

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

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|---------------------------|---|---------------------------------|
| JUDICIAL WATCH, INC., |) | |
| |) | |
| <i>Plaintiff,</i> |) | |
| |) | Civil Action No. 12-cv-2034-RBW |
| v. |) | |
| |) | |
| U.S. DEPARTMENT OF STATE, |) | |
| |) | |
| <i>Defendant.</i> |) | |
| _____ |) | |

**PLAINTIFF’S REPLY TO DEFENDANT’S OBJECTIONS TO PROPOSED
PRESERVATION ORDER**

In response to Plaintiff’s request for preservation of potentially responsive documents until their legal status can be determined, Defendant has filed an opposing ten page memorandum with over sixty pages of exhibits in an apparent attempt to answer a set of legal questions Plaintiff has not yet asked. *See* ECF 28. Plaintiff still does not ask the Court to answer those questions. Plaintiff merely requests that the universe of existing documents be maintained until “a final determination of the suit on the merits.” *City of Moundridge v. Exxon Mobil Corp.*, 429 F. Supp. 2d 117, 126 (D.D.C. 2006). Nevertheless, in light of Defendant’s objections, a brief Reply is warranted:

Defendant’s Records Management and Classification Compliance Is Disputed

1. Defendant assumes a legal conclusion by stating there is “no legal basis in FOIA for requesters to obtain employees’ *personal records*...” ECF 28 at 3 (emphasis added). As Plaintiff explained, there is a question whether a sufficient review was made to determine whether the records subject to the Preservation Order are in fact personal records. *See* ECF 22 at 3-4, ¶¶ 7-8; *see also* ECF 26-1 at 1 (records must be preserved as they may “remain Defendant’s property until reviewed by current government employees or officials.”). Indeed, the State

Department's own rules specify that personal records of a departing Presidential Appointee may not be removed from the government until the State Department "records officer in cooperation with the S/ES or appropriate administrative office" approves of the removal, a process which "generally requires a hands-on examination of the materials."¹

2. Similarly, Defendant's citation of NARA Bulletin 2014-06 only establishes that current *employees* may delete personal records that they *personally review* – this guidance says nothing about the authority of former or departing employees (or their attorneys) to conduct a review and delete records. ECF 28 at 4-5. Finally, Defendant again assumes a premature legal conclusion by arguing that the records subject to the Preservation Order are not "agency records," which Defendant would be otherwise obligated to retrieve. ECF 28 at 4.

This Court has Jurisdiction to Order the Requested Preservation

3. Defendant is wrong to suggest that this Court lacks jurisdiction to order the Defendant to take all reasonable steps to preserve records. ECF 28 at 3. Instead, Defendant cites cases to argue that this Court lacks jurisdiction to order the government to *search known personal records*, or to require retrieval and *production* of relocated documents. ECF 28 at 3-4. The question of whether the records subject to the Preservation Order have been properly classified as "personal" under federal law is disputed, *see* ¶¶ 1-2 *supra*, and the questions about search and production under FOIA are not yet before this Court.

Plaintiff is at Risk of Harm Without a Preservation Order

4. Defendant's evidence that Plaintiff is not at risk of harm does not withstand scrutiny. ECF 28 at 6-8. The declaration of the former Secretary indicates only that private attorneys or staff of the former Secretary were responsible for ensuring no government records have been

¹ See U.S. Department of State Foreign Affairs Manual, Volume, 5 Handbook 4, Records Management Handbook, §§ H-217.2.b(2), H-217.2.b(3), H-217.2.d. (CT:RMH-8; 08-13-2008), available at <http://www.state.gov/documents/organization/89251.pdf>, pages 14-15 (visited Sept. 9, 2015).

withheld from Defendant. ECF 28 at 7-8. This merely highlights the risk of injury – documents may easily have been *inadvertently* withheld following a single review by private attorneys who are not before this Court and are not bound by FOIA. ECF 22 at 3-4, ¶ 8.

5. As Plaintiff discussed, the August 21, 2015 letter from Mr. Kendall indicates former Secretary Clinton and Mr. Kendall believe they may lawfully discard the records in question. ECF 26 at 1. This statement is grounds for a preservation order. *United States v. Sum of \$70,990,605*, 991 F. Supp. 2d 154, 164 (D.D.C. 2013) (a “threat of destroying evidence” demonstrates “an imminent irreparable injury.”). Similarly, the reported failure to accurately capture all work emails in the produced 55,000 pages is evidence requiring preservation.² *Treppel v. Biovail Corp.*, 233 F.R.D. 363, 371 (S.D.N.Y. 2006) (“The burden of establishing the risk that documents will be destroyed in the future is ‘often met by demonstrating that the opposing party has lost or destroyed evidence in the past or has inadequate retention procedures in place.’”).

The Scope of the Requested Relief is Necessary and Appropriate

6. A preservation order is designed merely to “hold the parties in place until a trial can take place.” *Disability Rights Council of Greater Wash. v. Wash. Metro. Area Transit Auth.*, 234 F.R.D. 4, 7 (D.D.C. 2006). In these circumstances, the Court need not find that Plaintiff will succeed on the merits of its claims. It would “‘put the cart before the horse’” to “evaluate the merits of the litigation even before evidence has been gathered, let alone produced to the opposing party or submitted to the court.” *Treppel v. Biovail Corp.*, 233 F.R.D. 363, 370 (S.D.N.Y. 2006). At the preservation stage, “courts relax the standard so that plaintiffs do not

² Michael S. Schmidtjune, “State Dept. Gets Libya Emails That Hillary Clinton Didn’t Hand Over,” *New York Times*, (June 25, 2015) (“The State Department said on Thursday that 15 emails sent or received by Hillary Rodham Clinton were missing from records that she has turned over, raising new questions about whether she deleted work-related emails from the private account she used exclusively while in office.”), available at http://www.nytimes.com/2015/06/26/us/state-dept-gets-libya-emails-that-clinton-didnt-hand-over.html?_r=0.

have to demonstrate likelihood of success on the merits of the litigation, as such consideration is not appropriate for evidence preservation.” *Ingersoll v. Farmland Foods, Inc.*, 2013 U.S. Dist. Lexis 15943, *6 (W.D. Mo. Feb. 6, 2013).

7. Finally, Defendant’s objection that the Proposed Order is overbroad is without merit. ECF 28 at 2. It bears repeating that, while a preservation order is unusual in FOIA litigation, it is justified in this specific case because of the very unusual records management practices of Defendant. ECF 22 at 2, ¶ 3. These practices had the undisputed consequence of shielding tens of thousands of government records from FOIA for years, unjustifiably delaying the release of information to the public and to Plaintiff. Preservation relief of equal magnitude is now justified.

* * *

Accordingly, Plaintiff respectfully requests leave to file this Reply, and respectfully asks the Court to enter Plaintiff’s Proposed Preservation Order.

Dated: September 9, 2015

Respectfully submitted,

s/ Chris Fedeli
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