

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JUDICIAL WATCH, INC.,)	
)	
<i>Plaintiff,</i>)	
)	
v.)	Civil Action No. 13-1559-EGS
)	
INTERNAL REVENUE SERVICE,)	
)	
<i>Defendant.</i>)	

PLAINTIFF’S RESPONSE TO DEFENDANT’S NOTICE

Plaintiff Judicial Watch, Inc. (“Judicial Watch”), by counsel, respectfully submits this response to Defendant’s Notice dated May 7, 2015.

1. Defendant Internal Review Service (“IRS”) filed a Notice with the Court on May 7, 2015. (DKT No. 44). The Notice advised Plaintiff and the Court that the Treasury Inspector General for Tax Administration (“TIGTA”) has provided the IRS with an unidentified quantity of emails recovered from IRS backup tapes. The Notice did not state whether the emails are from all or only a subset of the 1,268 backup tapes located since July 1, 2014. Nor did it state whether additional emails remain to be recovered.

2. Undersigned counsel has repeatedly requested information from agency counsel about the status of emails recovered by TIGTA. During an April 13, 2015 telephone conference in two related FOIA lawsuits (*Judicial Watch, Inc. v. IRS* (15-220) and *Judicial Watch, Inc. v. IRS* (15-237)), the undersigned counsel asked for confirmation that the IRS had requested copies of all emails recovered by TIGTA, as reported by TIGTA’s Inspector General and Deputy Inspector General to the Congressional Committee on Oversight and Government Reform on February 26, 2015. See <http://oversight.house.gov/hearing/irs-tigta-update/>.

3. Agency counsel responded that the IRS is under no obligation to request copies of the emails recovered by TIGTA because they are allegedly not agency records. The IRS's position is extraordinary considering that, not only are the backup tapes and emails obviously IRS records, but the Court went to great lengths to address the issue of the "missing" emails, including holding a status conference, ordering a meet and confer before a magistrate judge, and ordering the IRS to submit multiple declarations about its efforts to recover or locate the emails. The IRS never mentioned the tapes in the seven declarations it submitted to the Court in August 2014 or during the meet and confer process. The IRS's position also ignores the undisputed fact that the tapes were within the agency's custody and control when Plaintiff submitted its FOIA request, yet the IRS failed to identify, locate, or search the tapes when it responded to the request. *See* Ex. 1 at pp. 24-27, 49-56 (TIGTA Testimony Tr. Feb. 26, 2015).

4. On February 26, 2015, TIGTA Inspector General J. Russell George and Deputy Inspector General Timothy P. Camus testified that they had obtained 744 backup tapes containing emails from Ms. Lerner's email account. Specifically, Mr. Camus testified that, on June 30, 2014, TIGTA asked the IRS to produce all backup up tapes used to back up Ms. Lerner's email account and, only one day later, on July 1, 2014, the IRS identified and produced 744 backup tapes to TIGTA. *Id.* at pp. 49-50. An additional 424 backup tapes were identified and produced to TIGTA in early February 2015. According to Inspector General George and Deputy Inspector General Camus' testimony, 32,774 unique emails from IRS Exempt Organizations Director Lois Lerner's email account were recovered from the initial 744 tapes. Plaintiff is unaware whether any of Ms. Lerner's emails have been recovered from the 424 subsequently discovered tapes.

5. The aforementioned testimony is uncontested that the recovered emails are from the email accounts of IRS officials, including Ms. Lerner, and cover the time period of Plaintiff's

request. The testimony also is unequivocal that the IRS reported publicly that any backup tapes had been recycled and were no longer available without asking its technicians whether the tapes existed. Mr. Camus also testified that hard drives previously reported by the IRS to have been destroyed had not, in fact, been destroyed. *See* <http://oversight.house.gov/wp-content/uploads/2015/02/TIGTA-Testimony.pdf> at p. 3.

6. Because the emails recovered from the backup tapes are responsive to Plaintiff's FOIA request, Plaintiff respectfully requests that the Court order the IRS to submit to the Court a report by June 12, 2015 addressing the status of the emails recovered by TIGTA. The report should include:

(a) clarification as to whether all emails that have been recovered by TIGTA have now been turned over to the IRS for review and processing in response to Plaintiff's request, the volume of those emails, and the time frame in which the IRS anticipates completing its review and production of responsive emails, and

(b) clarification as to whether the processing is complete for all 1,268 backup tapes to determine what emails are recoverable, and if not, when the processing is expected to be complete.

Dated: June 2, 2015

Respectfully submitted,

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