensitive" responsive documents was ever assembled. See id. at 89-90.

Ms. Hill did testify to seeing several unproduced responsive documents in the Secretary's possession in 1996, shortly before the Secretary's death. According to Hill's testimony, she met with Secretary Brown at a hotel early in 1996, and on that occasion the Secretary showed her a one-inch-thick packet of documents that he produced from a personal portfolio-type carrying case. See id. at 38-39. The Secretary told Hill that the documents had been retrieved from DOC files during the document search for Judicial Watch's FOIA requests. See id. at 39. Hill reviewed the top five or six documents, confirming that they were copies of letters from Melissa Moss to trade mission participants specifically referencing their donations to the DNC,

clearly responsive to Judicial Watch's requests. See id. at 40-41. Needless to say, these documents had not been, and have not since been, released to the plaintiff. Their current location is unknown, perhaps unknowable, although Judicial Watch argues that the evidence supports an inference that the documents were either destroyed during the flurry of document shredding following the Secretary's death, or removed from his office during that same time period. In any event, Hill's uncontroverted testimony is strong evidence that the DOC illegally withheld documents from Judicial Watch in violation of the FOIA. It is also apparent that the DOC was aware of this Court's orders that all responsive documents be produced, and willfully defied those orders, according to Ms. Hill's testimony. This conduct alone would seem to justify entry of judgment against the DOC, and yet it simultaneously precludes such judgment until the extent of the DOC's unlawful behavior is adequately explored.

Also relevant to this action is the testimony of Ms. Hill that the deposition of Melissa Moss contained a number of inaccuracies. See id. at 105 et seq. In addition, revelations about Moss's role in the orchestration of the trade missions casts her deposition testimony in a new light, and also raises doubts as to how the activities in which she participated could have produced no documents responsive to Judicial Watch's requests. As a whole, the evidence supports an inference that Moss played an important role in resisting Judicial Watch's FOIA

requests, and the testimony of Nolanda Hill points in particular to Moss as directly responsible for knowing violations of this Court's orders.[7]

On April 29, 1998, a superseding indictment was issued against Ms. Hill. Judicial Watch claims that it was intended as a further signal to keep quiet.

H. Action and Inaction by the DOC

The months since Ms. Hill's testimony have produced relatively few startling discoveries. More troubling, perhaps, than any action taken in this time is the continued lack of action by the DOC to investigate its own conduct in this FOIA response and litigation.

1. The Government's Failure to Investigate

To the best of this Court's knowledge, Nolanda Hill has never been questioned by anyone from the Department of Commerce, Department of Justice, Federal Bureau of Investigation, or other agency with investigative duties, despite wide publicity of her testimony before this Court. According to Judicial Watch, few of

[7]Consistent with its earlier indications, the Court will entertain motions for orders to show cause on the various matters raised by Ms. Hill's testimony. Any resulting contempt proceedings will be distinct from and will not preclude a subsequent referral of disciplinary matters to the Merit Systems Protection Board's Office of Special Counsel pursuant to FOIA section (a)(4)(F).

the more than forty officials deposed by it for this lawsuit testified that they had been approached in connection with any investigation of these matters. It appears that the DOC Office of the Inspector General has undertaken no investigation of the response to Judicial Watch's FOIA requests (although in light of the awards given to involved officials, this is hardly surprising). Although there was some speculation in the press following Nolanda Hill's testimony that the Attorney General might seek an independent counsel to inquire into campaign finance matters, including the alleged sale of trade mission seats, no such investigation has been conducted. In short, insofar as the Court aware, the government has not pursued any remedial or disciplinary action.

It must be noted, however, that the USAO-DC has offered to investigate the matters raised by Ms. hill's testimony if referred by the Court, and has asked the Court how it should proceed; Deputy Attorney General Holder filed an affidavit with the Court to this effect. Without discouraging this kind of communication, the Court notes that, absent a specific statutory provision such as section (a)(4)(F) of the FOIA, the courts ordinarily do not direct the internal disciplinary proceedings of the agencies, which have an independent duty to ensure that their employees act lawfully and ethically. While the USAO-DC's offer is appreciated as a signal of that office's good faith and willingness to cooperate, it does little to ameliorate the

failure of the Department of Commerce to investigate the events of this FOIA controversy. Only the agencies can effectively defend their own integrity by maintaining zero tolerance for this kind of misconduct.

In addition, neither the DOC nor the DOJ has reported to the Court on any investigation of the failure to produce the DNC minority donor list, despite the USAO-DC's representations to the Court in May and July of 1997 that the matter had been referred to the Inspector General of the DOC, with notification of the referral to the Public Integrity division of the DOJ. The Court can only assume that no investigative action has been taken. Although the DOJ's position, if any, as to this matter is unclear, the stance of the DOC can be inferred from its decision in December of 1997 to give awards to several employees involved in this litigation. As explained in the awards ceremony program, filed with the Court on March 23, 1998, employees including Mary Ann McFate (one of the principal contributors of affidavits supporting the DOC's Vaughn indices), Brenda Dolan (who in sworn deposition testimony claimed to have only a minimal role in the document search), and Peter Han were "recognized for their contributions to the Commerce Department's efforts to respond appropriately to numerous inquiries relating to political fundraising and its possible relationship to the Department. They have shown unusual commitment and professional cooperation in ensuring accurate, timely results." Department of Commerce,

Forty-Ninth Annual Awards Program, December 2, 1997. Finding no words to adequately express its incredulity, the Court simply disagrees.

2. May 20, 1998 In Camera Submission

On May 20, 1998, DOC revealed that parts of several documents ordered submitted for in camera review had been destroyed. Apparently, before releasing copies to Judicial Watch, DOC had redacted the originals; for some documents, the only true copy of the information was destroyed. This is, of course, yet another indication of the agency's carelessness in handling its response to plaintiff's FOIA requests. However, the Court has reviewed the redacted copies in camera and is satisfied that the information apparently deleted (social security numbers and financial information, for the most part) was properly withheld from Judicial Watch.

3. September 11, 1998 Hearing

On September 9, 1998, Judicial Watch somewhat dramatically requested an in camera conference regarding newly discovered evidence that it claimed showed obstruction of justice by the DOC. On September 11, 1998, the parties met with the Court to review the new evidence, which amounted to two unreleased and allegedly responsive documents which Judicial Watch had discovered and which suggested communication between the DOC and

the DNC with regard to trade missions. Based on the evidence presented by Judicial Watch and on the argument of the parties, the Court issued an order permitting limited discovery from the DNC and ordering the seizure by the DOC Inspector General of the computers and computer equipment of Sally Painter, Melissa Moss, John Ost, and Gail Dobert, to be searched for electronic copies of responsive information. The Inspector General has yet to report to the Court on the progress of that search.

J. Current Status

At this stage in the litigation, some limited discovery is still ongoing, and numerous motions are pending, almost all of which are plaintiff's motions for sanctions, compulsion of discovery, or requests for approval of additional discovery. On September 30, 1998, Judicial Watch submitted a list of pending motions requiring disposition if the Court were to deny the DOC's motion for entry of judgment. These motions will be disposed of in a separate order issued this date. In addition, consistent with its previous indications, the Court will entertain motions for orders to show cause relating to possible criminal contempt proceedings arising out of the testimony of Nolanda Hill. All other discovery matters should be pursued before the Magistrate Judge appointed to supervise continued discovery.

In conclusion, this somewhat tedious narration presents

numerous instances of likely violations of the Freedom of Information Act and this Court's orders. On many occasions, the DOC appears to have engaged in the illegal withholding of responsive documents, in the removal of such documents from the DOC, and in the destruction of potentially responsive documents in the office of the late Secretary Brown and elsewhere, as well as a great deal of misconduct during the litigation which the Court leaves for another day's decision. Upon consideration of this record, and of the legal issues discussed in Part II, the Court finds that a new search alone is an insufficient remedy, and thus the DOC's motion will be denied, partial summary judgment will be granted in favor of Judicial Watch ordering the commencement of the search proposed in the motion, and further discovery under the supervision of a Magistrate Judge will be ordered.

II. LEGAL ISSUES

In contrast to the controversial facts of this case, the legal issues presented by the DOC's motion for entry of judgment at first glance seemed innocuous. Upon further reflection, however, the Court has wrestled somewhat with how to properly dispose of the motion given the unusual factual context of gross violations of the FOIA and court orders.

A motion by a party for judgment against itself presents a novel situation, particularly in the face of opposition by the

nonmoving party. The Federal Rules of Civil Procedure are silent on the issue, and the Court is not familiar with any case, reported or otherwise, that has dealt with it. Nevertheless, if necessary, the Court would find that it does indeed have the power to grant the DOC's motion. The particular facts of this case preclude it, however, at least until the plaintiff has had a fair opportunity to locate through discovery the documents to which it is entitled under the FOIA. Because the DOC's motion fails to offer Judicial Watch full relief, the motion must be denied.

In place of the government's motion, however, the Court will grant partial summary judgment against the DOC and order the search proposed in its motion. The Court will also order a Magistrate Judge to preside over discovery designed to explore the extent to which the DOC has illegally destroyed and discarded responsive information, and possible methods for recovering whatever responsive information still exists outside of the DOC's possession. Together, the new search and the supervised discovery will effectuate the legitimate purposes of the DOC's motion without unjustly prejudicing the plaintiff's right to pursue the fullest relief available to it. Today's decision will significantly narrow the scope of continued proceedings, which will focus primarily on the issues of illegal destruction and removal of documents. Consequently, it will expedite the remainder of this litigation, consistent with the government's

aims in filing its motion. The close supervision of the discovery should also ease the DOC's frustration at Judicial Watch's persistent attempts to transform this FOIA litigation into a larger political inquisition. However, today's decision will simultaneously protect the right of Judicial Watch to pursue its statutory entitlement under the FOIA, and it will hold the DOC accountable for its blatant and egregious violations of the Act and this Court's orders.

A. Denial of the DOC's Motion

The first issue to be addressed is the disposition of the DOC's motion for entry of judgment against itself. As far as the Court is aware, this motion is totally without precedent. Equally as surprising as the motion itself, however, is plaintiff's strident opposition to the entry of judgment in its favor. Ultimately, although the Court does have the power to grant such a motion under certain narrow circumstances, it is not warranted in this case.

As a general proposition, a district court may grant a moving party's motion for entry of judgment against itself, even over the opposition of the nonmoving party, if (1) there is no genuine issue of material fact at issue, (2) the nonmoving party is entitled to judgment as a matter of law, and (3) the motion offers to the nonmoving party the fullest relief available under

the law. The Court bases this conclusion on many considerations, including primarily reference to the purpose and provisions of the Federal Rules of Civil Procedure. However, it is unnecessary to explain this reasoning in detail, because upon examination the DOC's motion fails to offer Judicial Watch the full extent of relief available.

The DOC argues that the full extent of relief available to a plaintiff suing under the Freedom of Information Act consists of a judgment ordering the following: (1) that the agency conduct a new, legally adequate search for documents, (2) that the agency release to plaintiff, or identify in a legally sufficient Vaughn index, all responsive documents, and (3) that the agency pay to plaintiff reasonable attorney's fees and litigation costs. Indeed, the DOC's motion offers all this and more. In its Amendment to Defendant's Motion To Enter Judgment, filed March 20, 1998, the DOC (1) details how the new search will be supervised by the DOC Office of Inspector General, (2) specifies the bureaus of the DOC that will be searched, (3) outlines procedures for contacting former employees in an effort to locate responsive documents that may have been removed from the DOC's possession, (4) suggests form instructions that will be provided to all offices searched, and (5) offers to submit sworn declarations from each office searched, executed by individuals with actual personal knowledge of the matters attested to. This is considerably more thorough than the new search that a court

would ordinarily order when granting judgment in favor of a FOIA plaintiff.

However, after much thought on the subject, the Court is of the opinion that such a search (plus attorney's fees) does not represent the full extent of relief available to Judicial Watch in this case. There is substantial evidence that the DOC has destroyed documents and removed documents from its control in an effort to avoid releasing them to Judicial Watch. If the Court were to grant the DOC's motion and merely order a new search, these documents would not be found even by the most exhaustive of searches, and the DOC would have succeeded in circumventing the FOIA.

The DOC recognizes this situation and proposes in its motion a plan for retrieving jettisoned information. The DOC offers to mail letters to former employees of three offices within the DOC and request that the former employees determine whether they may have removed documents from the DOC when they left and, if so, that they search the documents for information responsive to Judicial Watch's FOIA requests. While this plan is a step in the right direction, the remedy for the government's misconduct in this case must have more "teeth" than the DOC proposal offers. The courts cannot be powerless to remedy FOIA violations where the agency simply discards potentially damaging responsive documents. There must be some mechanism by which the courts can keep the agencies from circumventing the FOIA by simply removing

responsive documents from its control.

In the Court's opinion,[8] the most significant apparent obstacle to holding the DOC accountable for destroying and discarding documents is the general proposition that a final judgment may only be enforced against parties to the action before the court. Even were the Court to refer disciplinary matters to the Office of Special Counsel pursuant to FOIA section (A)(4)(F),[9] and even were it further to conduct contempt proceedings against those agency employees responsible for the illegal activities, the agency would still have a powerful incentive to destroy or jettison potentially harmful documents if the agency knew that the documents would then be permanently outside the reach of the FOIA requester and the federal courts. The agency would know that, when threatened, it could violate the law with relative impunity.

Fortunately, the courts are not in such a powerless position when faced with the destruction and discarding of responsive

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[8]The parties offered virtually no legal argument on the complex issues raised by the DOC's motion.

[9] In this regard, the Court finds merit in the view that the district courts should be more willing to refer disciplinary matters to the Office of Special Counsel when agencies act arbitrarily and capriciously in defiance of the FOIA. See generally Paul M. Winters, Note, Revitalizing the Sanctions Provision of the Freedom of Information Act Amendments of 1974, 84 Geo. L.J. 617 (1996). However, the statute clearly envisions (although perhaps does not require) that such a referral come at the end of litigation, when the issues of attorney's fees and costs are normally addressed; for this reason, the Court declines to consider the appropriateness of such a referral at this time.

documents. In certain circumstances, a judgment may be enforced against nonparties. See 12 Charles Alan Wright et al., Federal Practice and Procedure §3033, at 177. For example, as stated in Federal Rule of Civil Procedure 65(d), an injunction is binding upon the parties and "upon those persons in active concert or participation with them that receive actual notice of the order . . ." A number of cases have affirmed the courts' authority to enforce their orders on nonparties, based in part upon Federal Rule of Civil Procedure 71.[10] According to the Court of Appeals for the Second Circuit, "It seems clear that Rule 71 was intended to assure that process be made available to enforce court orders in favor of and against persons who are properly affected by them, even if they are not parties to the action." Lasky v. Quinlan, 558 F.2d 1133, 1137 (2d Cir. 1977) (citing 7 J. Moore, Federal Practice at 71.10 (1975)). This view was adopted by the Ninth Circuit in Westlake North Property Owners Association v. City of Thousand Oaks, 915 F.2d 1301, 1304 (9th Cir. 1990), in which the court stated: "Rule 71 was designed to memorialize the common-sense rule that courts can enforce their orders against both parties and non-parties." Id. In particular, the courts are willing to enforce orders against nonparties when their nonparty status is used as a shield to frustrate the courts'

[10]Fed. R. Civ. P. 71 states in relevant part: "[W]hen obedience to an order may be lawfully enforced against a person who is not a party, that person is liable to the same process for enforcing obedience to the order as is a party."

orders. See, e.g., Wilson Motor Co. v. Dunn, 264 P. 194, 197 (Olka. 1928) ("Such an absurd contention could only prevail where might was right and where utter contempt was in vogue of all law, courts, and orderly procedure.").

Tucked away in a footnote in its reply brief, the DOC argues that "the documents taken from the Department after the search (e.g., by Ira Sockowitz . . . David Rothkopf) [cannot] be considered 'missing documents,' because documents not in the possession of the agency, even if wrongfully removed . . ., are not considered to be 'improperly withheld' by the agency. See Kissinger v. Reporters Committee, 445 U.S. 135, 148-52 (1980)." Def.'s Reply at 9. The DOC's statement of the law is incorrect, and its reliance on Kissinger is in error.

In Kissinger, the Supreme Court held with regard to the FOIA that "Congress did not mean that an agency improperly withholds a document which has been removed from the possession of the agency prior to the filing of the FOIA request." Kissinger, 445 U.S. at 150 (emphasis added). The Court itself recognized the importance of the temporal restriction in its ruling on the three FOIA requests at issue in that case. The Court found no improper withholding for two of the requests, which the Court noted had been "filed after Kissinger's notes had been deeded to the Library of Congress." Id. at 154 (emphasis added). In contrast, the Court said of the third request: "At the time when Safire submitted his request for certain notes of Kissinger's telephone

conversations, all the notes were still located in Kissinger's office at the State Department. For this reason, we do not rest our resolution of his claim on the grounds that there was no withholding by the State Department." Id. at 155 (emphasis added). The clear implication is that the status of a particular document at the time the FOIA request is submitted determines whether the unreasonable failure to produce that document is an unlawful withholding. If the document is removed before filing of the request, then failure to produce it is not an improper withholding. In contrast, if the document is removed after the filing of the request, failure to produce it is an improper withholding.

Two Justices, each concurring in part and dissenting in part, recognized the importance of the timing of the removal of documents, particularly if done in an attempt to circumvent the FOIA. Justice Brennan noted: "Even the Court's opinion implies--as I think it must--that an agency would be improperly withholding documents if it failed to recover papers removed from its custody deliberately to evade an FOIA request." Id. at 159 (Brennan, J., concurring in part and dissenting in part). Justice Stevens worried that the majority decision "creates an incentive for outgoing agency officials to remove potentially embarrassing documents from their files in order to frustrate future FOIA requests." Id. at 161 (Stevens, J. concurring in part and dissenting in part) (emphasis added). Both Justices'

observations support the plain reading of the majority's holding that the time at which the FOIA request is submitted is the time when documents must be in the possession of the agency for the FOIA's disclosure requirement to apply.

Contrary to the DOC's assertion, the Supreme Court's decision in Kissinger does not permit agencies to evade the FOIA by removing documents from their control after the filing of a FOIA request; in fact, it explicitly rejected that contention with regard to the Safire FOIA request. In the opinion of this Court, a contrary ruling would go well beyond the concern of Justice Stevens that outgoing officials would remove documents to thwart possible, future FOIA requests; it would allow the DOC or any other agency to conduct a search, sort the responsive documents by political "sensitivity," and then remove the potentially damaging documents, secure in the knowledge that the FOIA requester would never see them (which may well be, in part, what happened here). Such a result would render the FOIA hollow and the courts powerless to intervene. Fortunately, the law does not require such agency misconduct to go unremedied.

The import of the preceding discussion for this litigation is twofold. First, as a general matter, these cases support the courts' power to remedy illegal actions, such as those of the DOC, by issuing orders and judgments that must be complied with even when nonparties are involved. In the context of this FOIA action, for example, this Court's orders compelling production of

illegally withheld documents may be enforced not only against the DOC but also against any nonparties to which the DOC transferred possession of responsive documents in an attempt to circumvent the FOIA and the orders of this Court. Second, the availability of this remedy to Judicial Watch makes clear that the DOC's motion fails to offer Judicial Watch the full extent of relief available under the law, because it provides no reliable mechanism by which to identify those nonparties who must be bound by the order and judgment.[11] For this reason alone, the Court declines to grant the DOC's motion.

B. Partial Summary Judgment

Although the Court must deny the DOC's motion for entry of judgment, it is not necessary to continue this litigation unmodified. The arguments of the parties and the record in this case persuade the Court that the interests of justice and judicial economy are best served by an entry of partial summary judgment resolving the greater part of this controversy, which is apparently largely undisputed. There is, at this stage of the litigation, no argument, and certainly no reasonable argument, that the DOC's document search was reasonable and legally

[11]Incidentally, neither does the DOC motion suggest a referral to the Office of Special Counsel pursuant to section (a)(4)(F) of the FOIA; however, this statutory mechanism is not truly "relief" for the plaintiff, but is instead a mechanism to be employed at the court's discretion.

adequate under the FOIA. On this issue, Judicial Watch is entitled to judgment as a matter of law.

Although Judicial Watch has not moved for summary judgment, the Court has the authority to enter summary judgment even in the absence of a motion. See 10A Wright et al., supra, § 2720, at 347-352; see also Leahy v. District of Columbia, 833 F.2d 1046, 1047 (D.C. Cir. 1987) (citing 10A Wright et al., supra, § 2720). The Supreme Court recognized the district courts' authority to enter summary judgment sua sponte in Celotex Corp. v. Catrett, 477 U.S. 317, 326 (1986). According to Professors Wright et al., the court may enter summary judgment on its own initiative so long as the parties are given sufficient advance notice and an adequate opportunity to demonstrate that summary judgment is inappropriate. See 10A Wright et al., supra, § 2720, at 339. "To conclude otherwise," the professors write, "would result in unnecessary trials and would be inconsistent with the objective of Rule 56 of expediting the disposition of cases." See id. § 2720, at 345. It would also be inconsistent with the purposes underlying the Rules in general, which according to Federal Rule of Civil Procedure 1 "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."

Here, the parties have had ample time and opportunity to address the appropriateness of entering judgment at this stage of the proceedings. The DOC's motion for entry of judgment was

filed in August of 1997. Since then the DOC has amended it, Judicial Watch has vigorously opposed it, and the DOC has filed a reply brief supporting it. Although the parties have failed to offer much persuasive legal argument in these filings, it has not been for lack of opportunity. The DOC apparently felt that its motion would be granted outright, and so its motion included virtually no legal argument. The DOC then devoted most of its reply to arguing that Judicial Watch's opposition failed to show that entry of judgment was inappropriate. Judicial Watch, for its part, offered some legal arguments, but its opposition focused primarily on the need for further discovery to explore the DOC's abuses, discovery that is ordered by today's decision. Both parties had sufficient advance notice and the opportunity to persuade the Court that judgment on the adequacy of the search was inappropriate, but they failed to do so.

Therefore, the Court may enter partial summary judgment as to the adequacy of the DOC's search if the Rule 56 standard is satisfied. Federal Rule of Civil Procedure 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the . . . party is entitled to judgment as a matter of law." The record in this case establishes beyond any reasonable dispute that the DOC's search was inadequate, unreasonable, and unlawful under the FOIA.

The DOC failed to search entire offices that were likely, if not certain, to hold responsive documents. Documents were destroyed, discarded, and given away, sometimes without being searched to determine if they were responsive, other times with full knowledge that they were responsive. There can be no genuine issue as to the reasonableness of the DOC's document search, which is the only fact material to this entry of partial summary judgment.[12]

For this same reason, Judicial Watch is entitled to judgment as a matter of law. The FOIA confers upon each requester a right to a reasonable search, and when an agency search is demonstrated to be unreasonable, the FOIA plaintiff is entitled to judgment as a matter of law and a new search. See, e.g., Kronberg v. United States Dep't of Justice, 875 F. Supp. 861, 871 (D.D.C. 1995).

Partial summary judgment as to the adequacy of the DOC document search is appropriate and will be entered. The DOC will be ordered to conduct the search proposed in its order, the details of which are set forth in the separate order issued this date. The requirements imposed upon the DOC in conducting this

[12]Today's decision does not deal with the propriety of the DOC's invocation of various FOIA exemptions to justify withholding particular responsive documents. That issue was dealt with initially in the Court's decision of September 6, 1997, which will be reinstated by separate order this date. Also, as mentioned above, there are a number of documents which were discovered since the DOC filed its most recent Vaughn index. The DOC is directed to compile an index and affidavits for those documents as soon as possible so that remaining issues in this regard can be speedily resolved.

search are more restrictive and rigorous than those ordinarily ordered as relief in a FOIA case, but the egregious facts of this case make such requirements entirely necessary to ensure agency compliance with the law and this Court's orders.

C. Supervised Discovery

Although the judgment and orders of this Court will be enforceable against nonparties, they will bind only those nonparties who can be shown to have acted in concert with the DOC in the removal of documents or to be currently in possession of the documents.[13] Consequently, further discovery is required to identify those nonparties. Some discovery from the DNC has already been authorized, and it should proceed as ordered. In addition, several pending motions will be resolved by separate orders issued this date.

The Court is of the opinion that continued discovery proceedings must be closely supervised. The main issues to be explored in the discovery ordered today are the removal and destruction of documents, including who was responsible for the action, when and where the action occurred, where and to whom the information was transferred, where the materials are currently

[13]Obviously, today's ruling would have little effect if the Court's orders and judgment were binding only on the initial recipient of documents removed from the agency. If the documents could be shielded simply by passing them to other persons one more step removed from the agency, the FOIA would be just as easily frustrated.

located, and who is in custody of them. Plaintiff should be allowed to inquire into any discoverable information related to the destruction or removal of documents after its first FOIA request was filed. This may include, out of necessity, some inquiry into the creation and handling of documents. Therefore, the Court declines to articulate too narrow a restriction on Judicial Watch's further discovery at this point, so long as it is reasonably aimed, in the judgment of the Magistrate Judge, at identifying instances of unlawful destruction and removal of documents by the DOC. Documents still located at the DOC should be located and processed during the new search ordered this date.

However, Judicial Watch should not be allowed to stray from inquiries that might be reasonably calculated to lead to evidence of unlawful destruction or removal of documents. Counsel for the DOC is not entirely unreasonable in its frustration with Judicial Watch's conduct during depositions. To ensure proper conduct and compliance with the direction set by today's order, all further discovery will be authorized by, scheduled by, and conducted in the presence of Magistrate Judge John Facciola. Magistrate Judge Facciola will also decide all matters arising during the course of depositions, including objections, motions to compel, motions to quash or modify subpoenas, and motions for protective orders.[14] The Court expects that this arrangement will

[14]The Court recognizes that, under Federal Rule of Civil Procedure 45(c)(3)(A)(ii), this arrangement will not apply to the

facilitate the expedient conclusion of discovery and encourage an appropriate professional demeanor among counsel.

III. CONCLUSION

Although the Court declines to end this long and extraordinary litigation today, it is now appropriate to set in motion the beginning of the end. The DOC's unprecedented motion for entry of judgment against itself will be denied, but partial summary judgment will be entered in favor of Judicial Watch and the DOC will be ordered to perform a rigorously monitored new search. In addition, further discovery under the close supervision of a Magistrate Judge will be authorized.

A separate order will issue this date.

Royce C. Lamberth
United States District Judge

DATE:

depositions of nonparties who resides more than one hundred miles from the District of Columbia. This circumstance may necessitate the appointment of Magistrate Judge Facciola as a Special Master, which would raise issues as to the payment of expenses by the government and other logistical considerations. These issues, however, will be addressed if and when they arise.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civ. Action 95-133 (RCL)
	)	
UNITED STATES DEPARTMENT OF COMMERCE,	)	
	)	
	)	
Defendant.	)	
	)	
	)	

ORDER

This case comes before the Court on defendant's motion for entry of judgment. Upon consideration of the arguments of the parties and the record in this case, and for the reasons set forth in an accompanying memorandum opinion:

The defendant's motion for entry of judgment is hereby DENIED;

Partial summary judgment is hereby ENTERED, sua sponte, in favor of the plaintiff on the issue of the adequacy of the defendant agency's search for responsive documents; and it is hereby

ORDERED that the defendant agency shall conduct a new and adequate search for agency records responsive to plaintiff's Freedom of Information Act requests made the basis of this suit; and it is further

ORDERED that such new and adequate search be supervised and

monitored by the Chief of Staff of the Secretary of Commerce and the Office of the Inspector General of the Department of Commerce as represented in defendant's amended motion; and it is further

ORDERED that such new and adequate search include all bureaus and offices of the Department of Commerce in which documents were located during the other searches conducted in response to plaintiff's FOIA requests made the subject of this action; and it is further

ORDERED that all bureaus and offices in which no document was located during the other searches shall be either (1) searched or (2) the subject of a declaration by the head of the office or bureau identifying why documents responsive to the FOIA requests in this case could not reasonably be expected to be located in the particular bureau or office; and it is further

ORDERED that detailed search instructions be provided to each bureau and office as represented in defendant's amended motion; and it is further

ORDERED that each office searched shall submit one or more declarations, executed by individuals having personal knowledge of the matters attested to, and (1) describing how the search of that office was designed and conducted and (2) stating that all documents identified as potentially responsive to the FOIA requests in this case were forwarded to a central depository; and it is further

ORDERED that the new search be completed on or before a date

to be set by this Court at a status conference; and it is further

ORDERED that defendant shall produce to plaintiff all nonexempt responsive agency records located in the new search on or before a date to be set by this Court at a status conference; and it is further

ORDERED that the defendant shall file and serve a new Vaughn index as to all responsive agency records that have been withheld by the defendant under claim of exemption and not yet the subject of a decision by this Court, on a date after production of nonexempt records to the plaintiff, said date to be set by this Court at a status conference; and it is further

ORDERED that discovery shall proceed under the supervision of and as authorized by Magistrate Judge Facciola and as set forth in a separate order issued this date; and it is further

ORDERED that a status conference is set for 10:00AM on January 7, 1999.

SO ORDERED.

_____
Royce C. Lamberth
United States District Judge

DATE:

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civ. Action 95-133 (RCL)
	)	
UNITED STATES DEPARTMENT OF COMMERCE,	)	
	)	
Defendant.	)	
	)	
_____	)	

MEMORANDUM OPINION

This matter comes before the Court on various discovery motions filed by the plaintiff, Judicial Watch, against the defendant Department of Commerce (DOC) and a number of nonparties. The several motions will be considered seriatim, after a brief review of the factual background.

I. GENERAL FACTUAL BACKGROUND

Plaintiff Judicial Watch filed three Freedom of Information Act (FOIA) requests with the DOC in the fall of 1994 seeking documents regarding the alleged sale of seats on DOC foreign trade missions in exchange for large donations to the Democratic

National Committee (DNC). Having received no response from the DOC, Judicial Watch filed this FOIA action on January 19, 1995. On May 17, 1995, the DOC released some 28,000 pages of documents and withheld about one thousand others.

On February 1, 1996, this Court denied the DOC's first motion for summary judgment, finding the agency's Vaughn index to be insufficient to support judgment as a matter of law and also authorizing discovery on the issue of the adequacy of the DOC's document search. The DOC filed a revised Vaughn index in April of 1996 along with a second motion for summary judgment. The Court denied the motion as to the adequacy of the search on August 7, 1996.

On September 5, 1996, the Court granted in part and denied in part the remainder of the DOC's motion as to the agency's withholding of documents pursuant to various FOIA exemptions. The Court found 153 of the 306 documents withheld under Exemption 5 to have been unlawfully withheld and ordered their production; summary judgment was granted for the DOC as to all other documents accounted for in the revised Vaughn index. The Court subsequently granted Judicial Watch's motion to reconsider, reviewed all of the withheld documents in camera, and will reinstate the September 5, 1996 ruling in a separate order issued this date.

Since Judicial Watch began its discovery in the fall of 1996, it has consistently and persistently uncovered evidence of

misconduct and unlawful withholding of documents by the DOC.[15] It has been demonstrated that the DOC wrongfully withheld documents, destroyed documents, and removed or allowed the removal of others, all with the apparent intention of thwarting the FOIA and the orders of this Court. As if the agency's own conduct were not reprehensible enough, its counsel has also repeatedly strayed far outside the boundaries of professional conduct (although not without some provocation by counsel for Judicial Watch).

In this context, the DOC filed a motion for entry of judgment against itself on August 12, 1997, which Judicial Watch vehemently opposed, and which the Court will deny in a separate memorandum opinion issued today. The denial of that motion requires that the Court deal with various pending discovery motions identified by the plaintiff as still in need of resolution. The various motions will be considered in the order presented in Plaintiff's List of Outstanding Motions, filed September 30, 1998.

II. MOTIONS

D. Ginger Lew Motion

In February of 1997, Judicial Watch arranged through DOC

[15]A review of much of that discovery is included in another memorandum opinion issued this date concerning the DOC's motion to enter judgment against itself.

counsel to take the deposition of Ginger Lew, former DOC General Counsel, on March 5, 1997. On March 3 or 4 (the parties offer different accounts), plaintiff contacted Ms. Lew's personal attorneys to inquire if they would accept service of a subpoena duces tecum on her behalf. Ms. Lew's counsel refused to accept the subpoena, although they offered that Lew would appear "voluntarily" and also allegedly offered to abide by Federal Rule of Civil Procedure 45, which dictates compliance of a nonparty with a subpoena. Judicial Watch, suspecting that Ms. Lew would later claim not to be subject to court process for want of service of the subpoena, refused to conduct the deposition without first serving the subpoena and canceled the deposition. Nevertheless, the next day Ms. Lew, her counsel, and DOC counsel appeared at the offices of Judicial Watch. Rather than speak to his visitors in person, Judicial Watch's counsel delivered them a letter and ordered them to vacate the premises or be removed as trespassers. Ms. Lew and her counsel then returned to the attorneys' office and communicated to Judicial Watch that Ms. Lew would be available for service of the subpoena at the office that day. Eventually, Judicial Watch did execute service of the subpoena on Ms. Lew at her attorneys' office, and a deposition was held on March 12, 1997.

When the deposition finally went forward, counsel apparently continued to bicker amongst themselves. Judicial Watch alleges that DOC counsel and Ms. Lew's counsel improperly "coached" the

witness through so-called “speaking objections” and unilaterally terminated the deposition. Counsel for Ms. Lew and the DOC deny such allegations and claim that they merely temporarily adjourned the deposition, which had already lasted until after six o’clock in the evening (it began at ten in the morning) and, according to counsel for Judicial Watch, would require several more hours for completion.

After the deposition, a number of motions were filed, including a motion for sanctions by Judicial Watch, a motion to terminate the deposition by counsel for Ms. Lew, a motion for sanctions by Ms. Lew, and a motion by Judicial Watch to delete from the record certain references to a sanction that its counsel had received in an unrelated case. The Court will decline to impose sanctions on either side, although not because the behavior from either was satisfactory in the least.

First, the Court will have no tolerance for the kind of service games played by Ms. Lew and her counsel. Judicial Watch was not bound to accept Ms. Lew’s “voluntary” appearance at the deposition, because, in this very litigation, nonparties who were not served with subpoenas have refused to produce all documents requested by Judicial Watch. Why a high-level government employee like Ms. Lew would play these games, usually reserved for con artists and hooligans, is impossible for the Court to fathom. Unfortunately, however, Ms. Lew’s efforts to take advantage of the discovery rules are not atypical of the want of

good faith that seems to pervade this litigation.

It is nevertheless true, however, that Ms. Lew was entitled to object to a subpoena served only one or two days before her scheduled deposition. See Fed. R. Civ. P. 45(c)(3)(A)(i); cf. Local Rule 208 (requiring five days for notice of deposition to be "reasonable"). If the lawyers in this case would demonstrate the minimal level of professional courtesy to one another, the Court thinks that these types of problems could be avoided. However, under the circumstances, Ms. Lew should have accepted the subpoena and filed written objections or moved this Court to quash or modify the subpoena to allow her reasonable time to prepare for the deposition, as provided for in Federal Rule of Civil Procedure 45. The parties and nonparties involved in this litigation must begin to understand that they are required to comply with the rules of civil procedure unless this Court orders otherwise. The frequency with which the litigants in this case appear to believe themselves free to comply or not comply with the discovery rules as they see fit is exasperating, and it should cease forthwith.

The deposition of Ms. Lew will be permitted to continue before the Magistrate Judge. Ms. Lew's legitimate objections to Judicial Watch's far-ranging questioning may be considered and enforced by the Magistrate Judge.

Each of the four motions filed in regard to the deposition of Ms. Lew will be denied.

E. Melinda Yee Motions

Plaintiff's Motion for Order to Show Cause Why the Testimony of Carola McGiffert Concerning Melinda Yee Materially Contradicts Defendant's Notice of Discharge of Obligation Pursuant to its Representation at December 6, 1996 Status Conference was filed April 9, 1997. A nearly identically titled motion regarding the testimony of Dawn Evans Cromer was filed June 25, 1997. Both motions will be denied.

These two motions arose from the representations of DOC counsel following a status conference held December 6, 1996, at which the Court asked for the names of the persons responsible for searching the office of Melinda Yee for documents responsive to Judicial Watch's FOIA requests. On December 8, 1996, DOC counsel filed a notice with the Court naming Dawn Evans Cromer, Beth Bergere, and Carola McGiffert as having had "some direct responsibility" for searching Ms. Yee's office. Subsequent depositions of Ms. McGiffert and Ms. Cromer, however, revealed that the three women had not searched Ms. Yee's office and had not been alerted by the DOC that their names were being given to the Court, much less asked if they had in fact searched the office.

Judicial Watch's request that the DOC show cause why the testimony of witnesses differs from counsel's representation is a strange creature. A host of traditional discovery methods are available to Judicial Watch if it wants to explore

inconsistencies in testimony or representations by counsel, including written interrogatories, requests for admissions, and in rare instances redeposing of witnesses. Of course, in this instance, plaintiff is not unsatisfied with the testimony of the two witnesses, and therefore has no reason or basis for redeposing Ms. McGiffert or Ms. Cromer. Instead, Judicial Watch seeks some defense or explanation from DOC's counsel. The Court feels that an order to show cause is not appropriate here. Disciplinary action and sanctions issues regarding the parties' conduct up to this point will be addressed at a later stage when the Court addresses the issue of attorney's fees and litigation costs; any future misconduct in the discovery context will be handled by the presiding Magistrate Judge.

Consequently, the plaintiff's motions will be denied.

F. William Ginsberg Motion

On March 21, 1997, Judicial Watch filed a Motion for Order to Show Cause against Peter R. Ginsberg, counsel for former Assistant Secretary of Commerce William Ginsberg. Judicial Watch contacted Peter Ginsberg on March 7, 1997 and asked him to accept service of a subpoena duces tecum on behalf of his client, William Ginsberg. Plaintiff's counsel and Peter Ginsberg then had some correspondence (whether by fax or phone or both is unclear) in which Peter Ginsberg explained that he would not be available to accept service for the deposition date suggested by

Judicial Watch. Instead, Peter Ginsberg requested a copy of the complaint in this action so that he could evaluate the relevancy of the requested documents (which consisted primarily of a voluminous diary kept by William Ginsberg while at the DOC). In an affirmation to the Court, Peter Ginsberg also suggested that he might invoke some unidentified privilege based on the personal nature of some of the entries.

The Court makes two observations. First, it is not appropriate for a litigant to unilaterally determine what documents to produce in response to a valid subpoena duces tecum; if a nonparty objects to the subpoena, it may file written objections, move to quash or modify the subpoena, or move for a protective order. Second, the Court is unaware of any privilege protecting documents from discovery because of their "personal content."

That said, Judicial Watch's motion is not timely and must be denied. William Ginsberg has never been served with a subpoena, and consequently the Court cannot compel him to comply with it. Nor can the Court compel Peter Ginsberg to accept service on his client's behalf, at least not without some showing of circumstances more grave or unusual than any established here. Nevertheless, why a former high government official and his attorney would engage in service-of-process games is simply inexplicable. Presumably, Mr. Ginsberg is a professional person, who is now employed in a responsible position, and yet he gives

the appearance of a scofflaw, someone who must be hunted down in the middle of the night by a process server or a marshal. When he finally does appear, Mr. Ginsberg simply must recognize that any legal arguments that he makes will be subjected to very close scrutiny by the Court.

The DOC will be ordered to provide Judicial Watch with William Ginsberg's last known address so that Judicial Watch can effectuate personal service of the subpoena. The DOC will also be ordered to submit a memorandum of law stating its position on the issue of whether the diary maintained by William Ginsberg is an agency record or "personal" papers. Cf. Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136 (1980). If the DOC's position is that these documents are agency records, the agency should reacquire them and process them according to its FOIA procedures, including release or indexing of all responsive documents. If the DOC considers the diary to be personal papers, as William Ginsberg apparently does, then Judicial Watch will have to serve the subpoena and the Court will entertain a motion to quash or for a protective order if William Ginsberg wishes to contest the subpoena.

G. DNC Minority Donor List

On May 29, 1997, counsel for the DOC filed a Notice to the Court stating that, in the May 28, 1997 deposition of Graham Whatley, it had been discovered that a list of minority donors to

the DNC had been found during the DOC document search and revealed to DOC lawyers, but never disclosed to Judicial Watch. Counsel for the DOC initially claimed ignorance of the document's existence, but on July 3, 1997 they filed a Supplemental Notice to the Court attributing their failure to produce the clearly responsive document to a combination of miscommunication and poor memory on the part of the two Assistant United States Attorneys working on the case.[16]

Judicial Watch refers to these notices to the Court in its list of pending discovery matters, although no motion appears to have been filed. Because no motion is pending, the Court will not further address the matter here.

H. John Huang Security Briefings Motion

On May 2, 1997, Judicial Watch filed a sealed Motion for Order to Show Cause relating to apparent discrepancies between evidence taken in this case and press reports about the number of security briefings that John Huang may have received while at the DOC. The DOC has adequately explained the situation, and in fact no discrepancy exists. The other matter raised in the motion concerned the desk calendar of John Huang, which is dealt with below. Plaintiff's motion will therefore be denied.

[16]The details of this series of events are set forth in the Court's opinion denying the DOC's motion for entry of judgment, also issued this date.

I. June 1997 Motions

In June 1997, Judicial Watch moved the Court for a status conference to consider a number of outstanding discovery issues. Although the request for a status conference has long since been mooted, the other matters raised and renewed in plaintiff's motion require resolution. Many of these same issues were also addressed in papers filed following the status conference held June 27, 1997, and the two sets of filings will be considered together.

4. Computer Files

In its June 4, 1997 request for a status, plaintiff requested the production of documents recovered by the DOC Inspector General (IG) pursuant to this Court's order of December 6, 1996 ordering the IG to seize and search the computers of identified DOC employees. This request is moot following the processing of the documents by the DOC and the release or Vaughn indexing of all responsive documents on March 4 and 12, 1997.[17]

5. Desk Diary of John Huang

Judicial Watch also requested that the Court order the

[17]To the extent that these and other documents are not subject to any pending motion for summary judgment (because they were processed after the filing of the DOC's second motion for summary judgment), the parties will be directed to file dispositive motions.

production by the DOC or its counsel of a legible copy of the desk diary maintained by John Huang while at the DOC. A partially illegible copy was released to Judicial Watch, but its requests for a legible copy have been repeatedly denied by the DOJ, which now has custody of the diary for the purposes of a criminal investigation. After consideration of the DOJ's opposition to plaintiff's subpoena and motion to compel, the Court is of the opinion that making the diary available to Judicial Watch for inspection and copying at the Department will not unduly impair any investigative or law enforcement interests of the DOJ, and therefore the Court will order the Attorney General to either (1) provide Judicial Watch with a legible copy of the diary or (2) allow it access to the diary for the purposes of inspection and copying.

6. Huang Documents Released by the DNC

Judicial Watch further requested production of "thousands of pages" of documents released by the DNC and believed to have been removed from Huang's files at the DOC. The Court is unable to determine the precise scope of this request, and the request will be denied without prejudice to renewal. If Judicial Watch chooses to pursue this matter, it may do so during the redeposition of John Huang, or it may issue and serve a new subpoena identifying the documents or categories of documents that it seeks.

7. Telephone, Facsimile, and Mail Records

Judicial Watch also renewed its request for production of all DOC "telephone, facsimile, and mail records showing communication with the White House, the DNC, and other outside entities, and with the home of Ron Brown, regarding the issues in this case." This is a tremendously overbroad discovery request, and plaintiff's inclusion of the phrase "regarding the issues in this case" does little to remedy that overbreadth. The DOC's subsequent interpretation of the wording, while perhaps cramped, cannot be a surprise given the breadth of the request on its face. Although Judicial Watch will be allowed to pursue this general line of inquiry into the creation of responsive documents, the plaintiff must establish proper foundations for its requests and must formulate them in a reasonable way. While the Court is certainly disturbed by the behavior of the agency in this litigation, the Court similarly has limited patience for Judicial Watch's persistent attempts to stretch its discovery beyond the proper bounds of the FOIA. The close supervision of the Magistrate Judge should alleviate these problems, so that an acceptable level of professionalism is observed by both sides.

8. Secretary Brown's Briefing Books, Calendars, and Daily Schedules

Plaintiff further requests all of the briefing books, calendars, and daily schedules of the late Secretary Brown. Why

plaintiff feels entitled to all of these documents is a mystery. Plaintiff is entitled to all those documents responsive to its FOIA requests that are not properly withheld pursuant to a statutory exemption. If the briefing books, calendars, and daily schedules of Secretary Brown contain as-yet-unreleased information fitting this description, the agency is required to produce it. Likewise, if any of this material might lead the plaintiff to admissible evidence regarding the adequacy of the DOC's search or the possible unlawful destruction or removal of documents, the DOC shall produce it upon the service of a legitimate discovery request by Judicial Watch. If the plaintiff is still not satisfied that the DOC has complied with this order, it must demonstrate to the Court that documents are being unlawfully withheld, not merely posit that documents may be being wrongfully withheld. The agency's history of misconduct in this case does much to support plaintiff's various claims of mishandling of documents, but it cannot sustain such claims by its own force alone.

9. Documents Removed from Secretary Brown's Office After His Death

Plaintiff also requests the production of all responsive documents taken from Secretary Brown's office after his death. Certainly, the DOC is already under an obligation to release or index any such responsive documents in its possession (and it

claims to have already processed the documents referred to in plaintiff's request). Again, the plaintiff must present some indication, beyond a mere reference to the DOC's blemished record in this litigation, upon which the Court could base a further order compelling production of a particular document or set of documents. The Court is not unwilling to issue such an order, but it must have a proper basis on which to act.

10. David Rothkopf Documents

Judicial Watch additionally requests that the Court review in camera all documents that David Rothkopf removed from the DOC when he left his employment there and which he subsequently returned to the DOC. The Court has already reviewed in camera all documents returned by Rothkopf and withheld by the DOC, and the Court is satisfied that these documents were properly withheld under FOIA Exemption 1. However, the Court understands the concerns of Judicial Watch at least with regard to documents which have already been established to have been wrongfully removed from the DOC in violation of the FOIA. Consequently, the Court will order the production of all of the Rothkopf documents for in camera review by the Magistrate Judge. As discovery proceeds under the supervision of Magistrate Judge Facciola, all documents that are discovered to have been wrongfully removed from the agency shall, in addition to normal FOIA processing by the DOC, be submitted for in camera inspection by the Magistrate

Judge.

11. Documents from Ira Sockowitz's Safe

Next, Judicial Watch requests the Court to inspect in camera all documents recovered by the IG of the Small Business Administration (SBA) from the safe of Ira Sockowitz's office at the SBA, because plaintiff is "not confident" that it has been provided with all relevant, nonprivileged materials. As with the Rothkopf documents, the wrongful removal of the Sockowitz documents justifies plaintiff's concerns. The documents have been provided to the Court; they will be reviewed, and a separate order will issue when the review is completed.

12. FOIA Guidelines

Judicial Watch also requests that the DOC provide plaintiff with a copy of the DOC's procedures and guidelines for responding to FOIA requests. This request is apparently moot; the DOC represents that these materials were produced to Judicial Watch before the June 27, 1997 status conference.

10. List of Persons Responsible for Searching the Office of Melinda Yee

Next, Judicial Watch requests a complete list of the persons responsible for searching the office of Melinda Yee. The DOC has explained that it thought Ms. McGiffert, Ms. Cromer, and Ms.

Bergere to have been responsible for searching that office, but that in fact it was never searched. Plaintiff had adequate opportunity at the depositions of Ms. McGiffert and Ms. Cromer to inquire into why they did not search, who else might have searched, who their superiors were, et cetera. If Judicial Watch would like to conduct further investigation of this matter, it may move the Court to authorize additional depositions or serve interrogatories or requests for admissions on the DOC. The plaintiff cannot, however, forego the ordinary rules of discovery and ask this Court to, in essence, issue discovery queries on its behalf. This request will be denied.

11. Draft Declarations

Next, plaintiff requests production of draft versions of several sworn declarations submitted by DOC employees, including Anthony Das, Mary Ann McFate, Melissa Moss, Melanie Long, Barbara Schmitz, and Secretary Brown, along with the names and addresses of those persons responsible for drafting the documents. Obviously, this request raises issues at the heart of the attorney-client privilege. These complex issues are not wisely decided based on no more information than an allegation by the plaintiff. If Judicial Watch wants to pursue these drafts, it should request them by ordinary discovery methods (if it has not already done so), and if DOC declines to produce them then plaintiff may file a motion to compel and the issue will be

litigated in that context.

12. Notes of Judith Means

Judicial Watch next requests that the Court review in camera the notes taken by Judith Means, an attorney in the DOC Office of General Counsel, regarding Ms. Means' participation in the DOC's document search. Again, this request raises issues of attorney-client and other privileges that should not be decided without informed deliberation. Plaintiff may pursue those ordinary discovery means available to it, and, if necessary, the Court will decide the matter after it is briefed in a meaningful manner.

13. Redeposition of Jude Kearney and John Huang

In its June 4, 1997 filing, Judicial Watch also sought authorization by the Court to depose for a second time Jude Kearney and John Huang, both of whom were first deposed in October 1996.[18] The DOC has indicated that it does not oppose plaintiff's request.

The Court's decision to grant or deny leave to redepose a witness is guided by Federal Rules of Civil Procedure 30(a)(2)

[18]It appears that plaintiff's request to redepose Huang has not been served on Huang's attorney. Judicial Watch shall promptly serve on Huang's counsel copies of all papers requesting that a second deposition be authorized, and Mr. Huang may move for reconsideration of today's decision within ten days of that service, if he has legitimate grounds for objection.

and 26(b)(2). Leave to conduct a second deposition should ordinarily be granted; the burden is on the opposing party to demonstrate that

> [1] the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; [2] the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or [3] the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

Fed. R. Civ. P. 26(b)(2); Michol O'Connor et al., O'Connor's Federal Rules, Civil Trials 288 (1997); see also Christy v. Pennsylvania Turnpike Commission, 160 F.R.D. 51, 52 (E.D. Pa. 1995). Under this standard, Judicial Watch will be authorized to depose both Kearney and Huang for a second time, although the deposition will be limited to information discoverable in the context of the unlawful destruction or removal of documents.

Because the redepositions of Kearney and Huang will be of limited scope and conducted in the presence of a Magistrate Judge, whatever burden imposed on the deponents will not outweigh

the benefits of the new testimony. Had the deponents been forthright in their initial depositions (and it appears that they were not), a second deposition may not be necessary, but under the circumstances plaintiff is entitled to question Kearney and Huang generally on their role, if any, in misconduct during the document search and specifically on the evidence that has been discovered since the October 1996 depositions. The Court is of the opinion that both Kearney and Huang have a lot of explaining to do. To the extent that matters from the first deposition are discussed a second time, the deponents' own behavior has necessitated the second round of depositions, and any cumulation of evidence will not be unreasonably cumulative or duplicative, so long as it is kept within the bounds of the limited discovery permitted today. Finally, the other discovery available to Judicial Watch, although it has been fruitful, does not support a denial of leave to redepose under FRCP 26(b)(2), because only Kearney and Huang can reasonably be expected to answer many of plaintiff's questions regarding their files and the creation of documents by them and under their supervision.

Therefore, plaintiff's motion for leave to redepose Jude Kearney and John Huang will be granted.

In conjunction with its requests to redepose Kearney and Huang, Judicial Watch asks the Court to order production of various documents, including the fax from the DNC discovered in the deposition of John Ost. The Court will allow Judicial Watch

to serve a subpoena duces tecum on each Kearney and Huang, setting out with particularity the documents and categories of documents requested. If Kearney or Huang objects, plaintiff may move to compel. In addition, if the DOC currently possesses the Ost fax, it will be ordered to release it to Judicial Watch or submit it for in camera review.

14. Plaintiff's Request for Other Additional Depositions

In its July 1997 filings, Judicial Watch also requested leave to depose several additional witnesses.

First, Judicial Watch's request that it be allowed to depose DOC officials holding the rank of GS-13 and below will be denied. Plaintiff must seek authorization from the Magistrate Judge for each additional deposition.

Second, Judicial Watch moves for leave to depose former Commerce Secretary Mickey Kantor. An identical request made while Mr. Kantor was Secretary was denied in deference to his obligations and duties as Secretary. Now, however, Mr. Kantor has left government service, and Judicial Watch may depose him.[19]

Next, plaintiff requests leave to depose former Undersecretary for International Trade Jeffrey Garten. This request will be granted. Plaintiff will also be allowed to

[19]To be clear, this deposition and all other discovery authorized by today's opinion will be conducted under the supervision of a Magistrate Judge, as explained more fully in a separate opinion issued today.

depose Nancy Linn Patton, Deputy Assistant Secretary for Asia and the Pacific.

Plaintiff's requests to depose T.S. Chung, David Barram, Jonathan Sallet, Kent Hughes and other named and unnamed witnesses will be denied without prejudice to renewal by plaintiff with a more thorough explanation of its reasons for deposing them and particularly what evidence it hopes to obtain from these potential witnesses.

15. Peter Han Notes

Finally (as to the June 1997 motions), Judicial Watch requests an in camera review of notes taken by Peter Han concerning his participation in the document search. The documents have been provided to the Court, and a separate order will issue when the Court's review is completed.

J. Howard University Library Motions

In October and November of 1997, Judicial Watch filed two motions asking the Court to compel the DOC to provide Judicial Watch with copies of a large amount of video and photographic material. Contrary to plaintiff's assertions, however, neither the FOIA nor any order of the this Court requires that copies of this material be produced to plaintiff; the materials need only be made reasonably available. See 5 U.S.C. § 552(a)(3). Therefore, because the DOC has made all of this material

available in its offices for viewing by Judicial Watch, the motion to reorder release of the materials and the motion for sanctions will be denied.[20]

K. Donald Forest Motion

On April 21, 1997, Judicial Watch began the deposition of Donald Forest, Director of the Greater China Region office at the DOC. According to Judicial Watch, Counsel for the DOC then engaged in a persistent use of so-called "speaking objections" to disrupt the deposition, which Judicial Watch then discontinued and filed a Motion to Compel and for Appropriate Immediate Remedies that same day. The DOC apparently has not opposed Judicial Watch's motion, although from the video deposition it is apparent that DOC counsel believed its objections to be legitimate. This motion will be granted in part and denied in part.

Unfortunately, DOC counsel's behavior at the Forest deposition is not atypical of the misconduct in which the DOC and its lawyers have engaged throughout this litigation. Nor is counsel for Judicial Watch innocent of improper behavior. At Mr.

[20]Apparently, some materials were mishandled by the DOC and copies were given to Howard University without retaining copies at the agency. However, the DOC claims that it has recovered all materials from Howard, copied them, and retained the originals at the DOC. These materials also appear to have now been made available to Judicial Watch, and thus the DOC has apparently complied with its obligations concerning these documents.

Forest's deposition, ordinary objections gave way to longer and more heated exchanges between counsel until, before the deposition was prematurely adjourned, the lawyers seemed to have forgotten entirely about the witness in favor of verbally sparring with one another. Such behavior would be reprehensible the first time; in this litigation, it has come to be the norm. Nevertheless, the Court declines to impose sanctions at this point for two reasons. First, to the extent that plaintiff requests that DOC counsel refrain from misconduct at future depositions, the presence of the Magistrate Judge should adequately deter future misbehavior. The same deterrence also should control Judicial Watch's transgressions. If misconduct continues, then the Magistrate will handle it or, if necessary, this Court will entertain contempt motions. Second, to the extent that the motion calls for sanctions on misconduct that has occurred up to this point, the Court will defer ruling on this issue until it considers granting attorney's fees and litigation costs at the end of this case. Therefore, plaintiff's motion for "appropriate remedies" is denied.

However, plaintiff is entitled to continue the deposition of Mr. Forest, and will be granted leave to do so. The deposition will be conducted before the Magistrate Judge, and the Court expects that a higher degree of professionalism will be demonstrated by counsel for both sides.

II. Laurie Fitz-Pegado Motion

On May 15, 1997, Judicial Watch filed a Motion to Compel and for Attorney's Fees and Costs. Plaintiff alleges that the Assistant United States Attorney formerly in charge of this litigation intentionally misrepresented who was to represent Ms. Fitz-Pegado at her deposition. In addition, counsel for the DOC appears to have been prepared to unilaterally determine which documents it would produce in response to plaintiff's subpoena duces tecum. The Court feels compelled to remind counsel, not for the first time, that the appropriate means of objecting to a subpoena is by timely written objection or by timely motion to quash or modify the subpoena. See Fed. R. Civ. P. 45. If the party serving the subpoena then objects, it may oppose the motion or move to compel, and the Court, not the litigants, will determine the permissible scope of the subpoena.

However, as with the Ginsberg matter addressed above, the plaintiff has not yet served Ms. Fitz-Pegado with a subpoena, and consequently the Court is not in a position to grant a motion to compel her to testify or produce documents. Whatever merit might lie in Judicial Watch's objections to DOC counsel's behavior will be taken up at the fees and costs stage of this litigation. Insomuch as the motion requests an order prohibiting future misconduct by DOC counsel, the Court is confident that the Magistrate Judge that presides over Ms. Fitz-Pegado's deposition will keep all persons present under appropriate control.

III. CONCLUSION

This memorandum opinion and the accompanying order resolve all pending motions in need of disposition at this point.[21] As set forth in another decision issued today, the case will now proceed with limited discovery under the supervision of a Magistrate Judge. Plaintiff is reminded that it still must obtain authorization from the Magistrate Judge for all additional depositions. More generally, the Court is hopeful that this case can now proceed in a professional and civil manner.

A separate order will issue this date.

_____
Royce C. Lamberth
United States District Judge

DATE:

[21]Although, as noted in the other decision issued today, the Court will entertain motions for orders to show cause regarding the allegations made in Nolanda Hill's testimony.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civ. Action 95-133 (RCL)
	)	
UNITED STATES DEPARTMENT OF COMMERCE,	)	
	)	
	)	
Defendant.	)	
	)	
	)	

ORDER

This case comes before the Court on various discovery motions by the plaintiff against the defendant and a number of nonparties. Upon consideration of the various motions and the arguments offered in support and opposition thereto, and of the record in this case, and for the reasons set forth in an accompanying memorandum opinion, it is hereby ORDERED that

Plaintiff's Motion for Sanctions and Attorneys' Fees and Costs, filed March 13, 1997 and amended March 17, 1997, is hereby DENIED;

Non-Party Ginger Lew's Motion for Fees and Costs, filed March 18, 1997, is hereby DENIED;

Non-Party Ginger Lew's Motion to Terminate or Limit Deposition, filed March 18, 1997, is hereby DENIED, and it is further ORDERED that the deposition will be conducted under the supervision of Magistrate Judge Facciola as set forth in a

separate order issued this date;

Plaintiff's Motion to Excise and for Appropriate Remedies, filed March 21, 1997, is hereby DENIED;

Plaintiff's Motion for Order to Show Cause Why the Testimony of Carola McGiffert Concerning Melinda Yee Materially Contradicts Defendant's Notice of Discharge of Obligation Pursuant to its Representation at December 6, 1996 Status Conference, filed April 16, 1997, is hereby DENIED;

Plaintiff's Motion for Order to Explain Why the Testimony of Dawn Evans Cromer Concerning Melinda Yee Materially Contradicts Defendant's Notice of Discharge of Obligation Pursuant to its Representation at December 6, 1996 Status Conference, filed June 25, 1997, is hereby DENIED;

Plaintiff's Motion for Order to Show Cause, filed March 21, 1997, is hereby DENIED, and it is further ORDERED that the defendant shall provide to plaintiff within 5 days of this order the last known address of William Ginsberg, and it is further ORDERED that the defendant shall submit on or before January 15, 1997 a legal memorandum setting forth its position on the issue of whether the diaries of William Ginsberg are "agency records" within the scope of the FOIA or are instead "personal papers" belonging to William Ginsberg in his private capacity;

Plaintiff's sealed Motion for Order to Show Cause, filed May 2, 1997, is hereby DENIED;

Plaintiff's request for the production of computer files

recovered by the DOC Inspector General pursuant to this Court's December 6, 1996 order, raised in plaintiff's June 1997 filings, is DENIED as moot;

Plaintiff's request for an order requiring the production of a legible copy of the desk diaries of John Huang, raised in plaintiff's June 1997 filings, is hereby GRANTED and it is hereby ORDERED that the Attorney General shall either (1) produce to plaintiff a legible copy of the diary or (2) allow plaintiff access to the diary for the purpose of inspection and copying, on or before January 8, 1999;

Plaintiff's request for production of numerous documents released by the Democratic National Committee, raised in plaintiff's June 1997 filings, is hereby DENIED;

Plaintiff's request for production of telephone, facsimile, and mail records showing communications with the White House, the DNC, and other outside entities, raised in plaintiff's June 1997 filings, is hereby DENIED;

Plaintiff's request for the briefing books, calendars, and daily schedules of the late Secretary Ron Brown, raised in plaintiff's June 1997 filings, is hereby DENIED;

Plaintiff's request for documents removed from the late Secretary Ron Brown's office after the Secretary's death, raised in plaintiff's June 1997 filings, is hereby DENIED;

Plaintiff's request that the Court review in camera all documents removed from and subsequently returned to the DOC by

David Rothkopf, raised in plaintiff's June 1997 filings, is hereby GRANTED, and it is further ORDERED that the DOC shall produce all of the documents removed from the DOC by David Rothkopf for in camera inspection by Magistrate Judge Facciola at a date to be set by Magistrate Judge Facciola, and it is further ORDERED that, from this date forward, any and all discovered documents reasonably demonstrated to have been wrongfully removed from the DOC shall be submitted to Magistrate Judge Facciola for in camera review as scheduled by Magistrate Judge Facciola;

Plaintiff's request that the Court review in camera all documents recovered by the DOC Inspector General from the safe of Ira Sockowitz, raised in plaintiff's June 1997 filings, is hereby GRANTED, a separate order to issue when the review is complete;

Plaintiff's request that the Court order production of the DOC's FOIA guidelines and procedures, raised in plaintiff's June 1997 filings, is hereby DENIED as moot;

Plaintiff's request for a complete and accurate list of persons responsible for searching the office of Melinda Yee, raised in plaintiff's June 1997 filings, is hereby DENIED;

Plaintiff's request for production of draft versions of sworn declarations submitted by various DOC employees, raised in plaintiff's June 1997 filings, is hereby DENIED;

Plaintiff's request that the Court review in camera the notes of Judith Means, raised in plaintiff's June 1997 filings, is hereby DENIED;

Plaintiff's request for leave to redepose Jude Kearney, raised in plaintiff's June 1997 filings, is hereby GRANTED, and it is further ORDERED that the deposition will be conducted under the supervision of Magistrate Judge Facciola as set forth in a separate order issued this date;

Plaintiff's request for leave to redepose John Huang, raised in plaintiff's June 1997 filings, is hereby GRANTED, and it is further ORDERED that the deposition will be conducted under the supervision of Magistrate Judge Facciola as set forth in a separate order issued this date;

Plaintiff's request that the DOC produce the facsimile identified by John Ost in his deposition testimony, raised in plaintiff's June 1997 filings, is hereby GRANTED, and it is further ORDERED that the DOC shall, if it currently possesses a copy of the facsimile, produce it either to the plaintiff or to the Court if subject to a claim of exemption;

Plaintiff's request for leave to take the depositions of DOC employees holding a rank of GS-13 or below, raised in plaintiff's June 1997 filings, is hereby DENIED;

Plaintiff's request for leave to depose former Secretary of Commerce Mickey Kantor, raised in plaintiff's June 1997 filings, is hereby GRANTED, and it is further ORDERED that the deposition will be conducted under the supervision of Magistrate Judge Facciola as set forth in a separate order issued this date;

Plaintiff's requests for leave to depose Jeffrey Garten and

Nancy Linn Patton, raised in plaintiff's June 1997 filings, are hereby GRANTED, and it is further ORDERED that the depositions will be conducted under the supervision of Magistrate Judge Facciola as set forth in a separate order issued this date;

Plaintiff's request to depose other named and unnamed witnesses, raised in plaintiff's June 1997 filings, is hereby DENIED;

Plaintiff's request that the Court review in camera the notes of Peter Han, raised in plaintiff's June 1997 filings, is hereby GRANTED, a separate order to issue when the review is complete;

Plaintiff's Request to reorder Immediate Release of Videotapes and Other Photographic Evidence Taken on Clinton Administration Department of Commerce Trade Missions, filed October 22, 1997, is hereby DENIED;

Plaintiff's Motion for Order to Show Cause, filed November 14, 1997, is hereby DENIED;

Plaintiff's Expedited Motion to Compel and for Appropriate Remedies, filed April 21, 1997, is hereby GRANTED in part and DENIED in part, and it is further ORDERED that plaintiff may continue the deposition of Donald Forest under the supervision of Magistrate Judge Facciola as set forth in a separate order issued this date;

Plaintiff's Motion to Compel and for Attorneys' Fees and Costs, filed May 15, 1997, is hereby DENIED; and it is further

ORDERED that the defendant shall file a new motion for summary judgment, with supporting affidavits and Vaughn index, within 30 days of the date of this order for all responsive agency records withheld from the plaintiff and not yet disposed of by this Court's decisions on previous motions for summary judgment, and that any cross-motion or opposition to such motion shall be filed 30 days thereafter.

SO ORDERED.

_____
Royce C. Lamberth
United States District Judge

DATE: